

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-171



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on August 29, 2013, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 29, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove from his record a special, derogatory Officer Evaluation Report (OER) covering his service from May 18, 2010, to May 31, 2011. The disputed OER documented his removal from his duties as the Operations Officer (OPS) of a large cutter and contains numerous low marks and negative comments.

The applicant alleged that the disputed OER, which is incorporated only by reference, is the result of bias on the part of his rating chain.¹ He stated, "My command's desire to always seem in the wrong culminated in the extremely negative OER which led to my transfer" and that the command "was looking for any excuse to relieve [him]." He alleged that while on the cutter, he "was subjected to such negativism that I was not surprised at all by my eventual removal" and that the command "created such a hostile environment by their constant focus on any negative detail within my sphere of influence and lack of useful feedback that I became clinically depressed" and sought counseling and medication two days before he transferred from the cutter.

¹ A Coast Guard officer is normally evaluated by a "rating chain" of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally the supervisor's supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations. The system provides for "multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting." U.S. Coast Guard, COMDTINST M1000.6A, Personnel Manual, Article 10.A.2.a (Change 42, April 2010) (hereinafter PERSMAN).

The applicant stated that his commanding officer (CO) appointed another officer on the cutter to conduct an investigation of his performance, quickly removed him as a result of the investigation, and then appointed the investigating officer to take over as OPS. The applicant provided many examples of alleged errors and bias, including the following:

- The OER states that his Deck Watch Officer (DWO) certification had lapsed when he arrived aboard the cutter, which hindered his qualification in his duties as the Senior Watchstander. However, he stated, he had been the Educational Services Officer at his prior unit and was prevented from administering tests for himself.² Although he was allowed to take the test during pre-OPS school, he was given just one hour to take it immediately before his class presented their capstone project and most of those who took it did not pass the test that day. However, he retook the test aboard the cutter on May 24, 2010, well before the cutter got underway on June 18, 2010. Regarding criticism about how he handled a DWO board, he noted that he had not served on such a board for three years and that he thought his questions were appropriate.
- Regarding an OER comment about taking a week to answer 15 questions from the CO about a patrol schedule, the applicant stated that the plan in question had been provided by the District command and that he himself had mentioned inaccuracies to the CO when he first showed it to him.
- During a long ocean transit, he was criticized for running behind schedule even though there was a large storm system that required them to divert almost 100 miles off course. He alleged that the “intensive on the spot instruction” he received lasted just five minutes during an Ops and weather brief and included an instruction about how to solve a multi-variable equation, such as “ $20x + 13y = \text{miles left}$,” and that he answered the command’s question shortly afterward receiving this instruction.
- Regarding an OER comment about how he “lacked command presence to speak [with] authority or confidence to large groups,” such as all-hands meetings, the applicant stated that the CO and executive officer (XO) began making the operational announcements immediately after the applicant reported aboard, and he was never told that he was not meeting their expectations in this regard.
- Regarding an OER comment about an inappropriate relationship with one female junior officer and making an “uncomfortable work environment” for other female crewmember, the applicant stated that the junior officer had “misinterpreted a compliment,” which was not intended as a sexual or romantic advance. He was shocked at her accusation and “immediately dropped all contact whatsoever with her.” He alleged that he was never

² Section 6 of the Educational Services Officer Manual states that “Designated ESOs are ineligible to take CGI exams for six months if they currently hold the exam in their inventory, held the exam in an inventory within the last six months or administered the exam within the last six months (i.e. DWINTO/ DWINTR). This may be waived by the Commanding Officer, Coast Guard Institute. Waiver requests for specific test may be emailed to ... stating the reason for the request and the last date the test was administered. The respective ESO’s command should be copied on all requests. Email approval, if appropriate, will be provided and should be used as the authority for the ESO that will administer the exam.”

told that he had made other female crewmembers uncomfortable and that his female subordinates had comfortably discussed both family problems and [REDACTED] issues with him.

- During a crew training evaluation, he was criticized for not satisfactorily planning the crew’s drills even though he had “factored in multiple redundant periods to allow drills that might fail to be re-run. However, certain failures can create cascading effects for other drill teams that cannot possibly be predicted. My CO assumed that I could have planned for several failures of the same drills across multiple training teams. I could not do something that elaborate under the defined schedule, but he refused to believe that every failure was not my fault.”
- Regarding an OER comment about an “alcohol incident” he incurred on May 7, 2011, the applicant stated that he went to a bar to use the wi-fi and paced himself by having just one drink an hour, which was reasonable since he is 6’2” and weighs more than 200 pounds. He left his drink unattended several times, however, and believes someone put something in his drink. He has no clear recollection of what happened after he left the bar except that he remembers running down a trail at one point. He woke up groggy and disoriented and fell a couple of times on his way back to the cutter, but he had not harmed himself or anyone else. His command sent him for alcohol screening, and even though his answers to the questions resulted in a diagnosis of “not alcohol abusive or dependent,” his command became “fixated on the idea that I had an alcohol problem.”

[REDACTED]

[REDACTED] The applicant stated that when the CO and XO warned him in mid February 2011 that he was not “performing to expectations” and would likely receive several low marks on his upcoming OER, he had only “three months of [REDACTED] chance.” He stated that, “[f]or whatever reason, my command appeared to have made up their minds to view every action I took in a negative light. They never troubled to make me aware of perceived deficiencies until it was too late to nip them in the bud.” He alleged that he was subject to “unspoken expectations and poor communications which left me out of the loop until it was too late to recover,” and that [t]heir unspoken expectations—which led to constant negative assessments—created such a hostile atmosphere that I went through most days just waiting to be told what else was not up to their standards. This made it difficult for me to seek them out to address upcoming issues, and instead prompted me to attempt to solve most problems on my own. I still managed to complete all missions assigned, but did so in spite of, rather than because of, the command climate.” In addition, the applicant alleged, he was greatly disadvantaged by the fact that even though he was responsible for all of the traditional OPS duties, the Navigation Division, the electronics technicians (ETs), and information systems technicians (ITs), did not report to him and so he had to work through the Weapons Officer and the Engineer Officer and was often posed questions or presented with problems that he did not have the information or authority to respond to.

The applicant stated that he realized that he had lost his enthusiasm for the work and was feeling tired. He had taken very little leave at his previous unit, had recently lost 16.5 days of leave as a result of not using it, and had 110 days of leave accumulated. At his prior unit, the one time when he took more than a few days of leave, he was tasked to work on an issue “that could have been resolved by other members of the Planning staff,” “could never get a chance to truly relax,” and had “continually sacrificed personal time for the Coast Guard.” He realized he had burned out, sought counseling, and was diagnosed with depression. The applicant alleged that while assigned to the cutter, he “had been suffering from undiagnosed depression, which

explained my suicidal ideations and actions, as well as the anxiety attacks.” The applicant stated that he was prescribed anti-depressants, took a ten-day break, and “came back feeling refreshed,” but then he incurred the alcohol incident because someone put something in his drink at a bar. In support of his allegations, the applicant submitted documents from his military record, which are included in the summary below.

SUMMARY OF THE RECORD

The applicant attended the Coast Guard Academy and was commissioned an ensign on [REDACTED]. He was first assigned to a cutter to serve as a Deck Watch Officer (DWO). On his first four semiannual OERs, his marks gradually rose from being primarily marks of 4 to primarily marks of 5,³ and he was recommended for promotion. He was promoted to lieutenant junior grade on [REDACTED] while serving aboard the cutter and he received a Letter of Commendation at the end of his tour in June 2007.

From [REDACTED], the applicant served as the head of the [REDACTED]. He was also assigned the collateral duty of Educational Services Officer. On his first semiannual OER at this unit, dated January 31, 2008, he received primarily marks of 4 and a mark in the fourth spot on the comparison scale⁴ and was praised for his [REDACTED] and recommended for promotion. On his second OER, dated June 30, 2008, the applicant received primarily marks of 5 and 6, a mark in the fifth spot on the comparison scale, and a recommendation for promotion. On his third OER, dated January 31, 2009, the applicant’s marks slightly declined and he received a mark in the fourth spot on the comparison scale. His CO noted that the applicant had been selected for promotion to lieutenant, highly praised the applicant’s performance as the Educational Services Officer, and commented that the applicant “[h]asn’t yet earned recommendation for positions leading larger groups, but may after [he] has developed more assertiveness and attention to detail.”

The applicant was promoted to lieutenant on [REDACTED]. On his fourth OER as the head of the [REDACTED] and his first as a lieutenant, his marks were slightly lower than those on his prior OER. This OER, dated May 31, 2009, contains primarily marks of 4 and 5 in the performance categories, a mark in the middle, fourth spot on the comparison scale, high praise for the applicant’s collateral duty as the Educational Services Officer, and a comment from his CO that he thought he would be able to recommend the applicant for promotion soon. On his fifth OER as head of the [REDACTED], dated May 31, 2010, the applicant’s primary duty is denoted as “Future Operations Officer.” He received seven marks of 4, seven marks of 5, four marks of 6, and another mark in the fourth spot on the comparison scale. On both of these latter two OERs, the CO noted that the applicant desired a career afloat but recommended him for personnel positions based on his performance as the Educational Services Officer. The applicant received a Letter of Commendation for his performance at the end of this tour of duty.

³ Coast Guard officers are evaluated in 18 different performance categories, such as “Teamwork” and “Judgment,” on a scale of 1 (worst) to 7 (best). A middle mark of 4 means that the officer’s performance met the expected high standards of all Coast Guard officers for that category. PERSMAN Article 10.A.4.c.4.g.

⁴ 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. PERSMAN Article 10.A.4.c.8.a.

In May 2010, the applicant began serving as the OPS on [REDACTED], where he was responsible for the safe navigation and operation of the cutter and had direct oversight of all search and rescue, law enforcement, aviation, and security missions. He supervised 4 junior officers and 24 enlisted members. His collateral duties included being the Senior DWO, the leader of the Navigation/Seamanship Training Team, and a member of the Safety and DWO training boards.

On May 16, 2011, the applicant was removed from his duties as OPS and transferred from the cutter. The disputed OER in this case was prepared to document his removal in accordance with Articles 10.A.3.c.1.a. and 10.A.4.h. and is incorporated only by reference. Because the OER was derogatory, the applicant was entitled to submit an OER addendum. His supervisor, the XO of the cutter, forwarded the addendum with an endorsement stating that the OER marks and comments were accurate and that the applicant had failed to meet standards communicated during multiple informal counseling sessions and also after the formal counseling session in February 2011. The applicant's CO concurred with the XO's comments and also claimed that the applicant had been "provided a clear way ahead and definite set of expectations on multiple occasions," citing counseling sessions in July, September, and December 2010 as well as the formal counseling in February 2011.

In May 2011, the applicant was reassigned to [REDACTED]. On his first OER in this position, dated May 31, 2012, he received primarily marks of 4 and a mark in the fourth spot on the comparison scale. He was "recommended for consideration for promotion with peers," by the [REDACTED].

VIEWS OF THE COAST GUARD

On December 5, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with the recommendation in a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC submitted sworn statements from the three officers who served as the applicant's rating chain aboard the cutter. The XO noted that the command had met daily with the applicant and other department heads, providing guidance, direction and counseling but that the applicant's performance did not warrant better marks on his OER and did not "set the example of high performance expected for this significant and visible leadership position." The CO described several specific instances of poor performance by the applicant, including his failure to qualify as an Officer of the Day in July 2010, and noted that an "outside observer" who acted as XO for two weeks in January 2011 had noted the same problems with the applicant's performance. The OER reviewer, who was Chief of Operational Forces for the Area, stated that he was "kept fully apprised of the developing situation with [the applicant] by the [CO]. A history of below average performance culminated in relief of primary duties following a late night incident aboard [the cutter] in which alcohol was determined to be a causative factor ... Based upon the information presented to me, I fully concurred with the course of action from the unit [CO]."

documentation to support adequate personnel management decisions, such as selection or reassignment. ... If an individual has been re [REDACTED] primary duties (other than relief for cause as prescribed by Article 4.F.6) and early transfer from unit is required, a special OER is required before the Reported-on Officer receives consideration for reassignment. An OER documenting removal from primary duties is derogatory and must be submitted in accordance with Article 10.A.4.h. In both cases, the OER counts for continuity.

Article 10.A.4.h. states that any OER that documents an officer's removal from his primary duty is considered derogatory and that the officer is entitled to submit an addendum "to explain the failure or provide their views of the performance in question," after which the supervisor and reporting officer are "afforded the opportunity to address the ... addendum" in endorsements before forwarding the OER to the reviewer, who must ensure that the derogatory information is substantiated.

Article 10.A.4.c.4. provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted d [REDACTED] e [REDACTED] [REDACTED] 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 [REDACTED] [REDACTED] to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. ...

• • •

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

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that the disputed OER documenting his removal as the OPS of a cutter is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the 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 To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁷

3. The applicant alleged that the disputed OER is erroneous because it failed to include comments about some of his achievements. According to the instructions for preparing OERs, the supervisor and reporting officer assign marks by comparing an officer's performance in each performance category during the evaluation period with the written standards for the numerical marks on the OER form and choose the mark that "best describes the Reported-on Officer's performance and qualities during the marking period."⁸ After choosing the numerical mark, the supervisor and reporting officer must then add one or more comments to the comment block "citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four," and the "[c]omments should amplify and be consistent with the numerical evaluations."⁹ Therefore, Coast Guard officers are not entitled to have all of their achievements mentioned in OER comments because the comments are only supposed to support the choice of numerical marks—i.e., to provide one or more examples of the performance that caused the supervisor or reporting officer to choose a particular mark—and supportive comments are only required when the assigned mark deviates from the standard mark of 4. The disputed OER meets this requirement because the marks that deviate from a 4 are all supported by negative or positive examples of the applicant's performance. The applicant has not proved that the OER is erroneous or unjust because it does not contain a comment about each of his accomplishments during the evaluation period.

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).

⁸ PERSMAN Article 10.A.4.c.4.b.

⁹ PERSMAN Article 10.A.4.c.4.b. and d.

4. The applicant claimed that his supervisor and reporting officer failed to take some of his accomplishments into account when assigning the low numerical marks in the disputed OER. However, each of the low marks is supported by a written example of the performance that caused the supervisor or reporting officer to assign the low mark, and the applicant has not submitted evidence sufficient to overcome the presumption of regularity accorded the marks and comments in the disputed OER. For example, although the applicant submitted evidence showing that he passed the DWO examination a few weeks before the cutter got underway, this fact does not disprove the claim in the OER that his arrival aboard the cutter without this qualification somehow hindered his duties as Senior Watchstander during the weeks before he passed the examination. Nor has he shown that he could not have ensured that he would have the qualification upon arrival. The applicant has not proven by a preponderance of the evidence that this comment is erroneous or unjust.

5. The applicant alleged that the XO and CO were biased against him and created a hostile work environment for him. However, he has submitted no evidence to show that their criticisms were unwarranted or abusive, and he has not even claimed that the alleged bias and hostility were based on impermissible grounds, such as gender or race. The applicant has submitted nothing to overcome the presumption of regularity accorded his rating chain in this regard.¹⁰

6. Article 10.A.2.b.2.j. of the Personnel Manual states that when officers are unable to perform their duties fully due to illness, the CO “shall ensure that these individuals do not receive below standard evaluations strictly as a consequence of these circumstances.” The applicant alleged that he became depressed during the evaluation period due to the command’s frequent criticism of his work and that he sought counseling two days before he was transferred off the cutter. The applicant’s allegations, however, do not prove that he was so disabled by depression during the evaluation period that he should not have been required to meet his CO’s expectations. The Board finds that the applicant has not proven by a preponderance of the evidence that his CO’s expectations should have been lowered during the evaluation period pursuant to Article 10.A.2.b.2.j.

7. The applicant made many allegations with respect to the actions and attitudes of his XO and CO. Those allegations not specifically addressed above are unsupported by substantial evidence that overcomes the presumption of regularity and/or are not dispositive of the case.¹¹

8. The applicant has not proven by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.¹² Therefore, his request to have the OER removed from his record should be denied.

ORDER

¹⁰ 33 C.F.R. § 52.24(b).

¹¹ 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”).

¹² *Hary*, 618 F.2d at 708.

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

May 29, 2014

