

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-057



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 receiving the applicant's completed application on January 11, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 3, 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, who voluntarily retired from the Coast Guard on [REDACTED] asked the Board to correct his military record by expunging his penultimate officer evaluation report (OER), covering his service from April 1, 2012, to December 22, 2012, and adjusting the start date of his final, Continuity OER¹ from December 23, 2012, to April 1, 2012, so that the Continuity OER will cover the entire fifteen-month period from April 1, 2012, until his retirement on [REDACTED]. In the alternative, the applicant asked the Board to raise his Reporting Officer's marks on the Comparison Scale and Promotion Scale in the disputed OER. He also asked the Board to "[g]rant other relief as may be just and proper, including preparation of an end-of-tour award."

The applicant explained that from April 1, 2011, through December 22, 2012, he served as the Officer in Charge (OIC) of a [REDACTED]. When he arrived, he learned that no case files had been processed since 2010, when his predecessor retired, and that 42% of his staff, including his executive officer, had just left for extended temporary assignments elsewhere. The applicant stated that "[f]our replacements arrived, then departed for extended travels and

¹ Under Article 5.A.3.a.(5) of COMDTINST M1000.3, a "Continuity OER," which contains a description of the officer's assigned duties but no numerical marks or comments evaluating the officer's performance, "may be submitted in cases where an OER is required by these instructions, but full documentation is impractical, impossible to obtain, or does not meet officer evaluation system goals."

returned in April 2012.” In all, 70% of his staff turned over in eighteen months. However, based on his significant accomplishments as OIC, he received a regular, annual OER with very high marks on March 31, 2012.

The applicant alleged that in 2012, a significant dispute developed between his local supervisor from agency “WXYZ” and “ABCD,” which was taking over as the [REDACTED] office’s parent command after more than two decades under WXYZ.² ABCD wanted to make an aggressive push, which the Deputy from WXYZ opposed based on that agency’s experience and foreseeable harm. The applicant, who was supposed to be serving as “the [REDACTED] of [REDACTED]” and had no authority to affect how the dispute was settled, was somehow expected to mediate between ABCD and WXYZ and to force WXYZ to acquiesce to ABCD’s demands. The applicant stated that he advised Coast Guard Headquarters and was told to “continue the noble work we were doing” because the applicant’s “replacement was too far along in the pipeline for a near-term change.” In the fall of 2012, the applicant alleged, the dispute between the Deputy from WXYZ and an O-4 staffer at ABCD Headquarters became less than cordial. The Deputy from WXYZ asked to transfer as soon as possible even though he knew that the applicant would be departing on terminal leave in December 2012 because the applicant had received orders to retire on [REDACTED], and had more than six months of accrued leave that he had to use or lose.

When he was about to leave [REDACTED], the applicant alleged, he received many positive accolades for his work as the [REDACTED] OIC. He submitted input for an OER³ but also submitted an OER waiver request to the Officer Personnel Management branch (OPM) of the Personnel Service Center,⁴ which approved his request on January 18, 2013. Therefore, he alleged, he should not have received a substantive OER and instead should have received a Continuity OER, with no performance marks or comments, covering his service from April 1, 2012, through his retirement on [REDACTED].⁵ In February 2013, the officer who had served as his local supervisor in [REDACTED] and who had assigned recommended numerical marks on his prior OER retired. On May 10, 2013, the applicant alleged, he was offered a chance to continue on active duty in a Headquarters assignment, but he opted to stick with his approved retirement date.

The applicant stated that when he retired on [REDACTED], he should have received a Continuity OER covering his final fifteen months on active duty in accordance with OPM’s waiver

² The Board notes that in his submissions, the applicant at times referred to ABCD as the incoming agency and WXYZ as the departing agency and at other times used the reverse denotation. The context of his sentences generally clarifies his allegations, however. For the purposes of this decision, the Board will use ABCD as the incoming agency and WXYZ as the departing agency.

³ Article 5.A.3.a.(3)(a) of COMDTINST M1000.3 states that a command must prepare an OER when an officer is detaching from the unit and no OER has been prepared within the last 182 days.

⁴ Under Article 5.A.3.b. of COMDTINST M1000.3, an officer may request and receive a waiver of the prescribed OER requirements.

⁵ Article 5.A.3.a.(3)(b) of COMDTINST M1000.3 states that an OER is mandatory when an officer is separating from the Service, but under Article 5.A.3.a.(5)(b)(3), a command may prepare a Continuity OER, instead of a substantive one, if the officer has an approved retirement date “within 18 months of the last regular OER submission and has met the expected high standard of performance during the period.”

approval. Instead, on October 15, 2013, he received the disputed substantive OER with significantly lower marks than the [redacted] OER from December 22, 2012, and a Continuity OER covering [redacted] period from December 23, 2012, through [redacted]. When he asked why he had received lower marks on his December 22, 2012, OER, he was advised [redacted] "I'll leave it alone and [redacted] it."

The applicant alleged that the lower marks in the disputed OER are erroneous and unjust. He alleged that he had no designated rating chain as required by regulation, but after he initiated his March 31, 2012, OER, his local supervisor assigned suggested marks and forwarded it to Coast Guard Headquarters, where some of the marks were lowered from 7s to 6s so that the applicant would have "room to grow." The Director of ABCD sign it as both Supervisor and Reporting Officer and a rear admiral, the Assistant Commandant for the program, signed the OER as Reviewer. On this OER, the applicant received [redacted] marks of 6 and seven highest possible marks in the various performance categories, including a 7 in the fifth spot (of seven) on the officer comparison scale, denoting an "exceptional performance." The OER also contained "accelerated promotion" language and the Reporting Officer's "[h]ighest possible marks" and "very laudatory comments with a strong recommendation for promotion" and "commendations from [redacted] of peers."

The applicant stated that the disputed December 22, 2012, OER had been timely prepared, the same local supervisor who prepared his March 31, 2012, OER would have assigned suggested marks in the disputed OER. At the time the OER was prepared, his local supervisor had already retired and so had no input. Instead, the applicant alleged, the Coast Guard assigned the duty of preparing his OER to the lower ranking O-4 of another military service who had been assigned to ABCD Headquarters and had been at loggerheads with the Deputy from WXYZ. This O-4 had had a heated doctrinal dispute with the Deputy, which was not within the applicant's control. The applicant alleged that the O-4 arranged for [redacted] to backfill the OIC position in [redacted] after the applicant left and conducted [redacted] to make his own performance appear better because the O-4 had previously been reprimanded. The applicant stated that according to [redacted] received, the O-4 attempted to disparage the Deputy from WXYZ and the applicant as soon as he arrived at the liaison office. The O-4 even falsely told some stakeholders that the applicant had been relieved of his duties.

After allowing this biased O-4 to draft his OER, the Coast Guard then had [redacted] Director of ABCD sign this disputed OER as Supervisor, and the [redacted] Reporting Officer. The OER contained [redacted] two standard marks of 4 for ("Teamwork" and "workplace climate"), ten marks of 5, and four marks of 6 in the various performance categories; a low mark in the third spot on the officer comparison scale denoting a "strong performance" and a low mark of "promotion potential" on the promotion scale, although the corresponding comment stated that he was "[a]lready performing on par w/ most O6s; has my rcmd for promotion to O6 [redacted]" (See attached OERs.)

In addition, the applicant alleged, because the Coast Guard waited to prepare the OER until after he retired, he was deprived of the ability to access his electronic work records to prove his

claims and deprived of the opportunity to dispute the OER through the Personnel Records Review [REDACTED]. No [REDACTED] end-of-tour or career capstone award, and so no [REDACTED] ceremony was held. The applicant also [REDACTED] various administrative errors committed by the Coast Guard prevented him from starting his current [REDACTED] job on time and [REDACTED] deprived him of wages totaling \$21,870.00. [REDACTED]

The applicant alleged that the lower marks in the disputed OER are unjust because they will likely prevent him from being recalled to active duty and will diminish his competitiveness for a Senior Executive Service (SES) position in the federal government. They are also erroneous, he alleged, because they fail to reflect the accomplishments he listed in his OER input and comments in the OER itself and because [REDACTED]

- He timely published a [REDACTED] for the [REDACTED],
- The [REDACTED] passed an audit by the [REDACTED] while he was OIC;
- The [REDACTED] increased its reporting by 15% despite a 70% [REDACTED]
- [REDACTED] s Commander, [REDACTED]; and
- He himself received accolades from a [REDACTED], Deputy Commander of the [REDACTED] and from the Chief of Staff.

The applicant alleged that his marks on his December 22, 2012 OER should have been just as high if not higher than [REDACTED] input at [REDACTED] campaign, his marks were lowered by one or two places in sixteen of the eighteen performance categories; his mark on the officer comparison scale fell from “exceptional performer” to “strong performer”; and his mark on the promotion scale fell from “accelerated promotion” to “promotion potential.” The applicant alleged that he never received any feedback except praise and appreciation while he was serving as OIC of the [REDACTED]. He alleged that he left the [REDACTED] a “high note” because he had successfully coordinated a behind-the-scenes [REDACTED]. He concluded that he had put himself and his family at risk by accepting a difficult and highly responsible assignment [REDACTED], accomplishing remarkable achievements, and earned universal praise while weathering a “turf battle between two powerhouse agencies.” As a result in return for his efforts and achievements, he received no end-of-tour [REDACTED] and an OER that will harm his future career. In support of these allegations, the applicant submitted many documents, including the following:

- A letter dated December 23, 2012, from the [REDACTED] congratulated the applicant on “an outstanding tour and a distinguished and highly successful career” and a handwritten note from the same officer states that he would stop by the applicant’s house in [REDACTED] to buy him a beer sometime.
- The applicant’s OER [REDACTED] achievements as OIC and quotes numerous accolades he received but which he cannot submit as evidence because he had no access to his emails once he left the [REDACTED].

- In an email exchange, the applicant requested a waiver of the requirement for an OER upon [REDACTED] on December 22, 2012, so that the Continuity OER prepared upon his departure would cover [REDACTED] fifteen months from April 1, 2012, through his retirement. In a reply dated January 18, 2013, [REDACTED] approved his request for a Continuity OER covering his service from April 1, 2012, through [REDACTED].
- In an email exchange dated October 15 and 16, 2013, an officer forwarded the applicant the disputed OER and the Continuity OER. The applicant replied that he was contacting OPM about the disputed OER because he had made remarkable achievements and received written kudos from the [REDACTED] upon his departure, but the OER had been adversely influenced by the O-4. In reply the officer advised him “to leave it alone and move on. We went to bat for you and the [REDACTED] your marks for the [REDACTED] [ABCD] weren’t a lot lower. If it helps, I can better explain the [REDACTED] results by phone.”
- Email [REDACTED] the applicant was offered a new billet as [REDACTED] on May 2, 2013 [REDACTED].
- [REDACTED] of accrued leave to carry over [REDACTED] of September 30, 2012, and [REDACTED] retirement orders show that he [REDACTED].
- News articles dated March 21, 2012 (during the reporting period for the applicant’s prior OER), state that an [REDACTED] that the fire had been contained, and that the owner was cooperating with authorities to avoid environmental [REDACTED] acts.

The applicant requested a hearing so that he can present his case to the Board.

VIEWS OF THE COAST GUARD [REDACTED]

On July 22, 2014, the Judge Advocate General of the Coast Guard submitted an [REDACTED] which he [REDACTED] that the Board deny the applicant’s request but correct the unit and rating chain on the applicant’s Continuity OER, as [REDACTED] recommended in a memorandum on the case prepared by the Personnel Section [REDACTED] (PSC).

PSC stated that while the applicant was assigned as the OIC of the [REDACTED] his supervisor was the Director of ABCD and a rear admiral [REDACTED] Review [REDACTED] on terminal leave and so assigned to Coast Guard Headquarters to facilitate his retirement. The applicant’s request for an OER waiver was granted because he was slated for involuntary retirement on [REDACTED], because he had [REDACTED] been passed over for promotion. On February 11, 2013, however, PSC-OPM received word from the applicant’s chain of command that the applicant wanted a substantive OER prepared for the period [REDACTED] to December 22, 2012, in lieu of a Continuity OER covering that period, because of a pending BCMR case. On February 15, 2013, OPM advised the applicant’s chain of command [REDACTED] that the applicant could rescind his waiver request to receive a substantive OER.

After the BCMR ordered the removal of one of the applicant's non-selections for promotion on April 15, 2013,⁶ PSC stated, the applicant's retirement on [REDACTED] was no longer mandatory. Therefore, OPM corrected the applicant's record and advised his chain of command to prepare a regular, annual OER for him dated March 31, 2013, because the applicant was expected to remain on active duty and compete for promotion again. On May 2, 2013, OPM offered the applicant orders to transfer to a new assignment, and on May 6, 2013, the applicant followed up with the program manager to ensure that an OER for the period April 1 to December 22, 2012, would be completed. However, on May 10, 2013, the applicant declined his orders for the new assignment, and on May 22, 2013, he informed OPM that he wanted to retire voluntarily on [REDACTED]. OPM approved his request on May 23, 2013, and so the applicant was voluntarily retired on [REDACTED]. On October 15, 2013, OPM received the disputed OER and the Continuity OER from the applicant's prior rating chain.

PSC stated that the after OPM approved the applicant's request for an OER waiver, he expressed a desire for a substantive OER "numerous times." Notwithstanding these requests, PSC stated, an officer cannot himself decide when an OER should be prepared: "Policy clearly uses the language 'may be submitted' when referencing an OER for continuity purposes in lieu of a fully documented OER. If the rating chain desired to comment on the applicant's performance even though an OER for continuity purposes was authorized, then the rating chain is empowered to do so and the intent of the [Officer Evaluation System] supports that idea." Based on declarations submitted by the Director of ABCD and the Assistant Commandant (see attached), PSC concluded that the rating chain carried out its responsibilities correctly and continues to stand by the assigned marks even after reviewing the BCMR application. PSC argued that the applicant has submitted insufficient evidence to prove by a preponderance of the evidence that the disputed OER is erroneous or unjust.

Regarding the applicant's request that the Comparison Scale and Promotion Scale marks on the disputed OER be raised, PSC stated that such marks are assigned totally at the discretion and judgment of the Reporting Officer and depend largely on the Reporting Officer's own experience with other officers of the same grade as the evaluatee. PSC stated that there is no evidence that these two marks were erroneously assigned.

Regarding the applicant's request for an end-of-tour award, PSC stated that the "determination of the appropriateness and accuracy of the award rested with his chain of command. The applicant failed to show any evidence that an award was intended to be issued." PSC also noted that the rating chain's declarations show that the chain of command intentionally opted not to give the applicant an award.

⁶ In BCMR Docket No. 2012-008, the Board removed the applicant's non-selection for promotion in 2011 because the Coast Guard's Personnel Records Review Board (PRRB) had found that one of his OERs contained errors when it was reviewed by the selection board. The PRRB had corrected the applicant's March 31, 2011, OER by raising two marks of 5 he had received for "Workplace Climate" and "Health and Well-Being" to marks of 6 and by adding the phrase "TAD to [REDACTED] from 05 May – 30 September 2010."

PSC noted, however, that the applicant's Continuity OER for the period December 23, 2012, to [REDACTED], should be [REDACTED] because it indicates that he was still assigned to the [REDACTED] during this period and it was signed by [REDACTED] again. PSC stated that the applicant was permanently transferred to a Headquarters Office, COMDT [REDACTED], when he left [REDACTED] and so the Director of ABCD was no longer on his rating chain. Therefore, PSC [REDACTED] recommended the Board correct the unit and rating chain shown on the Continuity OER.

In support of these claims, PSC submitted the following documents:

- The Assistant Commandant, who [REDACTED] as the Reporting Officer and Reviewer for the disputed OER from April 30, 2012, until the applicant's departure, signed a declaration stating that he based his marks and comments in the OER "on the supervisor's direct observation, the office [REDACTED] information [REDACTED] by the supervisor, and other [REDACTED] reports and records" and that [REDACTED] the officer comparison scale and promotion [REDACTED] in accordance with the instructions and his [REDACTED]. He alleged that [REDACTED] [REDACTED] were commensurate with his performance. I read no [REDACTED] convinces me the marks warranted [REDACTED] engaged with the [applicant], OPM, and ABCD to meet the [applicant's] desire [REDACTED] receive a regular OER. None of the personnel in [his] chain of command familiar with his performance recommended a performance award for this period of service and [REDACTED].
- The now retired Director of ABCD, who signed the disputed OER as Supervisor, stated that he based his assessment of the applicant's performance on input from his supervisor, on input from other personnel in his chain of command, and by comparing him with all the other O-5s with whom the Director had worked during his career. He stated that he has reviewed [REDACTED] applicant's submissions and "find[s] [REDACTED] no any substantive change [REDACTED] disputed OER [REDACTED]."
- An email dated August 28, 2012, in which OPM advised the applicant that he [REDACTED] filling a [REDACTED] and given the provisions of Article 5.A.2.e.(i) and (k) of COMDTINST M1000.3, OPM did not object to his [REDACTED] proposal that his rating chain going forward would consist of his [REDACTED] as Supervisor and the Assistant Commandant as Reporting Officer and Reviewer.
- In an email dated January 16, 2013, the applicant requested an OER [REDACTED] so that he [REDACTED] receive a Continuity OER [REDACTED] [REDACTED] his request. The applicant replied to this email on January 28, 2013, stating, "It seems I will in fact [REDACTED] receive an OER for the period 4/1/2012 to 12/22/2012. Apparently, DHS OGC sent me an earlier letter [REDACTED] just received), which supports a CG recommendation to expunge a non-select for O-6, which puts me [REDACTED] running for the upcoming O6 Selection Board. ... However, since the BCMR has not made a final ruling, I will continue on my path towards retirement [REDACTED] is able to find me short-term assignment, that will be benefi-

cial, but I expect that I will come back to OPM-3 at some point for guidance on an OER for [redacted] 2 to [redacted] date of the upcoming O-6 Selection Board.”

In an email string dated February 15, 2013, an officer in the applicant's unit advised OPM that “we have some churn w/ [the applicant]. He has expressed his desire to do a regular vice continuity OER because of a reported decision from DHS/USCG to allow him to compete one more time for O6. ... we're looking for verification from your office on the regular OER and what's appropriate for the end of period. If the regular OER is approved by your office, we will use the same rating chain as agreed on last year.” A civilian employee of OPM stated that the applicant's OER waiver could be rescinded since he was not retiring from the Coast Guard but that the applicant would then have to have an OER documenting his detachment from his last unit unless he was returning to the unit, in which case he would get a regular OER dated March 31, 2013. In reply, the head of OPM stated that it was not yet clear whether the applicant would be retiring because the IR had not yet issued a decision but even if he was retiring, “you can document his departure from his last unit with a regular OER dated [redacted] 31, 2013. He claims [redacted] had to provide OPM with a written request to rescind [redacted] OER. OPM replied, “No, the waiver [redacted] getting out.”

- In emails dated April 29, 2013, an officer in the applicant's unit asked OPM to confirm the applicant's claim [redacted] selection for promotion. He asked for confirmation of “what we should be doing. We are working with the [redacted] on getting his OER done. Should the end of period be when he departed his last unit on terminal leave ...?” OPM replied that the applicant could remain on active duty because the BCMR had expunged his non-selection and “WRT his OER, I would use the 31 March 2013 end of period [redacted] is an above-zone candidate. [redacted] delay his OER.”
- [redacted] in his unit about the “status of [his] OER.” He noted that “it's approaching the five month mark since I left [redacted] [redacted] concerned that the Director may soon be leaving his job, and I have an upcoming Board.” The officer replied that his OER was at the [redacted] for review and signature. The officer forwarded these emails to OPM, noting that the applicant wanted to start working and stop “burning leave.”
- In an email dated May 22, 2013, an officer in [redacted] OER [redacted] March 31, 2013, the applicant was on leave from December 23, 2012, to March 31, 2013. Later that morning, the officer forwarded the OER to OPM for review and noted that because [redacted] had changed his mind and decided to retire, the end date for the OER would be changed to December 22, 2012, and the unit would prepare a Continuity OER for the period December 23, 2012, through [redacted]

Based on PSC's [redacted] and evidence, the JAG concluded that after the applicant's OER waiver request was approved, the applicant informed his command that he wanted a regu-

lar, substantive OER for the period ending December 22, 2012, because he expected to be able to remain on active duty because of a pending BCMR case. Therefore, his rating chain prepared the disputed OER pursuant to the applicant's request.

The JAG recommended that the Board deny the applicant's request to remove or amend the disputed OER because, he argued, the applicant "has failed to meet his burden of proof concerning the strong presumption that the military superiors involved in this case discharged their duties correctly, lawfully, and in good faith." The JAG alleged that the applicant "has not presented sufficient evidence to reasonably suggest that the rating officers did not discharge their duties properly in either the production of two separate OERs or the numerical ratings given." The JAG agreed with PSC that a Reporting Officer's marks on the Comparison Scale and Promotion Scale on an OER are discretionary and not subject to correction even by the OER Reviewer. The JAG argued that the Reporting Officer's declaration supporting the accuracy of the OER supports the presumption of regularity accorded these two marks on the disputed OER.

The JAG concurred with PSC that when preparation of an OER is authorized, the rating chain could prepare one even if a Continuity OER was also authorized and that an officer "may not dictate the submission of a Continuity OER." The JAG also concurred with PSC's claim that there is no evidence that anyone in the applicant's chain of command intended to award him a medal upon his completion of his tour of duty at the [REDACTED]

The JAG noted that the OERs were not timely prepared in accordance with COMDT-INST M1000.3 but argued that the delay did not prejudice the applicant's military record. The JAG concluded by recommending that the Board deny the requested relief but correct the unit and rating chain on the Continuity OER in accordance with PSC's recommendation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2014, the applicant responded to the views of the Coast Guard. The applicant noted that the Coast Guard provided no explanation of or evidence explaining why eighteen of the twenty possible marks on the disputed OER, including the Comparison and Promotion Scale marks, were lowered. There are no Page 7s documenting formal counseling in his record. Therefore, he argued, in accordance with the decision in *Sawyer v. United States*, 18 Ct. Cl. 860, 868 (1989),⁷ he is entitled to relief. More to the point, he argued, his OER input and other submissions, such as the [REDACTED], which he initiated,⁸ reflect remarkable performance. Even the comments in the OER, he argued, are inconsistent with the lower numerical marks.

⁷ *Sawyer* is decision in a medical disability case that was overturned on appeal. *Sawyer v. United States*, 930 F.2d 1577 (Fed. Cir. 1991).

⁸ The [REDACTED] was first published in [REDACTED] two years before the applicant became OIC. A comparison of the early issues of the newsletter with those issued while he was OIC indicate that the applicant changed the name of the newsletter and significantly increased the number of articles included.

Regarding the OER preparation time, [REDACTED] notified him that it was contemplating rescinding his approved OER waiver. He argued that while his rating chain [REDACTED] report was in contemplation that I would compete in an upcoming O-6 Selection Board” and should have stopped when he elected to retire in May 2013. He argued that when he informed OPM that he was retiring, OPM should not have used the substantive OER his rating chain had drafted and should have prepared only a Continuity OER instead or, at least, informed the applicant and left the decision up to him. Moreover, the applicant argued, if OPM actually rescinded his OER waiver request, he should have been informed so that he could contest the decision via the PRRB.

Regarding his request for an end-of-tour award, the applicant alleged that contrary to the Coast Guard’s claim, the local commanding officer of ABCD proposed to give him an award and recommended that he draft his own. He also pointed out that, under the Medals and Awards Manual, awards are justified on the basis of meritorious service, not at the discretion of one’s rating chain. The applicant quoted the many laudatory comments in both of the OERs he received as OIC of the [REDACTED] as evidence that he should have received an award. He argued that the letter of congratulations that he received upon leaving the [REDACTED] from Commander, [REDACTED] and [REDACTED] and the accolades from other personnel in that command that he quoted in his OER input should weigh heavily in the Board’s deliberations because about half of the primary and collateral duties listed in block 2 of the disputed OER reference duties he performed for those commands. He noted that some of the other duties listed in block 2 reflect his duties as an [REDACTED], and his OER input includes many accolades from the [REDACTED]. Therefore, he argued, the record contains ample evidence supporting his request for an end-of-tour award even though “[n]ot reflected here are perspectives of agency [WXYZ]⁹ who continued to manage the information aspects of the mission, but suffice to say, the remarkable accomplishments seen during my tenure were largely the result of their masterful work. That recognition is not cherished by agency [ABCD].”

Regarding the rating chain’s declarations, the applicant stated that they do not explain why his marks were lowered, do not address the evidence of accolades and accomplishments he submitted, and do not address the problems encountered when the [REDACTED] was moved from WXYZ to ABCD. He also alleged that the Assistant Commandant’s claim that he based his evaluation on the supervisor’s direction observations is inaccurate because the applicant met the Director of ABCD, who signed the disputed OER as Supervisor, only once in person and it was during a social function. The applicant stated that when the Director of ABCD stated in his declaration that he relied on “input from his supervisor,” he presumably meant the local agency head of ABCD, whom the applicant cited in his OER input as saying, “I appreciate the short time we worked together and I want to compliment you on the outstanding work and support you’ve done ... as the OIC of [REDACTED]. Your direct engagement raised not only the level of [REDACTED] throughout the [REDACTED]”

⁹ See note 2 above.

Regarding the corrections to the Continuity OER recommended by the Coast Guard, the applicant does [REDACTED]

The applicant concluded that he has provided sufficient evidence to [REDACTED] that his rating decision to lower eighteen of the twenty marks on the disputed OER by one or two [REDACTED] was erroneous and unjust. Moreover, his rating chain was not designated in writing and he had no interaction with them. He reiterated that once he decided to retire voluntarily, there was no purpose in having his command complete the substantive OER, and so the OER waiver should have remained in effect.

In support of these claims, the applicant submitted copies of some evidence already in the record and the following:

- In an email dated February 15, 2013, the applicant's [REDACTED] Manager advised him that he had [REDACTED] OER that the applicant had drafted. The [REDACTED] [REDACTED] and, "[i]ronically [REDACTED] [REDACTED] probably taken [the CO's] advice when he called me last November to [REDACTED] award." He noted that the [REDACTED] [REDACTED] to prepare another officer's award and that "[g]iven the 'new' focus on the [REDACTED], not sure I'll see support anytime soon."
- In an email dated February 27, 2013, the [REDACTED] [REDACTED] [REDACTED] if he needed more information for the applicant's OER. He noted that "my supervising officer (Director [REDACTED]) is apparently departing; his job was posted this week. Since there's also a new ABCD CO (for managing OER overflow), this makes for interesting times. Anyway, please let me know as for input to my OER or consideration for an accompanying award (before the upcoming O-6 Board)."
- In an email dated April 23, 2013, PSC informed [REDACTED] applicant that his non-selection [REDACTED] to a BCMR order and so his retirement orders had been canceled. The applicant replied that he had intended [REDACTED] [REDACTED] see what job [REDACTED] be offered before requesting the cancellation of his retirement orders but knew that different codes would apply to [REDACTED] different type of retirement. PSC replied that new retirement orders [REDACTED] be issued if the applicant decided not to accept an assignment.

APPLICABLE LAW AND [REDACTED]

OER Responsibilities and Timing

Article 5.A.1.b.1. of COMDTINST M1000.3 governed the preparation of officers' OERs. Article 5.A.1.b.1. states that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to [REDACTED] under their command." Article 5.A.1.b.2. states that "[i]ndividual officers are responsible for managing their performance. This responsibility entails determining job expectations, providing sufficient performance feedback, and using that information to meet or exceed standards."

Under Article 5.A.2.d. and COMDTINST M1000.3, the CO of each unit is supposed to publish his subordinates' rating chain procedures to ensure timely submission of reports. Article 5.A.2.d. states that the Supervisor is normally the person to whom the officer answers on a daily or frequent basis and who provides the officer with most of his direction and requirements but that when an officer "responds to more than a single individual for different functions, the commanding officer shall appoint one individual to the position of Supervisor (to whom all secondary supervisors will provide evaluation input)." Under Article 5.A.2.e., the Reporting Officer is normally the Supervisor's supervisor, but a CO or member of the SES may serve as both Supervisor and Reporting Officer. A Coast Guard flag officer may serve as both Reporting Officer and Reviewer. Article 5.A.2.e.1.i. states that the "Reporting Officer for an officer (W2 - O5) assigned to another Service's staff assignment will be the commanding officer or senior staff officer of the Reporting Officer is assigned." Article 5.A.2.e.1.i. states that OPM may authorize exceptions.

Under Article 5.A.3.b., an officer may request and receive a waiver of the prescribed OER requirements when the commanding officer is detached from the command for more than 90 days. A command must prepare an OER when an officer is detached from the command. An OER has been prepared within the last 180 days. Under Article 5.A.3.b., an officer may request and receive a waiver of the prescribed OER requirements.

Article 5.A.3.a.(3)(b) states that a command may prepare a Continuity OER, instead of a substantive one, if the officer has an approved retirement date "within 18 months of the last regular OER submission and has met the expected high standard of performance during the period."

Article 5.A.2.d.2. and COMDTINST M1000.3 states that the Reporting Officer should seek feedback and initiate the rating chain process to the Supervisor no later than twenty-one days before the end of the reporting period. Article 5.A.2.d.2. states the Supervisor's section, gather feedback, evaluates the officer's performance, completes the Supervisor's portion of the OER, and forwards it to the Reporting Officer no more than ten days after the end of the reporting period. Article 5.A.2.e.2. states that the Reporting Officer bases his evaluation "on direct observation, the OSF or other information provided by the Supervisor, and other reliable reports and records," completes his portion of the OER, and forwards the OER to the Reviewer no more than thirty days after the end of the reporting period. If the Reporting Officer is not a Coast Guard commissioned SES, Coast Guard SES, or USPHS flag officer, and forwards the OER to OPM no more than 45 days after the end of the reporting period, OPM returns the OER to the Reporting Officer. If the rating chain for revision, the Reviewer returns it to the Reporting Officer for timely correction.

Completing an OER

Article 5.A.4.c.4. of COMDTINST M1000. Supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 5.A.4.c.7. for Reporting Officers, who complete the report on an OER, except for any comments the Reviewer may choose to add on a separate page):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the reporting period, the Supervisor shall fill in the appropriate circle on the report.

d. In the "Remarks" block following each evaluation area, the Supervisor shall describe the officer's behavior for each reporting period, including the name of any secondary supervisors, and other information as appropriate.

e. Comments shall be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

• • •

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. ...

Article 5.A.4.c.5. of COMDTINST M1000.2 instructs the Reporting Officer to complete the comparison scale on an OER by filling in the circle that most accurately reflects the performance of the reported-on officer in comparison to all other officers of the same grade that the Reporting Officer has ever known.

Medals and Awards Manual

Chapter 2.A. of the Medals and Awards Manual describes a series of personal awards for noncommissioned military service ranging from the Legion of Merit, through the Legion of Merit, Distinguished Service Medal, Commendation Medal, and Achievement Medal, down to a Commandant's Letter of Commendation. A Distinguished Service Medal (DSM) may be awarded to a person who, while serving in any capacity with the Coast Guard, distinguishes him or herself by exceptionally meritorious service to the United States in a duty of great responsibility. To justify this decoration, performance of duty, clearly above what is normally expected and that has contributed materially to the success of a major command or project, is required. Generally, the DSM is awarded to flag officers in principal commands." Each lesser medal is defined in relation to those above, so that the Legion of Merit (LOM) may be awarded

“for service comparable to the DSM in a duty of lesser though considerable responsibility” and the Meritorious Service Medal may be awarded for service “comparable to that required for the LOM but in a duty of lesser, though considerable, responsibility. ... When the degree of meritorious achievement or service rendered is not sufficient to warrant the award of the MSM, the Coast Guard Commendation Medal (CGCM) should be considered.” The Commendation Medal may be awarded for meritorious achievement or service “that is outstanding and worthy of recognition” and “well above that usually expected commensurate with an individual’s rank or rate. If the meritorious service is not sufficient to warrant the award of a CGCM, the Coast Guard Achievement Medal (CGAM) should be considered.” The Coast Guard Achievement Medal may be awarded to a member who “distinguishes him or herself for professional and/or leadership achievement in a combat or non-combat situation based on sustained performance or specific achievement of a superlative nature which must be of such merit to warrant more tangible recognition than the Commandant’s Letter of Commendation (LOC) Ribbon.” Under Chapter 1.D. and Table 1 of the Medals and Awards Manual, the Assistant Commandant had the authority to approve Coast Guard medals for him, while a Navy CO in pay grade O-6 and above or the Director of ABCD could have approved Navy medals.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a). The application was timely.

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.¹⁰

3. The applicant alleged that his OER for the period April 1 to December 22, 2012, should be removed or corrected because it is erroneous and unjust. 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.¹¹ 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.¹² To be entitled to relief,

¹⁰ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”).

¹¹ 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

¹² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.¹³

4. The Board finds that the applicant has not proven by a preponderance of the evidence that the disputed OER contains an error of significant hard fact. The numerical marks on the OER show that in comparing the applicant’s performance during the period April 1 to December 22, 2012, with the written standards on the OER form,¹⁴ the rating officials assessed the applicant’s performance at a somewhat lower level than the same officials had previously rated his performance for the period ending on March 31, 2012. The rating chain assigned him lower but still standard and above-standard marks for the various performance categories. The two marks of 4 for “Teamwork” and “Workplace Climate” suggest that they were particularly not impressed with his efforts in these two areas. Because marks of 4 are not negative marks, however, rating officials are not required to support them with negative comments. The rating officials did not explain why they assessed the applicant’s performance differently in the disputed OER than they had in his prior OER, but their declarations show that they have reviewed the applicant’s evidence and continue to support the accuracy of the marks and comments they assigned in the disputed OER. Although the applicant complained that he received no counseling during the reporting period, the Board notes that officers are only rarely counseled in writing, and they are largely responsible for learning their superiors’ expectations and meeting them.¹⁵ The applicant also alleged that his rating chain relied on the unreliable reports of his fill-in as OIC of the [REDACTED], but he submitted no evidence to prove that the fill-in was actually biased or otherwise unreliable or that the rating officials unreasonably or improperly relied on the fill-in’s reports.¹⁶ The Board concludes that the applicant’s evidence and information, including the many accolades he submitted or attested to, do not prove that he was entitled to higher marks in the various performance categories.

5. The applicant has not proven by a preponderance of the evidence that, in assigning the numerical marks on the disputed OER, the applicant’s rating chain overlooked significant work or achievements he made during the reporting period from April 1 to December 22, 2012. Although space for comments on an OER is very limited, a comparison of the applicant’s OER input with the comments in the OER shows that his rating chain included in the OER most of the comments that the applicant proposed with several modifications. For example, while retaining most of the substantive comments about the applicant’s work and achievements, the rating chain changed his proposed comment about having “Impeccable foresight” to “Exceptional planning and preparedness”; did not describe his public speaking as “Effervescent” as he suggested; and changed “Phenomenal Prime Mover” to “Dedicated Leadership,” “Trailblazing consensus-

¹³ *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).

¹⁴ COMDTINST M1000.3, Articles 5.A.4.c.4. and 7.

¹⁵ COMDTINST M1000.3, Article 5.A.1.b.2.

¹⁶ COMDTINST M1000.3, Articles 5.A.2.e.2.a. and 5.A.4.c.4.d. and 7.d. (allowing rating officials to rely on the reliable reports of others in assigning marks and comments in an OER).

maker” to “Recognized [REDACTED] expert,” “Most highly respected, trusted confidante” to “Highly respected, trusted agent,” and “An exceptionally innovative, visionary & caring leader” to “An innovative, visionary, and professional Coast Guard officer.” By policy, the comments in an OER provide examples of performance supporting the assigned numerical marks.¹⁷ The comments in the disputed OER do so and do not show that the marks are erroneously low.

6. The applicant asked the Board to upgrade his marks on the Comparison Scale and Promotion Scale in the disputed OER. The Comparison Scale is a highly subjective scale because the Reporting Officer must compare the officer’s performance during the reporting period to the performance of all the other officers of the same grade whom the Reporting Officer has known throughout his career.¹⁸ The Reporting Officer for the disputed OER was the Assistant Commandant with oversight of the applicant’s work. The applicant has not proven by a preponderance of the evidence that in comparing the applicant’s performance to that of other commanders, the Assistant Commandant erred in assessing him as a “strong performer” instead of an “excellent performer” or “exceptional performer.”

7. On the Promotion Scale, the applicant received a mark of “Promotion Potential,” instead of “Definitely Promote” or “Accelerated Promotion,” from the Assistant Commandant, who also included the comment that the applicant was “[a]ready performing on par w/ most O6s; has my rcmd for promotion to O6 at next board.” The combination of the mark and comment suggest that the Assistant Commandant thought that the applicant was capable of serving well in the next higher grade—captain—but was not certain that the applicant should *definitely* be selected as one of the best qualified for promotion. The applicant has not proven by a preponderance of the evidence that the Assistant Commandant erred or committed an injustice in assigning him a mark of “Promotion Potential.”

8. The applicant alleged that the disputed OER is unjust because he had no designated rating chain while he was serving as the OIC of the [REDACTED]. The composition of an officer’s rating chain is largely prescribed by policy and should be designated by the CO in writing.¹⁹ The record shows that in June 2012, the Director of ABCD signed the applicant’s March 31, 2012, OER as Supervisor and Reporting Officer, and the Assistant Commandant signed it as Reviewer. This rating chain appears to comply with policy because as the [REDACTED] of ABCD, the Director could serve as both Supervisor and Reporting Officer.²⁰ Presumably, therefore, the applicant was aware during the reporting period for the disputed OER that the Director of ABCD and the Assistant Commandant were on his rating chain. An email in the record dated August 28, 2012, shows that the applicant proposed a change in roles. He proposed that the Director of ABCD should serve as Supervisor and that the Assistant Commandant should serve as the Reporting Officer and Reviewer. OPM acceded to his request given his assignment as OIC of a [REDACTED] and the varying requirements of Articles 5.A.2.e.(i) and (k) of COMDTINST M1000.3, which provide that the

¹⁷ COMDTINST M1000.3, Articles 5.A.4.c.4.d. and e.

¹⁸ COMDTINST M1000.3, Article 5.A.4.c.8.a.

¹⁹ COMDTINST M1000.3, Article 5.A.2.

²⁰ COMDTINST M1000.3, Article 5.A.2.e.1.

Reporting Officer of an officer assigned to [REDACTED] should be the commanding officer or senior staff officer but also that the Reporting Officer for an officer assigned to [REDACTED] should be the Headquarters program manager who exercises responsibility for the program. In light of these policies and the evidence of record, the Board finds that the applicant has not proven by a preponderance of the evidence that his rating chain for the disputed OER was unauthorized or unjust or that he was unfairly surprised by its composition.

9. The applicant alleged that the disputed OER is unjust because it was not submitted in compliance with the schedule in Article 5.A.3. of COMDTINST M1000.3 for submitting OERs, which requires OERs to be submitted to PSC for review within 45 days of the end of the reporting period,²¹ and so he was unable to contest the disputed OER to the PRRB. Emails submitted by the applicant and PSC, however, reveal the following circumstances surrounding the preparation of the disputed OER: The preparation of the disputed OER was initially delayed because the applicant submitted a request for a waiver of the requirement to complete a substantive OER on January 16, [REDACTED] asked that his final fifteen months on active duty be covered by a Continuity OER. His request was approved, but a couple of weeks later [REDACTED] on February 28, 2013, the applicant [REDACTED] prepared [REDACTED] OER for the period ending December 22, 2012, based on his expectation that the BCMR would remove his non-selection for promotion, which would allow him to remain on active duty and compete for promotion again. The emails show that OPM and the applicant's rating chain acceded to his request and began preparing the disputed substantive OER, but they prepared [REDACTED] end date of March 31, 2013, because that would have been [REDACTED] of his OER if he had not gone on terminal leave in expectation of retiring.

The need for a substantive OER was not certain, however, until April 15, 2013, when the BCMR issued a decision removing the applicant's non-selection and allowing him to remain on active duty. In an email dated May 6, 2013, the applicant asked about the status of the substantive OER preparation because of his upcoming selection board and the pending retirement of the Director of ABCD. An email dated May 22, 2013, shows that the applicant's rating chain had prepared the disputed OER with an end date of March 31, 2013, because they thought he was remaining on active duty but wanted to amend it to show that he [REDACTED] from December 22, 2012, through March 31, 2013. Later that morning, however, the applicant announced that he intended to retire anyway. Therefore, the command forwarded a draft OER to OPM for review with a caveat that it would have to be amended to show an end date of December 22, 2012, instead of March 31, 2013, since the applicant was retiring. In addition, the email shows that the rating chain thought it was responsible for preparing a Continuity OER for the period December 23, 2012, through [REDACTED]

OPM approved the applicant [REDACTED] retire and issued new retirement orders on May 23, 2013 [REDACTED]. He received both [REDACTED] final disputed OER and the Continuity OER after he retired, when he could no longer apply to

²¹ COMDTINST M1000.3, Article 5.A.2 f.2.

the PRRB to contest them.²² In light of all these circumstances, however, the Board finds that the Coast Guard did not commit an error or injustice in failing to amend and finalize the disputed OER in time for the applicant to contest it with the PRRB. The applicant did not announce his decision to retire voluntarily until May 22, 2013. That announcement required an amendment of the OER his rating chain had drafted and preparation of a Continuity OER. There is no policy or regulation requiring this work to have been completed within a month, and the fact that the work was not accomplished within a month so that the applicant could contest the OER through the PRRB does not shock the Board's sense of justice.²³

10. The applicant alleged that after he announced on May 22, 2013, that he would retire voluntarily, OPM should have thrown out the substantive OER his rating chain had completed and prepared only a Continuity OER, as OPM had originally agreed to do on January 18, 2013, or at least consulted the applicant about what should be done. The Board finds, however, that in asking his rating chain to prepare the substantive OER on January 28, 2013, the applicant implicitly withdrew his OER waiver request; in authorizing preparation of a substantive OER in response to the applicant's request, OPM acceded to the applicant's implicit decision to withdraw the OER waiver request; and in preparing and submitting the substantive OER in May 2013, the rating chain complied with the then-extant requirement for one based on the applicant's expressed intention to remain on active duty. Although the applicant argued that the OER waiver remained in effect and that his rating chain's work should have been thrown out when he decided to retire voluntarily, the Board disagrees. After he requested a substantive OER on January 28, 2013, and OPM and his rating chain agreed, the OER waiver granted earlier in January was void. The Board finds that the applicant has not proven by a preponderance of the evidence that OPM's decision to validate the disputed OER was erroneous or unjust.

11. The applicant alleged that he should have received an end-of-tour medal for his service as OIC of [REDACTED]. The supporting evidence consists of his OERs and his OER input and other submissions, including an email dated February 15, 2013, in which he told another officer that he "should probably have taken [the CO's] advice when he called me last November and drafted my own award." Pursuant to Table 1 of the Medals and Awards Manual, the applicant could have received a [REDACTED] medal if authorized by a CO in pay grade O-6 or above, the Director of ABCD (as a member of the SES), or the Assistant Commandant. The applicant's email shows that the issue was considered, but none of the authorized personnel awarded the applicant a medal. Although the record shows that the applicant achieved many significant accomplishments as the OIC of [REDACTED], the Board will not second-guess those officers' decisions not to award him a medal because, based on the evidence of record, the Board is not persuaded that the lack of a medal is a result of an oversight, bias, or some other error or injustice.

²² COMDTINST 1070.1, para. 7.c.3.c. ("The PRRB will not accept applications from persons who are retired or separated from the Coast Guard.")

²³ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (stating that for the purposes of the BCMRs, "injustice" as used in 10 U.S.C. § 1552, is "treatment by the military authorities that shocks the sense of justice but is not technically illegal").

12. The applicant made numerous allegations with respect to the actions and attitudes of various [REDACTED] officers and other Government officials. Those allegations not specifically addressed above are considered to be not dispositive of the case or unsupported by substantial evidence sufficient to overcome the presumption of regularity.²⁴

13. Accordingly, the applicant's request should be denied because he has not proven by a preponderance of the evidence that his command's decision not to award him an end-of-tour medal was erroneous or unjust or that the disputed OER was adversely affected by a "mis-statement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.²⁵ However, the correction to the Continuity OER recommended by the Coast Guard should be made.

(ORDER AND SIGNATURES ON NEXT PAGE)

²⁴ 33 C.F.R. § 52.24(b); 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").

²⁵ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

ORDER

The application of [REDACTED] USCG (Retired), for correction of his military record is denied, but the unit and rating chain on his Continuity OER for the period December 23, 2012, through [REDACTED] shall be corrected to reflect that he was assigned to the Headquarters Office, [REDACTED] during that period.

October 3, 2010

