

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-082

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FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on January 24, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 28, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by removing an officer evaluation report (OER) covering his service as a deck watch officer, Law Enforcement Officer, and Assistant Operations Officer (AOO) of a cutter from February 1 to June 30, 2009; replacing it with a Continuity OER; removing his non-selection for promotion to lieutenant (LT) by the LT selection board that convened in September 2010; awarding him back pay and allowances; and placing his record before a special selection board for consideration for promotion. He alleged that the disputed OER contains marks and comments that are prohibited because they are based on performance that occurred before the reporting period for the disputed OER began¹ and is thus an inaccurate assessment of his performance during the reporting period. He alleged that he was not selected for promotion in 2010 by the promotion year (PY) 2011 LT selection board because of the erroneous marks and comments in the disputed OER.

The disputed OER, which is attached, shows that the applicant received high marks of 5 and 6 in many performance categories.² However, from his supervisor,³ the Operations Officer

¹ Articles 10.A.4.c. and 10.A.4.f.11. of the Personnel Manual prohibit marks and comments based on performance that occurred outside of the reporting period for the OER.

² In OERs, officers are evaluated in 18 different performance categories, such as "Professional Competence," "Teamwork," and "Initiative," on a scale of 1 to 7, with 7 being best.

(OO) of the cutter, the applicant received an average mark of 4 for “Directing Others” and a low mark of 3 for “Workplace Climate” supported by the comment, “Contributed to unauth[orized] writings & actions led to diminished respect & professionalism on watch, clouded senior/junior relationships.” And from his reporting officer, the Executive Officer (XO) of the cutter, he received average marks of 4 for “Judgment” and “Professional Presence,” a low mark of 3 for “Responsibility,” and a low mark of 3 on the Comparison Scale.⁴ The reporting officer supported these marks with the following negative comments:

- “Despite lapse in human relations sensitivity through unacceptable conduct on watch, [the applicant] performed his duties admirably with a fervor that encouraged others to strive to contribute in increased roles of responsibility.”
- “Responsibility was in doubt; participated in inappropriate behavior containing vulgar writings/actions on bridge, failed to follow through on initial recognition of problem; when counseled, sought corrective actions by meeting w/ watchstanders, department head & command chief; shared lesson learned with other afloat junior officers.”
- “[The applicant] demonstrated great potential early in this period. Unfortunately, his setback in responsibility has overshadowed his upward trend in performance.”

The applicant stated that when he reported aboard the cutter in June 2007, there was a “quote book” on the bridge where people had written down entertaining quotations of statements made on the bridge for many years. In the spring of 2008, he consulted his supervisor, the OO, about issues he was having with a fellow junior officer and he handed the OO the quote book because it contained examples of the problems that were causing him concern. The applicant told the OO that he had removed the quote book from the bridge because of its questionable content, but that someone took it from him without his consent at the direction of the other junior officer and returned it to the bridge. The applicant gave the quote book to the OO so he could review it and then consulted members of the Chiefs’ Mess about how to handle the matter. As a result of the consultation with the Chiefs, he told the OO that he thought the quote book should be removed from the bridge and quotations could be recorded on the back of the wake-up log book for a while. The OO agreed, and the applicant took the quote book since he intended to create a new one without the offensive content.

The applicant noted that he mentioned his removal of the quote book in his OER input for the reporting period that ended on September 30, 2008, as an example of his work in the category “Workplace Climate” and that the following comment in that OER was based on his efforts

³ An officer is evaluated by a “rating chain” of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally the supervisor’s supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations.

⁴ On an OER Comparison Scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of “unsatisfactory” for a mark in the first spot on the scale to a high of “a distinguished officer” for a mark in the seventh spot. A mark in the third, fourth (middle), or fifth spot on the scale denotes the officer as “one of the many competent professionals who form the majority of this grade.”

regarding the quote book: “Actively sought advice from CPO mess to defuse potential mission degrading situation; allowed all parties involved to reestablish effective communication vital to shipboard duties.”

The applicant stated that he retained the old quote book, intending to create a new one, and in April 2009 while he, the head of the Deck Department, and several others were away, involved in the boarding of a fishing vessel for five days,⁵ someone again took the quote book and returned it to the bridge without his knowledge. The commanding officer (CO) found the quote book on the bridge and held him accountable for its content in his OER for the period February 1 to June 30, 2009, even though he had been the first officer to object to the content and had twice removed it from the bridge. The applicant stated, “I, as a first tour Ensign, was the one member of the crew of the [cutter] with knowledge of the contents of the quote book who took positive, affirmative action to remove offensive comments and correct and longstanding—almost a decade long—sequence of conduct by scores of ships personnel; yet the OER indicates that I was the cause of the problem, rather than the solution.”

The applicant noted that his OER marks declined in ten categories from his prior OER, for the period ending January 31, 2009. He alleged that his performance did not actually decline but that the CO’s anger about the contents of the quote book overshadowed his rating chain’s assessment of his performance. He noted that the only negative comments supporting the decline in so many of his marks were comments concerning the quote book. He alleged that he was wrongly held accountable for the vulgar comments other members made over the course of a decade and all outside of the reporting period for the disputed OER.

With regard to the OER comments, the applicant alleged that they are erroneous because “[t]here is NO evidence to support any allegation that I actually engaged in ‘unacceptable conduct on watch,’ and I specifically deny that I did so.” He stated that his only “participation” in the “inappropriate behavior” on the bridge was his attempt to improve the working environment by removing the quote book from the bridge, and he did that long before February 1, 2009—the start of the reporting period for the disputed OER. The applicant stated that he had removed the quote book from the bridge before the reporting period for the disputed OER began and had zero involvement in its return to the bridge while he was away from the cutter. He did not make any entries in the book or direct anyone else to do so during the reporting period. He argued that the comment that he “failed to follow through” after recognizing the problem ignores the fact that he removed the quote book from the bridge and that someone else, without his knowledge or approval, returned it to the bridge.

The applicant also alleged that the CO, who served as the OER Reviewer, improperly directed his supervisor, the OO, and reporting officer, the XO, to assign him lower marks in several categories than they otherwise would have based solely on the CO’s discovery of the quote book on the bridge in April 2009. The applicant stated that because the full effect of that improper pressure cannot be known, the entire OER should be removed from his record. In support of

⁵ According to a Coast Guard news release, the cutter intercepted a xxxxxx-flagged fishing vessel on April 7, 2009; sought and received permission from the xxxxxx government to board and search the vessel; found 2,200 pounds of cocaine on board; and escorted the vessel and its crew more than 500 miles before turning them over to xxxxxx authorities on April 13, 2009.

his allegations, the applicant submitted several statements signed by crewmembers of the cutter, which are summarized below.

Statement of an LTJG Y, a Deck Watch Officer

LTJG Y stated that he stood a 1 in 3 watch on the bridge of the cutter and was often on watch with the applicant. He stated that knowledge of the quote book was widespread among the watchstanders and the crew, but the applicant removed it from the bridge in the summer of 2008 “because it contained some entries from past years that were inappropriate.” Not everyone agreed with his decision, but the applicant discussed it with some of the cutter’s leadership and kept the quote book in his stateroom. LTJG Y claimed that a new quote book was put on the bridge, and all the entries made in it were “in no way offensive or degrading.” However, in the spring of 2009, someone returned the old quote book to the bridge, where it was found by the CO. Although the applicant was not on board when this happened, he immediately admitted to the CO that he knew about the quote book.

Statement of LTJG Z, a Deck Watch Officer

LTJG Z stated that he stood several watches on the bridge with the applicant, and he consistently displayed expertise and professionalism. The applicant “never engaged in inappropriate, unprofessional behavior while on watch.” He stated that the presence of the quote book was well known, and it “had some entries from past years that were inappropriate.” However, the applicant removed the quote book from the bridge during a patrol in 2008 and kept it in his stateroom while he consulted other deck watch officers and his supervisor about it. A new quote book was started on the bridge, and all of the entries were appropriate. However, while the applicant was serving as the Law Enforcement Officer and boarding a fishing vessel, the original quote book was brought back to the bridge and discovered by the CO. “Understanding the severity of the situation, [the applicant] took ownership of his knowledge of the quote book.”

Statement of CWO X, the Supply Officer

CWO X stated that he reported aboard the cutter for duty as the Supply Officer in July 2008 and sometime thereafter, the applicant, LTJG X, and the head of the Deck Department came to his stateroom to discuss the quote book with him and another CWO, which they had already removed from the bridge because of some offensive content. CWO X told them that having a quote book was a common tradition and suggested that they discuss it with the OO. CWO X stated that he believes that they did discuss the quote book with the OO, who had it in his possession for a while. However, in 2009, the CO found the old quote book on the bridge. She called a meeting with the wardroom and dressed down all of the officers, including five who had never stood a bridge watch and were unaware of the quote book. CWO X stated that

[f]rom that moment on, everyone was walking on eggshells. ... I do know that she did not really want to hear what anyone had to say, and she asked generic questions such as, “How did we get here and how do we proceed?” [The applicant] spoke up first and apologized to the group as a whole, “stepping up” as it were. Although I know he was not alone in this, he was the one to man up and the CO did not seem impressed with this and actually looked even more upset with him for doing it, but that’s just my opinion. When [the other CWO] spoke, she shut him down with a negative comment, after which not much else was said that had any relevance to the book specifically.

... [M]ost of the bad ‘quotes’ were years old. Of the recent entries, the worst things were some “F” bombs. I certainly did not feel that the quotes from 3 to 7 years ago were the “Failure” of this current wardroom nor should that failure be put on specific personnel. I also don’t feel that trying to hold someone accountable today for the indiscretions of someone from 3 to 7 years ago is appropriate. [The applicant] took the issue to his immediate supervisor, [the OO], and properly used his chain of command.

Statement of a Gunner’s Mate, Second Class (GM2)

A GM2 stated that he frequently stood watch with the applicant on the bridge, sometimes twice a day, from June 2007 to June 2009, and that the applicant consistently displayed great professionalism and had “a positive influence on the bridge watch’s professionalism.” The GM2 stated that knowledge and use of the quote book on the bridge was widespread until the summer of 2008. However, the applicant found the quote book unprofessional and removed it despite others’ objections. The applicant kept the quote book in his stateroom and discussed its disposition with more experienced officers. After the applicant removed the old quote book, someone started a new one, but all of the entries were appropriate. However, during the spring patrol in 2009, someone put the old quote book back on the bridge. While the GM2 was standing watch, the CO came looking for it and took the old quote book.

PRRB Decision on LTJG X’s OER for February 1 to May 28, 2009

In support of his allegations, the applicant submitted a decision of the Personnel Records Review Board (PRRB) concerning the OER of LTJG X, one of the other officers held accountable after the CO discovered the quote book. LTJG X, who was selected for promotion to LT after the PRRB removed his OER in 2010, provided the applicant a copy of the PRRB’s decision for his BCMR application. The PRRB’s decision shows that based on statements solicited from LTJG X’s rating chain about his low marks for Directing Others, Responsibility, and Professional Presence, which are summarized below, the PRRB concluded that LTJG X’s OER for the period February 1 to May 28, 2009, should be removed from his record because the XO had been improperly directed by the CO to lower the mark he assigned for Directing Others based on performance not related to the quote book and because the low marks for Responsibility and Professional Presence were based on LTJG X’s contributions to the quote book, which occurred before the start of the reporting period for the OER. The PRRB found that prior to the reporting period for the OER, several officers who served on the bridge as Officer of the Day discussed the offensive content of the quote book, gave the quote book to the AOO “for disposition,” and “rightfully assumed the issue was resolved.”

The PRRB found that the CO, who served as the Reviewer for LTJG X’s OER, found the quote book in April 2009 and “wrongfully based her view of the applicant’s performance on the date she personally discovered the quote log and not based on the date when the performance actually occurred.” The PRRB found that the quote book had been removed from the bridge by the Assistant Operations Officer before the reporting period began and that any adverse effect on morale caused by the quote book during the reporting period resulted from the CO’s discovery of and response to the quote book, including an all-hands “stand down,” which created a “command climate issue.” The PRRB noted that when a command discovers poor performance that occurred before the current reporting period, the command may prepare an “exception OER” but

may not document such past performance in the officer's current regular OER. The PRRB's decision to replace LTJG X's disputed OER with a "Continuity OER" was approved by the Director of Personnel Management on September 13, 2010.

Statement of the Operations Officer of the Cutter to the PRRB

The OO, who supervised LTJG X from June 2007 through May 2009, stated that after he submitted his draft of LTJG X's OER, "it was made clear to me that anything other than [a mark of 2 in the category "Directing Others"] would not be approved by my chain of command and therefore I should make the edits as advised." The OO stated that the other low marks and comments in the OER were based on LTJG X's involvement with the quote book. The OO claimed to be unaware of any of the contents except what the CO read aloud during the Officers' Call, which was clearly unprofessional. He noted that the officers who were held accountable for the contents of the quote book did not necessarily make any inappropriate quotations in it themselves and may not have read it all the way through or known about the offensive matter that the CO found.

Statement of the Executive Officer of the Cutter to the PRRB Regarding LTJG X's OER

The Executive Officer (XO), who served as LTJG X's reporting officer (and who is the supervisor who assigned the applicant a mark of 4 for "Workplace Climate"), stated that the CO had directed him to lower LTJG X's mark for "Directing Others" to a 2 and that he had assigned LTJG X a mark of 2 for "Responsibility" because he

participated in a repulsive and vulgar quote book as I described in section 8 of his OER. While the commanding officer discovered and maintained custody of the quote book, she did read some of the entries to me and to the wardroom as examples of some of the severely offensive and inappropriate content. The commanding officer was very clear about how deeply offended she was by the entries in the book as was I upon hearing them. Additionally, the commanding officer described to me additional entries documenting discussions, vulgar language, and behavior by underway watch personnel that caused her great concern and doubt about the professionalism and senior/junior relationships taking place on the bridge. It is my opinion that, while no crewmember openly indicated that they were offended by the book, the entries highlighted to me were completely inappropriate and in violation of the Commandant's Anti-Harassment & Hate Incident Policy.

The XO also stated that he assigned LTJG X a mark of 3 for "Professional Presence" and assessed his potential as an officer in the last block of the OER based on LTJG X's participation in the quote book.

Statement of the Commanding Officer of the Cutter to the PRRB Regarding LTJG X's OER

The CO of the cutter served as LTJG X's OER reviewer (and the applicant's reporting officer). She stated that she supported LTJG X's mark of 2 for "Responsibility" based on his participation in the quote book, which she discovered on the bridge during the reporting period. She stated that the quote book contained "references to perverted, disgusting, and at best unprofessional behavior that took place on the bridge and elsewhere aboard the [cutter]. The quote book was not routinely stored in open view. ... The book was stopped and counseling given only

after I discovered it. [LTJG X] seems to take refuge in the fact that the book existed for several years. [He] had ample opportunity to stop the offensive behavior and the documentation of it. [He] did not speak up and he did not get involved in the solution.” The CO also supported LTJG X’s mark of 3 for “Professional Presence” because of his implicit condoning of the quote book during the reporting period.

VIEWS OF THE COAST GUARD

On June 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief by removing the disputed OER, replacing it with a Continuity OER, removing the applicant’s non-selection for promotion to LT in 2010 by the PY 2011 LT selection board, and, if he is selected for promotion by the PY 2012 LT selection board after his record is correct, backdating his date of rank to what it would have been had he been selected for promotion in 2010 and awarding him back pay and allowances. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC’s Memorandum

The PSC submitted sworn declarations signed by the applicant’s rating chain, which are summarized below, and in light of those declarations concluded that the rating chain did not carry out its duties properly under the Personnel Manual. The PSC stated that the OO’s and XO’s declarations show that they were improperly directed by the CO, who reviewed the OER, to lower marks they had assigned to the applicant when drafting the disputed OER. The PSC stated that

[t]he Reviewer directing any documentation in sections three, four, five, seven, or eight of the OER was not consistent with policy as those portions of the evaluation were the responsibility of the Supervisor and Reporting Officer. The Reviewer has the authority and duty to return an OER for correction or reconsideration; however returning an OER with specific outcome direction is not within policy. Having reviewed the Applicant’s package and the rating chain’s declarations, CG PSC believes that the Supervisor and Reporting Officer were directed by the Reviewer to align their assessment with her view of the Applicant’s performance in at least six particular dimensions, thus resulting in lower marks than would have been assigned.

The PSC found that the applicant “provided sufficient evidence to prove, by a clear and convincing standard, that the disputed OER inaccurately documents his performance during the period” and agreed with the applicant that the entire OER should be removed. Because the applicant’s other OERs are significantly better, the PSC stated that it would be “prudent to err on the side of the applicant and grant relief for [his] non-selection duty the PY 2011 ADPL LT selection board.”

Declaration of the OO of the Cutter

The OO, who prepared the supervisor’s portion of the disputed OER, stated that he does not have a copy of the original OER he prepared but he knows that it included significantly higher marks in several categories. However, he stated,

[f]ollowing my initial submittal, I was advised by the Executive Officer that I needed to edit those sections with more emphasis placed on the effects the Commanding Officer felt the quote book had on morale, and the performance of the bridge team. Although I believed that [the applicant's] overall performance in Directing Others, Teamwork and Workplace Climate were well above the marks assigned, it was made clear to me that anything other than the marks submitted in the contested OER would not be approved by my chain of command and therefore I should make the edits as advised.

The OO further stated that the applicant “had taken positive steps to remedy the situation and along with several of his shipmates, was wrongly made an example of.” The applicant “had taken steps to remove the book from the bridge and one of his shipmates, unbeknownst to him, took it back to the bridge.” The OO stated that although the entries read aloud from the quote book by the CO were offensive, he is not convinced “that those aware of the book when the commanding officer found it had indeed read through it or were aware of the specific unprofessional quotes within.”

Declaration of the XO of the Cutter

The XO of the cutter, who prepared the reporting officer's portion of the disputed OER, stated that the CO “insisted that [the applicant's] participation [in the quote book] was “career altering” and that it must be documented in his OER. I complied with her assessment by addressing her account of his participation in the quote book in his OER.” However, the XO was never allowed to read any of the entries, and the CO was very vague about the dates and nature of specific entries, so he had to prepare the OER marks and comments without knowing what unprofessional conduct the applicant was accused of committing in the quote book. The XO never actually saw the applicant engage in any unauthorized behavior while on watch or at any other time while assigned to the cutter. The XO concluded that he would have assigned the applicant significantly higher marks in several categories if he had not had to satisfy the CO's expectations. The XO also stated that he advised the OO of the CO's position on the applicant's OER and believes that the OO lowered the marks he assigned to the applicant accordingly.

The XO stated that the applicant told him at the time that he had shown the quote book to the OO. The XO supported the applicant's claim that he had removed the book from the bridge, consulted some of the command leadership, and “took action to remove offensive content” from it. Moreover, the XO stated that, based on his conversation with several members of the crew, he believes that the applicant did not know that the quote book had been returned to the bridge.

Declaration of the CO of the Cutter

The CO, who served as the reviewer for the disputed OER, stated that contrary to the applicant's claim, she knows that his involvement with the quote book took place during the reporting period for the disputed OER because she discovered the book in April 2009 and had several conversations with the applicant about the book during which he

4. ... acknowledged the book's existence, its inappropriate content, and his role surrounding the book to me during the reporting period. ...

a. However lighthearted [the applicant] and witnesses attempt to portray the book, the nature of the book and behavior detailed in the book are neither witty nor appropriate. The quote

book contains references to perverted, disgusting, and unprofessional behavior directly in opposition to Coast Guard core values that took place on the Bridge and elsewhere. The book details sex acts, including The book documents disrespect from officers to enlisted members (“How’s it goin [m.f.] Petty Officer”). Name withheld. During the marking period references to “my black ass” and “fuckin” are recorded as well as a reference to the male sexual organ. In addition, during the period disrespect from enlisted members to officers (“Sir, I could definitely see you being sold into sex trafficking”) is recorded. During the period, [the applicant] was in a position to stop this behavior. . . .

b. I know that the book was active and located on the bridge during the marking period. I found the book on the bridge during the marking period. I know that unprofessional behavior and the documentation of unprofessional behavior happened during the period of report because of specific dates written in the book and next to entries. A sample page of the quote book is included. One title of entries is labeled “Mar-May ‘09”. [The applicant] was an Officer of the Deck during the period and stood that watch on the bridge. Watchstanders, referred to as BMOW or QMOW or by their rank and first initial, made entries on several different days during the period. I knew that [the applicant] knew about the book when just days after my discovery of the book, he requested an audience with me to discuss the book. [He] clearly indicated to me his knowledge of the book, its location, its content, his participation in it and the inappropriateness of it. [His] name is listed several times in the book.

c. [The applicant] discusses the history of the quote book aboard [the cutter] as if to offer him relief from his conduct during the period. The failings of others, however egregious and many, are not germane. The history of the book prior to the marking period does not excuse [his] poor behavior during the marking period. . . . A commissioned officer, [he] should have recognized the inappropriateness of the book and should not have joined in. He had a duty to take action even if it were to stop the book himself. [He] offers an explanation that he provided the book to several people and that he had a plan to “improve the practice”. He sought out crewmembers, often subordinates, as if to receive permission and concurrence for maintaining the book. He, in fact, maintained the book himself for some time. He did not destroy the book or disavow himself from the unprofessional behavior contained in the book. Even after my discovery of the book, [he] referred to the book as a tradition to be continued.

d. I do not believe [the applicant’s] statement that he did not know that the quote book was on the bridge during the marking period. During the marking period, after I had discovered the book, I can recall at least four conversation with [him] concerning the book. Most of these conversations were held with his supervisor and reporting officer present. Not once, during any of those conversations, did he contest his knowledge of the book, his chain of command’s interpretation of his involvement in the book, or his lack of action to stop it. He never told me that he had not seen the book on the bridge. In fact, he told me that during a recent period the book was in his personal possession. During his last patrol aboard the [cutter], during the marking period, the book was active and on the bridge. There was recent information in the book. An entry was made by bridge watchstanders on 09 Apr 09. The book had not been dormant. When presented with the [disputed OER, the applicant] never raised any issue refuting the marks or comments he received, and rather to the contrary, he continued to acknowledge his role.

e. During the period [the cutter] conducted a boarding of a xxxxxx fishing boat. It was routine operations to conduct boardings while underway. [The applicant] was often involved in boardings and would sometimes be aboard another vessel for short periods of time. I do not recall the exact amount of time [he] was onboard the fishing boat. During the period [he] was not away from the unit for any length of time so as to absolve him of his actions concerning the book. During the period, while underway, [the applicant] stood watch on the bridge and while inport he made regular rounds of the bridge. His subordinates and watchstanders made entries in the book. After confiscating the book I discovered that the book and its location was common knowledge among senior bridge watchstanders, including [the applicant]. It is not credible to believe that the book was dormant or not on the bridge during the marking period and that [he] did not know about

it. It is unlikely that as a frequent watchstander and as Assistant Operations Officer during the period he would not know about the book's current [continued] existence. Furthermore, based on his reaction when I discovered the book, it was and still is clear to me that [he] was a willing participant in the unprofessional behavior and the recording of the unprofessional behavior and that he knew the location of the book.

5. [The applicant] and witnesses refer to an "original" and "new" quote book. There was one book. [The applicant] told me his attempt to start a "new" book was to skip pages in the book and to start recording quotes again at the end of the book. This fact was confirmed by my inspection of the book. The book I confiscated contained all previous period quotes as well as quotes from this period. There is no visible effort to remove objectionable and inappropriate material from the book. During the period the inappropriate and unprofessional behavior continued. As a relatively senior member of command cadre and an Officer of the Deck, [he] had a duty to stop the book and the inappropriate behavior. He failed to do so.

6. The marks and comments assigned by the Supervisor are administratively authorized, accurate, justified, and reflective of [the applicant's] performance during the period. ... Additionally, [he] failed to hold subordinates accountable for their own participation in unprofessional behavior. [His] attempt to shirk responsibility for his own actions further validates that he was not forthcoming about his knowledge of the book prior to me finding it and further validates the accurate evaluation of him.

a. [The applicant] states, "I did everything possible to bring an end to what could be considered inappropriate comments in the quote book." He did not do everything possible. [He] did not stop the inappropriate behavior and the documentation of the behavior, as was his duty to do so. [His] chain of command marked him according to his actions and conduct during the period, not the actions or conduct of others. [He] points to the four witness statements as validation of his points. He, again, sought out witnesses, all subordinates, as if to receive permission and concurrence for his actions surrounding the book. All witnesses directly participated in the inappropriate and unprofessional behavior or had knowledge of it and took no action. They have provided mischaracterizations of the quote book. I do not recall [the GM2] on the bridge when I discovered the book. ... [The applicant's] failure to remove the book and to stop the behavior condoned the inappropriate conduct of his watchstanders and subordinates. [He] failed to meet a standard of behavior that would show his subordinates that he could be trusted to lead and respect all of them, not just some. ...

7. The marks and comments assigned by the Reporting Officer are administratively authorized, accurate, justified, and reflective of [the applicant's] performance during the period. During several conversations with [the applicant] during the marking period he expressed to his Reporting Officer and me an understanding of the impact of his actions and inaction. He also expressed sorrow for his conduct. In every discussion with [him] he confirmed that he participated in the book. He called the book a "[cutter name] tradition" as he refers to it several times in his statement. Following my discovery of the book [he] told me that he wanted to ask me to return the book to him so that the tradition could continue. [He] did not effectively execute a corrective plan to remedy the situation. [He] failed to take appropriate action. He was given the benefit of the doubt after the discovery of the book by seeking corrective actions and did nothing to prove that he should receive any higher marks. I now believe that benefit given to [him] by his Reporting Officer was based on false words.

a. During the period, while underway, [the applicant] stood watch on the bridge and while in port he made regular rounds of the bridge. His subordinates and watchstanders made entries in the book. After confiscating the book I discovered that the book and its location were common knowledge among senior bridge watchstanders including [the applicant]. Is it not credible to believe that inappropriate behavior written in the book did not take place during [his] watch. Quotes are often listed by bridge watch positions. I have provided a sample entry in the quote book that appears to refute [the applicant's] claim that "I did not engage in ANY inappropriate

behavior, at any time, on or off watch, during this reporting period or outside of this reporting period.

b. ... [The applicant's] claim that an "unidentified individual" was responsible for the location of the book is not credible and is an attempt to deflect his own responsibility. The fact is the book was on the bridge during the marking period. The book contained vulgar writings and actions contrary to Coast Guard core values. In all conversations with [him] he told me that he knew the location of the book and was fully aware of its content. [He] lacked commitment and failed to act ethically when he had the opportunity to stop the book and the unprofessional behavior occurring. He, instead, allowed the book and behavior to continue. ...

9. [The applicant] accuses me of impermissible actions concerning his [OER]. During the period and in the execution of his [OER] dated 30 June 2009 I was fully aware of my duties and responsibilities concerning my role as Commanding Officer and Reviewer of [the applicant]. I performed my duties in accordance with COMDTINST M1000.6A. In an email sent to me dated 02 June 2010, [the applicant] asks me to commit the very impermissible action that he accuses me of. (Email enclosed) In the fourth paragraph of the mail he asks me to "modify the marks". I did not comply with nor respond to [his] inappropriate and presumptive request.

The CO stated in her 20 years of active duty and tours on four cutters, the applicant's "performance, conduct, and lack of responsibility [are] some of the most disturbing and appalling I have ever witnessed." In support of her declaration, the CO submitted photocopies of two pages out of the quote book and an email. The first page she submitted contains quotations entered in the book in early 2008 before she took command of the cutter:

During G.E: SN [name] is explaining that he never gets in trouble when he gets drunk. Mr. [name] asks "What about getting anybody pregnant?" [SN]: "Well, I got a"

During flight quarters: Captain: "What do you call it when you have meridian passage of the moon?" Nobody answers, so he says, "Local apparent moon." A few chuckle. BM [name] says: "Captain, those were sympathy laughs."

29 Feb. [The applicant] enters the bridge and quotes BM3 [name]: "How's it goin ... "[m.f.] [name]?" BM3: "Alright but I gotta get a relief soon so I can go take a shit." [LTJG X]: "Why wait BM3?" BM3 [name]: "Eh, I'll go when it hits the crack of that ass ... that's when I know it's time."

01 MAR 08 – Mid watch

LTJG [name] to ENS [name]: "I'm not trying to impress you, [name]. I'm trying to break world records here."

The second page that the CO submitted bears the heading "MAR – MAY '09" and contains the following quotations, which appear to have been entered by just two people, one who wrote the heading and made the first four entries and another who made the last two entries:

- BM1 [name]: "[name] was ... and praying."
- BM3 F: "Man, you try to find someone to help me out, so I can go to this meeting, and no one is around. But, if someone needs a relief to go to something, they come find my black ass."
- CIC [name]: "Chupacabra, Shark 01, I have you soft and broken." OOD: "Ouch that sucks."

- BM2 H: (Answers phone on bridge.) “Hello. You want to do what with the boom?” (Hands phone to OOD.) “It’s [name], I don’t know what he is saying.”
- ENS [name]: “I [unreadable word] at the chart.”

14 APR '09: BM2 H: “Sir, I could definitely see you being sold into sex trafficking.” ENS W: “Quote book.”

The email that the CO submitted is dated June 2, 2010, almost a year after the disputed OER was completed, and was sent to her by the applicant. The applicant advised her that he had recently learned that the OER would be more than a “speed bump” in his career and would likely end his career by preventing his selection for promotion. Therefore, he had decided that he needed to seek correction of the OER. He noted that he would appreciate it if she herself would “modify the marks,” but in the absence of a modification, he would be presenting his case to a board. He noted that he had passed on “lessons learned” to others and that, as a result, several other cutter crews had gotten rid of their quote books. He also pointed out that as an ensign aboard the cutter he had

recognized and brought an issue to light that had been skipped over for quite a while. Despite definite disagreements, I tried to handle the issue the way I was taught, at the lowest level. I first discussed it with my peers, then the Chief’s mess, after which, bringing it to the next person in my chain of command, [the OO]. After this, without any further guidance (still amongst criticism), I created a new book to make the best out of the old tradition. The old book that I removed from the bridge was even taken from my possession without my consent. When its existence was questioned last year, I took responsibility while most of those who knew about it did not stand up and be noticed. After you said I needed to sit down with you and explain the book, I entered the meeting with you believing I needed to brief you on how the old book made it to the bridge, and make sure you understood what had been done to alter the old book. I was confident that the actions I had taken, whether needing alteration or not, were at the very least sanctioned, especially since the Operations Officer was not there. After our meeting, you gave me a lasting and definite understanding of why even the presence of a book is not desirable and why it was my fault to have been part of it; an understanding I did not have in all conversations prior and one I have taken to heart.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 8, 2011, the applicant responded to the views of the Coast Guard. He stated that he agrees with the recommendation for relief except that, if he is not selected for promotion in September 2011 by the PY 2012 LT selection board, he wants the Coast Guard to convene a special selection board for him. He also took exception to some of the statements in the CO’s declaration. He stated that “she has taken comments or statements made by or clearly attributed to other individuals and erroneously labeled them as originating from me. Additionally, at no point from my discovery of the quote book to this present date have I failed to take full ownership of my actions. It is apparent that the facts and the validity of my actions have never fully been recognized by the reviewing officer. Therefore, I submit that the factually flawed conclusions of the Commanding Officer may have clouded her judgment, ultimately leading to the challenged OER.”

SUMMARY OF THE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.4.c.4. of the manual provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer’s performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink. [Emphasis added.]

• • •

d. In the “comments” block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary Supervisors, and other information accumulated during the reporting period. [Emphasis added.]

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. ...

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.4.c.8.a. states that on the Comparison Scale in an OER, a reporting officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.

Article 10.A.2.e.2.c. states that a reporting officer “[e]nsures the Supervisor fully meets responsibilities for administration of the OES [Officer Evaluation System]. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer **shall not direct** that an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.)”

Article 10.A.4.f.11. states that in writing OER comments, rating chain members may not “[d]iscuss Reported-on Officer’s performance or conduct which occurred outside the reporting period.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant asked the Board to correct or remove from his record his OER for the period February 1 to June 30, 2009, and also to expunge his non-selection for promotion to LT and award him back pay and allowances. The Board begins its analysis by presuming that a disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.⁶ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.⁷ To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁸

3. The applicant has alleged and proved by a preponderance of the evidence that the disputed OER was prepared in violation of Article 10.A.2.e.2.c. of the Personnel Manual because his reviewer, the CO, directed his supervisor and reporting officer to assign him lower marks than they thought should be assigned. The OO and the XO have executed sworn statements admitting this fact, and the CO did not deny it.

4. The applicant also alleged that the disputed OER is inaccurate as an assessment of his performance during the reporting period because the low marks and negative comments are based on performance that occurred outside of the reporting period for the OER—February 1 to June 30, 2009. He alleged that long before the reporting period began, he removed the quote book from the bridge and that someone else took it and returned it to the bridge without his permission or knowledge while he was occupied with a vessel boarding in April 2009. Rating chain officials must base their marks and comments in an OER only on a reported-on officer's performance during the reporting period, and they may not comment on "performance or conduct which occurred outside the reporting period."⁹ Therefore, if the applicant was unaware that the quote book had been returned to the bridge during the reporting period for the OER until after the CO discovered it, any marks and comments based on his involvement with the quote book were prohibited in his regular OER.¹⁰

⁶ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases, including disputes over OERs, prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁹ Personnel Manual, Articles 10.A.4.c. and 10.A.4.f.11.

¹⁰ Poor performance discovered after the end of a reporting period is properly reported in an exception or special OER under Article 10.A.3.c. of the Personnel Manual, not a regular OER.

5. The PRRB has concluded, in removing the OER of LTJG X from his record, that the quote book was removed from the bridge by the AOO—the applicant in this case—before the reporting period began. The applicant has submitted statements signed by two other commissioned officers, a chief warrant officer, and a petty officer supporting his claim that he removed the quote book from the bridge in the summer of 2008 because of its offensive content, consulted with and showed it to the Chief’s mess and his supervisor, retained the book with the intention of establishing a new one, and was serving as a boarding officer on a fishing vessel, rather than standing watches on the bridge, when an unknown person returned the quote book to the bridge in April 2009. In their declarations for the Coast Guard’s advisory opinion, both the OO and the XO support the applicant’s claim that he had removed the quote book from the bridge and that someone else returned it to the bridge without his knowledge.

6. The applicant’s CO stated in her declaration that she discovered the quote book on the bridge during the reporting period, that the applicant stood watches during the reporting period and so must have known that the quote book was there, that there was no evidence of any editing of offensive comments in the book, and that someone had simply skipped a few pages before making new entries in the quote book during the reporting period. She submitted a page of entries that were made during the reporting period as evidence that the quote book was not “dormant.” She also said that during at least four conversations about the book, the applicant acknowledged having had the book in his possession recently and never specifically denied awareness of the book’s presence on the bridge during the reporting period. CWO X, however, stated that after establishing that the applicant and others knew about the book, the CO “did not really want to hear what anyone had to say, and she asked generic questions such as, ‘How did we get here and how do we proceed?’”

7. The reporting period began on February 1, 2009, and the record shows that the CO discovered quote book on the bridge about ten weeks later, in mid April 2009, during or soon after the boarding of a fishing vessel in which the applicant was heavily involved as the designated Law Enforcement Officer. An investigation might have revealed when the book was returned to the bridge and who knew it had been returned, but none was conducted. If the quote book had been on the bridge throughout those ten weeks, the applicant would presumably have known because it would have been missing from his stateroom and he might have seen it while standing watches. However, the Board is persuaded by the finding of the PRRB and the statements of the OO, the XO, and the other officers that the quote book was not on the bridge throughout those ten weeks and that someone returned the book to the bridge shortly before the CO discovered it, during the week-long boarding of a fishing vessel, when the applicant was not standing watches. The page of the quote book submitted by the CO actually supports this finding because the handwriting of only two persons appears on the page, the applicant is not mentioned on the page, and the first and only dated entry on the page is April 14, 2009.

8. The Board finds that the applicant has proved by a preponderance of the evidence that his only involvement with the quote book during the reporting period for the disputed OER was his retention of the book in his stateroom, which does not reflect negatively on him. He has proved by a preponderance of the evidence that the quote book was returned to the bridge and used again during a period when he was not standing watches on the bridge and shortly before the CO found it. Therefore, the Board finds that marks and comments in the disputed OER

assess performance that occurred before the reporting period began and that, moreover, did not occur during the reporting period. In particular, the Board notes that the comment that the applicant “participated in inappropriate behavior containing vulgar writings/actions on bridge”¹¹ is not supported by the contents of the quote book and the XO, who wrote that comment, has admitted that he has no knowledge that the applicant ever participated in inappropriate behavior on the bridge during the reporting period.

9. The Board finds that the applicant has proved by a preponderance of the evidence that the disputed OER should be removed from his record because it was adversely affected by prejudicial violations of Articles 10.A.2.e.2.c., 10.A.4.c., and 10.A.4.f.11. of the Personnel Manual in that (a) his CO directed his supervisor and reporting officer to assign a lower marks than they considered to be accurate and (b) his rating chain based certain marks and comments on performance that occurred outside of the reporting period.¹² In BCMR Docket No. 151-87, the Board found that an OER should “not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” In this case, it is not clear exactly how the CO’s directions affected each of the marks in the disputed OER. Therefore, the Board finds that the OER should be removed from his record in its entirety and replaced with a Continuity OER.

10. The applicant asked the Board to remove his failure of selection for promotion to LT in 2010 by the promotion year (PY) 2011 LT selection board because the erroneous OER was in his record when it was reviewed by that board. When an applicant proves that his military record contained an error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant’s non-selection for promotion should be removed by answering two questions: “First, was [the applicant’s] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?”¹³ When an officer shows that his record was prejudiced before a selection board by error, “the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff’s *prima facie* case,¹⁴ there was no substantial nexus or connection” between the prejudicial error and the non-selection for promotion.¹⁵ To void a non-selection, the Board “need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”¹⁶

¹¹ The Board assumes that the CO would have submitted a copy of the pertinent page of the quote book if there were such evidence.

¹² See *Lindsay*, 295 F.3d at 1259.

¹³ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

¹⁴ A “*prima facie* case” is one in which there is sufficient proof to support a finding in the plaintiff’s favor if the evidence to the contrary is disregarded. BLACK’S LAW DICTIONARY, Rev’d 4th ed. (1968), p. 1353.

¹⁵ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

¹⁶ *Engels*, 678 F.2d at 175.

11. The applicant's record definitely appears worse because of the low and average marks and negative comments in the disputed OER. The marks of 3 for "Workplace Climate" and "Responsibility" and the mark in the third spot on the Comparison Scale are the only below-average marks he has ever received on an OER. Therefore, the first prong of the *Engels* test is clearly met.

12. With regard to the second prong of the *Engels* test, the Board notes the high marks in the applicant's other OERs and finds that it is not unlikely that the applicant would have been selected for promotion if the erroneous OER had not been in his record when it was reviewed by the PY 2011 LT selection board. The applicant has submitted *prima facie* evidence that the erroneous OER caused his non-selection for promotion, and the Coast Guard has submitted nothing to rebut this evidence. Moreover, the JAG has recommended removal of the OER and the non-selection for promotion. Therefore, the second prong of the *Engels* test is met, and the applicant's non-selection for promotion to LT should be removed from his record.

13. The Board notes that the applicant asked the Board to order the Coast Guard to convene a special selection board for him pursuant to 10 U.S.C. § 628. However, 10 U.S.C. § 628 authorizes only the Secretaries of "military departments" to convene special selection boards, and, for the purposes of Title 10 U.S.C., neither the Coast Guard nor the Department of Homeland Security is a "military department."¹⁷ Therefore, the Coast Guard lacks statutory authority to convene a special selection board, and the Board will not order it to do so.

14. The applicant asked the Board to award him the back pay and allowances he lost as a result of his non-selection. The Board finds that if he is selected for promotion by the first LT selection board to review his record after it has been corrected, his LT date of rank should be backdated, once he has been promoted, to what it would have been had he been selected for promotion in 2010 and he should receive corresponding back pay and allowances.

15. Accordingly, the relief described in findings 9, 12, and 14, above, should be granted.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹⁷ 10 U.S.C. § 101(8) (defining "military departments" as the Departments of the Army, Navy, and Air Force).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows:

The Coast Guard shall remove from his record his OER for the period February 1 to June 30, 2009, and replace it with an OER prepared for continuity purposes only with the same description of duties in block 2. The Coast Guard shall also remove from his record his failure of selection by the PY 2011 LT selection board.

If he is selected for promotion by the first LT selection board to review his record after it has been corrected as required by the paragraph above, his date of rank shall be backdated to what it would have been had he been selected for promotion by the PY 2011 LT selection board, and he shall receive corresponding back pay and allowances.

Katia Cervoni

Lillian Cheng

Ashley A. Darbo