

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-032

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant’s completed application on December 2, 2011, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 3, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by removing two derogatory officer evaluation reports (OERs)—one regular (ROER) and one special (SOER)—that he received as a temporary officer (lieutenant junior grade; LTJG) in 2005, when he was the officer in charge (OIC) of xx. As the OIC, he supervised 19 petty officers and was responsible for xx. However, he was removed from this assignment after a subordinate accused him of harassment and assault. The applicant also asked the Board to remove from his record a related CG-3307 (“Page 7”) documenting his involvement in an “alcohol incident”¹ and his treatment for alcohol abuse.

¹ Article 20.A.2.d.1. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) (hereinafter Personnel Manual) defines an “alcohol incident” as “[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member’s loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.” Article 20.B.2.g. requires that an alcohol incident be documented in the member’s record on a Page 7. Article 20.B.2 h. states that following a second alcohol incident, officers must be discharged and enlisted members “will normally be processed for separation.”

The applicant alleged that the investigation of the incident that resulted in this derogatory documentation showed that he did not sexually harass a subordinate. He also alleged that he was not punished for sexual harassment when he was awarded non-judicial punishment (NJP) at mast.² However, his commanding officer (CO) “decided to place hearsay into an official record” by including allegations of sexual harassment in the disputed OERs to ensure that he was not selected for promotion and did not receive a permanent commission.

The applicant alleged that the Page 7 documenting his treatment for alcohol abuse should be removed from his record because it indicates that he would begin rehabilitation treatment on October 21, 2005, when in fact he voluntarily began treatment in June 2005.

Regarding the timing of his application, the applicant stated that in 2005 he was unaware that the derogatory documents would continue to negatively affect his career after he lost his temporary commission and reverted to enlisted status. However, he was recently told that the derogatory documents prevented his selection for an appointment as a chief warrant officer.

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

- In the disputed ROER, which covers the applicant’s service from February 1 to June 30, 2005, he received several good and average marks but a low mark of 2 for “Workplace Climate”; below-average marks of 3 for “Judgment,” “Responsibility,” “Professional Presence,” and “Health and Well-Being”; and a low mark in the second spot on the Comparison Scale, denoting him as “a qualified officer.” The ROER contains many negative comments, including a statement in block 2 that it “is a derogatory Officer Evaluation” and supporting comments that he “[e]xhibited disregard for equal & respectful treatment of female subordinate while deployed as ‘in-charge’ superior”; that he failed to maintain sobriety, exercise good judgment and self-control; that he “consumed alcohol in the presence of enlisted forces to the point of memory loss, then engaged in questionable male-female interaction; destroyed camaraderie amongst [members]; and that he was “relieved of OIC duties for abusive alcohol consumption during ‘liberty’ & subsequent failure to uphold fair treatment standards of juniors. Strongly recommend revocation of [member’s] commission. Not recommended for promotion to O-3.” In an addendum to the ROER, the applicant stated only that he was “aware of the performance report and decline to comment. I have been counseled on the contents of Article 10.A.4.h. of the Coast Guard Personnel Manual.”

In the margins of this ROER, the applicant wrote notes complaining that the “date submitted,” June 9, 2005, precedes the dates of signature by the officers on his rating chain, July 22 and 27, 2005,³ and that the ROER was labeled “derogatory” in block two “without an inquiry or NJP.”

² Under Article 15 of the Uniform Code of Military Justice (UCMJ), commanding officers may hold a hearing (“mast”) to investigate members’ minor offenses against the UCMJ and may award nonjudicial punishment (NJP) instead of seeking a felony conviction by court-martial. 10 U.S.C. § 815.

³ The applicant apparently misunderstands that the “date submitted” in block 1 n. of an OER is not the date the rating chain submits the OER to the Personnel Command but the date whoever initiates the OER—normally the

- The disputed SOER covers two days from May 31 to June 1, 2005. It states that it is a derogatory OER prepared pursuant to Articles 10.A.3.c.1.b. and 10.A.4.h. of the Personnel Manual to document his NJP for assault and conduct unbecoming an officer and a gentleman. A Punitive Letter of Reprimand, which was the applicant's punishment at mast, is cited as an attachment to the SOER.

In the SOER, the applicant was assigned the lowest possible mark—a mark of 1 on a scale of 1 to 7—in the performance categories “Looking Out for Others,” “Teamwork,” “Workplace Climate,” “Judgment,” “Responsibility,” and “Professional Presence”; a mark of 2 for “Health and Well-Being”; and the lowest possible mark (“Unsatisfactory”) on the Comparison Scale, in which a CO compares an officer with all other officers of the same rank whom the CO has known throughout his career. All other performance categories are marked “not observed.” The low marks in the SOER are supported by the following written comments:

Consumed alcoholic beverages, with subordinates, to the point of memory loss. Subsequently invited an E-X in his chain of command to his private quarters where he proceeded to make sexual advances and briefly attempted to prevent the subordinate's egress. Following the subordinate's departure, he pursued her further through numerous phone calls to her room. Significant abuse of leadership authority resulted in removal from primary duties as a Team Leader. Derogatory behavior divided members of his xxxxxxxx, served as a catalyst for the E-X's early release from Coast Guard service, and added significant leadership burdens to the Xxxxxxxx's senior enlisted member. Actions demonstrated complete disregard for COMDT's Human Relations Policy.

Failed to uphold the CG Core Values, in particular Respect. Demonstrated exceptionally poor judgment and responsibility while leading a xxxxxxxx on deployment. Became intoxicated and subsequently harassed and assaulted a Petty Officer under his command. Actions brought discredit upon the Coast Guard and the Officer Corps. In addition, he caused extreme unnecessary stress on his subordinate which led to her request for early release from Extended Active Duty. Member was awarded a Letter of Reprimand at Non-Judicial Punishment.

Member was on track to be an exceptional officer but his actions demonstrated a significant Core Values flaw. Recommend revocation of member's commission. Alcohol was a major contributing factor in this incident.

In the margins of this SOER, the applicant has written claims that the comments are erroneous because the inquiry found no evidence that he had “pursued her further through numerous phone calls to her room” and the E-X is “still a part of the Coast Guard.”

- In the Punitive Letter of Reprimand, dated October 17, 2005, the applicant's CO noted that the applicant had received NJP at mast on October 13, 2005, for one specification of assault and one specification of conduct unbecoming an officer and a gentleman, which are violations of Articles 128 and 133 of the Uniform Code of Military Justice (UCMJ), respectively. The CO stated that “[a]fter a night of fraternizing and excessive drinking in the presence of enlisted personnel from your crew, you called [a female, subordinate xxxxxxxxxxxxxx (XXX)] to come to your motel room. Upon entering your room, [she] witnessed obscene movies on your television, became uncomfortable, and attempted to

reported-on officer—completes the personal information in block 1 and submits the OER to his rating chain for completion.

leave. At that point, you wrongfully and dishonorably grabbed her, closed the door and told her she needed to stay.” The letter states that the subordinate was eventually able to leave the motel room but was significantly affected by the incident. The CO reprimanded the applicant for his “reprehensible behavior” and poor judgment, leadership, and professionalism. He noted that the applicant’s consumption of alcohol was not an excuse and wrote, “That said, I understand you are undergoing alcohol rehabilitation and I strongly encourage you to continue that program over the long haul.”

- A Page 7 that the applicant signed on October 21, 2005, notes that the applicant had been involved in an “alcohol incident” on May 31, 2005, when his abuse of alcohol led to his NJP for assault and conduct unbecoming an officer and a gentleman. The Page 7 notes that the applicant had been counseled on the Coast Guard’s alcohol policies and “the serious nature of this incident.” The Page 7 states that the “unit CDAR [Command Drug and Alcohol Representative] will arrange an appointment with [a hospital clinic to] determine the nature of your relationship with alcohol. It is recommended that you abstain from the use of alcohol until your screening and assessment is completed.” The Page 7 further states that a second alcohol incident would result in his separation from the Coast Guard.

VIEWS OF THE COAST GUARD

On April 18, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request.

The JAG argued that the applicant has not proved that his rating chain erred by including comments regarding sexual harassment in the disputed OERs. The JAG noted that the phrase “sexual harassment” does not appear anywhere in the OERs and that his arguments in this regard are without merit. The JAG argued that the applicant has failed to rebut the presumption of regularity or to prove by a preponderance of the evidence that his rating chain failed to properly carry out their duties with respect to the disputed OERs.

The JAG noted that because the disputed OERs are not erroneous because of any prejudicial error, there are no grounds for removing the applicant’s failures of selection for promotion to lieutenant or for appointment to chief warrant officer.

Regarding the disputed Page 7, the JAG stated that the applicant had not proved that his CO erred in finding that his conduct constituted an alcohol incident and should be documented as such in his record.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC) and agreed with PSC that certain administrative errors in the disputed OERs should be corrected. PSC noted that

- Article 10.A.3.c.1.b. of the Personnel Manual in effect in 2005 requires preparation of an SOER whenever an officer receives NJP and that the SOER should show the nature of

the proceeding, the punishment imposed, and “other information necessary to reflect the performance evaluated.”

- Article 10.A.3.c.1.a. stated that an OER documenting the removal of an officer from his primary duties “is derogatory and must be submitted per Article 10.A.4.h.”
- Article 10.A.4.h.1. states that a “derogatory OER” is any OER that contains at least one lowest possible mark of 1 in any performance category or a mark of “Unsatisfactory” on the Comparison Scale and documents “adverse performance or conduct which results in the removal of a member from his or her primary duty or position.”

PSC stated that the disputed OERs were properly prepared as “derogatory” reports in accordance with these requirements and denied that the disputed OERs state that the applicant sexually harassed his subordinate. PSC noted that while the SOER uses the word “harassed,” not all harassment is sexual harassment, and the comment does not refer to the gender of the victim. PSC alleged that the disputed OERs fairly and accurately represent the applicant’s performance as an officer during the period in question.

PSC noted that the applicant failed to provide a substantive addendum to the OERs, to file OER Replies, and to seek correction of the disputed OERs through the Personnel Records Review Board.

PSC also noted three harmless, administrative errors in the disputed OERs and recommended that the Board correct them:

- The ROER should be marked in block 1.l. as an SOER, instead of in block 1.k. as a regular OER and that block 2 of the ROER should contain a citation to the article of the Personnel Manual under which it was prepared.
- The period of report for the SOER should not be the two days on which the applicant’s misconduct occurred but the day he was awarded NJP, instead.

The PSC made no comment on the applicant’s allegations about the Page 7. However, in support of PSC’s claims, all three members of the applicant’s rating chain submitted declarations regarding the applicant’s case, which PSC submitted:

Supervisor’s Statement

The applicant’s Supervisor was the Operations Officer of the XXXXXX. The Supervisor stated that the applicant’s team was deployed when the incident occurred and that the CO’s standing orders required the team to abstain from alcohol during a deployment. However, the applicant disobeyed this order and drank alcohol with his team to the point of not being able to remember anything. The Supervisor stated that the OERs and Punitive Letter of Reprimand were prepared primarily based on the testimony of the female XXX since the applicant could not remember anything.

Regarding his use of the word “harassment,” the Supervisor stated that multiple witnesses reported that the applicant had either slapped or tried to slap the XXX’s butt earlier in the evening. He noted that he thinks the order of events in the SOER might be wrong because he remembers that the applicant made numerous phone calls to the room where the XXX and a crewmate were staying in order to try to get the XXX to come to his room, not after she left his room. Moreover, the XXX only went to his room after the applicant issued her a direct order to do so. The Supervisor stated that the crewmate corroborated the XXX’s statements about the multiple phone calls.

Regarding the Page 7, the Supervisor noted that it should have been prepared in June 2005 but was overlooked and so prepared late. The Supervisor stated that the applicant knew that he had failed as an officer by drinking to excess and “then acting with disregard to the Commandant’s Sexual Harassment Policy.” He noted that the applicant had signed all the documents without challenging them.

Reporting Officer’s Statement

The Executive Officer (XO) of the XXXXXX served as the applicant’s Reporting Officer. The XO stated that when the applicant’s xxxxxxxx returned from a deployment, a XXX reported that the applicant had consumed alcohol, touched her, followed her to the hotel, grabbed her, and proceeded to call her room continuously. The XO stated that the applicant voluntarily underwent alcohol rehabilitation and that the disputed OERs and Page 7 resulted from his misconduct.

Commanding Officer’s Statement

The CO of the XXXXXX served as the Reviewer of the applicant’s OERs. He stated that he followed the guidelines in the Personnel Manual when reviewing the OERs. The CO stated that as a LTJG with an upcoming selection board, the applicant was due a regular OER at the end of June 2005. Therefore, they prepared the ROER and labeled it derogatory because the applicant had been relieved of his primary duty since “the totality of the circumstances led me to lose confidence in his ability to lead his xxxxxxxx.” The CO stated that the SOER was required because the applicant received NJP at mast.

Regarding the applicant’s complaint about comments about the sexual nature of his misconduct, the CO stated that such comments were “derived from the accusations, statements, and conversations at the time.”

The CO stated that the Page 7 was required under the Personnel Manual to document the applicant’s alcohol incident and the need for alcohol screening and assessment but noted that when the Page 7 was prepared, the applicant had previously entered alcohol rehabilitation treatment “on his own initiative.”

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 1, 2012, the applicant responded to the views of the Coast Guard by stating that he has no objection to the recommendation in the advisory opinion.

APPLICABLE REGULATIONS

OER Regulations

Article 10.A.1.b.1. of the Personnel Manual in effect in 2005 (Change 39) states that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Under Article 10.A.3.a., LTJGs receive a regular, semiannual OER (ROER) on June 30th when they are eligible for selection for promotion.

Article 10.A.4.c.4. of the Personnel Manual provides the following instructions for Supervisors completing their section of an OER (similar instructions are provided for Reporting Officers in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. ... After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. ...

e. Comments should amplify and be consistent with the numerical evaluations. 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.

Article 10.A.4.c.8.a. states that on the Comparison Scale in an OER, a Reporting Officer "shall fill in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known."

Article 10.A.4.h.1. defines "derogatory" OERs as follows: "Derogatory reports are OERs that indicate the Reported-on Officer has failed in the accomplishment of assigned duties. Derogatory reports are only those OERs which: a. Contain a numerical mark of one in any performance dimension, or b. Contain an "unsatisfactory" mark by the Reporting Officer in section 9 [which contains the Comparison Scale]. c. Documents adverse performance or conduct that results in the removal of a member from his or her primary duty or position."

Article 10.A.4.h.2 states that when an officer receives a derogatory OER, he may respond to the marks and comments in an addendum before the OER is passed to the Reviewer. The Supervisor and Reporting Officer may add comments to the addendum before forwarding it to

the Reviewer, who ensures that the information in the OER is consistent and that the derogatory information is substantiated.

Article 10.A.3.c.1. provides the occasions on which a member may receive a type of “Exception OER” known as a special OER (SOER). It states that for SOERs,

[t]he Commandant, commanding officers, higher authority within the chain of command and Reporting Officers may direct these reports. The circumstances for the Special OER must relate to one of the situations described in subsections a. through e. The authorizing article listed below should be cited in Section 2 of the OER along with a brief description of the circumstances which prompted the OER’s submission.

a. A special OER may be completed to document performance notably different from the previous reporting period, if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or reassignment. This report should not normally reflect performance that is reportable under Article 10.A.3.c.1.b. Notably changed performance is that which results in marks and comments substantially different from the previous reporting period and results in a change in the Section 9 comparison or rating scale. This OER counts for continuity.

b. ... A special OER is also required when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority’s action on an investigation includes direction that a Special OER shall be prepared because the evidence established that the officer was criminally culpable. ...

(1) The reporting period for this special report will be the time frame during which the officer’s conduct prompting the report occurred. The report shall clearly state: (1) the nature of the proceeding prompting the report and the result of the proceeding, e.g. criminal conviction, non-judicial punishment, or final reviewing authority’s action directing a special OER due to criminal culpability; (2) any punishment imposed as a result of criminal conviction or non-judicial punishment; and (3) other information as necessary to accurately reflect the performance being evaluated. Information about the proceeding may be included in the report even if the proceeding took place outside of the reporting period. The evaluation shall be limited to those areas affected by such conduct, since all other dimensions will be evaluated in the regular OER. Any dimension which is not evaluated shall be marked "not observed." A Section 9 comparison or rating scale mark and Section 10 comments on the officer’s potential are required. This OER does NOT count for continuity. ...

c. Special OERs may be submitted for officers being considered by selection panels or selection boards for promotion, extension, or continuation ...

d. To document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted. This report should not normally reflect performance reportable under Article 10.A.3.c.1.b.

e. When specifically directed by another article in this manual, e.g., Article 4.F.6., Relief for Cause. This OER may count for continuity, depending upon the circumstances which prompt its submission.

Article 10.A.4.f.1. states that an OER comment shall not “[m]ention the officer’s conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination inves-

tigations) except as provided in Article 10.A.3.c. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 10.A.4.g. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.”

Article 10.A.4.g. allows an officer to file an OER Reply to any OER within 21 days of receiving it to “express a view of performance which may differ from that of a rating official.”

Alcohol Abuse Regulations

Article 20.B.2.g. of the Personnel Manual states that following a member’s first involvement in an alcohol incident,⁴ the member shall be counseled about Coast Guard policy on alcohol abuse and the counseling shall be documented in the member’s record with a warning that a second alcohol incident will result in their separation from the Coast Guard.

Article 20.B.2.e.1. of the Personnel Manual states that any member involved in an alcohol incident must be screened for alcohol abuse or dependency, and the results of the alcohol screening must also be documented in the member’s record along with a statement of the recommended treatment, if any.

Article 14.B.2.a. of the Personnel Manual allows a member to appeal a Page 7 or similar documentation through his chain of command.

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 over this matter under 10 U.S.C. § 1552. Although the application was not filed within three years of the applicant’s discovery of the allegedly erroneous documents, it is considered timely because the applicant has remained on active duty as an enlisted member.⁵

2. The applicant alleged that his 2005 ROER and SOER are erroneous and unjust because they state that he committed sexual harassment and that the Page 7 documenting an alcohol incident is erroneous and should be removed because it indicates that in October 2005 he had not yet begun alcohol rehabilitative treatment whereas in fact he had begun treatment voluntarily in June 2005. The Board begins its analysis in every case by presuming that the disputed documents in an applicant’s military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the documents are erroneous or unjust.⁶

⁴ See footnote 1, above, for definition of “alcohol incident.”

⁵ *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).

⁶ 33 C.F.R. § 52.24(b).

Absent specific evidence to the contrary, the Board presumes that Coast Guard officers have acted “correctly, lawfully, and in good faith” in preparing OERs and other documents.⁷ With regard to his request to expunge the OERs in particular, 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,” a prejudicial violation of a statute or regulation, or factors “which had no business being in the rating process.”⁸

3. The Board finds that the applicant’s claim that the disputed OERs erroneously and unjustly accuse him of “sexual harassment” lacks merit. The phrases “sexual harassment” and/or “sexually harass” do not appear in either OER. Nor has the applicant proved that the inclusion of such a phrase in an OER would be erroneous or unjust even if he was not punished at mast for sexual harassment. Nothing in the Personnel Manual requires an officer to be found guilty of a UCMJ violation at NJP or court-martial before misconduct can be mentioned in an OER. In fact, Article 10.A.4.f.1. of the Personnel Manual expressly allows rating chains to make comments about an officer’s misconduct even if it is still the subject of an ongoing proceeding, such as an investigation, as long as the proceeding itself is not mentioned (except when an SOER is required to document such proceedings pursuant to Article 10.A.3.c.). The applicant has not proved by a preponderance of the evidence that any of the marks or comments about his misconduct in the disputed OERs are false or misleading, that they constitute or contain a prejudicial violation of any law, or that they were adversely affected by bias or some other “factor that had no business being in the rating process.”⁹ Therefore, the Board finds no grounds for removing the disputed OERs from the applicant’s record.

4. The applicant asked the Board to remove the Page 7 documenting his alcohol incident from his record because the wording of the Page 7 does not show that he had already voluntarily begun alcohol rehabilitation treatment. However, the documentation of the alcohol incident is required by Article 20.B.2.g. of the Personnel Manual and nothing in Article 20.B.2.g. requires the Page 7 to include any comment at all about past or future screening, though it is not prohibited either. The Board finds that the applicant is not entitled to have the Page 7 documenting his alcohol incident state that he had already voluntarily begun alcohol rehabilitation treatment in June 2005. The applicant alleged that the disputed comment—“The unit CDAR will arrange an appointment with [a hospital clinic to] determine the nature of your relationship with alcohol. It is recommended that you abstain from the use of alcohol until your screening and assessment is completed.”—is erroneous, but aside from the applicant’s own claim, no evidence in the record directly refutes this statement of what the CDAR was tasked to do in October 2005. Because the applicant had already voluntarily begun treatment, as noted in the Punitive Letter of Reprimand, it seems somewhat unlikely, although certainly not impossible, that the CDAR arranged for a second alcohol screening. However, regardless of whether the CDAR followed through, the Board finds that the error, if any, would be harmless¹⁰ because Article 20.B.2.e.1. of

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁹ *Id.*

¹⁰ See FED. R. CIV. P. 61 (“Harmless Error: ... At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”)

the Personnel Manual requires alcohol screening following an alcohol incident and documentation of that screening in the member's record. Therefore, the discussion of the screening in the Page 7 documenting the applicant's alcohol incident is not *per se* prejudicial since all members involved in an alcohol incident must be screened and the screening must be documented in their records.

5. The Board notes that the disputed comment in the Page 7 erroneously implies, but does not state, that the applicant did nothing to seek rehabilitation treatment between the date of his alcohol incident, May 31, 2005, and the date he signed the Page 7, October 21, 2005. The applicant argued that this erroneous implication is unjust. The Board, however, is not convinced that a mere implication requires correction especially when the prejudice caused by the erroneous implication, if any, is not noticeable given the prejudice resulting from the alcohol incident documented on the Page 7. In addition, the Board notes that the applicant signed the Page 7 and could have appealed the wording pursuant to Article 14.B.2.a. of the Personnel Manual if he found it to be erroneous or prejudicially misleading. Therefore, the Board finds insufficient grounds in the record for removing the Page 7 from the applicant's record.

6. The Coast Guard recommended that the Board change the reporting period for the SOER from May 31 to June 1, 2005, when the misconduct occurred, to the date of the applicant's mast. However, Article 10.A.3.c.1.b.(1) of the Personnel Manual states that for an SOER documenting NJP, "[t]he reporting period for this special report will be the time frame during which the officer's conduct prompting the report occurred." Since the applicant's (mis)conduct occurred on May 31 and June 1, 2005, rather than the date his command held the mast, the Board finds that the period of report for the disputed SOER is not erroneous and needs no correction.

7. The Coast Guard recommended that the Board change a mark on the disputed ROER to show that it was not a regular OER but a special OER prepared pursuant to Article 10.A.3.c.1.a. of the Personnel Manual to document the applicant's reassignment from his primary duty as an OIC. The preponderance of the evidence shows that the applicant's command prepared this derogatory OER both because the applicant's semiannual OER was due and because the applicant had been reassigned/removed from his primary duty. The OER itself states that it is derogatory and that the applicant was removed from his primary duty. Although nothing in the Personnel Manual prevents a regular OER from being derogatory, it is not clear from the regulations where that status is supposed to be shown on a semiannual OER. The applicant's OER identifies it as derogatory in block 2, as required by Article 10.A.3.c.1. Therefore, the Board finds that a mark in block 1.l., denoting the OER as "special," would be more consistent with the rest of the OER than the mark in block 1.k., which denotes the "occasion for report" as "annual/semiannual." Moreover, the applicant stated that he has no objection to the recommendation of the Coast Guard. Accordingly, the Board will direct the Coast Guard to make this change.

8. The Board agrees with the Coast Guard that the mark in block 1.k., denoting the occasion for the report as "annual/semiannual" is not prejudicial to the applicant. If it is error, it is a harmless administrative error, and the mark is not clearly erroneous because "annual/semiannual" OERs may be derogatory pursuant to Article 10.A.4.h.1. of the Personnel Manual.

Therefore, the correction of this mark does not warrant any further corrections of the applicant's record.

9. The applicant has not proved by a preponderance of the evidence that the two disputed OERs or the Page 7 documenting his alcohol incident contain any prejudicial errors. Therefore, his request for relief should be denied, but the mark in block 1.k. of the disputed ROER should be removed or struck out and a mark of "special" in block 1.l. should be entered, instead.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied, except that his OER for the period February 1 to June 30, 2005, shall be corrected by removing or striking out the mark in block 1.k., which shows the occasion of the report to be "annual/semiannual," and marking block 1.l. to show that the OER is a "special" one, instead.

