

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-190

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 July 11, 2012, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 25, 2013, 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 [REDACTED] in the Coast Guard, asked the Board to expunge from his record an officer evaluation report (OER) covering his service as the Engineer Officer of an [REDACTED] from July 3, 2009, through July 31, 2010, or to correct the OER to reflect the quality of service he actually provided during the reporting period, and to promote him directly from [REDACTED]. The disputed OER contains two above-standard marks of 5,¹ eight standard marks of 4, four below-standard marks of 3, and four poor marks of 2 for the various performance dimensions, a mark in the third spot on the comparison scale,² and a recommendation strongly against promotion.

The applicant alleged that he received no counseling during the reporting period for the disputed OER and that the low marks and negative comments were unexpected. He believes that they were an act of reprisal by his supervisor for an incident that occurred on August 20, 2010,

¹ Coast Guard officers are evaluated in 18 performance dimensions, such as "Teamwork" and "Judgment," on a scale of 1 (worst) to 7 (best). A "standard" mark of 4 in a performance dimension means that the officer's performance met the expected high standards of all Coast Guard officers for that category as described on the OER form. Personnel Manual, Art.

² On an OER comparison scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his or her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of "unsatisfactory" for a mark in the first spot on the scale to a high of "a distinguished officer" for a mark in the seventh spot. A mark in the third, fourth (middle), or fifth spot on the scale denotes the officer as "one of the many competent professionals who form the majority of this grade."

after the reporting period [REDACTED] before the OER was completed. He provided [REDACTED] explanation [REDACTED]

The applicant stated that soon after he reported for duty on the [REDACTED] began raising issues about safety and scheduling with his XO, and his [REDACTED] Officer (CO). On May 27, 2010, he sent an email to the District [REDACTED] voicing his concerns. On August 4, 2010, after the reporting period [REDACTED] violation when 3 crewmembers [REDACTED] to an unannounced change of [REDACTED] rule. He objected [REDACTED] XO's safety. Their conversation deteriorated to [REDACTED] XO was overheard asking him, "[REDACTED] are you being such an asshole." On August 24, 2010, the CO un [REDACTED] applicant from his duties, citing COMDTINST M6000.1E and claiming that since reporting to the cutter, the applicant [REDACTED] been exhibiting [REDACTED] errors and schedule inconsistencies common to an operational unit." Then the command referred [REDACTED] pursuant to COMDTINST M5370.1, and [REDACTED] Dr. S diagnosed him with "Occupational Impairment: PTSD symptoms." However, the negative OER he received in late September 2010 [REDACTED] had not been formally counseled about his performance, and there is no evidence supporting the low marks he was assigned by the XO and CO. The applicant noted that, [REDACTED] being placed on light duty for [REDACTED] months, on January 11, 2011, another doctor cleared him as being fit for unrestricted duty because he had no symptoms of PTSD.

[REDACTED] cant alleged that [REDACTED] was improper and unjust because he "never exhibited behavior that suggested he was a [REDACTED] and [REDACTED] he was never counseled about his behavior while aboard the cutter. [REDACTED] decision to refer him [REDACTED] health evaluation was also a matter of reprisal for the objections he [REDACTED] the mental health referral. The applicant argued that "[b]ecause there is no record of counseling [REDACTED] the two logical conclusions that can be drawn: Either the Commanding Officer of the [cutter] jeopardized the safety of the crew by allowing [the applicant] to remain on board for 13 months [REDACTED] August 24, 2010 mental health referral was reprisal for [his] objection to the decision to change the [cutter's] training schedule." The applicant alleged that the command violated COMDT PUB P6520.1 by referring him for a mental health examination in reprisal for raising objections to schedule changes due to his safety concerns.

The applicant's [REDACTED] comments in the OER are [REDACTED] inconsistent. One states that he "demonstrated support for crew concerns" while others claim that he showed "no respect for shipmates," "displayed unprofessional behavior and attitude," and was "unsupportive of team decisions made through collaboration and consensus." The applicant alleged that any objections to scheduling he voiced "were always motivated by the concerns of the crew." Moreover, several commendations he received during the reporting period are not highlighted in the [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
The applicant served on active duty as an enlisted member from [REDACTED] and from September 1991 until June 1, 2004, when he [REDACTED]. He received [REDACTED] member, including two Achievement Medals and a Commendation [REDACTED]
[REDACTED]

From [REDACTED] [REDACTED] for this work, he received [REDACTED] some 7s; marks of [REDACTED] and 5 [REDACTED] such as Speaking & Listening, Workplace Climate [REDACTED] Well-Being; marks in the sixth spot on the comparison scale, denoting an "Exceptional Officer"; and very strong recommendations for promotion. He received a second Commendation Medal for this tour of duty. [REDACTED]

From June 2006 to July 2009, the applicant served as the [REDACTED] [REDACTED] with seven direct subordinates in the [REDACTED]. On his three OERs for this work, he received mostly marks of 6 and 7; some marks of 4 and 5 for a few performance dimensions, such as Teamwork [REDACTED] Professional Presence, and Health and Well-Being; marks in the sixth spot on the comparison scale; and very strong recommendations for promotion. He was promoted to [REDACTED] on June 1, 2008, and received [REDACTED] third Achievement Medal for this tour of duty.

On July 3, 2009, the applicant reported to the [REDACTED] to serve as the [REDACTED] with twenty direct subordinates. On January 21, 2010, the CO awarded to the applicant and others on the cutter's [REDACTED] Guard Meritorious Team Commendation for their "extraordinary [REDACTED] from August [REDACTED] 29, 2009. The citation for the award notes that while conducting [REDACTED] [REDACTED] and demonstrated "the utmost in professional competence and commitment to safety." [REDACTED]

On May 27, 2010, the applicant sent an email to Coast Guard attorney requesting advice. He wrote the following:

I need your advice. I know what I show you can hurt a person, but this unit needs a command they can depend on [REDACTED]

Today is the day I was talking about last time I talked to you. This is the timeframe for today that made me [REDACTED] respect with this command. [REDACTED]

Yesterday morning there was a department head meeting because the XO want[ed] to get u/w [underway]. Bosn' and myself said no because the schedule had us in [port] and the crew was expecting to be in [port]. This isn't a small boat that just gets u/w because one p [REDACTED] good idea.

[REDACTED]

Also yesterday (later), there was a department head meeting to discuss today's schedule, it was planned that the ship would get u/w early (0700) and return at 0900. This plan was set and when I left about 1400 it was still scheduled as planned.

Today I came in by 0600 and OPS told me that the XO talked to him later yesterday about staying out later and we can leave all the people that need to see the doctor (flight surgeon) behind and we will most likely be out later, as long as the Capt'n can see the doctor too. I waited for someone (command) to let me know about the change. At 0630 I went to the XO stateroom to talk about the change, he has someone in there so I went to the CO. I told her I have a non-rate with a dentist apt at 1000, are we going to be back in time. The schedule was back at 0900 and I wasn't informed about the change. She said we will be back around 0900.

Well it's 0900 and we are at the [XXXX] entrance and it takes 20 minutes just to get back, not even mooring. Now I brought my non-rate and now she will miss her 1000 appt. Dentist apps are hard to get along with med. apps.

I'm writing this because the morale on boat is low and there are a lot of people, including myself, that feel "unsafe" with this command (XO and CO).

I know this is a big issue, and I have enclosed my records of events that made me come up to this decision.

I just got a phone call from the bridge, they contacted the station to come out and get the non-rate for her dentist apt. How about the rest of the crew that thought we were mooring at 0900.

Can you give me some advice, I truly need it.

On June 30, 2010, the CO sent an email about technical problems that were delaying the cutter's deployment to the [REDACTED]. She noted that "[REDACTED] and [chief petty officer] have done a tremendous amount of work in expediting [REDACTED] has been the driving force in working with the commercial companies to make [REDACTED], but the delay in communications and support errors has once again had a negative impact on our operational readiness."

On July 8, 2010, an officer sent an email to the CO stating that the [REDACTED] persistence and expertise," and concluding, "Sounds like you are lucky to have him." The CO replied that "the Canadians are very lucky I have him or [cutter] wouldn't be going on this mission." She cc'ed her email to the applicant.

Disputed OER

The supervisor's signature block on the disputed OER, covering the applicant's service from July 3, 2009, through July 31, 2010, indicates that the XO signed it on August 11, 2010, but the date on the digital signature is unreadable. The XO assigned the applicant low marks of two and three in the performance dimensions "Adaptability," "Speaking & Listening," "Looking Out for Others," "Teamwork," and "Workplace Climate." He supported these low marks with the following comments:

- Adaptability: "Failed to adapt to new leadership; exhibited highly impatient & disrespectful reaction to last minute Cmd decision to transport [REDACTED] to homeport. Out-

spoken critic who openly advocated in front of crew against many CG initiatives incl modernization & repeal of don't ask, don't tell policy.”

- Speaking & Listening: “Irritable communicator; unapproachable & argumentative during mundane conversations; held defensive posture & rambled neg thoughts. Prone to frequent inappropriate & offensive outbursts directed at superiors & subord[inate]s based upon hasty conclusions & incomplete info; poor listener.”
- Looking Out for Others: “Demonstrated support for crew concerns; gently notified mbr of sudden family death; assisted w/e-leave travel & CGMA loan while u/w; kept mbr stable & productive upon rtn. Unsupportive during mbr’s hospitalization & follow-on family advocacy needs; marginalized mbr & propagated intolerant shipboard atmosphere; forced Cmd to step in to provide basic needs.”
- Teamwork and Workplace Climate: “Unsupportive of team decisions made thru collaboration & consensus; often exhibited public disagreement & sewed discord after the fact; unwilling to provide constructive input to better meet crew needs by adjusting or improving established processes. Questioned Cmd experience/decisions w/out transparency or informing chain.”

The reporting officer’s signature block on the disputed OER indicates that the CO signed it on August 15, 2010, but the date on the digital signature is unreadable. The CO concurred with the XO’s portion of the OER, assigned the applicant low marks in the performance dimensions “Responsibility,” “Professional Presence,” and “Health and Well-Being,” as well as two standard marks of 4, and assigned him a mark in the third spot on the comparison scale, the lowest of three marks all denoting “one of the many competent professionals who form the majority of this grade.” The CO’s portion of the OER includes the following negative comments:

- “... Despite █████ competency, displayed unprofessional behavior & attitude yelling at mbrs, using derogatory terms thru-out cutter, neg. infecting crew. No unified support; displayed poor ldrship & no ownership, passed dept info w/ blame focused on Cmd.”
- “Although demonstrates clear mastery of the technical aspects of job, needs work on comms skills both up & down chain; avoided supervisor, did not keep informed of daily mundane/routine responsibilities; intentionally kept technical info from cmd; harsh, demeaning tone & inflection leave room for interpretation based on delivery; no adherence w/ Core Value & Cmd philosophy of respect for shipmates. Spoke to crew as separate voice from Cmd, focused blame on CG modernization w/ neg impact on crew morale. Maintained weight standards, but did not dedicate time to manage personal health/stress.”
- “Under no circumstances should [the applicant] be recommended for promotion to █████ ROO was critical to making improvements throughout the ship, █████ needs, promptly correcting █████ & responding to emergencies that kept [the cutter] mission capable, but consistent unprofessional attitude & behaviors hindered collaborative comms & increased stressful tension in the workplace climate. Despite

continued efforts to verbally counsel about intolerable interactions, ROO failed to make substantial progress. Improved constructive comms, ldrshp & pos. engagement w/others, particularly in non-██████████ related areas, will be required for favorable Cmd endorsement.”

The OER Reviewer, who was Chief of the District’s ██████████ signed the disputed OER on September 27, 2010, and forwarded it to the Personnel Service Center.

Mental Health Evaluation

On August 24, 2010, the applicant’s CO notified him that he was being referred for a non-emergency mental health examination. The CO stated that the applicant’s “intimidating, disruptive, disrespectful behaviors and actions as documented below clearly violate [COMDT-INST M5370.1] and are disruptive to unit security, the provision of a safe work environment for the entire crew, and the good order and discipline of the [cutter], which I will not tolerate. As such I direct you to immediately depart the unit and proceed to [a shore unit] to await further evaluation and treatment.” The CO also wrote about six incidents that occurred from April 26th through August 24th in which the applicant allegedly became infuriated and yelled and cursed at superiors or subordinates because of annoyances or minor, unplanned changes in the schedule and operations. None of the six incidents involved the applicant voicing safety concerns. She noted that the applicant had admitted that he needed to get help or medication for his “frustration and temper” so that he would not be “so cranky and upset all the time,” that he could not respect the XO, and that he felt that the “future of the Coast Guard is going down.” The CO noted that the applicant had had “three back to back afloat tours” and needed to work ashore for a while or retire. She advised the applicant of his rights with respect to the mental health referral.

On August 31, 2010, the applicant underwent a mental health evaluation with a psychologist. He told her that when the cutter was in ██████████ “there was an incident where he became enraged with his command and was yelling and swearing at his superior officers. ... He stated that he was unsure why he became so angry ... he has been experiencing excessive irritability and anger for the past two years. He described that xxxxx years ago he was on a ship as xxxxxxxxxxxxxxxxxxxxxxxx. Patient stated that ‘there was a ██████████ and that never happens.’”³ However, the applicant reported that he had suffered “stress-related symptoms since that time, including ongoing difficulty sleeping, hypervigilance, heightened startle, irritability, excessive anger, intrusive memories and anxiety.” The ██████████ had occurred in the fog, and the fogginess of ██████████ had made him anxious and hypervigilant during his cutter’s latest voyage. Sometime after ██████████ there was another incident in which the same ship had almost rolled over on its side, and ██████████ The applicant reported that “he has had concerns about the fact that these incidents have occurred in the last xxxxxx years when the rest of his career was incident free. He expressed safety concerns. Furthermore, since 1999 until the present, he was underway all but 9 months of that

██████████
██████████
██████████
██████████
██████████

time. He has not taken [redacted] expressed feeling ‘burned out.’” The [redacted] cluded [redacted] response to several incidents in [redacted] st tw [redacted] hips.” She recommended that he have six months of limited duty, weekly therapy to address [redacted] psychiatric evaluation to determine if medication could [redacted]

On [redacted] the Area Commander awarded the entire cutter a Meritorious Unit [redacted] On February 10, 2011, the app [redacted] because of his direct r [redacted] excellence awards [redacted] both [redacted] his “significant role in [the cutter’s] achieve [redacted] all Operational Excellence Award [redacted] March 22, 2011, the cutter’s crew was authorized to wear the [redacted] although they did not meet the criteria for the award because the cutter was not north of the Arctic Circle for 21 consecu [redacted]

On December 16, 2010, a doctor reported that the app [redacted] mand reported that the applicant’s inapp [redacted] cutter “had not been the first boat the patient demonstrated maladaptive behaviors. In light of this history, the patient does not have a mental [redacted] rate that he is unfit.” The doctor stated that the applicant was fit for duty and that the command could decide about his “continued suitability” for service. He diagno [redacted] applicant with an “occupat [redacted]”: “interpersonal difficulties within command.”

On January 11, 2011, a doctor noted that the app [redacted] ed duty since he [redacted] with symptoms [redacted] te not having met criteria.” He diagnosed the applicant with “occupational problem [redacted] f [redacted] without restrictions.

[redacted], 2011, the applicant submitted an OER Reply for inclusion in his [redacted] [redacted] [redacted] cations. Regarding his performance in Looking Out for Others, Teamwork, and Workplace Climate [redacted] had attempted to improve morale and motivate members during training. He noted that a District officer had told him in June 2010 that he [redacted] highly respected by both the command and [redacted] that he had received special recognition for [redacted] motivating the crew during TSTA training. Regarding his performance in Health and Well-Being, the applicant stated that he had participated in the cutter’s “DC Olympics” and helped many of the crew on weight control by “offering diets.” The applicant strongly objected to the comment that h [redacted] Coast Guard Core Values, stating that he “gave over 100% as [redacted],” updated numerous outdated progra [redacted] ter, “volunteered for two [redacted] to better [the cutter],” men [redacted] or officers and enlisted members, and went out of his way to be helpful and useful in many other ways. The applicant stated that the verbal and written commendations and awards he had received for his performance during the reporting period showed that his rating chain’s assessment of his performance was false and a matter of reprisal for his “actions bringing up safety issues of the unit to District level.”

Decision of the PRRB

On February 22, 2011, the applicant challenging the disputed OER to the Personnel Records Review Board (PRRB). The PRRB recommended that the recommendation was approved. The PRRB relied on the applicant's evidence below. The PRRB found that the XO and CO had repeatedly advised the applicant about his performance and carried out its duties in pre-accordance with the OER. The applicant had not submitted evidence sufficient to demonstrate that the applicant's performance during the reporting period was significantly better than the applicant's performance during the reporting period. The applicant's performance was apparently "uncharacteristic of him" given his history of performance. The PRRB concluded that the OER was not substantially accurate. The PRRB stated that the applicant's evidence

... does not justify higher marks, but this supporting documentation largely fails to directly address the specific instances of performance documented in the disputed OER. This paucity of evidence is in contrast to numerous examples provided by the rating chain that support the disputed OER's conclusions, describe additional instances of performance that caused significant angst amongst the crew, and demonstrate that the rating chain correctly sought to evaluate the applicant's performance and met the standards for evaluating personnel. The disjunctive proof offered by Applicant, as well as the lack of any persuasive evidence offering a direct, contrary assessment of his professional demeanor and his action with his command, is insufficient to persuade the Board that the disputed OER requires correction. ...

5. Applicant alleges the marks assigned on the disputed OER were the result of a confrontation with his Supervisor on [redacted]. This confrontation was after the disputed OER's period of report, which ended on 31 [redacted] 2010. The Supervisor stated that the confrontation played no role in this evaluation of the Applicant. The Board believes the rating chain completed its OER responsibilities as directed by CG policy. ...

... with the Supervisor and [Reporting Officer]. The Board believes Applicant's actions could have affected the OER due to his poor judgment and communication with his chain of command, but finds no evidence to support the allegation that the marks assigned were retaliatory in nature. Of note, it is evident, even from Applicant's own testimony to the Board, that the rating chain recognized his deficiencies, and did not hold his leadership, communication, or other deficiencies against him when evaluating his technical competencies. The rating chain gave credit as credit was due, and assigned marks reflecting substandard performance (below a "4") only in the appropriate performance dimensions.

Declaration of the Supervisor, XO of the

The XO stated that he would not respond to the applicant's "ad hominem attacks on my intentions and alleged conduct" but focus on the disputed OER.

The XO stated that he assigned the applicant a low mark for "Adherence to the [redacted] of his "persistent inflexibility and resistance to the [cutter's] Command philosophy." The applicant "exhibited repeated and acrimonious resistance to nearly all command efforts to foster greater teamwork and synergy. If not directly vocalizing against the command, often in a very vulgar

and disrespectful manner [REDACTED] denigrated the command to the crew and [REDACTED] effectively [REDACTED] crew and other junior officers as [REDACTED] them [REDACTED] 2010, upon learning that in addition to offloading four buoys, they had picked up one to take [REDACTED] because its storage location was inaccessible by tr [REDACTED] and “worth [REDACTED] to the crew to get back to homeport early. The applicant [REDACTED] XO’s stateroom “absolutely infuriated by the deviation from the [REDACTED] e buoy with them would not de [REDACTED]

[REDACTED] ing unscheduled evolut [REDACTED] [REDACTED] [REDACTED] mark for “Speaking & Listeni [REDACTED] XO stated that it is accurate because the applicant “frequently [REDACTED] often irrationally exhibited extreme hostility and anger at the slightest provocation. His communication skills epitom [REDACTED] workplace [REDACTED] merest suggestion or tasking that he did not agree with was to explode. He also very frequently mis [REDACTED] [REDACTED] ansmitted and would lose his temper fo [REDACTED] s behavior was clearly in violation of Workplace Violence and Threatening Behavior, COMDTINST M5370.1 (series) and became such an iss [REDACTED] extremely reluctant to speak to him for fear of his wrath. He exhibited this demeanor and directed it at all levels within the chain of command including the CO, XO, oth [REDACTED] partment Heads, Chiefs and [REDACTED] ranks. This was especially troubling when it involved junior members E5 & below who often would actually show physical distress (e.g. trembling) before speaking to him.” The XO noted that on July 7, 2010, the applicant was heard in his stateroom [REDACTED], swearing and [REDACTED] then came to [REDACTED] room and screamed loud enough to be heard throughout the O-2 Deck that the XO [REDACTED] because of an email. The XO followed the applicant back to his sta [REDACTED] why he needed [REDACTED] ail. [REDACTED] [REDACTED]

[REDACTED] November 8, 2009, the command [REDACTED] learned that the chief’s wife could not drive and had special med [REDACTED] They had two small children and lived in a very isolated place. The command engaged the District’s various employee [REDACTED] assistance services [REDACTED] but also assigned duty drivers and used Govern [REDACTED] vehicles to support the family until the chief was released from the hospital on November 27, 2009. The applicant “adamantly disagreed with the command’s solution and very clearly stated early on that the unit should not be helping the member to this degree. He strongly felt (and expressed to the rest of the crew) that the member’s life awa [REDACTED] e of no concern to the unit and he should deal with his own proble [REDACTED] came to a head on February 18, 2010, [REDACTED] cant kicked the chief off th [REDACTED] ting the XO or the CO. T [REDACTED] nt explained that the chief had not adequately informed him of all of his medical appointments and commitments and that the applicant was still unfit for sea duty. The XO stated, “Instead of proactively managing the E7’s situation to gain compliance and care for the member, [the applicant] preferred to wash his hands of the problem by simply kicking the member off the ship.” When questioned about this by the CO and XO, the applicant “became very angry and rashly submitted his retirement [REDACTED] ch the command endorsed and forwarded, but the applicant subsequently retracted.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] he had had to cancel a member's [REDACTED] [REDACTED] [REDACTED] licant had approved the member for "wedding leave" on the same dates. The XO asked, "wh[REDACTED] [REDACTED] [REDACTED] division take this into consideration? I assume he had [REDACTED] [REDACTED] [REDACTED] o get married. [REDACTED] [REDACTED] [REDACTED] [REDACTED] lied as follows:

[REDACTED]
[REDACTED]
[REDACTED] orders for the school. [REDACTED] [REDACTED] [REDACTED] [REDACTED] all my parts of my job, always questioning everything, let me know now, I will make a call and let you have an [REDACTED] [REDACTED] [REDACTED] along with the ones you already command ops and deck. [REDACTED]
[REDACTED]

[REDACTED] [REDACTED] mark for "Teamwork," the XO alleged that the applicant's "propensity to foster conflict amongst his superiors, peers and subordinates was directly detrimental to overall command team unity and effectiveness. On numerous occasions [he] [REDACTED] [REDACTED] direct supervisor from information concerning his department necessary for me to perform effectively in my position. He was consistently unresponsive to tasking provided by me and would either not do it, which required me to remind him, or he would do it but not let me know that it was completed." The XO noted that during a meeting of department heads on March 12, 2010, the applicant "stated in an [REDACTED] [REDACTED] his opinion that the CO did not know what she was doing and that he was afraid to go to sea with her."

The XO noted that sometimes when the command asked the shipboard leadership for input before a final decision was made on some issue, instead of collaborating and providing input, the applicant failed to initiate dialogue to improve the decision and instead "would 'back door' the new implemented solution, pointing holes in it, verbally criticizing it and/or directly modifying it to suit his needs. ... [The applicant] consistently failed to realize that as a department head and command member his responsibility was to support command decisions, even if they were unpopular, and especially those arrived at through a team effort." The XO noted that during a leadership development roundtable following an investigation of a disciplinary matter involving three crewmembers, the XO received good responses from the chiefs but when the XO asked for his input, the applicant said, "I don't even know why we're [REDACTED] [REDACTED] [REDACTED] [REDACTED] that "[t]his unsupportive response was typical for [REDACTED] [REDACTED] applicant] and demonstrated his complete rejection of all shipboard initiatives and programs that the CO and I strove to [REDACTED] [REDACTED] This response also demonstrated his unwillingness to [REDACTED] [REDACTED] ability for his people and offer constructi[REDACTED] [REDACTED] improve the unit."

Regarding the low mark for "Workplace Climate" in the disputed OER, the XO stated that during the reporting period, the applicant "consistently exhibited extreme oversensitivity to tasking, perceived procedural errors and schedule inconsistencies common to an operational unit. [His] reaction to these situations almost always took the inappropriate form of excessive, overbearing and extreme anger and mood swings that were oftentimes irrational, inconsistent and extremely vulgar and offensive. ... [He] frequently engaged in bullying, verbal abuse/attacks and physical intimidation both up and down the chain of command. Though a [REDACTED] [REDACTED] [REDACTED] [his] poor behavior has been the polar opposite to teamwork, unity, consensus and good harmony. [His] conduct was disloyal, dangerous and ran directly counter to good order, discipline and the Coast Guard's Core Values." The XO noted that during a Damage Control Training Team

debrief in the spring of 20[redacted] ant suddenly shouted at an E-5, "Why d[redacted] the fuck [redacted] shock."

On August 18 to 20, 2010, the XO stated, the cu[redacted] have reveille [redacted] aboard who had to be rowed to shore in time to walk to a n[redacted] ch a flight south. When later that evening, another ship offered the [redacted] reveille could be at the normal ti[redacted] the Officer of the Day, [redacted] Officer, and an [redacted], wh[redacted] XO "felt that [he] had informed enough key pla[redacted]st confusion, trusting that they w[redacted]et their people know." In the morning, however, he found the [redacted] up in the mess before reveille. Although the applicant had in fact learned of the schedule change the night before, he h[redacted] rest of [redacted] 48, and at 8:25, the applicant "entered [the XO's stateroom] in a very agitated manner and shouted at [redacted] a this ship!" [The XO] directed him to l[redacted]er [his] room in such a disrespectful manner." As the applicant left, the CO directed them both into her stateroom. When the applicant kep[redacted] are you being such an asshole." When the applicant left, he told them he would be "writing an email to District about both of you." The cutter finally got underway at 9:4[redacted]

The XO stated that on August 24, 2010, the applicant "stormed" into the XO's stateroom furious and with fists clenched. His behavior so "shock[redacted]... it evoked the [redacted] response in [the [redacted] [him] to make preparations to defend [himself] ... [because] he felt compelled to resp[redacted]

[redacted] that the marks and comments in the disputed OER are accurate. H[redacted]

Declaration of the Reporting Officer, CO [redacted]

The CO disagreed with the applicant's claim that [redacted] never counseled about his performance deficiencies. She stated that there "were several counseling sessions" in the CO's cabin or the XO's or applicant's own staterooms. The CO stated that she often went to the applicant's stateroom "to follow up on tasking that was not completed or to address issues and concerns I had about the [redacted] that were never communicated to me." The CO stated that the [redacted] unifications skins were poor, and "he n[redacted] direct supervisor [the XO] [redacted] aimed that she "provided fe[redacted] [the applicant] every time I saw there was a deficiency in his performance, recognized his tremendous technical specialty contributions, and when his effort improved." The CO alleged that she "considered and balanced [the applicant's] enormous technical proficiency, leadership, personal, and professional qualities to provide the most accurate evaluation." The CO stated that she considered the following matters in drafting the disputed OER:

[redacted]

- In 2009, she saw [redacted] petty officer physically shaking as he was [redacted] door later that day, received [redacted] e saw [redacted] eled him about his response, which “was not setting the proper example as the De [redacted] ever, the applicant’s “upset, angry, and growly [redacted] that [redacted] [redacted]

[redacted] he those two mandatory [redacted]

[redacted] s] lack of support for c [redacted] ment with [redacted] mand [redacted] t addressed throughout the performance [redacted] [redacted]

- In September 2009, the applicant lost his footing and “fell into the [redacted] [redacted] eding, she asked him to go to the Station clinic or local emergency room. When he objected, [redacted] the XO to send out a mishap report, [redacted] disagreed with. The CO stated that this incident “was an early example of [the applicant’s] stubborn behavior and inability to [redacted] ast Guard’s and District[’s] incident reporting guidelines.” [redacted] [redacted]

- The CO stated that after an annual health assessment, the applicant was concerned about his weight and seemed irritated and “even more stressed than normal.” He told her that to relieve stress, he was trying to leave work early, [redacted] and stop drinking a bottle [redacted] with his wife every [redacted] CO told him that “his mood changes were definitely noticeable by the rest [redacted] [redacted] al tone and quick temper expressed in a very loud manner [redacted] h him [redacted] difficulty of losing weight and asked him what diet he and his wife were [redacted] [redacted] [redacted]

[redacted] At a meeting of department heads in November 2009 about her [redacted] m-ily’s difficulties while the chief was [redacted] the applicant said the family should take care of themselves and “suck it up.” The chief’s wife’s brother had received [redacted] [redacted], and their daughter had had to go to the [redacted] high fever. The applicant “was co [redacted] inst my command actions to support [the chief’s] family and expressed that I was babying the [chief].” The CO believes that the applicant expressed his point of view and anger about her decision with other crewmembers. [redacted] [redacted]

- In February 2010, when the chief did not show up at an Officer’s Call and the CO asked why he was missing, the applicant informed her that he had kicked the chief off the boat without consulting her or the XO although he did not have the authority to do so. She later learned that he had done so while yelling and using expletives. As she and the XO were discussing the matter in a passageway later, the applicant app [redacted] [redacted] said he was going to put in his retirement letter. He had frequently threatened to retire, and she advised him to go home and that they would discuss it later. However, he refused [redacted] and typed and gave her his retirement letter. She endorsed it because she thought it [redacted]

would be best both [redacted]st Guard and the applicant if he retired [redacted]
[redacted]
change his mind. When [redacted]not, [redacted]ter to the Personnel
Command. Then the applicant showed up to try to retrieve [redacted]
steamed and asked for leave the entire following [redacted]r that
[redacted]
[redacted]

[redacted]one of the cutter's
storag [redacted]
[redacted] told about the problem [redacted]bility to
[redacted]he m [redacted]n to bring her the paperwork, he insisted
[redacted]e of it. He told her it would be g [redacted]April 1st and she agreed to that
deadline, but on April 2nd [redacted]ill in the shed. She then told him to have
the material removed by the time the cutter got underway on April [redacted]
[redacted]il 15th. The CO cited this incident as
an example of it taking "constant follow-up to ensure [the [redacted]
[redacted] another example of failed communicat [redacted]detail to meet a
deadline, and inability to convey a positive unit image working with local Coast Guard
units to fix discrepancies [redacted]

- On April 26, 2010, when the applicant [redacted]d that the cutter had loaded [redacted]oy as well as offloading four small buoys, the applicant "began ranting and raving that the command was worthless and we had violated our promise to take care of the crew by returning early to [XXXX]." The applicant s [redacted] deviation from [redacted] to load an addi [redacted]When she pointed out that the extra buoy would not delay the cutter, the app [redacted] always happens; that the command says one thing and then [redacted]re was [redacted]e applicant] to make such an outburst and get angry or so upset at t [redacted]
[redacted]
[redacted]

[redacted]ications for the crew to observe [redacted]ive
personality that was unable to toler [redacted]ences in the working environment.
It also demonstrated a fractured command which lacked support in becomin [redacted]
[redacted] affecting the good order and discipline of [redacted]
[redacted]

- During TSTA training in June 2010, when asked which of the crew should be recognized for their contributions, the CO and the XO immediately recommended the applicant "because he le [redacted] training of the crew with a lack of Chief Petty Officer [redacted]ite [the applicant's] disagreements and [redacted]own during the pro [redacted] [CO] agreed that [the appli [redacted]led the effort to pass the assessment." The CO stated that they were encouraged to pick someone else because it was not usual to recognize a member of the command cadre, but they picked the applicant and he received [recognition]. ... This example demonstrated [redacted] [redacted] and [CO] felt [the applicant] made a contribution to the success of [the cutter] and it was incorporated into his evaluation."
- [redacted]

- On July 12, 2010, [REDACTED] told the CO for the first time that the [REDACTED] [REDACTED] about \$8,000, and the app [REDACTED] shou [REDACTED] [REDACTED]
- On July 20, 2010, the CO discovered by talking [REDACTED] on a [REDACTED]. She asked the applicant about it, and he told her [REDACTED] reported it “because he knew I would not like to hear the info.” [REDACTED] her wonder if he was te [REDACTED] [REDACTED] that might impact op [REDACTED] er again [REDACTED] and ethical fitness to inform the CO of [REDACTED] impacting operational readiness. [REDACTED]
- On the same day, the applicant complained to her about babysitting [REDACTED] [REDACTED] to fix problems. He told her he was looking to transfer to a shore unit but might have to stay o [REDACTED] [REDACTED] w she could help and discussed leader [REDACTED] work with his chiefs and first class petty officers, but the applicant did not seem to have the desire or energy to work in devel [REDACTED] had spent too many hours at sea and should get an ashore assignment.

- Later that day, the applicant entered the XO’s stateroom and began very loudly cussing and screaming at the XO about an email the XO had sent to confirm port arrangements, and his shouting could be heard “on the entire O [REDACTED] area.” The CO [REDACTED] applicant that she [REDACTED] rate his behavior toward the XO. His “explosion of expletives demonstrates [REDACTED] [REDACTED] demeanor in the work place, unprofessional presence, refusal to [REDACTED]” The [REDACTED] apologized, said the Coast Guard organization was going downhill,” [REDACTED] [REDACTED] as a way to transfer out could not find a shore [REDACTED]

On July 20, 2010, the applicant gave the CO a copy of a [REDACTED] to review and told her that the work was [REDACTED] time. He had known this before but had not informed her because she would have told the District or Area Comm [REDACTED] [REDACTED] that they might direct the cutter to go to the [REDACTED], which would prevent the cutter fr [REDACTED] to homeport on schedule. That was the second time the CO knew he had deliberately withheld critical information from her, undermining her ability to be a successful CO.

The CO [REDACTED] during a car trip to Walmart on August 2, 2010, after the end of the reporting period, the applicant asked her about the status of his OER, and she told him that the XO was drafting it and she had not yet seen it. The CO claimed that given the applicant’s “poor actions and explosive behavior there was no way he was not aware of his performance deficiencies or that they would not be reflected in his evaluation.” There were “ [REDACTED] [REDACTED] es of great concern” that occurred after the reporting period, but she did not consider those incidents when she prepared the OER. After his violent outburst on August 20, 2010, she decided to [REDACTED] from the ship “for the safety, welfare, good order, and discipline of the unit.” The

CO thought he “was a [redacted] threat to his shipmates, and his trust at [redacted] extreme [redacted] her removed from command. She [redacted] heard [redacted] a call from a Navy officer who said that the applicant was seeking advice about how to get [redacted] mand. [redacted]

The [redacted] er the applicant left the cutter on August 24, 2010, “many of the [redacted] ion became noted discrepant rel [redacted] deficiencies, including [redacted] ld have been de [redacted] ith lo [redacted] disputed OER is factually accurate and reflective [redacted] performance during the reporting p [redacted] His “behavior and performance [were] incompatible with the per [redacted] om a commissioned military officer. [He] lacked the leadership, personal, and professional skills to earn my favorable r [redacted] promot [redacted]

[redacted] *OER Reviewer* [redacted]

The reviewer, who was [redacted] the District, stated that the applicant’s performance “came up several times” in his discussions with the CO during the reporting period. The CO described the applic [redacted] him as a “highly competent [redacted] and a “high performer” when he was in a good mood. However, the applicant increasingly became upset over “minor, easily solvable issues or incidents and sometimes threatened to put in his retirement letter.” The CO would meet with the ap [redacted] issues, but she [redacted] concern with the [redacted] of retirement, frequent irritable mood swings, and unprofessional outbursts.” [redacted]

[redacted] he applicant contacted a District officer and “expressed contempt a [redacted] [redacted] [redacted] e applicant in June to discuss these issues in detail. The applicant’s explanations “were rambling a [redacted] overall it was apparent to me his intent was to connect a series of minor or ordinary incidents in an overall effort to cast doubt on the ability of [the CO] to command while at the same [redacted] mingly to appear loyal.” The reviewer then met with the XO and the command chief and first class petty officers to discuss the issues the applicant had raised. The reviewer determined that the cutter “was operating safely but [the applicant] was creating [a] corrosive atmosphere because of his unprofessional and undermining behavior [redacted] met with the CO, they discussed options including relieving the ap [redacted] ties and finding a replacement for the [redacted] but the CO was not ready [redacted] applicant was a very good [redacted] although his disruptive behavior had to stop. She planned to counsel him and would base her decision on his willingness to improve. The reviewer told the applicant “the problem could be solved through improved communication and some professional good will” and the applicant agreed to do a better job of communicating and supporting the CO and XO. Later the CO told him that she had counseled the applicant and they had agreed on ways to improve communications. During the [redacted] she reported that the applicant’s “performance was good and communications were

still strained but improved; in mid August, the applicant's "behavior precipitated a [redacted] operating in low visibility trying to [redacted] a [redacted] days from the nearest port. ... For [the applicant] to say that he was shocked by the content [redacted] not credible." [redacted]

The [redacted] at the Coast Guard normally pays deference to those "with long, [redacted] are experts in their field. I believe [redacted] in the work place. He [redacted] ble personal pride to [redacted] and damaged the good order and discipline of [redacted] that has taken months for the unit [redacted] through. I believe the OER in question accurately reflects [his [redacted]g the period." [redacted]

Non-Selection

[redacted]ving the cutter, the applicant was assigned [redacted]ment team for patrol boats. On his OER dated July 31, 2011, he received twelve marks of 6 and six marks of 5 in the various performance dimensions [redacted]e comparison scale as "one of the many competent professionals who form the majority of this grade, and a strong recommendation for promotion "with peers." On his [redacted] dated July 31, 2012, the applicant received primarily marks of 6 and 7 in the various performance dimensions, a mark in the fifth spot on the comparison scale, and a very strong recommendation for promotion. On February 14, 2013, the applicant received another Commendation Medal for this [redacted]

The applicant was not selected [redacted] selection boards that convened in 2011 and 2012. Although he was [redacted] as not found [redacted] and so was not selected for promotion. Having twice failed of selection [redacted]

OF THE COAST GUARD

On January 30, 2013, the Judge Advocate General (JAG) of the Coast Guard [redacted] submitted an advisory opinion in which he recommended that the Board [redacted] the applicant's request. In so doing, he adopted the findings and analysis provided in a memorandum signed by Commander, Personnel Service Center (PSC). PSC submitted the following declarations to support its claims:

PSC Memorandum

PSC stated [redacted] directly denied relief in this [redacted] noted that although the applicant attributes the low marks and negative comments in the OER to an argument he had with his supervisor on August 20, 2010, the OER itself shows that both the XO and the CO had signed the OER before that date. [redacted]

PSC alleged that the applicant's command acted correctly in referring the applicant for a [redacted]th evaluation and noted that the referral and evaluation occurred after the XO and CO [redacted]

had completed the OER a [redacted] al information, such as the referral and [redacted] provide [redacted] evaluation were reviewed by the [redacted] sele [redacted]

PSC stated that, contrary to the applicant’s claim [redacted] “quali- fied” for [redacted] rds. Had he not been, he would have received a letter from [redacted] aining why he was not qualified for promotion. However, PSC [redacted]” they apparently did not find h [redacted]

[redacted] cond [redacted] ectly prepared by the applicant’s rating chain in [redacted] application regulations, and he h [redacted] proved that the assigned marks or comments are not accurate, fa [redacted] d on the rating chain’s observations of his performance during the reporting period. PSC argued that the applicant has [redacted] cient ev [redacted] fforded the disputed OER and has not substantiated any error or injustice in his record. Therefore, PS [redacted]

APPLICANT’S RES [redacted] COAST GUARD

On March 6, 2013, the applicant respo [redacted] p the views of the Coast Gu [redacted] appli- cant stated that the advisory opinion ignores his most significant argument, which is that the OER “was not a fair reflection of the service provided during the rating period and lacked evi- dentiary support, contained numerous inconsistencies, a [redacted] mendations and [redacted] l during the rati [redacted] repeated his arguments about inconsistent com- ments and the lack of any mention of [redacted] e reporting period. There- fore, the selection board did not have all [redacted] rmed decisio [redacted] motion.

[redacted] ht have caused the XO and CO to retaliate against him, the applicant stated that there is apparently no [redacted] with a readable electronic signature, which casts doubt on whether the OER was altered after the rating chain signed it on the date typed on the OER form. The applicant alleged that further doubt is cast by the lack of formal, written counseling in his record and the fact that, on the afternoon of August 20, 2010, the CO told him that his OER “may not be as good as he was expecting” and that the CO was not recommending him for promotion.

The app [redacted] t because the proceedings of selection [redacted] ret pursuant to 14 U.S.C. § [redacted] know if his command’s in [redacted] e mental health refer- ral in August 2010 affected the outcome of those proceedings. He argued that the Board should consider that the law places an “extreme evidentiary burden on the applicant” in his attempt to prove that the mental health referral was considered by the selection boards [redacted]

APPLICABLE REGULATIONS

Officer Evaluation Regulations

states that COs “must ensure acc[urately] fair, [and] [i]nformation provided to all officers under their command.” A Coast Guard officer is supposed to initiate h[is] OER 10 days before the end of a reporting period. Article 10.A.2.d.1. [redacted] and forward [redacted] OER [redacted] 10 days after the end of the reporting period. Article 10.A.2.d.2. [redacted] officer must prepare and forward the remainder of the OER no later [redacted]

Personnel Manual state[s] [redacted] ack, that “[n]o s[ub]ject fo[r] [redacted] performance feedback. Performance feedback occurs [redacted] subordinate receives advice or observ[ation] related to their performance in any evaluation area. Performance [redacted] face formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, [redacted] receive [redacted] feedback received. If the feedback is not fully understood, it is the Reported-on Officer’s responsibility to im[p]rove [redacted] responsibility to provide it.” [redacted]

Article 10.A.4.c.3.a.1. o[f] [redacted] block 2 of an OER may show the “[p]ersonal military decorations issued in accordance with Chapter 2 of Medals and Awards Manual, COMDTINST M1650.25 (series)” d[uring] the reporting period. Article [redacted].c.3.b. states that “[t]he Reported-on Officer, and other officers or officials outside the Reported-on Officer’s normal rating chain, may submit to the Supervisor or Reporting Officer letters, certificates, citations, comments or other reliable documents [redacted] performance of duty. [redacted] Reporting Officer [redacted] cite such reports in the OER ‘comments’ blocks, but shall not attach them to the OER.” [redacted]

[redacted].c.4. provides the following instructions for supervisors completing [redacted]

b. For each evaluation area, the Supervisor [redacted] 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 [redacted]. The Supervisor shall take care [redacted] officer’s performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the [redacted] on the form in ink.

d. In the [redacted] block [redacted] all [redacted] each evaluation area, the Supervisor shall include comments citing sp[ecific] [redacted] d[escribe] Officer’s performance and [redacted] each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary Supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. [redacted] [redacted] tify 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 [redacted] picture defined by the standards marked on the performance dimensions in the evaluation.

Mere repetition or par[redacted] standards is not sufficient narrative justification [redacted] or [redacted] standards.

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of four to show how they exceeded this high level of performance. [redacted]

Article [redacted] of the Personnel Manual states that on the comparison scale in an [redacted] reflects the Reporting Officer's rank [redacted]

Section 1. of the manual states that [redacted] comments may not "[d]iscuss Reported-on Officer's performance [redacted] occurred outside the reporting period."

[redacted] submit, within 21 days of receiving a copy of a validated OER from the Personnel Command, a reply [redacted] performance for inclusion in her record. [redacted] may attach their own responsive comments to the OER Reply.

Mental Health Referrals

Command-directed mental health evaluations are governed by Chapter 5.C. of the Coast Guard Medical Manual in effect in 2010, COMDTINST M6000.1D. Chapter 5.C.3. provides that if a CO believes a member of the unit has a mental [redacted] evaluation, the CO [redacted] member to undergo [redacted]. Before doing so in non-emergencies, the CO must provide memoranda to both the [redacted] and [redacted] the behavior that warrants the mental health evaluation. Chapter 5.C. [redacted] member for a mental [redacted] evaluation as a reprisal for making or preparing a lawful communication [redacted]

CWO Selection Boards

Paragraph 7.a. of COMDTINST 1410.2 lists the [redacted] that "shall not be provided to officer promotion boards." The list includes medical data.

Under Articles 5.B.3.j. and 14.A.7. of the Personnel Manual, the Commandant determines the number of [redacted] promoted to CWO4, and CWO4 selection boards make their selection [redacted] determining which CWO3s are "fully qualified" for promotion and then selecting [redacted] "fully qualified" the "best qualified" CWO3s to promote to CWO4. Those who are found "fully qualified" but not "best qualified" do not receive any sort of explanation of the board's determination.

FINDINGS AND CONCLUSIONS

[redacted]

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 over 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.⁴

2. The applicant alleged that the disputed OER is erroneous and unjust and a product of retaliation by his rating chain for a report he made to the District in April 2010 and for incidents that occurred after the end of the reporting period. 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 the evidence that the disputed information is erroneous or unjust.⁵ 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."⁶ When challenging an OER, an 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 clear and prejudicial violation of a statute or regulation.⁷

3. The applicant alleged that the marks and comments in the disputed OER are factually erroneous. He submitted statements from four crewmembers whose view of his leadership and communications differs greatly from the view of his rating chain members. These statements do not persuade the Board that the rating chain's assessment of the applicant's performance is erroneous, however. The OER itself and the XO's and CO's declarations provide numerous, detailed examples of incidents of behavior that support the lower numerical ratings assigned by the rating chain for the performance dimensions Adaptability, Speaking and Listening, Looking Out for Others, Teamwork, Workplace Climate, Responsibility, Professional Presence, and Health and Well-Being.

4. The applicant alleged that the disputed OER erroneously and unjustly fails to note significant accomplishments and awards he received during the rating period. The record does not show that the applicant received any personal awards during the reporting period that are listed in Chapter 2 of the Medals and Awards Manual and so could be attached to the OER by reference in block 2 pursuant to Article 10.A.4.c.3.a.1. of the Personnel Manual. The record shows that the CO awarded the applicant and others a Meritorious Team Commendation for their "extraordinary [REDACTED] 2009, but in accordance with Article 10.A.4.c.3.b., the applicant's contributions to [REDACTED] are described in detail in block 3 of the disputed OER, as was his leadership during the CART/TSTA training in June 2010, for which he was later recognized as "Top Trainer." Con-

⁴ 10 U.S.C. § 1552(b).

⁵ 33 C.F.R. § 52.24(b).

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

⁷ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

any adverse impact on the XO or CO. Therefore, the Board finds that he has not proved by a preponderance of the evidence that the disputed OER was retaliatory.

9. The Board finds that the applicant has failed to prove 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 clear and prejudicial violation of a statute or regulation.⁸ The Board agrees with the PRRB that the applicant has failed to prove the existence of an error or injustice in the disputed OER.

10. The applicant alleged that he was not selected for promotion because the selection boards somehow knew that he had been referred for a mental health evaluation and that referral was retaliatory, erroneous, and unjust. However, in light of the applicant’s demonstrations of an increasingly explosive temper in 2010, the Board finds that his CO did not abuse her discretion under Chapter 5.C.3. of the Medical Manual by referring him for a mental health evaluation. Moreover, paragraph 7.a. of COMDTINST 1410.2 clearly states that selection boards are not provided the candidates’ medical records, and the applicant has not shown the Board any reason to suspect that this rule was not followed in his case. Although the applicant claims that his non-selections for promotion prove that the selection boards must have seen his medical records, the Board finds that the disputed OER itself provided ample grounds for the selection boards to conclude that the applicant, although [REDACTED] best qualified for promotion to [REDACTED]. The Board finds that the applicant has not proved by a preponderance of the evidence that his record was prejudiced by any error or injustice when it was reviewed by the [REDACTED] selection boards that did not select him for promotion. Therefore, the Board will not promote the applicant or remove his non-selections for promotion from his record.⁹

11. The applicant made numerous allegations with respect to the actions and attitudes of his XO and CO. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.¹⁰

12. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

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

⁹ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

¹⁰ See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board’s ultimate disposition”).

ORDER

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

