

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-015**



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**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. Upon receiving the completed application on November 28, 2013, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 27, 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**

The applicant asked the Board to remove from his record the officer evaluation report (OER) for the period June 21, 2007, to July 16, 2008, and to replace it with a Continuity OER.<sup>1</sup> He alleged that the supervisor who prepared and signed this OER had been officially removed from his rating chain by their commanding officer (CO) both orally and by email. He alleged that after he submitted a complaint to his District's legal office about his supervisor's violations of policies and procedures, the CO removed the supervisor from not only his but other members' rating chains and chains of command.

The applicant explained that he complained to the District legal office because his supervisor had twice ordered one of the applicant's subordinates, a chief warrant officer (CWO), to write an opinion of the applicant's mental stability and emotional state, which the CWO refused to do because the supervisor had no authority to issue this order. The applicant stated that this action by his supervisor was the proverbial "straw that broke the camel's back" and caused him to report his supervisor for numerous violations of policies and procedures. After he submitted his complaint, his supervisor attempted to remove him from his billet for mental instability without the knowledge or permission of the CO, who was the only person with the authority to remove him.

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<sup>1</sup> A Continuity OER is one that lists the officer's official duties but contains no numerical marks or comments regarding the officer's performance. Coast Guard Personnel Manual, Article 10.A.3.a.5.d.

The applicant stated that a new officer was designated his supervisor, but after the CO retired in early July 2008, his old supervisor managed to reinsert himself in the applicant's rating chain for his OER dated July 16, 2008, and the marks he received were retaliatory and inaccurate. The disputed OER is mediocre with almost all marks of 4 (out of 7).

The applicant complained that although he timely submitted his input for the disputed OER and the CWO's OER during the first week of June 2008, those dates were later changed to make it appear that he submitted them late, on July 10 and 15, 2008, respectively, which caused them to be reviewed by the incoming CO instead of the outgoing CO. As evidence, he pointed out that the supervisor's signature on the CWO's OER is dated June 26, 2008—three weeks before the date of input submission, which is extremely unlikely if not impossible. In addition, he noted, the description of his official duties in block 2 of the OER states that he supervised only five enlisted members, whereas he also supervised the CWO.

In support of these allegations, the applicant submitted a sworn statement from the CWO who had been improperly ordered to write a mental health evaluation for the applicant. The CWO supported the applicant's claims that the old supervisor had been removed from the applicant's rating chain and chain of command after he repeatedly ordered the CWO to write a mental health evaluation of the applicant and that the disputed OER does not accurately reflect the applicant's performance. The applicant also submitted a statement from the officer who was appointed as his new, replacement supervisor after the CO removed the old supervisor from the applicant's rating chain. This officer strongly supported the applicant's claims that the prior supervisor had made a "bizarre request" to the CWO to write a mental health evaluation of the applicant, that the CO had removed the prior supervisor from the applicant's rating chain and chain of command, and that the disputed OER does not accurately reflect the applicant's performance during the evaluation period.

### **VIEWS OF THE COAST GUARD**

On May 21, 2014, the Judge Advocate General of the Coast Guard forwarded to the Board a memorandum on the case prepared by the Coast Guard Personnel Service Center (PSC) and asked the Board to accept it as the Coast Guard's advisory opinion. PSC recommended that the Board grant the requested relief.

PSC noted that under Article 10.A.2.g.2.b. of the Personnel Manual in effect in 2008, an officer is disqualified from serving on another officer's rating chain in any "situation where personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation." PSC stated that it had found the email in which the CO had removed the supervisor from the applicant's rating chain and chain of command. PSC also stated, however, that the new CO had the authority to reverse the change and apparently did so, but failed to inform the applicant of the change to his rating chain. Based on this confusion, the applicant's evidence, and declarations received from other officers, PSC agreed with the applicant that the disputed OER was inaccurate and should be removed from his record and replaced with a Continuity OER. PSC also stated that it believes that the applicant's OER input was submitted before July 10, 2008, although the exact date is unknown, and that the description of his duties should have included the fact that he supervised a CWO.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 28, 2013, the applicant responded to the Coast Guard's advisory opinion and agreed with the recommendation for relief.

### 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. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely because the applicant has remained on active duty.<sup>2</sup>

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

3. The applicant alleged that the disputed OER does not accurately reflect his performance during the evaluation period and was prepared by a supervisor who had been removed from his rating chain and assigned him marks in retaliation for the applicant's complaint against him. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.<sup>4</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.<sup>5</sup> 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.<sup>6</sup>

4. The Board finds that the applicant has proven by a preponderance of the evidence that the supervisor who signed the disputed OER should have been disqualified from serving on his rating chain in accordance with Article 10.A.2.g. of the Personnel Manual because, as his prior CO had determined, there was a significant conflict that raised a substantial question as to whether the applicant would receive a fair, accurate evaluation. The existence of this conflict is proven by the CWO's statement that the supervisor repeatedly and improperly asked him to write

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<sup>2</sup> *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).

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

<sup>4</sup> 33 C.F.R. § 52.24(b).

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

<sup>6</sup> *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).

an opinion of the applicant's mental health, by the replacement supervisor's confirmation of this "bizarre request," and by the fact that the CO removed the supervisor from the applicant's rating chain and chain of command after he learned of the supervisor's actions. This evidence shows that the disputed OER was prepared in apparent retaliation for the applicant's complaint by a supervisor who had already demonstrated significant prejudice against the applicant. Therefore, the Board finds that the OER was prepared in violation of Article 10.A.2.g. of the Personnel Manual. It should be removed from the applicant's record and replaced with a Continuity OER.

5. The applicant has also proven by a preponderance of the evidence that information on the disputed OER that would also appear on a Continuity OER is erroneous. The applicant alleged that the date of his submission of his OER input in block 1.l. was erroneously changed, and the Coast Guard has admitted that he submitted his input for the OER sometime before July 10, 2013, the date that now appears in block 1.l. The Coast Guard stated that the date of submission is unknown, and the applicant alleged that he submitted it timely during the first week of June 2008.<sup>7</sup> Because the Coast Guard has admitted that the date is wrong, and the applicant is best placed to know when he submitted his OER input, the Board finds that the date in block 1.l. of the Continuity OER should be Friday, June 6, 2008. In addition, the description of the applicant's official duties in block 2 of the Continuity OER should include the fact that he supervised one CWO because the CWO himself stated, and the Coast Guard has admitted, that the applicant supervised the CWO during the reporting period.

6. Accordingly, the applicant's request should be granted because he has proven by a preponderance of the evidence that the disputed OER contains erroneous information and was prepared in violation of Article 10.A.2.g. of the Personnel Manual.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>7</sup> Article 10.A.2.c.2.d. and e. of the Personnel Manual require an officer to initiate an OER and submit any supporting documentation no less than 21 days before the end of the reporting period.

**ORDER**

The application of [REDACTED] USCG, for correction of his military record is granted as follows:

- His officer evaluation report for the period June 21, 2007, to July 16, 2008, shall be removed from his record and replaced with one prepared “for continuity purposes only” in accordance with Article 10.A.3.a.5.d. of the Personnel Manual.
- Block 1.1. of this new Continuity OER shall show that the Date Submitted was June 6, 2008.
- Block 2 of this new Continuity OER shall include in the Description of Duties the fact that he supervised a CWO.

June 27, 2014

