

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-107



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the application upon receiving the applicant's completed application on March 1, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 22, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant (LT/O-3E) on active duty in the Coast Guard, asked the Board to correct his record by removing an Officer Evaluation Report (OER) covering his final year of service as the head of a Response Department at a Marine Safety Unit (MSU) from June 1, 2014, to May 31, 2015.

The applicant alleged that he received this OER with low marks and negative comments in retaliation for having reported the inappropriate behavior of two other lieutenants who were assigned to the MSU to his Command Cadre, including the Executive Officer (XO) and Commanding Officer (CO) of the MSU. The XO and CO prepared the OER as his Supervisor and Reporting Officer, respectively, and he claimed that it was easier for them to discredit him with a poor OER than to face the difficult challenge his report of inappropriate behavior presented. The applicant alleged that the retaliatory nature of the OER is proven by the fact that the three OERs he had previously received at the MSU had better marks, as do the OERs he has received at his current unit.

The applicant stated that he repeatedly reported the two lieutenants to the CO and XO for "rampant sexual harassment, inappropriate and vulgar comments, poor leadership, and a lack of any professional progression." One of the two, LT D, was the applicant's direct subordinate, and he alleged that the CO and XO also punished him for trying to hold her accountable. In retaliation, they removed him from many of his duties and gave him the disputed OER.

The applicant alleged that in 2016, after he, the XO, and the CO had left the MSU, the lieutenants' inappropriate behavior was investigated and they were relieved of their duties. LT D, who had been his subordinate, was punished at an Admiral's Mast in May 2016, and the other lieutenant, LT F, who was the XO of a nearby unit, was relieved of his duties.

In support of these allegations, the applicant submitted copies of his OERs. He also submitted excerpts of reports of investigations and the following witness statements and letters written on his behalf:

- A retired lieutenant commander, who was the XO of the MSU from 2006 to 2009 and who worked as a civilian and Senior Investigating Officer at the MSU while the applicant worked there from June 2013 to June 2015, stated that he was extremely impressed with the applicant's professionalism, skills, and leadership. The applicant had dedicated himself to making the MSU "a great place to work for his subordinates, peers, and supervisors" and he believes that the applicant "excelled and improved the unit's workplace climate tremendously." He stated that the applicant had tried to hold LT D "accountable for lewd and inappropriate comments, poor leadership, sexual harassment and no professional growth" on numerous occasions. He reported her behavior to the CO and XO who did nothing about her "creating a hostile work environment." Instead, they "shot the messenger" by removing the applicant from many of his duties and giving him the disputed OER. LT D's inappropriate behavior and poor performance were not taken seriously until the CO and XO left the MSU. After the new Command Cadre arrived, LT D was investigated and she received serious discipline at an Admiral's Mast. He stated that he believes that LT D had deliberately failed to complete assigned tasks and meet deadlines, knowing that it would negatively impact her supervisor, the applicant. She undermined the applicant's authority and "did not show him the respect he earned and deserved." He stated that the applicant is a superb officer and that the CO and XO had punished him for "doing the right thing" when they "did not want to hold the proper person accountable."
- A chief petty officer (CPO) who worked in the Prevention Department at the MSU from August 2013 to June 2015 while the applicant was the head of the Response Department stated that the applicant was "an exemplary leader who truly embodied the Coast Guard's core values," "treated all unit members with the utmost respect," and "consistently encouraged enlisted members to pursue their academic and professional development." The CPO stated that after observing "wildly inappropriate behavior" by LT D and LT F, the applicant took his concerns and those of other crewmembers to the XO and CO, neither of whom took corrective action. Their inaction "further emblazoned a hostile work environment that ultimately fostered an environment where everyone kept their heads down and tolerated unacceptable behavior" by both of the lieutenants. After the applicant "repeatedly tried to address the issues utilizing the chain of command, [he] was relieved of most of his primary duties and removed from a leadership role. I have zero doubt in my mind that this action was one of retaliation." The CPO stated that he himself had submitted a formal complaint to the District Civil Rights Coordinator after the applicant's "complaints of misbehavior to the command went unaddressed. ... [W]atching [the applicant's] career suffer in retaliation for his efforts to do the correct thing, was, for me,

completely unacceptable.” The CPO stated that the disputed OER is a “gross misrepresentation of [the applicant’s] abilities, performance and, most of all, potential.”

- A retired captain who “oversaw” the applicant at a District Command Center from June 2015 to June 2017 stated that the applicant performed his duties very well and “demonstrated outstanding judgment and professionalism.” The applicant had “quickly earned the trust, respect and admiration from the leadership, senior staff members and the District Commander.” He stated that he was astonished to learn that the applicant had received such a poor OER from the MSU and, although he did not observe the applicant’s performance at the MSU, he is confident that the applicant’s performance far exceeded what was shown on the disputed OER.
- A lieutenant commander who supervised the applicant at another unit from August 2010 to June 2012 stated that the applicant had “demonstrated a perpetual commitment to the service and steadfast dedication to the unit’s objectives,” as well as “a seasoned judgment normally expected of seasoned Patrol Commanders/Coxswains.” The applicant had “earned the unwavering trust of the command and was relied upon to coordinate personnel and responses in a highly stressful life or death mission.” He stated that although he did not observe the applicant at the MSU, the disputed OER is “wildly inconsistent with the work he provided while assigned under my supervision.”
- A commander who worked with the applicant at another unit from June 2011 to June 2012 stated that he had “consistently performed at the highest levels and conducted himself in a manner consistent with the Coast Guard’s core values. He quickly earned my trust, and that of the command as a whole. [He] skillfully orchestrated a myriad of complex, high profile National Security events and operations, supervised over 70 enlisted personnel, and did so while exhibiting excellent judgment. ... [He] particularly excelled in ‘planning and preparedness’ and ‘judgment’ and demonstrated continuous growth in both categories.” In the email forwarding her statement, she noted that she could not sign the statement as the applicant had drafted it because it had included “verbiage regarding my opinion on your 2014” and she had not been present.

Excerpts of Investigations

The applicant submitted excerpts of some witnesses’ statements for investigations conducted in 2016. One member submitted an 11-page complaint with the following comments:

- On several occasions, the witness stated, an LT F called the applicant “donkey” in front of enlisted members and, after the applicant left, LT F called his replacement, LT D, “donkey” too. According to an investigator, another witness stated that LT F had called him “Donkey” and he took it as a joke used when LT F had to teach him something and not to mean jack-ass. He also stated that someone had taken LT F’s plastic donkey.
- On one occasion, LT F and another officer were laughing at a picture in which the applicant looked “sad and beaten down” on his last day. When the witness said, “Awe that’s sad,” LT F replied, “It’s not sad. He got what he fucking deserved.” The witness reported this conversation and LT F was required to remove the photograph from his computer. The witness also stated that many of the crew felt that LT D had been “instrumental in

getting [the applicant] removed from his position because she constantly spoke negatively about him in front of the crew and [his] being removed benefited her career. Additionally, she had many closed door conversations with the Command without [the applicant], her direct supervisor, present. Much of the crew assumed whatever she was telling the Command about [the applicant] was probably ten times worse than what she was saying to us about him. Regardless, it was insubordinate, disloyal, and unprofessional to constantly ridicule a Commissioned Officer and her direct supervisor in front of the enlisted crew.”

- A mannequin was placed in a male restroom, which many civilians used, and it remained there for a few days until the CO required that it be removed. (The applicant stated that he had reported the presence of the mannequin “on numerous occasions” but it was never addressed.)
- One day, LT F came to work wearing a paper mask, and he continued to wear it at his desk even while speaking to his supervisor. The witness stated that this showed that enlisted crew were “held to a higher standard than the Commissioned Officers.” The applicant included a photograph of an officer—presumably LT F—wearing a long white mask with a pointy chin.
- In 2014, one member had stated in a Command Climate Survey that the junior officers treated the unit “like a frat house.” In a working group, LT D had addressed the comment and said, “I know I’m guilty of this.” However, the behavior never changed. During the working group, some officers tried to figure out who had made certain comments. When the witness pointed out that the survey was supposed to be anonymous, an officer said something like, “I know; but I don’t know how we can fix those issues with those people if we don’t know who was affected.”
- When the name of the new District Commander was announced, LT D “called her a ‘bitch’ and stated that she never should have made Admiral anyway because she crashed a boat earlier in her career.” The witness stated that this showed that “there is no limit to what she would say or do to a subordinate.” Another witness confirmed this claim.
- When a subordinate approached another officer (the applicant stated that the officer was LT D) and said he did not “feel like they were jiving,” the officer later reported the comment to the witness and said, “Can you believe that? I’m a [redacted]. I don’t have to fucking jive with him,” which showed her “perception of her positional power and unwillingness to resolve conflicts with subordinates.”
- When LT D was assigned to investigate an incident in which a member had punched a hole in the wall and immediately admitted it to his supervisor, LT D had repeatedly tried to get crewmembers to make statements about prior similar incidents but they refused to do so. (The applicant commented that this shows that LT D had “animosity towards her enlisted members and how the climate of gunning for members was rampant” at the MSU.)

The applicant also submitted excerpts of statements from other witnesses that were submitted for the investigation after two petty officers accused LT D of creating a hostile work environment in the fall of 2015. These excerpts include the following:

- A civilian who had served as the mast representative of the member who had punched the hole in the wall learned that LT D had spoken to the accused and gotten him to sign the charge sheet without his representative present. When the civilian told LT D that she should not have done this, LT D started yelling and cursing at him, “telling [him] that [he] shouldn’t even be involved because [he’s] ‘just a civilian’ and the mast rep is only for the actual mast, not for the time period leading up to the mast.” When the representative showed her the rules in the manual, LT D was very angry and “went on to not only investigate the specific incident but many other issues concerning this member over the past couple of years prior to this incident and getting statements from other members that had no direct involvement with the matter at hand. She recommended mast but the command chose to only issue the PO a page 7.” The member paid for the repair to the wall and shortly thereafter decided not to reenlist.
- A member was in the women’s locker room when LT D was measuring another member for a body fat/weight-in measurement. The member did not actually see the measurements, but LT D asked her to sign the form as a witness. When the member respectfully requested to have the measurements redone the next day so that she could witness them, LT D “was very upset and mad.”
- An independent duty yeoman working at the MSU stated that LT D’s behavior “comes across as very harassing to other members at the unit. Her attitude is poor and I often see her in angry fits, stomping around the unit when she is upset with someone from her Department.” The yeoman stated that she did not want “to get caught in [LT D’s] cross-hairs as I have seen the way she treats members at this unit and do not want to be treated that way myself. ... It is my observation that her actions and attitude have created a hostile work environment for the members” at the MSU.
- A member stated that LT D had created a hostile and offensive work environment. He reported that once when he said, “If you need a diver, I’ll go down on her,” meaning a vessel, LT D started laughing and said, “oh you’d like to go down on her” with sexual overtones, which embarrassed him. She also said, “Wow, I think that’s the first time I was ever able to make you blush.” The member said this was blatant sexual harassment. He also stated that he had heard LT D refer to another member as a “piece of shit” and ask when his enlistment expired, “implying she did not want him to be approved to reenlist.” And LT D once got mad when a member who had to work over the weekend asked her for comp time even though she had just taken comp time herself and she was not the member’s immediate supervisor. Another witness stated that LT D compared this to her asking the Sector for comp time (instead of her own supervisor). (The applicant commented that LT D frequently called one member a “piece of shit” and that when he tried to hold her accountable on her own OER, the XO “ordered [him] to correct it.”)
- According to notes of the investigator, another witness stated that LT D had “talked bad about [the applicant] on a consistent basis. She also talked bad about the port security specialist – that they were missing deadlines. [The applicant] was relieved [of his duties] because he missed deadlines. Several situations that [LT D] had confrontations with [two others]. [The witness’s] impression is that it is like a badge of honor – how she acts.” This same witness stated that LT F “may carry stuff too far with junior petty officers – straddles the line. Calls [someone] “Donkey” – essentially a “jack-ass” in front of others.

Described the collage of pictures in his office – meant to be funny.” (The applicant explained that LT F had had a collage of people, many in offensive poses, in his office, which he had taken down after members complained.)

- A witness stated that a member had undergone a qualification board while on a trip in a government vehicle in October 2015, even though such boards were normally conducted in a conference room, where the member would have reference materials. Another witness stated that the board was conducted in the van because of timing regarding new standards and busyness at the MSU. A third witness stated that the previous command had “played stump the chump in boards. It wasn’t always about mentoring/professional growth.” According to the investigator, a fourth witness stated that conducting the board in the van had been “a good use of everyone’s time” and he did not “notice different lengths in the boards.” (The applicant claimed that some members’ qualification boards had been “lengthier and harder than others. ... The unfair process was told to the command and nothing was done about it. This created a very hostile work environment to many members.”)
- Another witness stated that members had been afraid to take boards under the prior Command Cadre because of random questions “outside the scope of the PQS.” She stated that the “frat house” comment in a 2014 survey might have been due to a “shanking” game in the “bull pen” in which, if someone snuck up and poked you with a pen, you had to do 20 push-ups. She stated that this game had been stopped at the request of a member who had PTSD. She stated that there were also “magnetic darts and mini golf course.”
- According to the investigator, when asked about a “mammals rape mammals” comment LT F had made during a sexual assault prevention course, LT F replied that he “[n]ever said deal with it. [A person] was going to Hilton Head. [LT F had] recently watched a show about the dark side of dolphins. Part way thru saying it [he] tried to self correct. Was not saying in any way [that the person] was going to be raped. Happened sometime in the spring; don’t know when. No one approached him about the incident.” LT F also told the investigator that a female member had asked him to remove her picture from a collage after she gave it to him. It was a picture of her holding a lantern, and he took it down when she asked him to. The investigator wrote that LT F said that “‘Donkey’ is course correction term – term of endearment. You screwed up will you fix this. Have called multiple people ‘Donkey’ not just [redacted]. [LT F] told [redacted] if you don’t like it please tell me. Donkey is from Shrek – related donkey to Shrek; does not use in relation to jackass. No one ever approached him that using ‘donkey’ was inappropriate or offended anyone. Old [redacted] used to call everyone a jack wagon.” LT F stated that some warrant officers had asked if it was okay to give a qualification board during a 90-minute drive back to base in October 2015, which “felt a little weird” but it was the “last opportunity before cut-off” due to an incident. LT F stated that it was “a legitimate board based on questions from previous boards – didn’t feel different or unfair. Did have some look-up questions. Could see how it was perceived by [a third party] as unfair, but didn’t think it was.”

Report of Investigation of Disrespect and False Official Statement by LT D

The applicant also submitted a report of an investigation dated February 18, 2016, into the conduct of LT D on two dates: November 25, 2014, and November 16, 2015. The investigator noted that as a result of certain witnesses' statements for the prior investigation into allegations of harassment—which had not been substantiated—LT D had been read her rights and accused of violating the Uniform Code of Military Justice (UCMJ) by disrespecting a superior commissioned officer, making a false official statement, and committing conduct unbecoming an officer.

The report states that LT D had been assigned to the MSU from July 2013 to January 2016 and that on or about November 25, 2014, LT D had discussed possible future tours of duty with the Senior Investigating Officer and the applicant, whom she had replaced as the head of the Response Department. After stating that she might apply to be an Admiral's aide, LT D had claimed that the new District Commander, a Rear Admiral, was a "bitch" and a "terrible boat CO." Then again, on or about November 16, 2015, when told that the District Commander would be visiting the MSU, LT D had called her a "bitch" in the presence of several members. However, when interviewed, LT D had denied calling the District Commander a "bitch." The report indicates that LT D had met the District Commander once, for a handshake, and had not worked with or for her.

According to the investigator, the applicant stated that his relationship with LT D was "almost adversarial. It was hard to give her tasking without having some kind of pushback of not wanting to carry it out. She was 3 years my senior, and when I would have an assignment, she would say that I need the experience and that I need to do this. When I would push back, she would go to the command."

The investigator concluded that LT D had disrespected the District Commander and committed conduct unbecoming an officer but that she had not made a false official statement. He noted that LT D was "brash and short fused" and might not remember calling the District Commander a bitch. The investigator recommended that LT D be punished at mast for violating Articles 89 and 133 of the UCMJ and permanently reassigned to a different MSU.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on September 6, 2007. In 2009, he attended Officer Candidate School. He was appointed an ensign in the Reserve on May 6, 2009, and began serving on an extended active duty contract as a patrol commander and Operations Division Chief at a Maritime Force Protection Unit. On his first OER, dated March 13, 2010, the applicant received primarily above-standard marks of 5 (on a scale from 1 to 7) in the various performance categories and a mark in the fifth spot of seven on the officer comparison scale, denoting that he was among the better of "the many competent professionals who form the majority of this grade." He was recommended for promotion. On his second OER, dated September 30, 2010, the applicant received primarily marks of 4 and 5 in the various performance categories and another mark in the fifth spot on the comparison scale. The applicant was promoted to lieutenant junior grade (O-2) on November 6, 2010.

On his third and fourth OERs at the Maritime Force Protection Unit, dated January 31, 2011, and May 31, 2011, respectively, the applicant received primarily marks of 5 in the various performance categories, marks in the fifth spot on the comparison scale, and strong recommendations for promotion “with peers.” On his fifth OER, dated January 31, 2012, the applicant received primarily marks of 5 and 6 in the various performance categories, another mark in the fifth spot on the comparison scale, and a strong recommendation for promotion. And on his sixth and final OER at this unit, dated June 1, 2012, the applicant received primarily marks of 6 in the various performance categories, another mark in the fifth spot on the comparison scale, and another strong recommendation for promotion “with peers.”

In June 2012, the applicant transferred to the MSU, where he was head of the Response Department. As such he supervised six members, two civilians, and two auxiliarists and was responsible for “contingency plans, force readiness, exercises, pollution response, waterways management & security threats” for part of the Great Lakes. The XO was his Supervisor, and the CO was his Reporting Officer. On his first OER at the MSU, dated January 31, 2013, the applicant received primarily marks of 5 in the various performance categories, a mark in the fifth spot on the comparison scale, and a strong recommendation for promotion “with peers.” The applicant was promoted to lieutenant on May 6, 2013.

On his second OER at the MSU, dated May 31, 2014, the applicant received primarily marks of 5 and 6 in the various performance categories; a mark in the fifth spot on the comparison scale, which on an LT OER denotes an “excellent performer”; and a strong recommendation for promotion with “best of peers.”

On May 9, 2015, the applicant received a Commandant’s Letter of Commendation for his performance of duty from January 8 to April 17, 2015, while he was temporarily assigned to the Sector, about 50 miles away. The applicant had demonstrated “exceptional competence and initiative” and made significant contributions to bi-national icebreaking efforts “through one of the most challenging icebreaking seasons in more than 40 years on the Great Lakes.”

The applicant’s final OER at the MSU, dated May 31, 2015, is the disputed OER in this case. The OER notes that he supervised five petty officers and two civilians and that he had served at the Sector as a “Cmd Ctr Watchstander 2 days/wk from Nov–May assisting w/ watch rotation while focusing career toward response ashore specialty.” As the applicant’s Supervisor, the XO of the MSU assigned him one low mark of 3 for “Planning and Preparedness,” eight marks of 4, and four marks of 5. The low mark of 3 is supported by this comment:

Failed to adequately plan/prepare for major projects; ineffectively coordinated/tracked progress to ensure on-time completion & submission of all requirements for security & oil resp exercises; required counseling, motivation & repeated goal prioritization to ensure on time submission of assigned tasks.

The CO concurred with the XO’s marks and, in the Reporting Officer’s part of the OER, assigned the applicant marks of 5 in four performance categories but a mark of 3 for “Judgment” and a mark on the third spot on the comparison scale, denoting a “fair performer.” The CO included the following comments:

Actively pursuing qualifications for Response career path but lacks the ability to apply the technical knowledge needed to make decisions as a leader & Dept Head. Attention to detail, effective mgmt. of long term projects & follow-through w/ assigned tasks are areas that must improve if continued promotion w/in CG is desired. [He] has the potential to succeed as a Response officer but must improve his overall leadership & mgmt skills & ability to perform CG missions.

Aggressively sought opportunity for own career development; swiftly integrated into Sec ... Cmd Ctr break-in as SU Controller & continued MSU duties; completed qual augmenting watch schedule & progressed toward Ops Unit qual; provided assistance to others seeking qual. Ineffective judgment skills; often relied upon others to make decisions & provide specific direction; displayed inability to compile critical info/process tasks; failed to present sound decisions & recommendations to Cmd. ...

Not recommended for promotion to next grade w/peers at this time. Many of [the applicant's] primary duties were given to other personnel due to the inability to effectively manage Resp Dept/Incident Mgmt missions & ensure timely completion. [He] has the technical knowledge & abilities that could be of great asset to the CG if proper focus is applied. Continuous direction & guidance is recommended to shape & form mbr's capabilities. However [he] is still capable of effectively performing as an exceptional officer in the CG. Assignment to a Sector Response Division or Dist/Area/HQ Cmd Ctr would assist mbr in understanding of CG missions & growing leadership potential.

In the summer of 2015, the applicant and the CO were transferred to other units and the XO retired. The applicant became a Command Duty Officer at a District Command Center. On his OER dated May 31, 2016, the applicant received primarily marks of 5 and 6 in the various performance categories, a mark in the fifth spot on the comparison scale, and a strong recommendation for promotion "with best of peers." On his next OER, dated May 31, 2017, he received primarily marks of 5 in the various performance categories; a mark in the fourth (middle) spot on the comparison scale, denoting "one of the many high performing officers who form the majority of this grade"; a standard mark of "promote" on the new promotion scale;¹ and a strong recommendation for promotion with "best of peers." On his May 31, 2018, OER, he received primarily marks of 5 and 6 in the various performance categories; a mark in the fourth (middle) spot on the comparison scale, denoting "one of the many high performing officers who form the majority of this grade"; a mark of "promote" on the promotion scale; and a strong recommendation for promotion "with peers."

VIEWS OF THE COAST GUARD

On August 31, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief and adopting the findings and analysis of the case provided in a memorandum signed by Commander, Personnel Service Center (PSC).

PSC noted that the applicant had not filed a reply to the disputed OER and had not applied to the Personnel Records Review Board (PRRB) to have it removed. PSC received sworn declarations from the CO, who was the Reporting Officer, and the OER Reviewer, which are summarized below. Based on those statements, PSC stated that "while command climate

¹ The available marks on the promotion scale on the OER form, ranging from worst to best, are "do not promote," "promotion potential," "promote," "definitely promote," "in-zone reorder," and "below zone select."

issues were known, they had no bearing on the applicant's inability to finish projects on time or provide sound recommendations. Both officers stand by their marks." PSC stated that the applicant had "submitted no evidence to support his claim of retaliation" and that "the OER is based from facts that occurred during the period of report, specifically a major joint exercise the applicant failed to manage." Therefore, PSC recommended that the Board deny relief.

Declaration of the CO

The CO stated that the disputed OER is based on the applicant's—

inability to manage projects and make sound recommendations on his own. When given a straight forward project or task, he performed well, but had difficulty working on large projects and without significant oversight. During this period, the XO conducted counseling with [the applicant] as he did with all officers at the unit. Project management was brought up several times especially relating to the full scale PREP exercise that he was in charge of managing. During a mid-period review, the XO prepared an OER for [him] that showed him his marks were below average and discussed what he had to improve. Difficulty continued and was even noted to the XO by the civilian Port Security specialist who indicated the PREP exercise and other response related activities could fail without a significant change. After discussion with the [Sector's] Prevention Department Head (previous MSU CO) and the Sector, [the applicant] was removed from his primary duties and given the opportunity to work on Command Center qualifications at the Sector. Even during this period, concerns were raised by the PDH [Prevention Department Head] and Sector members related to his decision making process and management. At the end of the period, an initial OER was prepared and review/consulted with OPM [the Officer Personnel Management branch of PSC]. OPM indicated that based on comments and removal of primary duties, marks of 3 were required and appropriate to indicate performance.

In response to the applicant's specific claims about the command climate, leadership, and retaliation, the CO stated the following:

- After the survey conducted in 2014, a working group was formed with officers, enlisted members, and civilians. The working group made recommendations, which were implemented.
- As CO of the MSU, he had punished four members at mast, including two petty officers, a lieutenant junior grade, and a lieutenant commander. "All charges were thoroughly investigated and acted upon as required. If [the applicant] felt no action was being taken, he had every right and opportunity to file official charges to the Command or Sector to take action." He stated that no one had accused LT D with harassment or misconduct until after he and the applicant left the MSU.
- The petty officer who punched a hole in the wall had previously been referred for counseling and anger management and the "second referral was part of the investigation." The CO stated that LT D's investigation "was conducted with legal assistance/review ... [and] not all members were part of those discussions." The CO attached an email in which a judge advocate noted that he had told LT D "to run down info on any further misconduct as well as any info that might be aggravating or mitigating." In response, the CO noted that he had spoken with LT D and the applicant "from a supervisor standpoint re the benefits of mast and other administrative options. I think I am pretty clear on where I want to go just need to discuss with the XO one last time."

- As LT D's supervisor, the applicant could have brought charges against her and the marks he assigned in her OER could have been final. He attached a memorandum on which he noted that at one of the masts he had held, he had reminded the attendees that "anyone can take action, book someone, or bring a concern to the command."
- "There are not set timelines or questions for qualification boards but based on the member's preparation, training, and experience. It was noted by the XO that several members ... thought that all they were required to do was the qualification sign-offs and not any additional reading/research in the reference material that was indicated as part of the qualification. As CO, I typically asked pre-board questions that did require look-ups to ensure the member researched a topic that they had not seen in the ... area or may not encounter all the time. From my memory, I only remember possibly one member not passing an oral board."

The CO concluded that the applicant could make a good officer "but his performance during the period noted was not to a standard expected of a LT and he was marked accordingly."

Declaration of the OER Reviewer

The Review of the OER, who was the Prevention Department Head at the Sector, stated that "[d]uring the OER period, [the applicant] failed to adequately plan or prepare for numerous projects or duties. Specifically for a major joint oil spill exercise between the Coast Guard and [a major oil company]. Additionally, he often struggled in day-to-day department operations and personnel management. Including demonstrating poor judgment and decision making skills. There were significant command climate issues that became known following the change of command at [the MSU]; however, these issues did not affect the previous decision to remove [the applicant] from his primary duties."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

After receiving extensions of the time to respond to the views of the Coast Guard, the applicant submitted his response on December 10, 2018.

The applicant stated that the statement of the Senior Investigating Officer, which he submitted, is sufficient to prove that the OER was retaliatory. The applicant repeated some of his allegations and stated that he had "reported the misconduct and inappropriate behavior of [LT D and LT F] to the command in the Summer and Fall of 2014 and yet nothing was done about it," except to relieve him of his duties and give him low marks on his OER.

The applicant also responded to the claim that he had failed to manage a major joint exercise. He stated that the PREP exercise had taken place on August 12 and 13, 2014. Before the exercise, of the two civilian port security specialists who worked for him, one was going through a second divorce, so he gave him time off "to handle the situation without stressing out." The other one's mother died just before the PREP exercise and so he allowed her "to take time off, properly bury her mother and grieve. I was taking care of my civil servant co-workers by allowing them to grieve while also managing the PREP." The applicant also submitted a copy of the after-action report, dated February 20, 2015, and noted that even though he "supposedly did not

prepare for [the exercise], yet on paper, it appears to be a successful exercise.” He stated that the exercise had received the praise of the District Commander and National Public Radio. He also noted that he was not removed from his duties until October 2014, two months later.

The applicant stated that he was counseled about his performance by the XO only after he had informed the command of the unprofessional actions of LT D and LT F. He noted that he had received a Commandant’s Letter of Appreciation for his assistance at the Sector Command Center in coordinating icebreaking operations, which required good planning and judgment. And while working at the Command Center for six months, he earned a boat forces pin and his Situation Unit Controller qualification, “which involves making spur of the moment life and death decisions.” He also earned a Boarding Team Letter, which allowed him to wear a firearm and assist in boarding vessels and security duties. He argued that if he had had poor judgment, he would not have been allowed to wear a firearm. He stated that he was able to achieve these qualifications at the Sector because there were “no command climate issues, and there were numerous senior officers who were interested in mentoring junior officers.”

To support these allegations, the applicant submitted the following documents:

- A PREP After Action Report dated February 10, 2015, for an exercise on August 12 and 13, 2014, shows that the exercise involved an oil refining and shipping companies; several maritime contractors and nongovernmental organizations; seven Coast Guard units, including the MSU; and fifteen other federal, state, and municipal agencies. The report concludes that most of the objectives of the exercise were met but also identifies significant problems, including Simulation Cell role confusion; “a definite lack of knowledge regarding ICS [Incident Command System] positions,” which was used “by the exercise players as the response management system”; “lack of familiarity with the ‘Planning P’ on the part of many participants”; a “lack of staffing in the Finance and Logistics Section”; a lack of “a good understanding of status changes until late in the exercise” by the Resources Unit; the lack of a “list of responsibilities”; and the lack of familiarity of many of the participants with the Coast Guard’s Response Plans.
- An email with a link to a National Public Radio story from September 15, 2014, titled, “Great Lakes racing to prepare for a new kind of oil spill.”
- A memorandum dated January 13, 2015, shows that the applicant was certified as a Boarding Team Member and that the Sector Commander was “satisfied that [he] possess[ed] the judgment and temperament required to carry and use” a pistol, baton, and pepper spray while performing law enforcement duties.
- A memorandum dated March 3, 2015, states that the applicant had completed the qualifications “to assume the duties and responsibilities as a Sector ... Situation Unit Controller.”
- A certificate, Page 7, and memorandum dated June 4, 2015, show that the applicant had fulfilled the Personnel Qualification Standards to wear a temporary Boat Force Operations pin.

OER POLICIES

Article 2.E.4.b. of the OER Manual, PSCINST M1611.1A, states the following about how a Supervisor should prepare and OER (similar instructions are provided for the Reporting Officer in Article 2.F.2.):

b. For each evaluation area, the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor must 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 selects the appropriate circle on the form. Refer to Table 2-2 Performance Dimension Marking below in determining the appropriate mark to assign to each performance dimension. Inflationary markings dilute the actual value of each evaluation, rendering the OES and the OER itself ineffective.

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d. In the “comments” block following each evaluation area, the Supervisor includes comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four (if applicable). The Supervisor draws on their 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 (if applicable). They should identify 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. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

Table 2-2 of the OER Manual states that a mark of 3 means that the officer “[d]id not meet all the written performance standards in the ‘4’ block.”

On the OER form, CG-5310B, to assign a standard (middle) mark of 4 in the category “Planning and Preparedness,” the Supervisor must find that the officer was “[c]onsistently prepared. Set high but realistic goals. Used sound criteria to set priorities and deadlines. Used quality tools and processes to develop action plans. Identified key information. Kept supervisors and stakeholders informed.”

On the OER form, CG-5310B, to assign a standard mark of 4 in the category “Judgment,” the Reporting Officer must find that the officer “[d]emonstrated analytical thought and common sense in making decisions. Used facts, data and experience and considered the impact of alternatives and political realities. Weighed risk, cost and time considerations. Made sound decisions promptly with the best available information.”

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter under 10 U.S.C. § 1552. The application was timely filed.²

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³

3. The applicant alleged that his OER dated May 31, 2015, is erroneous and unjust and a result of retaliation by his XO and CO after he complained about inappropriate behavior by LT D and LT F. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information 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 it is erroneous or unjust.⁴ 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.⁵ 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.⁶

4. The applicant has not proven by a preponderance of the evidence that the disputed OER contains a "misstatement of significant hard fact." The record shows that the applicant failed to ensure that the MSU's Response Department properly planned for a major exercise in August 2014. The Sector's After Action Report, Commandant's Letter of Commendation, qualifications, and supportive statements from other officers, which the applicant submitted, do not adequately rebut the statements of his rating chain on the OER and in their declarations about his lack of planning and his decision-making as head of the MSU Response Department during the reporting period. The fact that the applicant has received better marks on OERs for other reporting periods and specifically in the categories "Planning and Preparedness" and "Judgment" also

² *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).

³ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

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).

does not show that he met the criteria for higher marks in those performance categories during the reporting period for the disputed OER.⁷

5. The applicant has not proven by a preponderance of the evidence that the disputed OER was retaliatory for his complaints about LT D and LT F to the XO and CO. Most significantly, the applicant never filed a complaint of harassment that could, at least in theory, have caused trouble for the XO or CO (because the Sector and District offices would have learned about his complaint). Nor did he submit substantial evidence of his complaints about LT D and LT F to the XO and CO. The applicant submitted substantial evidence of inappropriate behavior by LT D and LT F, but assuming *arguendo* that he complained to the XO and CO about their behavior, he has not shown that his complaints to the XO and CO would have caused them to remove him from his duties and assign him low marks on his OER if he had been properly performing his duties as head of the Response Department. Although the Senior Investigating Officer and a chief petty officer assigned to the MSU Prevention Department signed statements supporting the applicant's claim that the OER was retaliatory, the Board is not persuaded that the applicant's duties were removed or that he received low marks on the disputed OER because of his alleged complaints to the XO and CO about the two other lieutenants, one of whom was his own subordinate.

6. The applicant has proven by a preponderance of the evidence that his work environment was very challenging for him: In a command climate survey, one member referred to the MSU as a "frat house," and the members apparently played games and played jokes on each other. The applicant's subordinate, LT D, disrespected him behind his back, presumably even before he was removed from his duties.⁸ She also repeatedly offensively criticized one or more of their subordinates and the District Commander, and yet she was apparently more trusted to get the work done by the XO and CO by the fall of 2014. LT F, although not in the applicant's chain of command, was condescending in that he occasionally called the applicant and others "Donkey" in reference to the movie *Shrek* when pointing out an error to them; wore a paper mask in his office at least once—presumably pursuant to a joke or bet; had a collage of members' photographs in his office that the applicant considered offensive; and felt that the applicant "got what he deserved" when he was removed from his primary duties. The applicant has also shown that the XO and CO did not convene an investigation in response to his alleged complaints about LT D and LT F and that the subsequent Command Cadre did convene investigations when members filed formal complaints about LT D and LT F. The investigations show that in 2016 the accusations of harassment against LT D were found to be not substantiated but that she received NJP for calling the District Commander a "bitch." Although the applicant's work environment was clearly challenging for him, the Board finds that he has not proven by a preponderance of the evidence that he was sabotaged or otherwise unfairly prevented from performing his duties properly.

⁷ *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) ("[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.").

⁸ Investigations conducted in the fall of 2015 and winter of 2016, after the applicant was permanently transferred from the MSU in June 2015, show that LT D had repeatedly criticized the applicant to others. Although the witnesses' statements do not provide clear dates and so LT D's criticisms could have started only after the applicant had been removed from his duties, because the investigator called LT D "brash and short fused," the Board assumes that her criticisms of the applicant started before he was removed from his duties.

7. The applicant has not proven by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁹ Therefore, the applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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).

ORDER

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

March 22, 2019

