

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-126

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 March 18, 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 January 12, 2012, 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, a lieutenant (LT/O-3) on active duty, asked the Board to correct his record by removing an officer evaluation report (OER) covering his service as from May 23, 2008, through January 31, 2009. During this period, he was a lieutenant junior grade (LTJG/O-2) serving as the Operations Officer on a XXX patrol boat in the Arabian Gulf. In the alternative, the applicant asked the Board to raise two below-standard performance marks of 3 he received on the disputed OER to at least standard marks of 4.¹

The applicant alleged that the low marks he received on the disputed OER were a matter of retribution by the commanding officer (CO) of his cutter. The applicant alleged that his CO was the subject of a command climate investigation he helped to instigate and that as a result of the investigation, she was relieved of command. The applicant noted that the disputed OER is much poorer than his other OERs.

With regard to the command climate, the applicant alleged that when he reported aboard on May 24, 2008, he noticed the crew's frightened and solemn demeanor. The CO had only been aboard a couple of weeks and yet the "degradation in morale, motivation to work and to

¹ 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 and a middle mark of 4 being "the expected standard of performance." Personnel Manual, Art. 10.A.4.c.4.g.

sustain the mission was immediately apparent.” The CO belittled the outgoing Operations Officer and the XO in front of subordinates and accused them of being lazy and “running a ‘shit show.’” When the applicant and chief petty officer assumed their roles, they received “similar unprofessional verbiage.” The CO also displayed “seemingly indecisive decision making and unpredictable temper tantrums, sometimes swearing and throwing objects.” In July, the applicant “made the decision to inform shore staff of her actions, emphasizing the danger this ‘fear’ factor was subjecting the crew to in the precarious Arabian Gulf.” The command climate investigation ensued and he believes that the low marks in the disputed OER were a “retributive act for revealing her actions to the attention of our parent command.” The applicant noted that his request for a copy of the command climate investigation under the Freedom of Information Act had been denied.

In support of these allegations, the applicant submitted his own OER input and copies of documents from his military record and from his case before the Personnel Records Review Board (PRRB), which are included in the summary of the record below. He also submitted the following statements from subordinate crewmembers:

- A first class petty officer, XXXX, who served on the cutter from May to December 2008, and reported directly to the applicant, stated that he was immediately impressed with the applicant’s style of leadership and “his ‘hands off’ approach to running the [Operations Department].” XXXX stated that he and others noticed “a growing tension between [the applicant] and our Commanding Officer.” Others told him that the CO had “been very hard on [the applicant for] as long as they [could] remember but they couldn’t say why.” XXXX stated that he witnessed the CO reprimanding the applicant on administrative matters in front of junior crewmembers, which was inappropriate. He further stated that

[a]s the abuse kept ensuing towards [the applicant] from the Captain, I admired him for not losing his control of the [Operations Department]. He was able to maintain a great deal of professionalism with us even though it felt like the Captain had it out for him. When the situation with the Captain became so abusive and overwhelming for the crew, he had a meeting with the rest of the first classes and ask[ed] us how we were doing and if we thought that the situation with the Captain was something we should report. We all agreed that it would be in the best interest of the unit to report these incidents through the appropriate chain of command. Needless to say when the investigation wrapped up and the Captain returned to command, we felt she had a great deal of animosity towards us. I believe the verbal abuse and ridicule towards [the applicant] was consistent with that before the investigation. As a testament to his leadership, he remained professional and kept a sense of calm with[in] the [Department]. He would always try and put together morale events for the crew underway and inport. This helped the crew stay focused and relaxed during the arduous schedule we maintained. I do believe [the applicant] was the only officer I was able to approach on board who I didn’t feel uncomfortable with.

- A third class petty officer, XXX, who served on the cutter from May 2008 to May 2009, stated that the CO’s demeanor fluctuated violently and without warning, and that it was especially frightening to stand watch on the bridge. She would instantly dress down crewmembers who did not meet her expectations by, for example, not following perfect radio procedures or not adhering to verbal standing orders, which sometimes changed overnight. In addition, she would throw objects, such as pens, staplers, file folders, and three ring binders, across the bridge in anger.

XXX stated that in July 2008 the crew brought the CO's conduct to the attention of the Area Command Master Chief and Executive Officer, which resulted in a command climate investigation. The results of the investigation improved the CO's conduct but only temporarily. Thereafter, her "verbal tirades [were] slightly 'tongue-in-cheek,' as she attempted to downplay (and, in fact, flaunt) her disdain for the performance of those around her." XXX stated that when new crewmembers arrived in December 2008, they immediately said that the working climate was unacceptable even though it had improved from being frightening to just undesirable.

XXX stated that the CO's attitude affected his performance marks in November 2008. The XO did not recommend him for advancement even though XXX received no below-standard marks and good marks for his professional knowledge as a gunner's mate. However, XXX's supervisor protested the XO's failure to recommend him for advancement, and XXX was then recommended for advancement.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in 2004 and attended Officer Candidate School to receive his commission as an ensign in the Reserve on March 1, 2006. He was first assigned as a deck watch officer aboard a xxxxxxxxxxx cutter patrolling xxxxxxxxxxxxxxxxx. On his first semi-annual ensign OER in this position, he received marks of 4 and 5 in the various performance categories and a mark in the fifth spot on the comparison scale. On his second OER, he received marks of 5 and 6 in the various performance categories and a mark in the fifth spot on the comparison scale. The applicant was promoted to LTJG on September 1, 2007. On his third OER as a deck watch officer, dated October 31, 2007, he received primarily marks of 6 and a mark in the sixth spot on the comparison scale, denoting "an exceptional officer." His reporting officer recommended the applicant for command afloat or for a position as the Operations Officer or Executive Officer (XO) of a patrol boat in the Arabian Gulf, and the applicant received orders to serve as the Operations Officer of a patrol boat in the Arabian Gulf the following spring. On his fourth and last OER as a deck watch officer, dated May 22, 2008, the applicant received primarily marks of 5, a mark in the fifth spot on the comparison scale, and a recommendation for promotion "with peers" from the same rating chain that completed his prior OER. The applicant's knowledge of law enforcement and skills as a boarding officer were particularly praised. He received an Achievement Medal for his tour aboard the cutter.

On May 22, 2008, the applicant transferred to the patrol boat. His first OER in this position, covering his performance through January 31, 2009, is the disputed OER in this case. It shows that the XO of the patrol boat, who assigned the first 13 performance marks as the applicant's supervisor, was also a LTJG. The XO assigned the applicant one below-standard mark of 3 for "Professional Competence," eleven standard marks of 4, and one above-standard mark of 5 for "Looking Out for Others." The marks of 4 and 5 are supported by positive written comments that summarize the applicant's accomplishments during the reporting period as described in the applicant's own OER input. The below-standard mark of 3 for "Professional Competence" is supported by the comment, "Requires cont'd improvement in implementing of NAVRULS & CO's Standing Orders."

The CO of the patrol boat, serving as the applicant's reporting officer,² assigned the last six performance marks on the disputed OER, including the comparison scale mark. The CO assigned the applicant one below-standard mark of 3 for "Responsibility," two marks of 4 for "Judgment" and "Professional Presence," and two marks of 5 for "Initiative" and "Health and Well-Being." The CO included many positive comments to support these marks but also the following comments: "Mbr has shown significant improvement [in regard to] timeliness/completion of work projects. Continues to work long hours to complete tasking. Has shown willingness to learn and follow ship specific instructions. ... Continues to improve w/ delegation & follow through. ... Needs continued improvement on supporting command decisions/policies."

The CO assigned the applicant a comparison scale³ mark in the fourth spot, indicating that the applicant was "one of the many competent professionals who form the majority of this grade." In describing the applicant's "potential" or "ability to assume greater leadership roles and responsibilities," the CO wrote the following:

Demo'd significant improvements and steady professional growth during period. With strong desire to lead, has greater potential for follow-on billets with greater responsibility. Highly recommended for Executive Officer ashore billet at South East Regional Fisheries Training Center or future afloat assignments including [Operations Officer] of buoy tender. Possesses in-depth operational knowledge, personal drive and physical requirements for Law Enforcement duties, strong candidate for position at Maritime Law Enforcement Academy as an Instructor. Now capable of succeeding in high op-tempo command cadre position. Rec'd for post-graduate program selection. Rec'd for advancement w/ peers.

The disputed OER is signed by the XO, as supervisor; the CO, as reporting officer; and a Coast Guard captain serving as Commodore of the patrol forces in the region, as reviewer.

The applicant's second OER aboard the patrol boat covers the three months from February 1, 2009, until he transferred stateside on May 27, 2009. The XO assigned him six marks of 5 and seven marks of 6 in the various performance categories with very positive comments, such as "Superior foresight! Meticulous preparation for ... Anticipated and promptly responded ... earned trust of CO to safely conn ship." The new CO assigned the applicant three marks of 5 and two marks of 6 in the various performance categories and a mark in the fifth spot on the comparison scale. The new CO wrote that the applicant had "demonstrated steady growth"; had an "excellent work ethic, operational experience and aspiration to lead"; and was a "strong candidate for future command cadre positions with increasing responsibility including XO WTGB [tugboat] & OPS WMEC/WHEC [medium and high endurance cutters] w/ follow-on Command Afloat opportunities including WPB & WTGB [patrol boat and tugboat]." He also praised the applicant's in-depth knowledge of law enforcement and experience as a boarding officer. The

² 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.

³ On a LTJG 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 third, fourth, or fifth spot on the scale denotes "one of the many competent professionals who form the majority of this grade."

new CO recommended the applicant for post-graduate studies and for “advancement with peers.” The applicant received an Achievement Medal for his service aboard the patrol boat.

For his next tour, the applicant was assigned to serve as a xxxxxxxxxxxxxxxxxxxxxxxxxxxx at the xxxxxxxxxxxxxxxxxxxxxx. He was selected for promotion to LT in September 2009. On his semi-annual LTJG OER dated January 31, 2010, the applicant received primarily marks of 5 and a mark in the fifth spot on the comparison scale, as well as a recommendation “for continued promotion w/ peers.”

The applicant applied to the PRRB for correction of the disputed OER, but his request was denied.

VIEWS OF THE COAST GUARD

On July 11, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG stated that the applicant has not submitted convincing evidence that the rating chain violated its duty to prepare the OER fairly and accurately. In recommending denial of relief, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC submitted sworn declarations from the applicant’s rating chain for the disputed OER, including the XO, CO, and Commodore. Based on those declarations, which are summarized below, the PSC found that the rating chain members had “carried out their duties in accordance with Coast Guard policy.” The PSC stated that while assigned to the patrol boat, the applicant reported to the XO daily for his administrative and departmental duties and reported to the CO “for day to day operation duties as Officer of the Deck and Operations Officer.” The PSC stated that the declarations show that the CO had significant concerns about the applicant’s job performance before the command climate investigation was initiated and suspended his qualification as underway Officer of the Deck and that the applicant was counseled numerous times about his performance as Officer of the Deck and about repetitive mistakes in administrative reports.

The PSC noted that the Commodore stated that the applicant’s allegation of retribution based on the CO’s removal following the command climate investigation is misleading because the investigation had no bearing on her removal from command. The PSC found that the declarations “refute the applicant’s assertion that the numerical evaluations were given in retribution.” The PSC concluded that the disputed OER was prepared accurately and in accordance with policy and that the applicant had submitted insufficient evidence to overcome the presumption of regularity.

Declaration of the XO as the Applicant’s Supervisor

The XO, who is currently the CO of another patrol boat, stated that the marks assigned to the applicant in the disputed OER “are consistent with his performance as subjectively evaluated by myself and [the CO] throughout the period and, in my opinion, were not given in retribution

Officer, there were numerous occasions when he did not follow standard operating procedures or navigation rules of the road placing the cutter in danger. He was counseled immediately. I kept [the Commodore] apprised of [his] performance and discussed having [him] relieved as Operations Officer. I received permission to send [him] underway with another cutter for performance evaluation and based off his performance he was not relieved as Operations Officer with [the Commodore's] concurrence. When [the applicant] was preparing for a Navy Seal application he asked me to make a false report on his physical fitness test results. During his third attempt of the physical fitness test in Kuwait, he failed to measure the 1.5 mile run as directed and after we realized the run was two tenths less than a mile and a half, he asked me to report that he had passed the complete test. I refused to. The OER dated 01 February 2009 was discussed with [the Commodore] as well as calling the detailer resulting in the removal of [the applicant's] recommendation for command afloat based off his performance during the marking period. I constantly and continually counseled [him] on his lack of honesty, his failure to meet deadlines, and his inability to follow standard operating procedures as a Deck Watch Officer.

4. [XXXXXX] approached me a few weeks after the command climate investigation and apologized to me. I told [XXXXXX] as long as he felt what he did was right at the time then he had no reason to apologize. [He] contacted me a few months after he had transferred from [the patrol boat] requesting I write a letter on his behalf for his NJP. I did write the letter for [him].

5. [XXX] reported to [the patrol boat] after having blatantly failed to report accurate information in regards to his security clearance. His lack of honesty resulted in his mid-tour marks. His lack of clearance resulted in his inability to fill the billet he was assigned for his first 6 months on board.

Declaration of the Commodore as the Applicant's OER Reviewer

The Commodore of the patrol forces, who is currently captaining a 378' high endurance cutter, stated that the applicant was the Operations Officer of one of eleven patrol boats under his control. The Commodore stated that the applicant's application is misleading. He stated that although a command climate investigation was conducted after the applicant complained, it was completed several months before the CO was relieved for a loss of confidence. The Commodore stated that the command climate investigation was taken into consideration, but "it had no bearing on the reason/cause to remove [the CO] from operations in the Arabian Gulf ... [which] dealt with xx and therefore [were] not related." Regarding the applicant's performance, the Commodore stated the following:

4. As I recall, the topic of [the applicant's] performance was the subject of several conversations I had with [the CO]. She had expressed concern on a number of occasions on two specific points, professionalism and responsibility, even before I initiated the investigation of the command climate. So much so was her concern in his abilities to perform as an underway Officer of the Deck, she had to pull his qualification letter for failing to call her in accordance with her standing orders on more than one occasion. Two specific examples were maneuvering the cutter in accordance with the rules of the road and reporting to her upon changes to tasking and sector location.

5. In efforts to establish a positive leadership environment, [the CO] was directed by me to draft a memo to [the applicant] addressing his deficiencies and noted areas for improvement. I'm sorry I don't have a copy of this letter, but I did help proofread the document which had seven different areas addressed. In fact, part of this leadership plan included [temporary active duty aboard another cutter] for a "second look" under a different chain of command.

6. In my opinion, the counseling done by the Supervisor and Reporting Officer, the interactions the [applicant] had with my Command Master Chief, and the reinforcement of expected perfor-

mance while aboard [the other cutter] were extremely effective at pointing this Junior Officer in the right direction. To that end, [the CO] reinstated his underway Officer of the Deck qualification and the subsequent/relieving Commanding Officer recorded improvements in his professionalism on his final evaluation at the unit.

7. His overall performance earned him an Achievement Medal upon his departure from the unit. His Supervisor and the Reporting Officer in question [the CO] were both consulted by me and concurred with the award; no animosity was present or warranted. [The applicant] appeared to take stock of his shortcomings, developed a plan to meet the expectations of his rating chain and made the necessary corrections required to earn the higher marks.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 9, 2011, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond in writing. No response was received.

SUMMARY OF THE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual in effect in 2009 states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.4.c.4. 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.

• • •

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.

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.g.2. of the Personnel Manual states that a rating chain member may be disqualified from evaluating a subordinate if the rating chain member has been “relie[ved] for cause due to misconduct or unsatisfactory performance, [is] an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation. ... If not already determined by the commanding officer, it is incumbent on the Reported-on Officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the Reported-on Officer during the reporting period or within 30 days after the end of 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 remove from his record his OER for the period May 23, 2008, through January 31, 2009, or to raise the two below-standard marks he received. 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.⁵ 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.⁶ 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.⁷

3. The applicant alleged that the disputed OER was prepared in retribution for his complaint to the parent command about the CO’s allegedly abusive conduct, which triggered a command climate investigation. The applicant’s evidence shows that the CO sometimes expressed her frustration with errors on the bridge by throwing objects and verbally criticized errors in operations immediately rather than waiting to criticize the performance of the applicant and other subordinates in private. However, the record shows that the applicant’s complaint about the CO in July 2008, approximately two months after he and the CO reported aboard, occurred soon after the CO removed the applicant’s qualification as the Officer of the Deck. The command climate investigation in 2008 did not result in the CO’s removal, although she was apparently counseled because she stopped expressing her frustration with errors on the bridge by

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁷ *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).

throwing things. The following year, the CO was relieved of command, but the Commodore has stated that the command climate investigation in 2008 had no bearing on the CO's relief for cause, which occurred after the disputed OER was prepared.

4. The entire rating chain has supported the validity of the assigned marks, including the XO who assigned most of the marks on the disputed OER, including the mark of 3 for "Professional Competence." The fact that the CO removed the applicant's Officer of the Deck qualification soon after they reported aboard, discussed his performance with the Commodore, and delivered an administrative letter of censure to him during the reporting period also supports the assigned marks. The fact that the applicant had received higher marks previously as a deck watch officer on a XXX cutter and received higher marks after he was given the non-punitive letter of censure, assigned temporarily to another patrol boat, and counseled by the Command Master Chief does not prove that the marks in the disputed OER do not accurately reflect his performance during the reporting period.

5. The applicant has not submitted sufficient evidence to overcome the presumption of regularity accorded his rating chain and the disputed OER. He has not proved that the CO was or should have been disqualified from serving on his rating chain just because he instigated or helped to instigate the command climate investigation. The Board finds that he has not proved by a preponderance of the evidence that the CO should have been disqualified from serving on his rating chain pursuant to Article 10.A.2.g.2. of the Personnel Manual.

6. Accordingly, relief should be denied because the applicant has not proved by a preponderance of the evidence 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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Philip B. Busch

Reagan N. Clyne

Dorothy J. Ulmer