

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-179

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XXXXXXXXXXXXXXXXXXXXX

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 June 1, 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 March 16, 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 commander (LCDR/O-4) on active duty, asked the Board to correct his record by removing an officer evaluation report (OER) covering his service as from June 7, 2007, through April 30, 2008, as the Executive Officer (XO) of a cutter, and replacing it with an OER prepared for continuity purposes only. He alleged that the OER is a product of bias and tremendous hostility on the part of the commanding officer (CO) of the cutter, who prepared the disputed OER.¹

The applicant alleged that in May 2007, after he had served as XO for about a year, the commanding officer of his cutter "was involved in an alcohol-related incident and was immediately relieved for cause."² The applicant served as acting commanding officer until the new CO reported aboard on July 11, 2007. This new CO had previously been the XO of the same cutter and he constantly compared the applicant's performance to his own past performance as XO. Initially, the CO told the applicant that he wanted things done "by the book," but he repeat-

¹ An officer is normally 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. However, the commanding officer of a cutter normally serves as both Supervisor and Reporting Officer for the XO and thus prepares all of the marks and comments in the OER. Personnel Manual, Article 10.A.2.e.1.e.

² This first CO was xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

edly questioned why policies that the CO had implemented when he was XO were not being implemented even if they were no longer in effect.

For example, the applicant alleged, whereas previously, canvas banners known as “brow dodgers” would be embroidered with not only the name and number of the cutter but also with the CO’s name, the MLC Inspection Compliance Team had announced that personalized brow dodgers would no longer pass inspection. Therefore, he did not have the cutter’s brow dodger personalized with the new CO’s name. However, even though he advised the CO of the new policy, the CO repeatedly raised the matter whenever they saw another cutter’s personalized brow dodger and told the applicant that “there are regulations and then there are regulations” and that he was “ruining a longstanding Coast Guard tradition.”

The applicant alleged that the CO blamed him for the discontinuance of other traditions as well, even if they had been discontinued before the applicant reported aboard, such as the tradition of giving knives to departing officers and having black canvas deck coverings instead of blue. In addition, the CO insisted on having the cook prepare a monthly birthday cake with crewmembers’ names and required the applicant to “drag crowds to the messdeck” even though “the crew absolutely hated the birthday cakes.”

The applicant stated that the CO’s leadership style was “confrontational.” The CO set either unrealistic expectations or none at all and then “violently erupted when his expectations were not met.” Many of the crewmembers complained about the command climate at the local Work Life office. The applicant alleged that because of these complaints, including some about how the CO treated the applicant, the Work Life counselor alerted the local Integrated Support Command, and the Chief of Cutter Forces visited the cutter to inquire about the command climate. The applicant alleged that the Chief was very displeased with what he found and ordered the CO, who was very defensive, to develop a plan to improve the command climate. However, the command climate became much worse, instead.

The applicant alleged that the CO called the applicant and the Operations Officer to his stateroom to discuss the command climate, but when the applicant tried to explain the effect of the CO’s conduct on the crew, the CO became angry and refused to listen. The applicant also alleged that the CO’s behavior became erratic and paranoid. The CO was paranoid about the crew “going behind his back to his superiors”; about “an oversight in processing a medical waiver [being a possible] excuse to end [the CO’s] career”; and about the District’s failure to send a “Bravo Zulu” message when the cutter left the region. The applicant alleged that the CO “would frequently interrupt discussions to address perceived slights” and publicly reprimand the applicant and others for these perceived slights. In addition, the CO often “vented” to the applicant about the scrutiny he was thought he was under and began to require the crew to get his approval for even mundane tasks. The applicant stated that the CO would “stew continuously” over personnel issues, such as crewmembers who claimed they could not mentally handle sailing on the cutter, a crewmember who wanted a humanitarian transfer to another region, and another who appealed his performance marks. In September 2007, when advised that there would be a civil rights climate assessment, the CO told him that they should try to stop people from “nosing around the ship” to find trouble, but it turned out that the assessment was of every unit in the region. The applicant stated the following:

Issues like these occurred on occasion at every unit I've ever served at, and in my experience commanding officers generally took them in stride, as part of the job," but the CO "appeared to take strong, personal offense to all these criticisms, and would obsess over them. Ultimately, ... his disproportionate responses to what were essentially routine personnel issues created a self-fulfilling prophesy, inasmuch as many of the crew did begin to complain, and [the CO's] leadership came under scrutiny. In the meantime, he would call me into his cabin to discuss and pick apart the details of his e-mails, his logic and reasoning, and why his superiors were ignoring him. I grew to hate going into his cabin about anything.

The applicant alleged that the CO's expectations constantly shifted, which made determining them very difficult, especially when they conflicted with policy and with past orders issued by the CO. For example, the CO directed him to investigate a potential inappropriate relationship and then accused him of "running [his] mouth about this investigation." And in September 2007, the CO asked him to record the CO's weight falsely during the semiannual weigh-in and said he would lose the few excess pounds by the end of the month. When the applicant hesitated, the CO said, "You are clearly uncomfortable," and "stormed out" of the applicant's stateroom. The applicant stated that although the CO met his weight standard prior to the deadline and never mentioned the incident again, the CO's request that he falsify an official record per se disqualifies the CO from preparing the applicant's OER. The applicant argued that a superior officer making an unlawful request of a subordinate for his own benefit raises a substantial question as to whether the superior can prepare a fair OER for the subordinate and so disqualifies the superior under Article 10.A.2.g. of the Personnel Manual.³

Moreover, the applicant argued, the CO should have been disqualified from preparing his OER because the CO was frequently openly hostile to him even in front of the crew. The applicant alleged that this hostility stemmed from his refusal to break Coast Guard regulations by buying a personalized brow dodger and falsifying the CO's weight in the database and his failure to carry on traditions that the CO had instituted when he was the XO. On the other hand, the applicant stated, it is possible that the CO was simply irrationally hostile toward him.

The applicant alleged that the CO's hostile and erratic behavior continued until the applicant transferred from the cutter in June 2008. He stated that when he asked the CO about the disputed OER, which was dated April 30, 2008, the CO stated that he had not recommended the

³ Article 10.A.2.g. of the Personnel Manual states the following:

1. In instances where a Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out their rating chain responsibilities, the commanding officer or the next senior officer in the chain of command shall designate an appropriate substitute who is capable of evaluating the Reported-on Officer. ...

2. As used within this subparagraph: ...

b. "Disqualified" includes relief for cause due to misconduct or unsatisfactory performance, being 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.

c. 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.

applicant for command afloat because the applicant had once told the CO that his wife did not want him to take another afloat assignment, and the CO considered this a weakness. In addition, the CO told him that he “could not count on him.”

The applicant also noted that Article 10.A.2.g. of the Personnel Manual states that a rating official is disqualified from preparing an OER if he is “relie[ved] for cause due to misconduct or unsatisfactory performance.” The CO was relieved of command for cause on June 16, 2009. The applicant alleged that the CO was relieved for cause because of the hostile command climate he created and which the applicant had endured during the reporting period for the disputed OER. Therefore, applicant argued that the CO’s relief for cause is another basis for removing the disputed OER from his record although it did not occur until about a year after the OER was prepared.

The applicant alleged that he was subjected to a “hostile work environment” aboard the cutter and that the OER was a result of this treatment and so should be expunged. In this regard, the applicant noted that in a previous BCMR case, Docket No. 2008-174, the Board stated that “it is theoretically possible that a CO could treat a junior officer so horribly that the junior officer could not reasonably be expected to perform her duties well even if the CO’s abuse was not based on gender, race, or religion” and that an OER “resulting from such treatment might constitute an ‘injustice’ in the officer’s record and so be removed by the Board.” The applicant stated that “even taking into account the military environment,” his CO “was so hostile and abusive that no competent executive officer could have expected to perform his duties well.” He stated that the CO directed “berating, belittling, and demeaning comments [toward him] in front of the crew almost daily.” The applicant alleged that the CO once “raise[d] his fist to him as if to strike, but lowered it.” Otherwise, the CO’s offensive conduct was all verbal but it was also humiliating and abusive, and it interfered with his work performance. He “was hesitant to send so much as an e-mail or make a phone call without somehow violating [the CO’s] subjective and constantly changing paradigm for how the ship should be run and what a proper XO would so.” He alleged that the CO’s treatment “negatively impacted his effectiveness in dealing with the crew, which may have led [the CO] to come to the conclusions about [the applicant’s] job performance that he did.” However, the CO did not recognize this cause and effect. The applicant stated that he did not complain about the CO to the Area staff because he thought his concerns would be dismissed and might result in his own dismissal.

The applicant argued that because the disputed OER is the product of a hostile work environment and the bias of a CO who should have been disqualified from preparing the applicant’s OER, the OER is erroneous and unjust and should be removed from his record. The applicant further argued that the disputed OER clearly made his record worse, especially the CO’s comment that he was not recommended for another afloat tour, and that because the disputed OER was in his record when it was reviewed by the CDR selection boards in 2008, 2009, 2010, and 2011, his non-selections for promotion by those boards should be removed from his record, and if he is selected for promotion in 2012, his date of rank should be backdated to what it would have been had he been selected for promotion in 2008, and he should receive corresponding back pay and allowances.

The applicant asked the Board to request the report of the command climate investigation under 33 C.F.R. § 52.43(b) and to provide him with a copy. The applicant stated that he believes that some of the incidents that were investigated and that led to the CO's relief for cause occurred while he was assigned to the cutter because he himself was questioned by the investigator. In support of his allegations, the applicant submitted several statements, which are summarized below.

Chief of Area Cutter Forces and Operation Forces

CAPT B, the CO's supervisor, stated that he visited the cutter twice during the CO's command. His first visit occurred soon after the CO arrived, and CAPT B was concerned about the morale and lack of professionalism of the crew because the cutter's prior commanding officer had been relieved for cause. CAPT B stated that the CO "seemed very receptive to our discussions on bringing the professionalism up to standards." CAPT B's second visit occurred in 2008 in response to complaints that the CO was very hostile to the applicant and the entire crew. Crewmembers reported that the CO had demeaned the applicant in public. During his second visit, CAPT B expressed his displeasure with the command climate and told him to draft a plan of action to improve it. CAPT B stated that sometime after he transferred to Headquarters in the summer of 2008, he received a call from a crewmember stating that "the command climate had gotten much worse." CAPT B informed the officer who had replaced him as Chief of Cutter Forces and he heard that a subsequent investigation resulted in the CO's relief for cause "due to the hostile work environment he had created onboard."

Work Life Supervisor

Ms. T, the regional Work Life Supervisor, stated that in 2008 crewmembers of the applicant's cutter began to complain to her about the CO's "dramatic mood swings, irrational behavior and unexplained fits of rage." Some of them refused to reveal their identities for fear of retribution. Ms. T stated that she was told that the atmosphere aboard the cutter was tense and that "everyone felt like they were walking on eggshells." A gunner's mate told her that the CO "consistently belittle[d] the XO on the messdeck and bridge." Another reported that the CO would "freak out" when things went wrong and curse at the XO or the Operations Officer in front of subordinates. Some reported that the CO had thrown objects at people. One reported seeing the CO jump up and down on the washers and dryers. An unnamed officer told her that he was afraid of the CO; that he had been ordered off the bridge after making a mistake in a navigation brief; and that he feared he would receive a negative OER.

Ms. T stated that because of such reports, an Area team was sent aboard to interview the crew, but she heard later that they did not voice their concerns for fear of retribution. She stated that "[i]f anything the investigation simply made matters worse by coming onboard, interviewing and finding 'no problems.' This further empowered [the CO]." Ms. T noted that the crew made no negative comments about the applicant but instead praised his performance and professionalism.

Supply Officer

CWO C, the cutter's Supply Officer, stated that the CO disrespected the applicant by criticizing the Coast Guard Academy and its graduates, of which the applicant was one. CWO C also saw the CO belittling the applicant in front of junior officers and failing to praise him for things that went well. CWO C stated that the CO had "frequent, drastic mood swings" and set no expectations but "blamed [the applicant] for things that occurred along the way that he did not like."

Senior Chief Petty Officer

A senior chief, BMCS W, stated that the applicant was in an unenviable and untenable position as the XO but "did his utmost to delicately balance the operational requirements of a Coast Guard cutter and the needs of its crew with a very difficult and ... unbalanced commanding officer." BMCS W stated that he saw the CO belittling and berating the applicant during Officers' Calls and on the bridge. BMCS noted that during a special training event with a "full special sea detail" of all rates and ranks on the bridge, the CO came to the bridge, asked the applicant if he had completed certain paperwork, and then relieved him and sent him below to complete the paperwork "in such a manner as to diminish and demoralize [him]."

SUMMARY OF THE RECORD

The applicant graduated from the U.S. Coast Guard Academy in 1994 and served at various shore units and on four cutters as a junior officer, including service as the CO of a patrol boat from March 2002 to July 2004. The applicant received two annual OERs for his service on the patrol boat. On the first, he received six marks of 4, nine marks of 5, and three marks of 6 in the performance categories, a mark in the 4th spot on the comparison scale, a recommendation "for promotion with peers," and merely consideration for "future afloat opportunities" if he showed "additional personal and professional growth/experience." On the second OER, he received three marks of 4, twelve marks of 5, and three marks of 6 in the performance categories, another mark in the 4th spot on the comparison scale, and remarks that he had already been selected for promotion to LCDR, that he had shown considerable personal and professional growth, and that he was "well-suited for continued afloat opportunities." He received an Achievement Medal for this service and was promoted to LCDR in November 2004.

From July 2004 to June 2006, the applicant served as a liaison officer coordinating the training of Coast Guard and Navy personnel at a Navy training command. His first reporting officer in this position was the same person who served as his first CO at his next command, who was relieved for cause after being arrested for assaulting a bartender. The applicant received high marks—primarily 6s—on his two OERs at this assignment and marks in the 5th spot on the comparison scale. He was strongly recommended for promotion and received a Commendation Medal for this service.

On June 29, 2006, the applicant reported aboard the cutter as the XO. His first OER as XO covers his service through June 6, 2007, and was prepared by the Chief of Cutter Forces because the commanding officer had just been relieved of command. The Chief assigned the

applicant eight marks of 5 and ten marks of 6 in the various performance categories⁴ and supported them with very positive comments. He assigned the applicant a mark in the 5th place on the comparison scale,⁵ which denotes an “Excellent performer; give toughest, most challenging leadership assignments.” In assessing the applicant’s potential for future leadership roles, the Chief stated that following:

Strongly recommended for promotion to O5 with his peers. He is already performing at the O5 level & clearly ready for increased responsibility & authority. He consistently produced noteworthy results both administratively & operationally. Fine leader, trainer & fiscal manager w/ strong work ethic. Understands joint operations, international issues & is a strong candidate for senior service schools. Naval War College ideal. Strong desire to transition to the Sector Response career path & his recent afloat experience combined w/ his overall operational expertise & Command Center experience make him an ideal candidate for any Sector Response assignment.

The disputed OER is the applicant’s second and last as XO of the cutter and covers his service through April 30, 2008. The new CO assigned the applicant six marks of 4, seven marks of 5, and five marks of 6 in the various performance categories and a mark in the 4th spot on the comparison scale, denoting a “Good performer, give tough, challenging assignments.” All of the comments in the OER are positive except one, as shown below:

Intelligent, hardworking officer managing extremely demanding O4 afloat assignment. Recommended for promotion to O5 w/ peers. [The applicant] has expressed a strong desire to transition to the Ops Ashore community; does not seek to return afloat & is not recommended. Recommended for assignment as Chief/Asst. Chief, Sector Response Dept. Demonstrated solid grasp of operational fundamentals. Ideal candidate for challenging staff assignments involving program analysis or oversight; demonstrated keen understanding of budget & other processes & then applied to unit’s best advantage. Currently in receipt of orders to CG-751 (Cutter Forces). I fully expect he will thrive there.

The CO also awarded the applicant an Achievement Medal for his service aboard the cutter upon the applicant’s departure in July 2008. However, the applicant was not among the 241 of 387 eligible LCDRs selected for promotion to CDR by the selection board that convened in 2008. In his subsequent assignment as a division chief in Cutter Forces, the applicant received OERs in 2009 and 2010 with high marks in the performance categories and marks in the 5th spot on the comparison scale and, in 2011, an OER with marks of all 6s and 7s in the various performance categories and a mark in the 6th spot on the comparison scale, indicating that he was “Strongly recommended for accelerated promotion.” However, he was not selected for promotion to CDR by the selection boards that convened in 2009, 2010, or 2011. The opportunity for selection by those boards was 114 out of 250 eligible candidates, 135 out of 278 eligible candidates, and 143 out of 261 eligible candidates, respectively.

⁴ 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.

⁵ On a LCDR OER comparison scale, the Reporting Officer assigns a mark by comparing the reported-on officer to all other LCDRs whom the Reporting Officer has known throughout his 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 1st spot on the scale to a high of “Best officer in this grade” for a mark in the 7th spot.

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 declarations from the CO and the OER Reviewer, which are summarized below, show that the disputed OER was properly prepared, accurate, and fair. The JAG summarized the applicant's arguments for expunging the OER as claims that the CO asked him to engage in unlawful behavior; was irrationally biased against him; and created a hostile work environment for him.

Regarding the applicant's claim that his CO asked him to engage in unlawful behavior by falsely documenting his weight, the JAG noted that the applicant has submitted no evidence to support his self-serving allegation and that the CO denied the accusation in his declaration. The JAG noted that the applicant had a duty to report the CO's alleged unlawful request but failed to do so.

Regarding the applicant's claim that his CO was irrationally biased against him, the JAG stated that documentation submitted by the CO shows that the applicant's performance was poor during the CO's first two months aboard and that the CO was very displeased with his performance. The JAG stated that the applicant's poor performance as XO caused the constant confrontations between him and the CO and that the XO failed to perform his basic duties as second in command of the cutter as described in Coast Guard Regulations. The JAG concluded that the applicant's allegations of irrational bias are unfounded and without merit.

Regarding the applicant's claim that the CO created a hostile work environment for him and should be disqualified from his rating chain because he was relieved for cause, the JAG stated that the CO's relief for cause occurred after the disputed OER was prepared and the applicant left the cutter. The JAG alleged that the applicant has not shown that the OER is not fair and accurate and the CO "has provided ample evidence that clearly explains the CO's discontent when the applicant's performance as XO, which clearly justifies the CO's evaluation of the applicant." The JAG noted that although the applicant compared his situation to that of the applicant in BCMR Docket No. 2004-115, the cases are clearly distinguishable because in that case the Personnel Command had already found that the applicant's CO had created a hostile work environment, was biased against the applicant, and treated the applicant in an unprofessional manner. However, the Personnel Service Center has made no such findings regarding the applicant and the CO.

The JAG stated that the applicant has not submitted convincing evidence that the rating chain violated its duty to prepare the disputed OER fairly and accurately and that he had not met his burden of proof.

Regarding the applicant's non-selections for promotion, the JAG stated that because the applicant has failed to prove that the disputed OER is erroneous, it is "logically impossible" for him to show a causal nexus between the alleged error and the non-selections. Therefore, the JAG concluded, there is no basis for removing the applicant's non-selections for promotion.

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). PSC submitted sworn declarations from the applicant's CO and the OER Reviewer. Based on those declarations, which are summarized below, the PSC concluded that the applicant "has not provided sufficient evidence to overcome the presumption of regularity with respect to the construction of the disputed OER."

PSC stated that the applicant's four witnesses' statements constitute speculation. PSC stated that the Board should presume that the CO prepared the OER based on his observations of the applicant's performance during the reporting period unless there is specific evidence to the contrary. PSC stated that there is no evidence that the CO did not fulfill his duties as prescribed by the Personnel Manual in evaluating the applicant. PSC argued that there are no grounds for removing the applicant's non-selections for promotion from his record.

PSC stated that the CO's relief for cause in June 2009 is not evidence that the applicant's OER was not prepared properly in May 2008. PSC pointed out that it was incumbent on the applicant to request disqualification of the CO in April or May 2008 if the CO was biased against him, but he did not do so. PSC noted that the applicant also failed to submit an OER Reply to dispute the OER and "express views about performance that may differ from that of a rating chain official." In addition, the applicant did not apply to the Personnel Records Review Board to correct the OER within a year of receiving it. PSC recommended that the BCMR deny the applicant's requests for relief.

Declaration of the CO

The CO stated that he stands by the accuracy of the OER and that many of the applicant's allegations are fabricated or incredibly exaggerated. For example, the CO stated that he would joke and tease the applicant whenever they saw a personalized brow dodger and the applicant would laugh with him. However, the applicant now describes this running joke between them as a terrible ordeal that he had to endure.

The CO stated that he never asked the applicant to falsify his weight in the records. He stated that the applicant's application constitutes perjury in this regard.

The CO denied ridiculing or chastising the applicant in public. In fact, the CO stated, he had to fend off complaints about the applicant doing this to others and sometimes heard the applicant yelling down passageways. The CO claimed that the only time he spoke harshly to a crewmember in public was when it was "required due to emergent safety of the ship, such as bridge operations, etc." The CO stated that he did not recommend the applicant for command afloat because of "his inability to handle the XO position, his absolute horrid ship handling and his dangerous inattention to details."

The CO stated that the crewmembers who wrote statements for the applicant are "a couple of disgruntled sailors" who "had been held accountable for [poor performance] and now saw a chance to get even as they did during my investigation." The CO noted that the wardroom

of the cutter was full of Academy graduates, but only CWO C alleges that he repeatedly insulted them.

The CO stated that although he did not find the applicant suited to his position, he had always liked him and thought him to be honest until he read the applicant's sworn statement in his application, which is "complete perjury." He alleged that if the atrocious behavior the applicant describes had occurred during the applicant's tenure aboard the cutter, the applicant would have taken the opportunity during the investigation in 2009 to make these allegations but he did not. The CO pointed out that it is only after the applicant has been passed over for promotion multiple times that he challenges the accuracy of the disputed OER.

The CO stated that he is shocked that CAPT B has supported the application because about the time the CO took command, CAPT B told him that the cutter was "a ship without a rudder" and a "floating party boat" and that the wardroom was "spoiled" and overly concerned about their leave time. In addition, CAPT B told him that he was disgusted with the applicant's failure to lead and take responsibility and his decision to take leave and attend training when the prior CO had just been relieved of command. CAPT B told him that he was already debating firing the applicant and told the CO he could fire the applicant if he had any reason. Therefore, the CO began writing down the applicant's shortcomings in case he had to fire him. (This document is summarized below.) However, when the CO finally concluded that the applicant should be fired because of safety and leadership issues and his lack of organizational abilities, CAPT B told him to "keep mentoring the lad." The CO noted that this conversation occurred shortly before CAPT B transferred and that CAPT B may not have wanted to go to the trouble of finding a replacement XO.

The CO alleged that he had to work hard to make up for the applicant's shortcomings and that he had to be "CO and XO at the same time." He stated that the applicant was incapable of handling most personnel and disciplinary issues and that "[i]t was all [the applicant] could do just to clear his inbox and not be late with OERs, correspondence, daily paperwork, being late with most" anyway. The CO stated that the applicant could not delegate or train junior officers, and the CO had to show him how to make a "to do" list and organize items on a dry erase board. The CO stated that his command was harmed by the applicant's incapability and a lack of support from CAPT B as he "went about changing a party boat culture into a military vessel."

The CO stated that when CAPT B visited the cutter again, he told the CO, "I did not do you any favors by keeping the XO aboard, did I?" CAPT B pointed out the applicant's lack of leadership on the bridge and a "need to reign in the XO." The CO alleged that CAPT B may be vengeful because during the administrative proceedings that led to the CO's relief for cause, the CO reported the lack of support he received from Cutter Forces.

The CO alleged that the disputed OER is "overly generous and fair." He alleged that he "spent a year holding [the applicant's] hand while he would apologize for being a poor XO, cry, explain how he only went back to sea because he failed as a 110' [patrol boat] CO," which the applicant blamed on the Group Commander. The CO stated that he is now retired and so does not care if the applicant is promoted, but he will not stand by while his name and character are assassinated.

CO's July 2007 Notes About the Applicant

In support of his allegations, the CO submitted a copy of notes he made about the applicant's performance during the CO's first few weeks aboard the cutter and a screen shot of the folder showing that the document was last modified on July 27, 2007. The CO wrote that CAPT B had told him he was very disappointed in the applicant because when the prior CO was relieved for cause, the applicant "did not step up and take charge but instead pushed for taking his leave as scheduled" and "failed to inform Area that he would be attending an ICS course the week after his leave. He effectively left the cutter in the hands of the LT Engineer Officer."

The CO wrote that the applicant made no preparations for the CO's arrival, such as ensuring that briefing binders were completed by the department heads. The CO stated that he had to ask the applicant for documents repeatedly or retrieve them himself when he was about to take command. The CO advised the applicant to make a "to do" list but this idea "does not seem to have sunk in. The same issues arise regularly." The CO noted that he had to ask the applicant about five times to have the prior CO's dirty linen and garbage removed from the CO's cabin and to have the cabin cleaned. The applicant apparently tasked people to clean the cabin but never followed up and so the CO had to clean it himself. In addition, the CO stated that he had to repeatedly tell the applicant to contact another District about a burial at sea that needed to be rescheduled. The applicant was putting it off to the last second, which would have caused the family to make travel arrangements for a date when the burial could not occur. The CO wrote, "I have no confidence that if I tell the XO to do something that it will get done without repeat tasking. He fails to do the simple tasks of organization, tasking, delegation, follow up, and reporting back. He can only handle one simple task at a time."

The CO wrote that after he told the applicant that he would not condone a port call in Jamaica and that the applicant should "change it," he heard the applicant and the Operations Officer discussing the country clearance message for Jamaica. When he reminded the applicant that he had vetoed a stop in Jamaica, the applicant replied that he had not believed the CO was serious about not going there. The applicant told him that he had had to counsel a female junior officer about inappropriate relationships several times, but when the CO asked to see the documentation, the applicant told him there was none.

The CO wrote that a week before his assumption of command ceremony, he instructed the applicant to have the ship cleaned for the arrival of CAPT B to officiate and to have the crew dressed "in clean, pressed ODUs for the ceremony." Although the applicant acknowledged this direction, no cleaning was done until the day before the ceremony and the 3 hours of cleaning that occurred was not sufficient. The applicant asked the CO to inspect the ship, but he refused because it was still very dirty and most of the crew were in wrinkled uniforms. The CO wrote that the applicant "fails to show leadership or the character to make difficult decisions."

The CO noted that just days before going on patrol, he had to press the applicant to ensure that they had AMIO supplies on board. In addition, a week before sailing, the applicant gave the crew a "stand down" leave schedule. The CO told him he was not comfortable granting so much leave because he had yet to see up to date completed work lists from the department

heads, “a Nav brief, track lines, tides and currents, or any item whatsoever that indicated we were ready to sail.” The applicant stated that he would “hold up all stand down” if the cutter was not ready to sail. The CO stated that this was an example of the applicant’s inability to track work. He reported that soon after he assumed command, he asked the applicant how he tracked and coordinated the departments’ inport work lists. The applicant told him that he did not track or coordinate the work but “left that to each department.” When the CO asked him how he knew what was going on in each department and how issues were coordinated, the applicant “just looked at me with a blank stare.” The CO wrote that he asked the applicant to document the status of the inport work lists but some of the lists were for the quarter or the whole year. The CO still did not know the status of the work lists and, he wrote, “I am sure I will have to request it a 4th time.”

The CO wrote that it was evident that the applicant “fails to take a leadership role on the cutter” and “he does not have the respect of the CPOs and Officers.” He noted that the applicant could not name the cutter’s legal officer even though the legal officer is one of an XO’s most important contacts for handling disciplinary matters. The CO wrote that he was having to repeat himself several times or carry out the applicant’s duties himself.

The CO wrote that the applicant had told him that his wife would not allow him to take another tour afloat and when the CO asked him why he had taken the XO assignment, the applicant said “to get promoted to O-5. He also stated that he did not do well on his last afloat tour (CO 110) so he wanted to prove to himself that he could do the job at sea.” The CO wrote that he appreciated the applicant’s honesty but did not consider either reason valid.

The CO wrote that the prior CO had told him that the applicant was a poor XO. In addition, the commander who sailed the cutter back to homeport after the prior CO’s relief for cause told him that “he had little confidence in the XO after observing him for his brief time aboard. [The commander] stated that [the applicant] was unorganized and failed to do his basic job as XO.” He also advised the CO “to watch that guy” since he did not believe the applicant was competent.

The CO wrote that he counseled the applicant on July 23, 2007, about his lack of preparation for getting underway. Many issues that should have been handled during the cutter’s two months at pier were not handled until the last couple of days. The CO wrote that he told the applicant that he “was documenting his failure to perform his duties and that he needed to greatly improve or I would need to find a replacement.” In response to this counseling, the applicant “visibly pouted and moped in front of the wardroom and has continued down that path.” The CO concluded his notes by saying that he would “continue to monitor [the applicant’s] performance during this next patrol. I will give him every chance to succeed; however if he fails to do his duties, I will seek a replacement. At this time, I have no confidence in his abilities to carry out his duties as the Executive Officer.”

Declaration of the OER Reviewer

The OER Reviewer, who was the Assistant Branch Chief for Area Cutter Forces, wrote that he never directly observed the applicant’s performance and that his interactions with the

applicant “consisted of working on issues pertaining to the cutter, such as budget, training, patrol planning, etc.” As OER Reviewer, he checked the OER for “technical and grammatical accuracy.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 30, 2011, the applicant responded to the views of the Coast Guard. He noted that he is disputing not only the comment about not being recommended for duty afloat, but the entire OER, which was a “product of irrational animus and hostility” toward him. The applicant alleged that the CO’s declaration was vitriolic and shows that the CO was trying to prevent the applicant’s promotion when he wrote that comment even though he recommended the applicant for promotion.

Regarding his claim that the CO asked him to falsify his weight in an official record, the applicant stated that while it is a matter of his word against the CO’s, he believes that the preponderance of the evidence in the record shows that he is more credible than the CO “on this and just about every other point.” He noted that the CO blamed both him and CAPT B for damaging his command. In response to the JAG’s claim that he should have reported the CO’s solicitation of a crime, the applicant pointed out that he had no witnesses to support his claim and that the important point is not whether the applicant should have reported the incident but that the CO retaliated against him for refusing to falsify the record.

In response to the JAG’s claim that there was no hostile work environment because PSC did not determine that there was one, the applicant argued that the CO’s hostility toward him is clearly documented in this case and was witnessed by his subordinates. The applicant argued that his duties as XO under Coast Guard Regulations did not deprive him of the right to a workplace free of hostility as the JAG suggested. The applicant further argued that because he has shown that the disputed OER is a product of bias and a hostile work environment and because the comment about him not being recommended for assignment afloat is extremely damaging for an officer who has spent most of his career at sea, he has proved that his record was prejudiced by error before the CDR selection boards and so his non-selections should be removed under the *Engels* test. The applicant noted that the Coast Guard did not attempt to refute a causal nexus between the alleged error in his record and his non-selections even though the Government bears the burden of proof on this point.

Applicant’s Response to PSC

In response to PSC’s claim that his witnesses’ statements are mere speculation, the applicant pointed out that they only testified about matters they actually observed or had reported to them and did not speculate about why the applicant received a poor OER from the CO.

In response to PSC’s claim that the applicant was required to raise the issue of the CO’s disqualification at the time, the applicant pointed out that there is no such requirement and that the regulation states only that an officer should report such matters during the reporting period or within 30 days of the end of the reporting period.

Regarding his failure to submit an OER Reply, the applicant pointed out that he was still assigned to the cutter when the OER was completed and any such action on his part would have made an already tense situation unbearable. He also noted that rating chain members can attach written responses to OER Replies, which can make matters worse if the rating chain member chooses to include more negative comments. The applicant noted that he is also not required to apply to the PRRB for correction of the OER even though that board had jurisdiction to correct the OER within the first year after it was entered in his record.

Applicant's Response to the CO's Declaration

The applicant stated that although he might have laughed out of cynical acknowledgement when the CO mentioned the brow dodgers, it "was certainly no joke." The applicant alleged that the XO who arrived to replace him immediately inquired about the lack of personalization of the brow dodgers, which shows that the CO "had front loaded [the new XO] with this information and still bore ill will toward the applicant for refusing to purchase the personalized brow dodger."

The applicant stated that the CO's claim that he never ridiculed the applicant in public is clearly false since the Work Life Supervisor, Ms. T, stated that crewmembers had told her that the CO "would consistently belittle the XO on the bridge." The applicant noted that Ms. T is not a "disgruntled sailor" as the CO characterized his witnesses and that noticing and reporting command climate issues is part of her job. The applicant stated that CAPT B is not a disgruntled sailor either and yet he admits that he visited the cutter specifically because of reports that the CO was being hostile and demeaning towards the applicant. The applicant alleged that BMCS W and CWO C are not disgruntled sailors either because, while they were subordinate to the CO, they have since been assigned as the Officer in Charge of a small boat stations and to two command cadre positions, respectively.

The applicant stated that the CO's attacks against his witnesses were typical of the behavior he was subject to daily. "[W]henver anyone said anything even remotely critical of [the CO], rather than engage in honest self-reflection, his typical response was to become enraged and assail the other person's motives." The applicant noted with regard to the CO's claim that CAPT B did not approve the applicant's removal because he was lazy that the record shows that CAPT B had just relieved the CO of the cutter and so would not have been shy about relieving the applicant. The applicant stated that the CO's habit of ascribing horrible motives to people supports his allegation that the CO was paranoid and convinced that people were out to get him.

The applicant stated that the CO's claims about his poor performance are belied by many of the marks and comments in the disputed OER. For example, the CO's claim that the applicant could not handle the XO position contradicts the OER comment that he had completed a successful tour as XO. The CO's claim that his ship handling was horrid is contradicted by the mark of 5 he received for Professional Competence and the comments about his assuming "conn to salvage mooring attempts in challenging conditions." The applicant also alleged that the CO's claim that he showed a dangerous inattention to detail is contradicted by the lack of any such comment in the OER, the mark of 6 for Responsibility, his recommendation for promotion, and his Achievement Medal. The applicant alleged that the CO's claim that he could barely clear his

inbox is contradicted by the mark of 4 he received in Results/Effectiveness, which requires timely and high quality work, the mark of 6 he received for Evaluations, and the comment that the crew's evaluations were all of high quality and on time.

Regarding the CO's notes about his performance last modified on July 27, 2007, the applicant pointed out that they cover only the first 50 days of the CO's tour of duty with the applicant, that the incidents in the notes are not mentioned in the disputed OER, and that the CO clearly stopped taking notes on July 27, 2007. The applicant alleged that if his performance had continued to be poor, the CO would certainly have continued taking notes to support any future decision to fire him.

Responding to the CO's claim that CAPT B declared himself disgusted with the applicant for taking leave and attending training after the prior CO was relieved for cause, the applicant stated that the Area agreed that he could take leave since he had taken very little since he reported aboard in 2006 and that the course he attended was required for XOs and COs, was not available online, and had to be completed by June 30, 2007. Moreover, the course was held just two blocks from the cutter's berth and he reported to the cutter each day for two hours before class and two hours after class. Moreover, CAPT B attended the class with him and accompanied the applicant to and from the cutter all three days of the course.

Regarding the relief books, the applicant alleged that such books are usually presented to a CO during the "relief week" before the assumption of command ceremony, but the CO arrived six weeks early and demanded the books right away. The applicant ensured that they were completed early in response to the CO's request. Moreover, this happened during transfer season, when the applicant had to process the turnover of one-third of the enlisted members and one-half of the officers. The applicant alleged that the departments all had worklists, but the CO's premature demands trumped and interfered with their work.

Regarding the last-minute preparations for patrol, the applicant explained that the Supply Officer, Navigator, Assistant Navigator, and Navigation Leading Petty Officer were all new arrivals in the summer of 2007 and so were familiarizing themselves with the cutter and their jobs while they prepared for patrol. Although some preparations were completed at the last minute, this is not unusual for a cutter "trying to function in the middle of transfer season," not to mention trying to deal with the relief for cause of the last CO and the very early arrival of the new CO. In addition, the applicant denied the CO's claim that he did not have an inport worklist. The applicant stated that the department heads sent him their worklists and he would make or recommend changes as necessary. The applicant alleged that all preparations for patrol were completed by the time the patrol began.

Regarding the potential port call in Jamaica, the applicant stated that he has "no specific recollection" of this incident but that the CO was not always clear in his tasking and was "prone to conflicting tasking."

The applicant alleged that the only reason he could not name the legal officer when the CO arrived is because the cutter's previously assigned legal officer had just transferred and the legal office itself had reorganized so that the cutters did not have assigned legal officers, who

instead began working under a “duty pager system” to balance the workload. The applicant noted that this new system was explained to the CO.

The applicant also stated that he never told the CO that he had failed as the CO of a patrol boat although he felt that he could have done better and he certainly never cried aboard the cutter.

The applicant alleged that the CO’s lack of credibility is proved by his claim that he never ridiculed or chastised the applicant in public, by the contradictions between the positive marks and comments in the disputed OER and the CO’s severe criticisms in his declaration, and by the tone and language of the declaration, which “devolves into a meandering screed in which he alternately assails the motivations of others and catalogues his grievances” against CAPT B and the applicant. The applicant argued that if his performance was as poor as the CO painted it, he should not have received the OER that he did and that the CO’s own declaration proves his claim regarding the CO’s bias and the hostility of the work environment on the cutter.

The applicant alleged that the OER Reviewer’s declaration shows that he failed to perform his duties properly since he only checked the disputed OER for technical and grammatical accuracy. The applicant noted that an OER Reviewer is supposed to ensure that the OER “reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential” and that the Supervisor and Reporting Officer have adequately executed their responsibilities in preparing the evaluation. The applicant alleged that the OER Reviewer acted as a “rubber stamp” for the disputed OER and so abdicated his responsibilities to the applicant. The applicant alleged that if the OER Reviewer had performed his role correctly, he would have found that the CO’s recommendation against future assignments afloat, which suggest that the applicant was not qualified for duty afloat, was inconsistent with the numerical marks and comments showing that the applicant was qualified for sea duty.

Finally, the applicant alleged that the CO’s claim that he was “overly generous” in assigning marks and comments in the disputed OER and his claims in his declaration that the applicant’s performance was much worse than what was portrayed in the OER show that the OER as a whole is erroneous and should be removed. The applicant argued that he has proved that the CO was irrationally biased against him, paranoid, and openly hostile. Moreover, he has proved that his work environment was so hostile that no officer could expect to perform well. Therefore, the OER and his non-selections for promotion should be removed from his record.

COMMAND CLIMATE INVESTIGATION

In response to the applicant’s request, the Board opted to review certain parts of the cutter’s 2009 command climate investigation, including the investigator’s report, any pages mentioning the applicant by name or title, and documentation of the 2008 climate assessment by the Civil Rights Office. The Board sent a redacted copy to the applicant.

2008 Civil Rights Office Assessment

In his report of the 2009 investigation, the investigator reported that CAPT B told the CO to re-instill a military culture on the cutter when he assumed command on July 11, 2007. During the May 2008 climate assessment, the Civil Rights Office (CRO) found no civil rights issues onboard the cutter but advised the CO that there were climate issues, as noted in the final report.

The report of the 2008 climate assessment, dated June 2, 2008, stated that the junior enlisted members claimed that the junior officers were “scared to do their jobs in fear of making the slightest mistake which would be addressed immediately in a negative way by the Commanding Officer (CO). The CO constantly yells at the crew and the JO’s no matter who is in the immediate area.” There were no morale events and morale had decreased since the CO arrived. The enlisted members also noted that the applicant had made an inappropriate racial comment when he told an African American that he should put on a hard hat and jacket so that he could be distinguished from some Haitians who had been rescued and were on deck.

Senior enlisted members told the CRO that they were afraid to ask questions in fear of retaliation and that the XO had told a YN that none of the junior officers would receive end-of-tour awards. They felt that the CO and XO were requiring them to conduct training at such a fast pace that safety was coming in second to mission success. In addition, some members who had been injured had not reported their injuries because of how the CO and XO would react.

The chief petty officers complained that the junior officers “were not doing their job and supporting the CO the way they should as the majority of them had been under the previous command and were reluctant to change which was gravely overdue.” They told the CRO that “they support the CO and XO and the much needed change to a disciplined military environment.”

The chief warrant officers and junior officers complained that the junior officers were “in fear for their careers,” which impeded their work, and were afraid to speak to the CO. They also complained about the way they “were addressed in front of their subordinates; most of the time it is negative, belittling and embarrassing.” One officer reported to the CRO that the CO and XO had told them that they all needed to be “on the same sheet of music when asked questions” by the CRO and that on the evening of the first day of the CRO’s two-day visit to the cutter, the applicant had gathered subordinate officers together to ask what questions the CRO had asked and what responses had been given. Another officer reported that when the applicant learned in 2007 who the new CO would be, he approached the new CO and asked to resign as XO.

The CO and the applicant were interviewed together by the CRO. The CO stated that he was unaware of any morale issues, and the applicant “had little if anything to say during the brief and was unfamiliar with any specific issues on the cutter.” The applicant denied making an inappropriate racial comment to an African American crewmember.

In response to the CRO’s report, CAPT B ordered the CO to prepare a plan to address four areas of concern: “negative leadership practices including belittling or chastising members in front of the crew”; crewmembers being fearful of voicing concerns; low morale and poor

mentoring of junior officers; and “inconsistent interactions with crewmembers, at times intimidating and other times friendly and supportive.”

CAPT B himself visited the cutter on June 17, 2008, and advised his superiors that he “witnessed a very professional unmooring with a 20 kts on the dock wind (even though the XO wasn’t very engaged).” CAPT B stated that the CO’s “heart is in the right place” but he “needs to work on how he delivers the message.” CAPT B stated that the junior officers were not as “beat down” as he had been led to expect and that the Chief’s mess fully supported the command. CAPT B also stated that he met with the department heads, who stated that “they fully support the CO and are looking forward to some upcoming changes (they didn’t say it but I knew they were talking about the XO [the applicant] transferring). ... With a new XO coming onboard at the end of this patrol and full support from the wardroom and CPO’s mess, I believe [the cutter] can make positive climate changes.”

On June 22, 2008, the CO submitted a draft plan in response to CAPT B’s direction, but it was rejected as too defensive. The CO described highly unprofessional behavior that had been occurring on the cutter prior to his assumption of command and noted, *inter alia*, that the challenges he faced had been “exacerbated by the fact that I had to perform the function of both CO and XO.

On July 19, 2008, the CO submitted a revised plan, which was less defensive and included more positive steps to improve the command climate, including a quarterly questionnaire about the climate. However, the 2009 investigator reported that no such questionnaire was ever distributed because the CO “never felt those [four concerns] existed in the first place.” The CO stated that he used the May 2008 climate assessment personally and could not recall sharing it with others.

2009 Witnesses’ Statements About the Applicant

In interviews with the investigator and follow-up statements, the crew made the following comments about the applicant:

- The CO stated that he had appeared inconsistent with the crew because he had previously had to serve as both the CO (nice guy) and XO (enforcer) during the applicant’s time as XO.
- LT H reported that the applicant was upset after meeting with the CO, who had accused the applicant of deserting him by “leaving him out alone with the crew” while they were all on liberty.
- LTJG W stated that he had seen the CO drunk on the street the year before with the applicant.
- A crewmember stated that the Operations Officer and the applicant “weren’t ever getting training from the CO on leadership, they were only ever publically humiliated.”

- CAPT D stated that the applicant “was considered a weak XO. This had been noted by [CAPT D] personally during a program manager visit as well as by CAPT B, feedback from ISC XXXXX on the XO’s working relationship with his staff, as well as feedback from [the CO]. He said this was known, and that is why he supported [the CO] by working with OPM to have a known high performer replace [the applicant]. He went on to say the comment of having to be both CO and XO meant that he had to play more of a disciplinary role than most CO’s.”
- The applicant’s own interview with the investigator focused on matters other than the command climate.

2009 Findings About the Command Climate

The investigator reported that the junior officers he interviewed “used words such as uncomfortable, hostile, tense, awkward, scared and roller-coaster to assess the climate on board and within the Wardroom.” Both officers and chiefs reported “a continued propensity to reprimand in public rather than private, including calling out officers for mistakes in front of the crew.” The CO, they stated, continued to belittle and berate them and they dreaded speaking to him. One officer reported sitting “in his stateroom for 20 minutes, sick to his stomach, knowing he was going to have to go in and brief the CO.” The investigator reported that not everyone thought that the command climate was bad but that the four concerns noted in CAPT B’s letter to the CO following the 2008 assessment continued to exist.

The CO was relieved of command on June 16, 2009, as a result of the investigation, but matters other than the command climate were investigated, and whether or how much the command climate weighed into the decision to relieve him is unclear.

APPLICANT’S RESPONSE TO THE COMMAND CLIMATE INVESTIGATION

The applicant stated that the investigation, even as redacted, strongly supports his claim that he was subject to a hostile work environment on a daily basis and so could not reasonably have been expected to perform his duties well. He alleged that the investigation supports his claim of bias, and so the CO should be deemed disqualified from serving on his rating chain. The applicant stated that the investigation showed that the CO is in denial about his habit of belittling subordinates and the command climate he created on the cutter. The investigation also shows that the CO blamed the applicant for not keeping him out of trouble. The applicant argued that the CO’s continued denial of the hostile command climate and his improper behavior undercut the CO’s credibility generally and therefore supports his claim that the CO asked him to file a false report about the CO’s weight in September 2007. He argued that the CO clearly should not have been on anyone’s rating chain and that the CO should have been charged with cruelty and maltreatment under Article 93 of the Uniform Code of Military Justice even though the investigator recommended against it.

The applicant argued that because the Area Cutter Forces already knew about the cutter’s command climate when the disputed OER was reviewed in 2008, the OER should have received a more careful review.

Regarding his own responses to the investigations, the applicant noted that the CRO interviewed him and the CO together and so he dared not speak the truth. In addition, he alleged that when CAPT B visited the cutter on June 17, 2008, he was the only member of the crew CAPT B did not speak to. And when he was interviewed for the 2009 investigation, he did not know that the investigation concerned the command climate and so only answered the questions the investigator posed, which were about certain events in Barbados.

Regarding descriptions of his performance as “weak” in the investigator’s report, the applicant stated that none of the officers who reported this ever told him about their views. He noted that CAPT B was the OER Reviewer for his first OER as XO, which was an excellent OER. The applicant stated that the captains who deemed his performance to be weak apparently did not take into consideration the impact of the CO’s hostility and paranoia on his performance and reputation. The applicant attributed his poor relations with ISC XXXXX to the fact that the crewmembers were desperate to leave the cutter or remain ashore when it sailed for medical or other reasons and that these requests from the crew resulted in escalating disputes with the ISC. However, but for the horrible command climate, his relationship with the ISC would not have deteriorated.

The applicant stated that he does not claim to be perfect, but his career has been ruined because he had the misfortune of serving as XO on a cutter for two consecutive COs who were relieved for cause. He asked the Board to grant relief.

SUMMARY OF THE REGULATIONS

Coast Guard Regulations

Chapter 6-2-1 of Coast Guard Regulations states the following regarding an XO’s responsibilities:

In performing his duties, the executive officer shall conform to and effect the policies and orders of the commanding officer and shall keep informed of all significant matters pertaining to the command. The executive officer shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command. While recognizing the right and duty of heads of departments and other officers to confer directly with the commanding officer on important matters relating to their duties, the executive officer must be responsible for keeping appropriately informed of such matters.

Chapter 6-2-3 spells out the specific duties of an XO as follows:

A. The executive officer, subject to the orders of the commanding officer, and assisted by the appropriate subordinates, shall:

- (1) Generally supervise the administration of the business of the ship.
- (2) Perform the functions of personnel officer for the unit ...
- (3) Prepare and maintain the bills and orders for the organization of the command as a whole.
- (4) Supervise and coordinate the work, exercises, and training of the personnel of the command.
- (5) Supervise and coordinate the procurement of supplies for the ship.
- (6) Have direct responsibility for medical matters when no medical officer is attached ...

- (7) The executive officer shall exercise general supervision and control over the security and use of the ship's keys.
- (8) Prepare and promulgate a plan of the day and such other advance schedules as may serve to aid subordinates in planning their work.
- (9) Make frequent departmental inspections with the responsible subordinates and take remedial action for the correction of any deficiencies.
- (10) Function as the safety officer of the command ...
- (11) Ensure justice and consistency in exercising authority.
- (12) Endeavor to maintain high morale within the command.

Personnel Manual

Article 10.A.1.b.1. of the Personnel Manual in effect in 2008 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.”

Article 10.A.4.g. allows an officer to submit a reply to an OER to express his own views of his performance for inclusion in his record.

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 because the applicant has remained on active duty since the disputed OER was entered in his record.⁶

2. The applicant asked the Board to remove from his record his OER for the period June 7, 2007, through April 30, 2008, and his subsequent non-selections for promotion and to backdate his date of rank and award him back pay and allowances if he is selected for promotion with a corrected record in 2012. 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.⁷ 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.⁸ 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.⁹

3. The Coast Guard pointed out that although the applicant now alleges that his CO should have been disqualified from serving on his rating chain in 2008 because of bias and that he was subject to a hostile work environment, the applicant failed to seek the CO’s disqualification in 2008 pursuant to Article 10.A.2.g.2. of the Personnel Manual, failed to file an OER Reply as allowed by Article 10.A.4.g., and did not apply to the PRRB for removal of the disputed OER pursuant to Article 10.A.7. The applicant’s decisions not to seek disqualification of his CO, not to file an OER Reply, and not to file a PRRB application do not constitute waivers of his right to apply to the BCMR for correction of the OER. However, together these three choices constitute significant evidence that he considered the disputed OER to be a fair and accurate assessment of his performance at the time he received it. The applicant’s delay in applying to this Board for

⁶ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁹ *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).

expungement of the disputed OER until he had not been selected for promotion three times is also evidence that he accepted the OER as accurate and fair at the time.

4. The applicant alleged that the CO should be deemed disqualified from serving on his rating chain because, more than a year after the disputed OER was prepared, the CO was relieved for cause. The Board rejects the idea that if a CO has been relieved for cause, he is retroactively disqualified from serving on any officer's rating chain under Article 10.A.2.g.2. of the Personnel Manual. Article 10.A.2.g.2. clearly prohibits a CO who has been relieved for cause from his command thereafter or contemporaneously preparing subordinates' OERs because of the likelihood of prejudice. Article 10.A.2.g.2. does not require unlimited retroactive disqualification. The Board finds that applicant has not shown that the CO was disqualified from serving on his rating chain in 2008 because he was relieved for cause more than a year later.

5. The applicant alleged that the CO should be deemed disqualified from serving on his rating chain because the applicant refused to obey an unlawful request by the CO to falsify a report of his weight in September 2007, which might "raise[] a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation," pursuant to Article 10.A.2.g.2. However, the applicant was unable to support his claim with evidence of the alleged request. Nor is there any evidence that, if the CO did make this request, he suffered any consequences from the applicant's refusal that would cause him to take revenge through the applicant's OER eight months later. The Board finds this allegation to be unproved.

6. The applicant alleged that the CO's admission that the disputed OER is "overly generous" and certain inconsistencies between the CO's characterization of his performance in his declaration and in the OER prove that the OER contains misstatements of fact and should be expunged for inaccuracy. However, "retrospective reconsideration [by a rating official] of an OER is not a basis for correction."¹⁰ The CO's recent criticisms of the applicant's performance and his comment that the disputed OER is "overly generous" do not persuade the Board that the OER marks and comments do not accurately reflect the CO's opinion of the applicant's performance at that time. The fact that the applicant's allegations may have caused the CO to regret some positive marks and comments he included in the disputed OER does not persuade the Board that those marks and comments are erroneous. Even if the Board believed that the CO had erred by making the OER "overly generous," which it does not, such errors would have benefited the applicant by improving his marks and comments.

7. The applicant alleged that the CO should be deemed disqualified from serving on his rating chain because the CO was biased against him and pointed to the evidence that the CO belittled and berated him in his witnesses' statements and the statements gathered by the command climate investigation. The applicant alleged that the CO might have been biased against him because certain traditions that the CO had started or upheld when the CO was XO had been stopped either by policy or by the applicant's predecessor. However, substantial evidence in the record shows that the CO had sound reasons to criticize the applicant's performance. The record shows that the prior CO, the officer who sailed the cutter back to XXXXX after the removal of

¹⁰ Decision of the Deputy General Counsel in BCMR Docket No. 84-96; *see also Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976); and BCMR Docket Nos. 67-96, 189-94, 24-94, 265-92, and 311-88.

that CO, and CAPT B all warned the CO that the applicant was not a good XO, just as the marks and comments in his 2003 and 2004 OERs show that he was not a particularly good CO of a patrol boat. CAPT D told the investigator that based on his observations, the applicant was “a weak XO.” The notes that the CO made up until July 27, 2007, support the CO’s claim that the applicant’s performance as an XO was worthy of criticism. Nor does the Board agree with the applicant that the CO’s failure to continue the notes after July 27, 2007, proves that the applicant was thereafter a good XO. The Board finds that the applicant has not proved by a preponderance of the evidence that the CO was biased against him and should therefore be disqualified from his rating chain pursuant to Article 10.A.2.g.2.

8. The applicant alleged that the OER Reviewer’s description of his work as “checking OERs for technical and grammatical accuracy” proves that the OER failed to perform his duties correctly as prescribed by the Personnel Manual. Article 10.A.2.f.2. of the manual states that the OER Reviewer “[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential,” “[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES,” and “return[s] an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments.” Absent evidence to the contrary, officers are presumed to have carried out their duties “correctly, lawfully, and in good faith.”¹¹ The Board finds that the OER Reviewer’s statement that he checked the “technical and grammatical accuracy” of the disputed OER does not prove that he did not know and perform his duties under Article 10.A.2.f.2. Ensuring the “technical accuracy” of an OER may well include checking that the OER marks and comments conform to the requirements for preparing OERs under Article 10.A.4.c., which include requirements that the marks and comments be consistent and that the comments identify the officer’s strengths and weaknesses and “paint a succinct picture of the officer’s performance and qualities.”

9. The applicant alleged that the disputed OER is internally inconsistent because someone who has spent most of his career afloat but is not recommended for another afloat assignment would not receive the other, positive marks and comments that the CO included for the applicant. However, the block in which the recommendation against another afloat assignment was made is the block in which the Reporting Officer is supposed to make comments about the Reported-on Officer’s potential for future service. The Board finds that the rest of the marks and comments in the OER are not so positive that they are inconsistent with a recommendation against another afloat assignment. The applicant has not proved by a preponderance of the evidence that the OER Reviewer failed to perform his role properly in accordance with the Personnel Manual when reviewing the disputed OER.

10. Although the applicant alleged that he was subject to a “hostile work environment”¹² during the reporting period for the disputed OER and so could not reasonably have been

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).

¹² Military officers are not protected from “hostile work environments” under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-16; see *Roper v. Dep’t of the Army*, 832 F.2d 247, 248 (2nd Cir. 1987) (finding that “the *Feres* doctrine prevents members of the military from challenging military decisions through actions brought under Title VII”). However, “it is the Coast Guard’s policy to apply the same protections [in Title VII] to the military

expected to perform his duties well, he has not shown that he was a member of a protected class or that the CO's conduct toward him was based on racial, ethnic, religious, sexual or other irrational prejudice, which is a required element of a "hostile work environment."¹³ However, Chapter 3.A.1.a. of the Equal Opportunity Manual states that every member of the Coast Guard deserves to be treated with honor, dignity, and respect. As the Board found in BCMR Docket 2008-174, it is theoretically possible that a CO could treat a subordinate officer so horribly that the subordinate could not reasonably be expected to perform his duties well even if the CO's abuse was not based on the subordinate's gender, race, ethnicity, or religion. An OER resulting from such treatment might constitute an injustice in the officer's record and so be removed by the Board.¹⁴

11. Although the applicant has not shown that his CO criticized him because of his gender, race, ethnicity, or religion, the legal criteria for a "hostile work environment" are instructive as to the type of evidence needed to prove that a command climate is so abusive that a competent officer cannot reasonably be expected to perform his duties well. Occasional hostile or humiliating words and actions are insufficient.¹⁵ Factors that courts consider aside from bias include the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating or merely offensive; and whether the conduct unreasonably interfered with an employee's work performance.¹⁶ A "hostile work environment" in the civilian sector exists "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"¹⁷ However, in assessing such matters, the Board must also take into account the distinctly different military, shipboard environment of the applicant's workplace, as well as the potential dangers incurred by poor performance.

12. The reporting period for the disputed OER ended on April 30, 2008. The record shows that sometime in spring 2008, the Work Life Supervisor reported receiving numerous complaints about the command climate aboard the applicant's cutter, including some complaints about how the CO treated the applicant. An assessment by the Civil Rights Office in May 2008 revealed no civil rights issues but significant command climate issues, in particular "negative leadership practices including belittling or chastising members in front of the crew"; crewmembers being fearful of voicing concerns; low morale and poor mentoring of junior officers; and "inconsistent interactions with crewmembers, at times intimidating and other times friendly and supportive." CAPT B stated that sometime after he transferred in the summer of 2008, he received a call from a crewmember stating that "the command climate had gotten much worse." A command climate investigation conducted in the spring of 2009 concluded that the CO had

workforce." EOM, Chap. 3.A.5.b. "It is incumbent on those in leadership positions to create a workplace environment built on the core values of honor, respect, and devotion to duty, and to ensure that the workplace is free of discrimination or harassment on any prohibited basis." *Id.* at Chap.1.d.

¹³ *Id.* at Chap. 4.b.

¹⁴ The Board may remove injustices from any Coast Guard military record. 10 U.S.C. § 1552(a). For the purposes of the BCMRs, injustice is sometimes defined as "treatment by the military authorities that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

¹⁵ See *Overton v. N.Y. State Div. of Military and Naval Affairs*, 373 F.3d 83, 99 (2d Cir. 2004) (Pooler, J., concurring).

¹⁶ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

¹⁷ *Id.* (citations omitted).

continued to belittle and berate subordinates after the May 2008 assessment. One witness stated that the CO had only “publically humiliated” the applicant, instead of modeling leadership, and another stated that the CO had once blamed the applicant for abandoning him in town when in fact the CO had chosen not to return to the cutter until the wee hours of the morning after he had drunk too much alcohol. The Work Life Supervisor, Ms. T, reported that a gunner’s mate told her that the CO “consistently belittle[d] the XO on the messdeck and bridge” and that another reported that the CO would curse at the XO when things went wrong. The cutter’s Supply Officer stated that he saw the CO belittling the applicant in front of junior officers and failing to praise him for things that went well. BMCS W stated that he saw the CO belittling and berating the applicant during Officers’ Calls and on the bridge. For example, BMCS W reported that during a special training event with a “full special sea detail” of all rates and ranks on the bridge, the CO came to the bridge, asked the applicant if he had completed certain paperwork, and then relieved him and sent him below to complete the paperwork “in such a manner as to diminish and demoralize [him].”

13. The Board finds that the applicant’s supporting evidence lacks sufficient specificity about dates, frequency, and the words used by the CO to prove that the applicant was subject to a work environment so humiliating and irrationally hostile that he could not have been expected to perform his duties well during the reporting period for the disputed OER. Several crewmembers have characterized the CO’s criticisms as belittling, humiliating, or berating. However, there is substantial evidence that the applicant’s performance frequently warranted criticism, and the witnesses’ statements contain insufficient detail concerning the wording and frequency of the CO’s public criticisms of the applicant and the problems and potential dangers to which the CO was reacting. Therefore, the Board cannot conclude that the command climate was arbitrarily hostile and abusive, as the applicant alleged, or that he could not reasonably have been expected to perform his job to the CO’s satisfaction. The Board in no way excuses the CO for not expressing his anger and criticisms more appropriately. However, the evidence in the record is insufficient to prove that the attitude and actions of the CO during the reporting period for the disputed OER created a hostile work environment that warrants expungement of the OER.

14. The applicant has not proved by the preponderance of the evidence that any of the specific examples of his performance cited on the OER are inaccurate or unjust or that the numerical marks are too low. Statements by CAPT B and CAPT D support the CO’s claims that the applicant was a poor XO. While the applicant described his circumstances aboard the cutter in a way that makes it appear that it would have been impossible for him to succeed or to please the CO, he has not supported his claims in this regard with sufficiently detailed evidence. Although the evidence shows that the CO was quick to criticize and insensitive to the impact of his public criticisms, the Board cannot determine, by the evidence presented, that another LCDR could not have performed substantially better and so received better marks and comments than the applicant. The applicant has not proved by a preponderance of the evidence that he was subject to a hostile work environment during the reporting period.

15. The applicant made numerous allegations with respect to the actions and attitudes of his CO, CAPT B, and CAPT D. Those allegations not specifically addressed above are considered to be not dispositive of the case.¹⁸

16. The applicant has not proved that he was a member of a protected class subject to bias or harassment, that the command climate was irrationally hostile, or that he could not reasonably have been expected to perform his duties to the satisfaction of the CO. He has not proved that the CO should have been disqualified from serving on his rating chain. There is ample evidence that the CO publically criticized his performance, but the applicant has not proved that he did not in fact perform in a way that warranted the CO's criticisms. The Board finds that the applicant has submitted insufficient evidence to prove by a preponderance of the evidence that the disputed OER was adversely affected by a "misstatement of significant hard fact," a "clear and prejudicial violation of a statute or regulation," or factors that "had no business being in the rating process."¹⁹ Therefore, the Board will not order the expungement of the OER.

17. Because the applicant has not proved that the disputed OER is erroneous or unjust or that his record was erroneous or unjust when it was reviewed by the selection boards, there is no basis for removing his non-selections for promotion to CDR.²⁰

18. Accordingly, the applicant's requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹⁸ See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "could [not] affect the Board's ultimate disposition").

¹⁹ *Hary*, 618 F.2d at 708.

²⁰ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (noting that before removing a non-selection for promotion, the Board must find that the applicant's record was prejudiced by error or injustice when it was reviewed by the selection board and that it is not unlikely that the applicant would have been selected for promotion in any event).

