

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-038

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 February 12, 2015, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 4, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove from his record the third officer evaluation report (OER) he received for his service as [REDACTED] of a Coast Guard Sector from June 2010 through June 2013. The disputed OER covers the period June 1, 2012, through June 21, 2013. He also initially asked the Board to expunge his non-selection for promotion to lieutenant commander (LCDR) in 2014 and to backdate his date of rank as if he had been selected for promotion in 2014, but he withdrew these requests for relief after he was selected for promotion in 2015.

The applicant alleged that the disputed OER was prepared in retaliation by his supervisor, a commander (CDR/O-5), who was head of the Prevention Department of which the [REDACTED] was a part. He explained that the commander retaliated against him because, during the reporting period for the disputed OER, he reported the commander for hazing a lieutenant junior grade (LTJG/O-2) in the applicant's division. He stated that the LTJG told him that while the applicant had been on paternity leave, the LTJG realized when he was changing clothes after a [REDACTED] that he had provided inaccurate information to the CDR in his brief about the vessel's cargo operations. Because he was still changing his clothes, he asked a GS-13 to inform the CDR about the mistake. When the LTJG returned to the office, the CDR directed him to come to attention and reprimanded him about the inaccurate report in front of the GS-13 and an E-6 petty officer. Then the CDR pressed a small piece of paper to the LTJG's chest; said, "Here is your badge of shame"; and laughed and patted him on the shoulder as if it were a joke. The

paper was octagonal and had a frowning face below the word “shame.” The applicant alleged that the LTJG told him he was still upset about the incident and was trying to avoid interacting with the CDR.

The applicant stated that he discussed the matter with a lieutenant command and chief warrant officer, and concluded that “an incident occurred and I was morally and ethically obligated to follow the Commandant Instruction for Hazing Awareness Training (CI 1610.1), part 3.d, and the Commandant’s Anti-Discrimination and Anti-Harassment Policy Statement in reporting the incident to a senior officer or local human resources.” He claimed that the incident went against the Commandant’s guiding principles of “Honoring Our Profession” and “Respect Our Shipmates.” Therefore, he discussed the matter with the LTJG and reported the incident to the Sector Deputy Commander, another O-5, who served as the applicant’s Reporting Officer for the disputed OER. After his report, the CDR was required to apologize to the LTJG.

A few months later, in March 2013, the applicant alleged, the CDR told him, “Be careful about talking about your supervisor behind his back. He will find out about it.”

The applicant alleged that the CDR produced a “toxic work environment” and that the incident he reported was just one of many. He alleged that even before this incident, a command climate survey had resulted in an intervention at the Sector.

The applicant stated that he did not challenge the disputed OER by applying to the Personnel Records Review Board (PRRB) because “my experience working for this supervisor was so negative that I was unsure of my desire to continue within the Coast Guard.” The one-year deadline for applying to the PRRB expired before he decided he wanted to continue his career. In addition, he was advised that the disputed OER was not bad enough to prevent him from being promoted. He stated, “It was not until a recent review of my record with OPM-4, that I realized how much lower [the OER marks are] compared to my other evaluations, in particular the previous OER.”

The applicant stated that when the CDR counseled him about the OER, the CDR told him that he had received a mark of 4 in “Speaking and Listening” because he was sometimes “‘too confrontational’ and needed to learn how to say ‘Aye Aye, Sir’ more frequently.” However, this advice contradicted what the CDR had told him previously, which was that he “had become too much of a ‘Yes, Sir’ officer and that [he] needed to start speaking up.” The CDR also told him that “Looking Out for Others” and “Directing Others” were two of his strongest areas, and yet his marks in these two categories were lower than on his previous OER. In addition, the CDR did not explain to him why his mark for “Professional Presence” had dropped. (The mark for “Professional Presence” on an OER is assigned by the Reporting Officer, not the Supervisor.) The applicant noted that his Reporting Officer’s comments about the applicant’s potential in future assignments were less positive in the disputed OER than previously in that they changed from saying he had the skill and understanding to serve as a future Prevention Department head, which is a lieutenant commander’s billet, to saying that he had the experience and analytical skills for a staff policy or training position in prevention and that upon completing his post-graduate education and upcoming tour of duty at FORCECOM, he would be ready for

“operational field assignment w/in any Marine Safety Unit, Sector Prevention Department, or LDC assignment.”

The applicant stated that the lower marks on this OER were unwarranted and directly contradicted the CDR’s own policy. He explained that when he prepared and submitted subordinates’ evaluations to the CDR for review, the CDR told him that he could not lower someone’s marks from the prior evaluation unless he had previously counseled the person about the issue. The applicant also alleged that the CDR pressured him to raise the marks of an officer who was the soccer coach for the CDR’s son’s soccer team.

The applicant noted that, in retrospect, after he reported the hazing incident, he should have asked for the CDR to be disqualified from his rating chain pursuant to COMDTINST M1000.3A. However, he concluded, “[d]oing the right thing by reporting the incident should not cause me to be punished now and in the future.”

In support of his allegations, the applicant submitted the following statements:

- A lieutenant commander (LCDR) who served with the applicant at the Sector from 2010 to 2011 stated that he was an excellent officer and a hard worker who looked out for others. She stated that in February 2013, she received a call from the applicant about “a situation that disturbed him.” She advised the applicant to report the incident to the Deputy Sector Commander. The applicant also told her that the CDR was too hard on many subordinates, including the applicant. Others had also complained to her about the CDR, who had arrived after she was transferred to another Sector. Although the applicant was concerned about the potential effect on his career, he helped the LTJG speak to the Deputy Sector Commander about the incident.
- A chief warrant officer (CWO), now retired, stated that the applicant had approached him after the CDR “had pinned an idiot or stupid pin” on the LTJG in front of a petty officer and a civilian. The applicant “wanted to report it as hazing but was concerned that it would have an adverse effect on his working environment or career. I understood his concerns because [the CDR] didn’t promote a workplace climate where you felt free from retaliation. After all, [the LTJG] was belittled in public for making a simple mistake during a briefing. I told him that as a supervisor he had to look out for others.” The CWO consulted another officer and then told the applicant that the incident qualified as hazing and had to be reported. The LTJG was satisfied with the result, but “it appears [the applicant] who did the right thing is the one who’s paying the price.”
- In an email to a member, who asked to remain anonymous, the applicant requested a statement about the incident in which the CDR had placed a “badge of shame” on the LTJG. The member responded that he would not provide one—not because he was concerned about the CDR seeing his statement, but because of possible impacts on others. He stated that the LTJG “wishes to have this behind him and I respect that

100%.” He stated that if the applicant received a poor OER, he should discuss it with the CDR.

- A civilian employee stated that she has enjoyed working for the Coast Guard for a long time, but her experience during a three-year period in the Prevention Department made her doubt wanting to continue. She explained that from 2011 to 2014, her department was under the command of the CDR. When the CDR arrived in 2011, he told them that the department was broken and that he was going to fix it. The CDR gave her a very poor evaluation when all her prior evaluations had been excellent. The CDR told her to do only the work he assigned to her and not to help others with their work as it only enabled them to leave work early. He told her she reminded him of his mother, who would clean the house from one end to the other each day and “never really accomplished anything in her daily work routine.” She stated that the CDR assigned her many time-consuming and involved tasks that did not fall within her job description. And although she performed many special projects to his satisfaction,

he always made me feel as if I was never doing enough or doing it quickly enough to suit him. He seemed to take pleasure in regularly assigning me more work than it was possible to accomplish within my work hours. I often stayed late in an effort to keep up. He once asked me, “I bet you think I’m a real asshole, don’t you?”, and “I bet you feel like an indentured servant, don’t you?” He also told me regularly that my position was a dead end, I would never be promoted, and my position would be abolished when I left. I felt a constant sense of pressure, disapproval and discouragement throughout his time [at the Sector], and I felt I was consistently required to do the work of three people by myself. The majority of my coworkers voiced similar opinions, and I observed the way they were poorly treated by [the CDR] on a regularly basis. Needless to say, our departmental morale deteriorated greatly and stayed down until he was transferred. When he left in July 2014, I was more worn down and discouraged than at any previous time in my career.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned an ensign in May 2005. He was assigned to a cutter as a student engineer from June 2005 through June 2007 and received excellent OERs aboard the cutter. He was promoted to LTJG in November 2006.

From July 2007 through June 2010, the applicant served as a [REDACTED]. He received excellent OERs in this position and was promoted to lieutenant in May 2009. On his final OER at this Sector, the applicant received mostly top marks of 6 and 7 in the various performance categories and a mark in the fifth spot (of seven) on the officer comparison scale, denoting an “excellent performer.” The applicant also received a Commendation Medal for his work as a [REDACTED] upon leaving the Sector.

In June 2010, the applicant reported to another Sector as [REDACTED] within the Prevention Department. On his first annual OER in this position, dated June 17, 2011, the applicant received four marks of 5 for “Speaking and Listening,” “Writing,” “Workplace Climate,” and “Health and Well-Being,” eleven marks of 6, and three marks of 7, and another mark in the fifth spot on the officer comparison scale. The prior Chief of the Prevention Department served as his supervisor; the Deputy Sector Commander served as his Reporting Officer; and the Sector Commander served as his Reviewer.

For the applicant’s second OER as [REDACTED], dated May 31, 2012, the CDR served as his supervisor; a new Deputy Sector Commander served as his Reporting Officer; and the Sector Commander served as his Reviewer. On this OER, the applicant received one mark of 4 for “Writing,” eight marks of 5 for “Planning and Preparedness,” “Using Resources,” “Professional Competence,” “Speaking and Listening,” “Evaluations,” “Judgment,” “Professional Presence,” and “Health and Well-Being,” and nine marks of 6, plus another mark in the fifth spot on the officer comparison scale. The Reporting Officer concurred with the CDR and wrote that the applicant—

[e]mbraced tough [REDACTED] related challenges head-on & produced exceptional results throughout the period. [He] is especially astute on Coast Guard’s oversight of alternate compliance programs (ACP/MSP). [He] has solid marine safety/security experience & possesses the intellect and technical understanding to serve as a future O-4 Prevention Department head or high visibility broadening assignment to hone [his] staff mgnt skills during next tour. [His] current progress toward earning a Master’s degree in Organizational Leadership will position [him] well for assignment to the LDC or district/HQ marine safety/security staff. Recommended for promotion to LCDR.

The applicant’s third OER as [REDACTED], dated June 21, 2013, is the disputed OER in this case. The CDR served as the supervisor; the Deputy Sector Commander as the Reporting Officer; and the new Sector Commander as the Reviewer. On this OER, the CDR assigned the applicant two marks of 4 for “Speaking and Listening” and “Writing” and six marks of 5 for “Planning and Preparedness,” “Using Resources,” “Professional Competence,” “Looking Out for Others,” “Directing Others,” and “Evaluations” from the CDR. The CDR also assigned the applicant four marks of 6 and one mark of 7 for “Workplace Climate.” The applicant’s Reporting Officer concurred with the CDR’s marks and assigned the applicant a mark of 4 for “Professional Presence,” marks of 5 for “Judgment” and “Health and Well-Being,” two marks of 6, and another mark in the fifth spot on the officer comparison scale.¹ The Reporting Officer wrote that the applicant—

¹ In all, the applicant received three marks of 4, eight marks of 5, six marks of 6, and one mark of 7 in the performance categories on the disputed OER. Of the thirteen marks assigned by the CDR, nine were identical to the marks the CDR has assigned him in 2012. The CDR raised one of his marks from a 6 to a 7 (for “Workplace Climate”) and lowered his marks by one point in three categories: “Speaking and Listening,” “Looking Out for Others,” and “Directing Others.” The Reporting Officer assigned the applicant identical marks in four categories and on the comparison scale in 2012 and 2013 but lowered his mark for “Professional Presence” from 5 to 4 in 2013.

[d]emonstrated solid mgnt skills as evidenced by impressive performance of subordinates & teams' rapid disposition of technical [REDACTED] issues. [His] grasp of value of interagency ops/partners & ability to liaison will compliment follow-on assignments. Field experience & analytical skills point to success at staff policy position w/in Prevention or trng position. Improved planning & communication skills, coupled w/ successful completion of current post-graduate education & FORCECOM tour will bolster future operational field assignment w/in any Marine Safety Unit, Sector Prevention Department or LDC assignment. Recommended for promotion to LCDR.

The applicant received an Achievement Medal for his tour of duty as [REDACTED]. His next assignment was as a [REDACTED]. For this service, he received an OER with very high marks in 2014 and his Reporting Officer gave him his “[h]ighest recommendation for promotion with very best of peers.” However, the applicant was not selected for promotion in 2014. In 2015, the applicant received another OER with exceptionally high marks and was subsequently selected for promotion.

VIEWS OF THE COAST GUARD

On August 12, 2015, 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. He noted that the disputed OER “did not deviate significantly from previous OERs,” that the CDR has assigned the applicant a mark of 7 for “Workplace Climate,” and that the Reporting Officer had recommended the applicant for promotion. The JAG also adopted the findings and analysis provided in the memorandum signed by Commander, Personnel Service Center (PSC).

PSC submitted declarations signed by the CDR, the Reporting Officer, and the Reviewer for the disputed OER. Based on the declarations, PSC stated that the Reporting Officer was aware of the CDR’s inappropriate behavior and addressed it to the satisfaction of the offended officer. PSC noted that both the CDR and the Reporting Officer state that the marks in the disputed OER are accurate, “based on observed performance during the period and should not be changed.”

PSC also noted that at the time, the applicant did not seek to disqualify the CDR, file an OER Reply, or apply to the PRRB. PSC pointed out that in another case, BCMR No. 2011-179, the Board found that an applicant’s failure to do these three things—

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

PSC argued that the applicant did not submit any evidence to show that the OER contains an error or that he was treated with manifest injustice. PSC concluded that the applicant's rating chain carried out their evaluation responsibilities properly and that there are no grounds for removing the OER or his non-selection for promotion in 2014. PSC recommended that the Board deny relief.

Declaration of the CDR, OER Supervisor

The CDR stated that as head of the Prevention Department from 2011 to 2014, he was responsible for the administration and operations of the 113 personnel in the department, as well as a detached duty office, a cutter, and three aids to navigation teams. The CDR stated that he was the applicant's direct supervisor and "stand[s] by the marks and comments as originally assigned." He stated that the applicant's statements are "inaccurate, untrue, or taken out of context and speak nothing of his demonstrated level of performance over the evaluation period in question." He attributed the "numerical fluctuations" between the applicant's 2012 and 2013 OERs to the applicant's actual performance during those marking periods. The CDR stated that he offered the applicant mid-period counseling on three occasions before the disputed 2013 OER was prepared, but the applicant did not schedule time for the counseling. However, the CDR noted, during their prior mid-period counseling session in December 2011, the CDR had stressed the importance of seeking increased responsibility and professional growth by acquiring qualifications, designations, and certifications and managing projects, and he would have done so again if the applicant had scheduled a counseling session. The CDR submitted a copy of notes he had provided to the applicant about his performance during the December 2011 counseling session.

Declaration of the Reporting Officer

The Deputy Sector Commander, who served as the applicant's Reporting Officer for both this 2012 and 2013 OERs, stated that the applicant was a "good manager" of his division, but the position was a challenging one that was later upgraded to an O-4 position, instead of O-3. The Reporting Officer stated that he assigned the applicant the marks that he earned during the reporting period and that he had actually commended the applicant for looking out for the LTJG. Regarding the applicant's performance, the Reporting Officer stated that in addition to his division chief responsibilities, the applicant stood watches as a Command Duty Officer (CDO) and thus worked under the Chief of the Sector Command Center, as well as the CDR, who headed the Prevention Department. As a CDO, the Reporting Officer stated, the applicant "stood relatively good watches, but much more was expected of him." He explained that besides the applicant, he had been the primary or secondary supervisor for four other "CDO watch standing [REDACTED] over the past 10 years. While [the applicant] accepted the extra duty, the other three lieutenants embraced the challenge, owned every aspect of their primary and secondary responsibilities, and excelled at both leadership opportunities." The Reporting Officer concluded that his marks and comments in the disputed OER were fair and "consistent with [the applicant's] full body of work during that period."

The Reporting Officer also wrote that the CDR and the applicant had "very different styles and manners and methods of communicating" and there was "some sort of tension within

their staff.” The applicant and the staff were used to the prior department head’s approach and did not “fully embrace” the CDR’s approach. From 2011 to 2013, the Sector “had multiple workplace and climate surveys” and there were “some areas of concern to resolve but that was from both ends of the leadership pyramid.” He noted that the applicant’s last reporting period at the Sector “was indeed a difficult one for him and being the direct report to a CDR, like his predecessor, could be kind of intimidating for some.”

The Reporting Officer stated that when the applicant reported the incident that the applicant called “hazing,” he spoke to the applicant and the LTJG and then to the CDR. He learned that instead of documenting the LTJG’s inaccurate briefing, the CDR had taken the “badge of shame” route, which the Reporting Officer considered inappropriate. He instructed the CDR to apologize to the LTJG, which he did. The Reporting Officer stated that he never told the CDR that the applicant had brought the matter to his attention. After the apology, he met with the CDR, the LTJG, the Sector Commander, and the Command Senior Chief, and all “considered this issue resolved.” However, it became clear that “there were several members of the Prevention Department and [REDACTED] that believed something more public should have been done to the CDR.” The Reporting Officer also noted that the Sector Commander, who was the CDR’s Reporting Officer, lowered one mark on the CDR’s own OER because of the incident.

Declaration of the OER Reviewer

The new Sector Commander who served as the OER Reviewer stated that he performed his administrative function but was not present at the Sector during the reporting period and so cannot validate or refute any of the applicant’s assertions. He stated that in reviewing the OER, he found the marks to be consistent with the written comments.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 10, 2015, the applicant responded to the Coast Guard’s advisory opinion. He noted that the declarations submitted by PSC prove that the hazing incident he had described took place and that the CDR had been reprimanded and received a lower mark on his OER due to his inappropriate behavior. He noted that the CDR would presumably have learned of this lower mark more than a month before he prepared the applicant’s disputed OER.

The applicant stated that at the time of the hazing incident, the Deputy Sector Commander assured him that he would not allow the CDR to retaliate against him, and he did not ask to remove the CDR from his rating chain because he “relied on the integrity of Coast Guard leadership to live up to their assurances that reprisals are not tolerated.” However, he argued, he has been penalized for trusting the Deputy Sector Commander. Moreover, he pointed out, he did not wait four years to challenge his OER, as did the applicant in BCMR No. 2011-179; he waited only fourteen months and only because he had been told that the disputed OER would not harm his career.

The applicant disputed the Coast Guard’s claim that the marks in his 2013 OER are not significantly lower than those in the 2012 OER. He noted that as the last operational OER in his

record before the selection board, the OER was significant and any reduction in marks, “no matter the amount, would indicate a negative recommendation for promotion contradictory to the [recommendation for promotion] in block 10 of the OER.” The applicant noted that “any unwarranted change would constitute retaliation even if it is small in some people’s opinion.” He also alleged that the comments in the disputed OER support the higher marks he was assigned in his 2012 OER.

The applicant argued that the fact that the CDR raised his mark for “Workplace Climate” to a 7 does not rebut his claim that the lowering of other marks was retaliatory. He noted that such logic would provide “a road map for further retaliation cover up by other members in the organization stating ‘simply raise one mark to cover lowering several others in order to negatively affect the member’s career.’”

The applicant also noted that his rating chain did not meet their deadlines for preparing the disputed OER. The CDR was supposed to sign it 10 days after the end of the reporting period but signed in 16 days after, instead. Similarly, the Reporting Officer was supposed to sign it within 30 days after the end of the reporting period, but he signed it 45 days after.

Regarding mid-period counseling, the applicant stated that he did schedule a session, but the CDR was unable to meet that day and rescheduled it. However, after operational matters required their session to be rescheduled twice again, he opted to ask the CDR if there were areas he needed to work on and was told, “No, you are doing fine.”

The applicant concluded that it “should shock anyone’s sense of justice to believe that the OER of a biased rater, which is the product of a hostile working atmosphere, should be allowed to destroy the career of an otherwise competitive officer. My failure to anticipate the future bad behavior of my supervisor should not be used to support a negative finding.”

Regarding the work environment, the applicant stated that the CDR “established an unjust test for performance.” He alleged that the Coast Guard had “recognized unfair bias and hostility which the Board must conclude created an unjust reprisal and non-selection.” The applicant argued that he has established that he reported his supervisor’s misconduct and his supervisor subsequently reduced his OER marks and so there “is an unquestionable time link between making said report and receiving lowered marks.”

In support of his allegations, the applicant submitted the following statements:

- A junior officer who worked in the Prevention Department wrote a statement in which he alleged that once, when he was surprised to have been assigned a collateral duty from outside his chain of command, he asked the CDR about it. The CDR responded by asking him if he had heard the story of “the golden whore.” The CDR explained to him that in a brothel, “the best whores get the most customers and therefore are the busiest ‘workers’; this in turn makes the pimp a lot of money so he makes sure those whores stay busy.” The junior officer stated that he left the CDR’s office disgusted and tried to avoid him thereafter.

- Another junior officer stated that while he was assigned to a different department at the Sector, he had frequent encounters with the CDR, who was “a difficult person to work with” and was often condescending. At the end of one conversation, the CDR asked him, “Do you know what your job is?” When the junior officer explained his position description to the CDR, the CDR’s attitude did not change. The junior officer stated, “While some of his leadership lessons were meant to improve officer staff work, his style was ineffective and ‘toxic’ in nature.” He stated that this style might be appreciated by an officer’s peers and superiors but was “at the expense of their direct subordinates.” The CDR would often comment on or rewrite his memoranda and appeared to take pleasure in counseling him. He noted that during his career he has “experienced multiple ‘toxic’ leaders that still maintain and enjoy extensive CG careers at the expense of their direct subordinates’ long term careers and even mental health.” With such leadership, he stated, subordinates are bullied into a constant state of panic and indecisiveness, “while the toxic leader maintains good favor with their superiors, remains in place, and is even promoted.”
- A chief petty officer who worked in the Prevention Department stated that a DEOMI survey had shown that the CDR’s department “was not a pleasant workplace” and that she did not trust the CDR. She stated that he would tell her one thing and “turn around and say the opposite.” After someone told her that the CDR had said she was not competent and had messed up some correspondence, she asked the CDR about it directly, and he denied that she had messed up any correspondence and told her she was doing a great job. In addition, during a one-on-one meeting she expressed concern about his habit of making jokes about people having come back from extended vacations when in fact they had been away on temporary duty or medical leave. He started to reply, “Chief, if I knew you were so sensitive,” so she ended the meeting immediately because she had gone “to him with a legit concern and it turned into a very patronizing conversation.” In addition, she stated, the CDR continued to task her subordinates directly, because their desks were right outside his office, instead of working through her, even after she asked him not to task them directly several times. Her subordinates would tell her about the tasking later. If she heard him tasking them directly, she would approach them, and the CDR would say, “Oh Chief, I didn’t know you were here.”

APPLICABLE REGULATIONS

In June 2013, instructions for evaluating officers were contained in Article 5.A of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3 (“Manual”). Article 5.A.1.b.1. of the Manual states that Commanding Officers “must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers.”

Article 5.A.4.c.1. states that an officer initiates his OER by completing all the blocks in the first section and forwarding it to his supervisor no later than 21 days before the end of the reporting period.

Article 5.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 5.A.4.c.7.):

(b) For each evaluation area, the Supervisor shall review the ROO's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Supervisor shall carefully read the standards and compare the ROO's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance to the level of performance and qualities against the standards...After determining which block best describes the ROO's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form to ink.

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(d) In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the ROO's performance and behavior for each mark that deviates from a four. Supervisors shall draw on his or her observations, those of any secondary Supervisors, and other information during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations. They should amplify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.

Article 5.A.2.g.(2)(b) of the Manual states that an officer may be disqualified from serving on another's rating chain and that "disqualified" means "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." Paragraph (2)(c) states, "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 5.A.4.g. of the Manual allows the reported-on officer to submit an OER Reply "to express a view of performance which may differ from that of a rating official," which will be included in the officer's record as part of the OER. Members of the rating chain may include comments in their endorsements to the OER Reply.

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 within three years of the date the disputed OER was entered in the applicant's military record.²

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.52, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³

3. The applicant asked the Board to expunge the disputed OER from his record as a product of retaliation by his supervisor, the CDR. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in an applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of evidence that the disputed information is erroneous or unjust.⁴ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁵ When challenging an OER, an applicant cannot "merely allege or provide 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 facts," facts "which had no business being in the rating process," or a clear and prejudicial violation of statute or regulation.⁶

4. The applicant has proven by a preponderance of the evidence that he assisted an LTJG in reporting to the CDR's supervisor, the Deputy Sector Commander, that after the LTJG had asked a GS-13 to report to the CDR that the LTJG's brief on a [REDACTED] had been inaccurate, the CDR embarrassed the LTJG by giving him a paper "badge of shame" in front of the civilian and a petty officer before laughing and patting him on the shoulder. The applicant decided that this incident constituted hazing because the CDR embarrassed the LTJG,⁷ and he

² 10 U.S.C. § 1552(b).

³ See *Steen v. United States*, No. 436-74, 1977 U.C. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *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).

⁷ According to the Coast Guard's Hazing Policy, COMDTINST 1610.1,

[t]he practice of hazing will not be tolerated in the U.S. Coast Guard. Aside from serving no useful purpose, the demeaning and abusive activities associated with hazing inhibit performance, debase personal dignity, and can result in serious injury. To prevent it, we must develop an awareness of what constitutes hazing and understand the negative impact of such activities.

Although a general definition is difficult to provide it typically occurs in connection with various impromptu and unsupervised "initiations" and is the result of the erroneous perception that the event gives license to subject an individual to personal abuse. Examples include: tacking on of crowns, throwing personnel over the side from a ship or pier, application of grease, oil, or other noxious substances on a member's body, forcing consumption or encouragement to consume excessive quantities of alcohol, shaving of heads or removal of body hair, offensive hitting, slapping or touching another individual and any other action which subjects an individual to ridicule or embarrassment.

encouraged the LTJG to report it. The Deputy stated that he thought that the CDR had acted inappropriately toward the LTJG and had the CDR apologize. The Deputy stated that he believes that the CDR's Reporting Officer lowered one of the CDR's own OER marks because of this incident. Although the applicant alleged that the CDR knew he had encouraged the LTJG to report the incident, the Deputy Sector Commander denied having told the CDR that the applicant helped the LTJG report the incident. The CDR did not address whether he knew or, if he knew, how he felt about the applicant accompanying the LTJG to the Deputy's office to report the incident.

5. The applicant has also proven by a preponderance of the evidence that several of the CDR's 113 subordinates did not appreciate his crude language and leadership style. He has not proven that his work environment was so "toxic" or hostile that he could not be expected to perform well, however.

6. The disputed OER was prepared in 2013 a few months after the LTJG's complaint. The applicant alleged that it was also prepared after the CDR had received his own OER, but this point is not proven. While CDRs normally receive annual OERs dated March 31, if the CDR's Reporting Officer is detaching from the unit, as the CDR's was, the CDR's annual OER is normally delayed until the date of the Reporting Officer's detachment,⁸ in which case the CDR might not have known that one of his own marks would be lowered when he prepared the disputed OER.

7. In the disputed OER, nine of the thirteen performance marks assigned by the CDR are identical to those the CDR assigned in the applicant's 2012 OER. Of the four that are different, the applicant's mark for "Workplace Climate" was raised from 6 to 7; his mark for "Speaking and Listening" was lowered from 5 to 4; and his marks for "Looking Out for Others" and "Directing Others" were lowered from 6 to 5. The Reporting Officer concurred with the marks assigned by the CDR, and in their declarations, both the CDR and the Reporting Officer strongly supported the accuracy of their OER marks and comments. The CDR noted that the applicant needed to seek increased responsibility and professional growth through qualifications

Some incidents of hazing have been condoned as unit initiations or innocent jest without intent to harm. Although the actions or verbal harassment may be considered humorous by some observers, they often create a real fear in the minds of the victims. Further, they undermine the very morale and "Esprit de Corps" they purport to advance.

Traditional service "initiation ceremonies," including Chief Petty Officer and crossing the equator, dateline, Arctic and Antarctic Circle initiations are authorized. However, Commanding Officers shall ensure these events do not include any degradation of character, sexual overtones, bodily harm or undue harassment.

Hazing constitutes military misconduct and its prevention is an all hands responsibility. Victims and casual observers shall report all violations of this policy. There is no place in the Coast Guard for dehumanizing treatment and every incident of hazing shall be investigated and appropriate disciplinary action initiated against the perpetrators, including those in the chain of command who tacitly condone such practices either by their inaction or by neglecting to investigate reported suspected incidents.

Our success as an organization very much depends on our people. A healthy, positive and professional work environment is essential to enable each of us to contribute. Strong support of this policy will help us maintain such an environment.

⁸ COMDTINST M1000.3, Art. 5.A.3.

and certifications during the reporting period. The Deputy Sector Commander noted that the applicant had had a “difficult” last year at the Sector and that his OER marks were based on his performance as a CDO, which was assessed by the Chief of the Sector Command Center, as well as on his performance as [REDACTED]. The Deputy stated that the applicant had failed to embrace certain challenges and excel in ways that other [REDACTED] he has known have done.

8. The applicant alleged that the comments in the disputed OER could support higher marks. While true, this claim ignores the purpose of OER comments. Raters do not write the comments and then pick a numerical mark based on their comments. Instead, pursuant to Article 5.A.4.c. of the Manual, in preparing an OER, the raters first compare the officer’s performance to the written performance standards printed on the OER form and then pick the most appropriate numerical mark and add a comment or two to illustrate why the numerical mark was chosen. Therefore, numerical marks of 4 (the “standard” mark) and higher are generally illustrated with positive comments because the comments for each mark must be consistent with the mark. As the OER Reviewer noted, the comments in the disputed OER are consistent with the assigned marks.

9. The applicant complained that his rating chain did not comply with the deadlines for submitting OERs. The disputed OER shows, however, that the applicant himself submitted his part of the OER late—on June 21, 2013, rather than the 21 days before the end of the reporting period as required by Article 5.A.4.c.(1) of the Manual. Moreover, this Board has long held that delay *per se* is insufficient to justify removal of an otherwise accurate OER.⁹ Even a clear violation of the Manual does not justify removal of an OER unless the violation was prejudicial, and there is no evidence that the slight delay in the preparation of the disputed OER was prejudicial to the applicant.¹⁰

10. Although the applicant apparently encouraged the LTJG to report the badge of shame incident and the CDR may have known that the applicant had done so and may have known it would lower a mark on his own OER, the Board finds that the applicant has not proven by a preponderance of the evidence that the CDR should have been disqualified from his rating chain. The Board is not persuaded that the applicant’s assistance with LTJG’s “badge of shame” report, “raise[d] a substantial question as to whether the [applicant would] receive a fair, accurate evaluation,” pursuant to Article 5.A.2.g.(2)(b) of the Manual. Nor is the Board persuaded that the disputed OER was retaliatory, as the applicant alleged, or that it was adversely affected by a “misstatement of significant hard facts,” factors “which had no business being in the rating process” (such as reprisal), or a clear and prejudicial violation of statute or regulation.¹¹ In making this finding, the Board relies especially on the Reporting Officer’s concurrence with the CDR’s marks and comments in the disputed OER, even though the applicant had raised the possibility of retaliation with the Reporting Officer after the badge of shame incident, and also on the Reporting Officer’s comments about the applicant’s “difficult” last year, his performance as CDO, and his failure to embrace all of the challenges and opportunities available during this

⁹ See, e.g., CGBCMR Docket Nos. 2005-053; 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

¹⁰ *Hary*, at 708.

¹¹ *Id.*

tour of duty as other [REDACTED] had done. The applicant has not proven by a preponderance of the evidence that the disputed marks are inaccurate or unreliable.

11. Accordingly, the Board finds insufficient evidence of error or injustice in the disputed OER to warrant removing it. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED], USCG, for correction of his military record is denied.

December 11, 2015

