

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2011-125**

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XXXXXXXXXXXXXXXXXX**

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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on March 18, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated December 22, 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 ALLEGATION**

The applicant, who is a Reserve officer, asked the Board to correct his record by removing an officer evaluation report (OER) for the period from May 1, 2006 to April 30, 2008 (disputed OER). Alternatively, he requested that certain language be removed from the comments in sections 7 and 8 of the disputed OER, and that the mark of 3 in the "evaluations" category be raised to 4 and the mark of 3 in the "initiative" category be raised to 5. He also asked his mark on the comparison scale (block 9) be moved to the right one block from "fair performer; recommended for increased responsibility" to "Good performer; give tough, challenging assignments."

In addition to removing or modifying the disputed OER, the applicant asked that his non-selections for promotion to commander (CDR) before the promotion year (PY) 2009 and 2010 selection boards be removed from his record and that his corrected record be placed before the next CDR selection board convened to consider officers of that grade. Additionally, he requested that if selected by the first selection board to consider him for promotion to CDR with a corrected record that his date of rank once promoted be the date he would have had if he had been selected by the 2009 CDR selection board.

The applicant alleged that the following underlined comments in the blocks 7 and 8 of the disputed OER are inaccurate:

[The applicant] met the minimum requirements of a reserve Sector Command Center assignment. Stood situation unit watch w/minimal effort extended beyond these watches. An affable & cooperative mid-grade officer, [the applicant]' intentions are good, however, competing personal interests, lack of communication w/active duty supervisor, cancelled drills & little productivity during this 2-year period suggest the CG is a low priority at this time. [Comments in block 7]

Showed willingness to contribute to SCC msn. Waited for direction/little follow up. Supported development of new situation unit PQS . . . minimal visibility of final product. While not selected, volunteered for professional/command development courses & active duty assignments. Sought new/future reserve assignment w/increased ADSWC & deployment opportunities, showed commitment to improving own skills & competencies. Used sound judgment on watch during UN General Assembly security events, shifted other Government Agency assets for better coverage. Maintained composure, portrayed confidence, a very proud member of Team CG. Participated in SEC NY outreach, Incl. marched in parade and education partnership program, attended grade-school during professional outreach day. Extremely active, avid athlete. [Comments in block 8]

The supervisor gave the applicant a mark of 3 in the “evaluations” category of the leadership section of the disputed OER. The comment related to this mark reads: “[Prepared 3 OERs [including] own, all [required] guidance & revisions; [Reported-on officer’s] own OER documentation minimal & tardy.”

The reporting officer [RO] gave the applicant a mark of 3 in “initiative” which he supported by writing the disputed comments in blocks 7 and 8. He also marked the applicant in the third block to the right on the comparison scale as a “fair performer; recommended for increased responsibility”

The RO officer described the applicant’s potential for assuming greater leadership roles and responsibilities in block 10 of disputed OER, as follows:

[The applicant] performed required number of drills & ADT-AT time during this 2-year evaluation period. Officer could have been a significant contributor to the SCC during period. Experience gained supporting the CAT 1 SCC in Tier 1 port for [Coast Guard’s] largest east cost command is of value to a future assignment. Potential of success w/change in environment upon next assignment; well-suited for field/response-related assignments where fire/rescue/response background will be extremely valuable; anticipate future assignments to strike team. With increased initiative & responsibility expected of O4, could potentially earn recommendation for promotion to O5.

Block 2 of the disputed OER describes the applicant’s primary duty for the period under review as follows:

SCC [Sector Command Center] Watch & staff member. Coordinates operational efforts of multi-agency assets in execution of OPERATION NEPTUNE SHIELD in port of NY/NJ. Managers daily patrols, monitors critical infrastructure, security zones, maintains Maritime Domain Awareness, keeps Command Duty Officer informed. Coordinates vessel boardings & escorts. Develops & produces process-improvement & job-aid products for SCC. Manages 10 reserve enlisted & 1x O2 assigned to SCC. Ensures all readiness requirements current. Tracks drilling schedules & completion.

### **APPLICANT'S ALLEGATIONS AND ARGUMENTS**

The applicant argued that it was erroneous to include the comment "cancelled drills" in block 7 because it was a misstatement of significant hard fact, and he argued that he was passed over for promotion as a result of the comment. The applicant stated that he was required to complete 48 drills per year for a total of 86 drills for the two-year period covered by the disputed OER (however  $2 \times 48 = 96$ ). He stated that he completed a total of 86 drills during the two-year period. He denied that he ever canceled or rescheduled any drills. In support of this contention, the applicant submitted his own affidavit and a document from Direct Access reflecting the dates on which he drilled.

The applicant argued that his record before the PY 2009 and PY 2010 CDR promotion boards was prejudiced by the erroneous "canceled drills" error. In this regard, he argued that any reservist record that states that the reservist "cancelled" drills because he considered the Coast Guard to be a low priority makes that record appear worse than it would in the absence of that comment. He argued that the comment left the selection board with the erroneous impression that he failed to fulfill his Coast Guard obligations. This erroneous impression permitted the selection board to draw an adverse conclusion about the applicant's commitment to the Coast Guard that could have impacted their decision not to select him for promotion.

The applicant next argued that it was erroneous and unjust to include, not just the words "canceled drills," but the entire sentence "competing personal interests, lack of communication w/active duty supervisor, cancelled drills & little productivity during this 2-year period suggest the CG is a low priority at this time." The applicant contended that neither he nor the selection board has any idea what the reporting officer meant by "competing personal interests." Therefore, he argued that the selections boards were left to engage in impermissible speculation about the meaning of "competing personal interests." The applicant denied that he had any competing personal interests that affected his performance. In this regard, he stated that he scheduled the majority of his drills (70 out of 86) during the week days, at the expense of his civilian employment, to be of increased value to the Coast Guard. He also stated that in addition to his civilian employment, he owned a restaurant, which he sold because he did not have the time to devote to it. He argued that selling the restaurant showed that the Coast Guard was a high priority for him.

The applicant denied that he failed to communicate with his active duty supervisor and argued that that portion of the comment that there was a "lack of communication with [his]"

active duty supervisor' was a misstatement of significant hard fact. He stated that he saw his supervisor almost every time he came in to work. He stated that he repeatedly asked his supervisor for tasking, but she often did not have any work for him and at one point, attempted to farm him out to another division. He argued that if his productivity was lacking it was because he wasn't given any work to do, despite his repeated requests for work. In this regard, the applicant also denied the comment in block 8 of the disputed OER that he "waited for direction" and asserted that the comment is a misstatement of fact in light of his repeated requests for tasking. The applicant stated the following:

Given the obligation of supervisors to "provide[] direction and guidance to the reported-on officer regarding specific duties and responsibilities" [footnote omitted] and the fact that all officers, including supervisors and reporting officers, are evaluated in the area of "looking out for others," "Developing others," "directing others," and "teamwork," it "shocks the sense of justice" that applicant's rating chain failed to give him any meaningful work to do, especially in the face of repeated requests for taking. And it is particularly shocking to then blame him for a lack of productivity.

The applicant next alleged that it was erroneous and unjust to include the comment "While not selected" in block 8 of the disputed OER because it violates Article 10.A.4.f.3. of the Personnel Manual, which states that members of the rating chain shall not "mention or allude to the fact that the reported-on officer was not selected by a board or panel." The applicant acknowledged that he did not appear before any "board or panel" for consideration of training or active duty assignments, although he did appear before panels to consider whether he should be assigned to a PAL (personnel Allowance list) position or to an unbudgeted position. The applicant argued that the rationale behind prohibiting comments on non-selection is no less applicable to his situation even if no panel or board was involved in his non-selection for training or active duty assignments. He argued that the fact that he was not selected was irrelevant to his performance, particularly where the reason for his non-selection for some training was the Coast Guard's hesitancy to expend a training quota on a reservist, of which the selection board had no knowledge. Therefore, the selection board was left to speculate as to why the applicant was not selected for training. "And in the context of [the disputed OER], which describes Applicant's performance as lacking in certain respects, the promotion board was more likely to consider that the non-selection was based on applicant's performance rather than the [actual reason for his non-selection]." The applicant argued that the challenged comment suggests that he was not selected for any new or future reserve assignments, which was not his situation.

The applicant argued that even if the comment that stating that he had not been selected for training or active duty assignments was not error, it was "nevertheless unjust because the selection board was left to speculate why he was not selected for training and was not aware that the Coast Guard did not want to expend a quota on a reservist.

Last, the applicant argued that the disputed OER was a product of bias against him because he was a reservist, which is a factor adverse to the rating and that had no business in the rating process. The applicant stated the following:

[The] applicant does not suggest that an officer bears no obligation to take initiative in carrying out his duties— indeed, he is marked in that category. But it is singularly unjust to assign a reserve officer to an unbudgeted position—one which by definite is not a “quality of match” for the officer [footnote omitted] – and provide him with no meaningful work to do, and then blame him because he failed to meet unrealistic or non-existent expectations. And applicant acknowledges that a member of the SELRES is “expected to obtain and/or maintain the competence required of that position.” But his assignment to the Command Center staff was different from his assignment to the SCC watch. On watch, his responsibility was to respond to incidents as they were happening in real time, under the direction of Command Duty Officer. As a member of the Command Center staff, other than . . . two projects he completed, he had no responsibilities despite his repeated efforts to gain some.

Applicant believes that his superiors could not be bothered with him because he was a reservist. He found CDR [G], originally his supervisor and later his reporting officer to be unapproachable. When he went to his superiors for guidance or tasking, he was treated as though he was a burden, and what the command wanted was a reservist who was already fully trained, and not one who was not a “quality of match” who would require additional training. And when Applicant sought additional training, his request was refused because the command was not going to expend any of its limited training quotas on him because he was a reservist.

The applicant argued that any negative OER that is the product of bias against the reported-on officer’s status as a reservist is not “fair and objective.” He stated that he has submitted sufficient evidence to overcome the presumption that the rating chain performed their duties correctly, lawfully and in good faith.

The applicant argued that the disputed OER contains both error and injustices, that his record was prejudiced by errors or injustices in that it appears worse than it would absent the errors and injustices, and that it is not unlikely that he would have been promoted in any event with a correct record. *See Engels v. United States*, 678 F.2d. 173, 175 (1982).

### ***Applicant’s other LCDR OERs***

The applicant earned two other OERs while assigned to Coast Guard Activities New York. He was assigned to primary duty as the Unified Command Center Watch Officer for one reporting period and as the Sector Command Center Controller for the subsequent period. His marks for these two OERs were mostly 4s, with some 5s, and an occasional 6. He was marked in the 4<sup>th</sup> block on the comparison scale on both OERs, which described him as a “Good performer, give tough, challenging assignments.”

In his subsequent assignment to Coast Guard District Seven following the disputed OER, the applicant earned two regular OERs and one concurrent OER. His primary duty on the first District Seven OER was the Assistant to the Chief of Operational Planning and on the next OER

he was assigned to duty as the Planning Force Readiness-Duty officer. His marks on both OERs were 4s, 5s, some 6s, and an occasional 7. On the first OER for this command, the applicant was marked in the fourth block on the comparison scale which described him as a “Good performer; give tough, challenging assignments.” On the second regular OER, the applicant was marked in the fifth block on the comparison which described him as an “Excellent performer; give toughest, most challenging leadership assignments.” On the concurrent OER, the last of his LCDR OERs of record, the applicant received marks of 5s, 6s, and an occasional 7. He was marked in the fifth block on the comparison scale.

### **VIEWS OF THE COAST GUARD**

On August 25, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief to the applicant by removing the following two phrases from the challenged comments: “cancelled drills” from the block 7 comments and “while not selected” from the block 8 comments. With respect to the remainder of the disputed comments, the JAG argued they should not be removed because the applicant has not overcome the presumption that his rating chain officials acted correctly, lawfully, and in good faith in making their evaluations under the officer evaluation system. *Arens v. United States*, 969 F.2d 1034, 1037 (1992).

On the issue of removing the applicant’s failures of selection for promotion to CDR, the Coast Guard relied on *Engels v. United States*, 678 F. 2d. 173 (Ct. Cl. 1982), which states that before addressing a failure of selection “an applicant must first show that the service committed a legal error.” After which, the next question is whether the error is causally linked with the passover, i.e. whether it is harmless or prejudicial. According to *Engels*, if the applicant meets his burden of proving a causal connection between the alleged error and the failure of selection for promotion, the “end-burden of persuasion falls to the government to show harmlessness – despite the applicant’s prima facie case, there was no substantial nexus or connection.” *Id.*

The JAG stated that with respect to the first step under *Engels*, which is proving the existence of an error, the applicant has met his burden by proving that block 7 of the disputed OER contains the inaccurate phrase “canceled drills.” The JAG also agreed that the comment “while not selected” qualifies as a restricted comment under Article 10.A.4.F. of the Personnel Manual and should not have been included in the OER. However, the JAG argued that the erroneous comments are at best harmless, that they can and should be administratively corrected, and they have no substantial nexus to the applicant’s passovers for promotion. The JAG stated that the applicant has not made a prima facie showing of a substantial connection between the improper comments and his failure to be selected by the PY 2009 and PY 2010 CDR selection boards. In support of this conclusion, the JAG offered the following analysis:

The disputed OER as a whole portrays the performance of a marginal/at standard officer with potential to improve. The OER contains 13 marks of (4) or standard performance; 2 marks of (3) or below standard; 3 marks of (5) or above standard; and on the comparison scale, marked as a fair performer. Apart from the errors previously noted, it is evident that the applicant’s rating chain carried out their duties fairly and objectively by accurately marking the applicant in accordance

with the Coast Guard Personnel Manual. . . . The primary responsibility for completing a fair and accurate evaluation of the applicant rested [with the rating chain]. All three rating chain members provided declarations in support of their evaluation of the applicant. Of major significance regarding the disputed OER is block 10 (Potential) . . .

In block 10 . . . the [RO] stated; “With increased initiative & responsibility *expected of 04, could potentially earn recommendation for promotion to O5.* This is a clear indication that the RO felt as though the applicant’s performance was below the level expected of an O4. Moreover, this is also a clear indication that the applicant did not have the RO’s recommendation to be considered for promotion to O5. Although the deliberation process with respect to promotion boards are kept secret, it would appear more reasonable than not that the applicant’s failures of selection(s) were not caused or due to the administrative errors noted above – but because the applicant did not have the RO’s recommendation for promotion. {Emphasis in advisory opinion.]

The court in *Engels* placed the burden of establishing a prima facie case of showing a substantial connection between the error and the passover on the applicant. The court explained this step of the analysis by breaking it down into “two separate but interrelated standards: 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 errors? Second, even if there was some prejudice, is it unlikely that [he] would have been promoted in any event? *Id* at 176. Although an argument can be made that the applicant’s record may have been prejudiced by the administrative errors . . . it is clear that the applicant would not have been promoted in any event because he lacked the critical promotion recommendation from the RO. Thus we can conclude that even if we assume, *arguendo* that the applicant’s OERs were prejudiced by the errors as indicated, it is highly unlikely that he would have been promoted in any event based on the RO’s comments in block 10 [of the disputed OER].

The Coast Guard obtained declarations under penalty of perjury from each member of the applicant’s rating chain for the disputed OERs.

1. The supervisor wrote that the disputed OER is a very accurate report of the applicant’s performance. She stated that the OER identifies the applicant’s best intentions and strengths while honestly depicting an officer who rarely showed the initiative or professional growth commensurate with the rank of 04. She denied that the OER was a product of bias because of the applicant’s status as a reservist. She stated the following:

I have served as a reservist and have supervised a number of other reservists and can assure you I understand very well the challenges of maintaining consistent productivity and communicating with supervisors. The 1) flexibility in scheduling and 2) patience with qualification and project delivery afforded [the applicant] by

me and by my supervisor (. . . RO for the subject OER) was commensurate with his role as a reserve officer assigned to the SCC.

2. The RO stood by his assessment of the applicant's performance and denied that he was biased against the applicant because he was a reservist. The RO stated the following:

I will not change my assessment of [the applicant's] performance while assigned to Sector New York. [The applicant] told me in an after-hour's discussion on my home phone he was having difficulty managing his job as a fire fighter, member of the Fire Fighter football team, ownership of a bar (that was in jeopardy of losing its liquor license at the time due to police involvement), family issues and Coast Guard Reserve requirements. I told him if the Coast Guard was not in his top three priorities [--] and according to the [the applicant] it wasn't at the time [--] he move into the IRR [Individual Ready Reserve]. I had frequent meetings with Capt [L], the Senior Reserve Officer for Sector New York [who was the reviewer for the disputed OER] on finding a better fit for [the applicant] at Sector New York and [his] performance.

I disagree with [the applicant's] accusation of bias because of his status as a reservist. I served in the Army IRR and was activated during Desert Storm. I know from personal experience the many sacrifices of a Reserve officer. As such I gave [the applicant] every opportunity to succeed. I even removed the difficult requirement he had been given by the previous Chief, Sector Command Center to qualify as a Sector Duty Officer (SDO). This was due to the lack of [the applicant's] progress towards qualifying as a SDO. I don't have any issue with striking the statement 'while not selected.' Other than that this OER is an accurate statement of [the applicant's] performance.

3. The reviewer wrote that he was the senior reserve officer at Sector New York. He stated that he had little direct contact with the applicant and was more familiar with the applicant's RO and supervisor, each of whom was supportive of the Reserve program. The reviewer described two telephone conversations that he had with the applicant as follows:

To the best of my recollection the timing of the first call was approximately when he was detaching from Sector New York for transfer to CG District 7. He told me he was going to get a "bad OER" because they had not given him any work to do. That was the first time I was aware that he was, in his opinion, being under-utilized and that his performance was in the opinion of others, sub-par. At that time [the applicant] and I discussed the fact that as a senior O-4 he should not need someone to tell him what to do, that he should show the initiative and drive expected of a senior O-4 and do whatever it took to make himself invaluable to his supervisor; or in the alternative, he should have raised the issue higher up the chain of command to seek a more meaningful assignment. We discussed the fact that his career needed greater breadth of experience to be competitive for promotion – he had been at Sector New York for a very long time. We discussed the fact that he could possibly overcome what he called a "bad OER" and I



offered the advice that he should make himself so invaluable at his new command that when he transferred from that assignment “they would beg him to stay and demand 3 people to replace him.

The second relevant conversation with [the applicant], again, initiated by him, was after he had received his copy of the OER at the heart of this matter. He asked what he could do about his OER at this time. In as much as by the time he called me seeking my advice it was well past the allowable time frame for a reply to the OER, we discussed the fact that he was in fact past the deadline to make an official reply to his OER and further, that as a senior O-4, (a) he should have either known the reply requirements or (b) he should have researched the appropriate regulation prior to calling me and not to have asked me to tell him how he could rebut his OER. From the outset of my time at Sector New York, it was repeatedly emphasized that all officers were to be intimately familiar with the relevant portions of the Coast Guard Personnel Manual pertaining to Officer Evaluation Reports. Resultantly, in my experience, [the applicant] showed a level of knowledge about OERs that was far below what was expected of a senior O-4 and further showed a lack of initiative to research the issue for his own good. We again discussed that with exceptional performance in his new assignment he could overcome the OER in question.

# # #

In reviewing [the applicant’s OER] as part of my duties, using the CG PERSMAN as a guide, a “4” is the expected standard of performance expected of a Coast Guard officer. Relative to the assigned mark of “3” in block 5.f. (Evaluations), based on the comments in the OER, in my experience, the assigned mark does not warrant an upward elevation. Further, relative to the mark of “3” in Block 7.a. (initiative) the documented performance of [the applicant], as a senior O-4, clearly does not warrant an upward elevation.

Relative to the Comparison Scale which requires a comparison to other officers of the same grade whom you have known in your career, in my experience, [the applicant’s] documented performance, clearly does not warrant anything higher than the current grading as a “fair Performer; Recommended for increased responsibility.”

***Memorandum from the Commander, Personnel Service Center (PSC)***

The JAG attached comments from PSC as a part of the advisory opinion. PSC stated that satisfactory participation in the Selected Reserve includes completing 90% of the 48 scheduled drills per year. PSC stated that the applicant met this requirement by completing a minimum of 43 drills for each of the two years covered by the disputed OER. PSC stated that the applicant’s drill history does not indicate that he ever canceled drills and therefore the words “canceled drills” should be stricken from the comments in block 7 of the disputed OER.

PSC stated that although the italicized words in the following quotation “*While not selected*, volunteered for professional/command development courses & active duty assignments” are not prohibited as defined in Chapter 10.A.4.f.3. of the Personnel Manual, they do not speak to the applicant’s performance and could invite speculation about the reason for his non-selection for training courses and active duty assignments. Therefore, they should be removed. PSC also stated the following with regard to unbudgeted positions:

Being assigned to a Reserve unbudgeted position in Direct Access is not a reflection of quality of match, as alleged. Rather, it describes an allocation of funding for pay purposes for individuals in over-billeted positions. Each Coast Guard unit is allotted billets coded as “Reserve unbudgeted.” When writing OERs, members who have a “Reserve unbudgeted” position as a job description in Direct access were required under policy in effect at the time the disputed OER was completed to list their primary duties in block 2.

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On September 26, 2011, the Board received the applicant’s response to the views of the Coast Guard. He noted the Coast Guard’s agreement that the words “canceled drills” was inaccurate and the phrase “while not selected” was a prohibited comment under Article 10.A.4.f. of the Personnel Manual. However, the applicant disagreed with the Coast Guard’s description of the errors as administrative errors. He argued that the erroneous comments were intentionally added to the disputed OER to convey a specific message and the words had the effect of preventing him from being selected for promotion to O-5. He argued that he has met his burden of proving a substantial connection between the admitted errors and his non-selection for promotion to O-5.

The applicant disagreed with the Coast Guard’s contention that the probable reason for his non-selection for promotion was the lack of an affirmative recommendation for promotion to the next higher rank in block 10 of the disputed OER. In this regard, the applicant stated the following:

While it would have been obvious to the promotion board, as the Coast Guard argues, that applicant did not have his [RO’s] recommendation for promotion, the board likely concluded that the reason he did not have his [RO’s] recommendation was due to [the RO’s] belief that participation in the Coast Guard Reserve was a “low priority” for applicant because he had “cancelled drills” – a belief that had no basis in fact.

The applicant stated that a selection board is likely to consider an OER in its entirety rather than parsing sections as the Coast Guard suggests.

The applicant argued that the comment “[w]hile not selected” left the promotion board to speculate about the reasons for his non-selection. He stated that given the OER as a whole, the promotion board likely concluded that the reason applicant was not selected for these

opportunities was because of his performance and they likely considered that factor in determining that the applicant was not among the best qualified. The applicant argued that the two admitted errors by themselves were sufficiently egregious to result in his non-selection.

The applicant also restated his argument that the entire following comment is inaccurate: “intentions are good, however, competing personal interests, lack of communication w/active duty supervisor . . . & little productivity during this 2-year period suggest the CG is a low priority at this time.” He denied that he ever told the RO that the Coast Guard was not in his top three priorities. However, he admitted that he had a conversation with the RO in which he stated that his schedule with the New York Fire Department was not very flexible. He argues that he showed his commitment to the Coast Guard by selling his interest in a restaurant instead of transferring to the IRR. He also stated that scheduling the majority of drills during the work-week which was more beneficial to himself and the Coast Guard also shows that the Reserve was not a low priority for him.

With respect to the communication aspect of the challenged comment, the applicant stated that neither the supervisor nor the RO denied that he made repeated requests for tasking. He argued that as his supervisors, they were required to provide him with “direction and guidance regarding specific duties and responsibilities.” He stated that instead of fulfilling their responsibilities, they put all the responsibility on him.

The applicant also restated his allegation that the rating chain for the disputed OER was biased against him because he was a Reservist. He argued that because the members of his rating chain were Reservists early in their careers does not disprove his allegation that they were biased against him because he was a reservist. He claims that he asked the RO for a training quota for CDO training and was told that “the Coast Guard was not going to expend a training quota on a reservist,” which he stated was not denied by the RO.

The applicant maintained his request for relief as discussed earlier in this decision.

## **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 section 1552 of title 10 of the United States Code. The application was timely.
2. The applicant asked that the disputed OER be removed from his record because it is inaccurate and because the rating chain was biased against him. In the alternative, he asked that certain comments be removed from the disputed OER. He also asked that certain marks be raised. The JAG recommended only partial relief by removing the underlined words from the following sentences in the block 7 and 8 comments of the disputed OER because they were either erroneous or unjust, and the Board agrees.

[The applicant'] intentions are good, however, competing personal interests, lack of communication w/active duty supervisor, cancelled drills & little productivity during this 2-year period suggest the CG is a low priority at this time.

While not selected, volunteered for professional/command development courses & active duty assignments. Sought new/future reserve assignment

3. However, the applicant argued that not only should the words “canceled drills” and “while not selected” be removed but that the entire sentences should be removed from the disputed OER. The Board disagrees and finds that the applicant has submitted insufficient evidence to prove that the entire sentences are erroneous. In this regard, the applicant argued that the portion of the sentence that refers to his having competing personal interests is vague and open to speculation by a promotion board. He denied that he had competing personal interests that affected his performance or that the Coast Guard Reserve was a low priority for him. He stated that selling his interest in his restaurant to have more time for the Coast Guard, as well as scheduling his drills during the week days to make more of a contribution to the Coast Guard demonstrates that the Coast Guard was not a low priority for him. In contrast to the applicant’s statement, the reporting officer wrote in his declaration that he had a conversation with the applicant in which the applicant admitted that he was having difficulty managing his civilian job, sports activity, ownership of a bar, family and the Coast Guard. Although the applicant denies that he told the reporting officer that the Coast Guard was not one of his top three priorities, he admits that he had a conversation with the RO about this subject matter, after which he sold his ownership interest in a restaurant. The RO officer had the opportunity to speak with and observe the applicant’s performance for a two year period. His comments about the applicant’s performance and personal and professional qualities are judgments that he is entitled to make based on his observations, conversations with the applicant, and any reports from the supervisor or others. The applicant has the burden of proving that the “competing personal interests” comment is an inaccurate statement. He has offered only his statement disagreeing with the comment as proof of inaccuracy. His statement is insufficient to prove that the comment is inaccurate, particularly in light of the rating chain’s affirmation of the OER.

4. The applicant denied that portion of the sentence which states that he lacked communication with his active duty supervisor. He stated that he saw his supervisor almost every time he came to work. However, the question is not whether he saw the supervisor but whether he communicated with her about work assignments, processes, and problems. Although the supervisor did not directly address the comment about the applicant’s lack of communication with her, she stated that the disputed OER “identifies the applicant’s best intentions and strengths while honestly depicting an officer who rarely showed the initiative or professional growth commensurate with the rank of O4.” As stated above, the applicant has the burden of proving that comment about his lack of communication with his active duty supervisor is inaccurate. Other than his statement, he has offered no other evidence to prove that the subject criticism is inaccurate. His uncorroborated statement is insufficient to prove that the comment is inaccurate.

5. With regard to that portion of the sentence that states that the applicant had little productivity during the two-year period, the applicant stated that if his productivity was lacking, it was the supervisor’s fault because she failed to give him work to do, despite his repeated

requests for work. However, the comment does not state that the applicant lacked productivity because he did not have assigned duties, but states that he had low production for the two-year period covered by the disputed OER. The applicant offers no evidence, other than his own statement, to prove that his production in his assigned duties was at a higher level. He stated that he asked his supervisor for more tasks, but none was offered. The applicant did not present any evidence to support his contention that he repeatedly asked his supervisor for more tasks. Both the supervisor and RO officer stood by the disputed OER as an accurate assessment of the applicant's performance.

6. The applicant denied that he "waited for direction" as written in the block 8 sentence "Waited for direction/little follow-up." He asserted that the comment is a misstatement of fact because he repeatedly asked for tasking and none was given. He argued that it was the obligation of his supervisors to provide him with direction and guidance regarding specific duties and responsibilities. However, in contrast to the applicant's argument, block 2 of the disputed OER shows that he was assigned a specific primary duty. The disputed OER reflects how well he performed his duty in that assignment and not how well he performed in some unassigned tasks. In addition, as an O4 the applicant should not have waited to be told what to do. He should have been a self-starter. The applicant has the burden of proof and he has not submitted sufficient evidence to prove that the comment "waited for direction" is inaccurate.

7. With regard to the allegation that the rating chain was biased against him in their evaluation of his performance because he was a reservist, each member of the rating chain denied this assertion. There simply is no evidence of bias except for the applicant's allegation, which is insufficient to prove bias. Even if there were some bias, that alone would be insufficient to cause removal of the OER. In BCMR No. 1999-085, The Secretary's Delegate for the Department of Transportation, stated that case precedents are clear that, absent legal error, personal bias or animosity alone in the rating process is insufficient to void an OER. See *Germano v. United States*, 26 Ct. Cl. 1446, 1461 (1992), citing *Guy v. United States*, 221 Cl. Ct. 427, 433 (1979).

8. The applicant has not proved that the marks of 3 in "evaluations" and "initiative" are inaccurate. The comments in the disputed OER amply support the below standard marks. Nor has the applicant shown that his mark in the third block on the comparison scale is inaccurate. The comparison scale mark is where the RO compares an officer with others of the same grade the RO has known throughout his career. The applicant has not shown the mark fails to represent the RO's honest assessment of the applicant when compared to other LCDRs he has known.

9. To summarize, the applicant has shown only that the disputed OER contained two erroneous comments: "canceled drills" and "While not selected," which can be removed from the OER without removing the entire OER. Correcting the disputed OER to remove the erroneous comments does not require the removal of the entire OER or any of the other comments in the disputed OER unless it is impossible or impractical to sever the incorrect/unjust material from the appropriate material. See Final Decision in BCMR Docket No. 151-87. The Board can easily strike the erroneous phrases from the surrounding OER comments without removing the entire OER or remaining comments.

10. Since the applicant has established that two comments in the disputed OER are erroneous, the next question is whether his failures of selection for promotion to CDR should be removed. To be successful in obtaining the removal of his failures of selection for promotion, the applicant must prove a substantial connection between the errors and his passovers. In determining whether a nexus existed between the error and the applicant's failures of selection for promotion, the Board applies the standards set out in *Engels v. United States*, 230 Ct. Cl. 465 (1982). In *Engels*, the United States Court of Claims established two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was the claimant'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 he would have been promoted in any event?" *Id.* at 470. The burden of proof on the first prong of the standard belongs to the applicant and if he is successful that burden shifts to the Coast Guard to prove that he was unlikely to be promoted in any event.

11. With regard to the first prong of the Engels test, the Board finds that the erroneous words "canceled drills" make the applicant's record appear somewhat worse because they imply that he missed drills and did not reschedule them. The Board would also agree with the applicant that performing drills (inactive duty training) is a significant responsibility for a Reserve officer, and the words canceled drills could be interpreted as suggesting a lack of commitment by the applicant.

12. The Board also finds that the inappropriate comment "While not selected" makes the applicant's record appear worse because the comment suggests that when competing with other officers before a board or panel for professional training and/or active duty assignment, he was not one of the more qualified. Mentioning or suggesting that an officer was not selected by a board or panel is prejudicial *per se*, which is why its use is restricted in OERs by the Personnel Manual.

13. The Board notes that except for the disputed OER, the applicant has an otherwise good record. He has performed substantial periods of active duty and none of his other LCDR OERS contain any marks below the standard grade of 4 or any comments that would suggest that he should not be promoted to CDR. Therefore, the Board finds that the erroneous comments in the disputed OER make the applicant's record appear somewhat worse, and therefore, the burden shifts to the Coast Guard to show that it is unlikely that the applicant would have been promoted in any event.

14. The Coast Guard argued, and the Board agrees, that the errors were not prejudicial because it is unlikely that the applicant would have been promoted in any event. As the JAG noted, the reporting officer did not recommend the applicant, a LCDR for promotion. In fact the RO stated in block 10 that "[w]ith increased initiative & responsibility expected of O4, could potentially earn recommendation for promotion to O5." In addition to the non-recommendation for promotion to CDR, the lackluster comments, the marks of 3 in "evaluations" and "initiative," and the mark in the third block on the comparison scale, also make it unlikely that the applicant would have been promoted in any event.

14. The comments “canceled drills” and “While not selected” should be removed from the disputed OER. However, he has failed to prove any other errors with respect to the disputed OER and he has failed to prove that his failures of selection for promotion to CDR should be removed.

15. Accordingly, the applicant should be granted partial relief as discussed above.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

## **ORDER**

The application of XXXXXXXXXXXXXXXXXXXX, for correction of his military record is granted, in part. The OER for the period May 1, 2006, to April 30, 2008, shall be corrected, as follows:

- The words “canceled drills” shall be removed from the last line of the comments in block 7.
- The words “While not selected” shall be removed from the second line of comments in block 8. The word volunteered shall be capitalized as the beginning of a new sentence.

No other relief is granted.

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Bruce D. Burkley

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Christopher M. Dunne

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Barbara Walthers