

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

---

Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-082**



**FINAL DECISION**

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on April 8, 2014, the Chair docketed the case and assigned it to [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 5, 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, a [REDACTED] on active duty, asked the Board to correct his record by removing an officer evaluation report (OER) covering his service as the commanding officer of a cutter from [REDACTED] and replacing it with an OER prepared for continuity purposes only. The applicant alleged that his rating chain failed to follow proper procedures and that the violation of those procedures led to the exclusion of important information which would have positively influenced his evaluation. The applicant stated that it is his belief that this OER is the reason that he was not selected for promotion by the [REDACTED] selection board. The applicant also stated that, if it is not possible to grant his request for removal of the OER in question, then as alternative relief his marks in blocks 4a, 5e, and 8c, and the comparison scale mark in block 9 of his OER should be raised.

The applicant also stated that should his request regarding the OER be granted, then his non-selections for promotion by the [REDACTED] selection board should be removed so that he will have two more opportunities for selection to [REDACTED]. In addition, the applicant argued, if he is subsequently selected for promotion, his date of rank should be backdated to June 1, 2014, which, he alleged, is the date he would have been promoted had he been selected for promotion in October 2013, and he should receive all due back pay and allowances.

Regarding the disputed OER, the applicant stated that it was based on incomplete information about his performance because his rating chain failed to follow proper procedures. He

explained that although the reporting period for his annual OER would not end until July 31, 2011, he submitted his input for the OER to his supervisor, ██████████ in February 2011 because ██████████ was leaving the unit on or about May 1, 2011. The applicant noted that although his OER was not due for several months, his departing supervisor, ██████████ was required to submit a draft OER to the new supervisor, ██████████ before leaving and asked the applicant for his input, so he provided it. This OER input covered only 80 percent of the time from August 1, 2010, to April 22, 2011, when the applicant ██████████ left the cutter.

The applicant stated that after he ██████████ he was placed on convalescent leave for a month and then on temporary limited duty (TLD) from May 24, 2011, to October 6, 2011. Because ██████████ were unknown and the applicant had to take ██████████ he was relieved of his duties as captain of the cutter.

The applicant stated that because his regular evaluation period ended on July 31, 2011, he should have been allowed and required to submit additional OER input on July 20, 2011, twenty-one days before the end of the period, and the OER should have been prepared by his new supervisor. Instead, for unknown reasons, his prior supervisor, ██████████ prepared the OER with an end date of June 10, 2011; used only the input provided by the applicant in February 2011, instead of seeking input from the applicant on his achievements from late February through late April 2011; and signed the OER on October 9, 2011.

The applicant alleged that his reporting officer, ██████████ who signed the OER on October 19, 2011, never personally observed the applicant's performance as CO of the cutter and admitted to the applicant in a phone call that he had not reviewed the applicant's OER input before signing the OER as required by Article 10.A.2.d(3)(b)(1) of the Personnel Manual. In addition, the applicant alleged, his rating chain failed to enter the number of days that his performance was unobserved ██████████ in block 1.i. of the OER, and ██████████ failed to note in block 7 whether or not he concurred with the supervisor's part of the OER. Moreover, the OER was not timely prepared and submitted to the Personnel Service Center within 45 days of the end of the reporting period, as required by the manual. And then his OER Reviewer, ██████████ signed the OER on October 20, 2011, even though he had retired from the Coast Guard more than two months earlier.

The applicant alleged that the OER input he provided ██████████ by itself warrants higher evaluation marks, but the procedural errors and particularly his rating chain's failure to seek his OER input for the period from late February through late April 2011 prejudiced the disputed OER and caused his non-selection by the ██████████ selection boards. For example, the applicant alleged that the standard mark of 4 he received for the performance category "Speaking and Listening" does not accurately reflect his remarkable ability to listen with an open mind and maintain a free flow of information among the crew. The applicant alleged that the mark of 4 he received for "Workplace Climate" is also erroneous in that it fails to reflect his performance during the spring of 2011 when a junior crewmember told him he was considering suicide because of his marital problems, and the applicant reacted by driving the cutter to the closest port to get medical help for the crewmember, which set an example for the rest of the crew about how crewmates should be treated.

Regarding the mark of 4 he received for “Responsibility,” the applicant alleged that it is erroneous and unjust because his work as the CO of a [REDACTED] that was often working far from the cutter required a level of responsibility that was greater than that of his peers doing other assignments. The applicant noted, as an example of his responsibility, the fact that he saved significant money and operational time by having his crew refurbish the cutter’s generators instead of installing new, untried generators, even though the refurbishment created more administrative work. In addition, the applicant alleged, he always held his subordinates to the highest standards of personal and professional accountability.

Given his superb leadership as CO of the cutter and its unique challenges, the applicant alleged, the mark in the fourth spot on the comparison scale that his reporting officer assigned him is inaccurate and unjust. The applicant argued that the work of a CO “is extremely difficult and to do it even moderately well demonstrates an outstanding level of professional competence and leadership ability which is not required of other personnel in the same pay grade.” He argued that two months’ worth of his leadership of successful cutter operations were not taken into account in the preparation of the OER and that he did his job far better than moderately well. Therefore, he argued, he should have received at least a mark in the fifth spot on the comparison scale.

In support of his allegations, the applicant submitted several statements, which are summarized below.

#### *Executive Petty Officer of the Cutter*

A [REDACTED] who served as the Executive Petty Officer (XPO) of the cutter from July 2009 to June 2011, submitted a statement (see attached) stating that as a result of the applicant’s “superior management skills,” the applicant maintained an aid availability rate of 99.6 percent and so ensured year-round functionality and reliability of the [REDACTED]. The XPO also stated that during the applicant’s tenure, he “flawlessly executed the [REDACTED] mission without injury or loss of life to any of his crew.” The XPO declared that this success was mostly due to the applicant’s “dedication to safety, well-being and training of his crew” and also the applicant’s “love and dedication” to the Coast Guard missions.

The XPO also stated that the applicant was very concerned for the welfare and well-being of his crew. He stated that whenever there were issues brought to the applicant’s attention, the applicant always acted quickly to ensure a “cohesive team atmosphere and good morale.” The XPO also cited instances when the applicant assisted crew members and their families in times of need, specifically, when a shipmate mentioned to others that he had been contemplating suicide. The applicant had the crew moor the cutter so that he could comfort the member while waiting for an EMS unit to come and transport the member for proper medical attention.

#### *Machinery Technician Chief (Retired)*

[REDACTED] who served as the cutter’s Engineering Petty Officer from 2009 to 2011, affirmed the statement made by the XPO. He stated that there were always “open lines of communications” among the crew; that the applicant and the rest of the command cadre always

worked together to provide a sound and stable command climate; and that the applicant was a “great role model and leader, always striving to get the most out of his people while allowing them to grow personally and professionally.” He stated that the applicant was known to be a motivator, a mentor, and an “all around great example of what a Coast Guardsman should be.”

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on [REDACTED]. He became a [REDACTED] [REDACTED] advanced to chief petty officer [REDACTED] E-7 in [REDACTED] and was [REDACTED]. In June 2006, he received his third Achievement Medal upon his completion of a tour of duty as the Officer in Charge of an [REDACTED].

From June 1, 2006, through June 12, 2009, the applicant served as the [REDACTED] [REDACTED] on a cutter. On his OER for the period of June 1, 2006, through June 30, 2007, the applicant received marks of 6 in the Performance of Duties categories “Planning Preparedness,” “Results/Effectiveness,” “Adaptability,” and “Professional Competence” and a mark of 5 for “Using Resources.” In the Communication Skills section, the applicant received a mark of 6 for “Speaking and Listening” and a mark of 5 for “Writing.” With regard to the applicant’s Leadership Skills, he received three marks of 5 for “Looking Out for Others,” “Directing Others,” and “Evaluations” and three marks of 6 for “Developing Others,” “Teamwork,” and “Workplace Climate.” In the Personal and Professional Qualities section, the applicant received four marks of 6 for “Initiative,” “Judgment,” “Professional Presence,” and “Health and Well-Being” and a mark of 5 for “Responsibility.” He received a mark in the fifth spot on the comparison scale and was recommended for command afloat and for promotion “with peers.”

On his second OER as the [REDACTED] of a cutter, dated May 16, 2008, the applicant received all marks of 6 in Performance of Duties and Communication Skills sections; five marks of 6 and a one mark of 5 (for “Evaluations”) in the Leadership Skills section; and four marks of 6 and one mark of 7 (for “Professional Presence”) in the Personal and Professional Qualities section. He received a mark in the sixth spot on the comparison scale, denoting an exceptional officer and was recommended for command, for commissioning, and for promotion “with the best of peers.”

On his third OER as the [REDACTED] dated June 12, 2009, the applicant received all marks of 6 in Performance of Duties with the exception of one mark of 7 for “Professional Competence”; two marks of 6 in Communication Skills; five marks of 6 and a one mark of 5 (for “Evaluations”) in the Leadership Skills section; and three marks of 6 and two marks of 7 (for “Judgment” and “Responsibility”) in the Personal and Professional Qualities section. On the comparison scale, he was again marked as an “exceptional officer.” On June 9, 2009, the applicant received his fourth Achievement Medal for his superior performance of duty while serving as a [REDACTED] from July 2006 to June 2009.

On [REDACTED] the applicant became the CO of the cutter. On his first OER as CO, dated July 31, 2010, the applicant received one mark of 5 for “Adaptability,” three marks of 6 for

“Planning and Preparedness,” “Using Resources,” and “Professional Competence,” and a mark of 7 for “Results/Effectiveness” in the Performance of Duties section. For Communication Skills, the applicant received a mark of 5 for “Speaking and Listening” and a mark of 6 for “Writing.” With regard to his Leadership Skills, the applicant received five marks of 6 and a mark of 5 for “Workplace Climate.” In the Personal and Professional Qualities section, the applicant received a mark of 5 for “Health and Well-Being” and four marks of 6 for “Initiative,” “Judgment,” “Responsibility,” and “Professional Presence.”

The disputed OER covers the applicant’s performance as CO of the cutter from August 1, 2010, through June 10, 2011. (The applicant’s [REDACTED] The OER states that the occasion for report is the detachment of the officer. In the Performance of Duties section, the applicant received two marks of 5 and three marks of 6. In the Communication Skills section, he received a mark of 4 for “Speaking and Listening” and a mark of 5 for “Writing.” With regard to his Leadership Skills, the applicant received one mark of 4 for “Workplace Climate,” two marks of 5 for “Developing Others” and “Teamwork,” and three marks of 6 for “Looking Out for Others,” “Directing Others,” and “Evaluations.” In the Personal and Professional Qualities section of the OER, the applicant received a mark of 4 for “Responsibility,” two marks of 5 for “Initiative” and “Judgment,” and two marks of 6 for “Professional Presence” and “Health and Well-Being.” On the comparison scale, the applicant was rated in the middle, fourth spot as “one of the many competent professionals who form the majority of this grade.” His reporting officer recommended him for promotion “with peers” and recommended that he “be given another operation tour as XO of WLM, 1LT WLB/WLBB in order to further develop and demonstrate command & leadership skills.”

On June 11, 2011, the applicant was reassigned to serve as a [REDACTED] [REDACTED] On his first OER in this position, dated June 1, 2012, the applicant received two marks of 4 for “Looking Out for Others” and “Initiative,” fifteen marks of 5, a mark of 6 for “Professional Competence,” and another mark in the fourth spot on the comparison scale. His reporting officer highly recommended him for promotion and noted that the applicant’s upcoming reassignment as the [REDACTED] of a large cutter would provide him “with the operational opportunities needed to demonstrate the critical leadership & judgment expected of a future Commanding Officer.”

On July 5, 2012, the applicant reported for duty as the [REDACTED] of a large cutter. On his first OER for this service, he received three marks of 5, seven marks of 6, and eight marks of 7 in the performance categories; a mark in the sixth spot, denoting an “exceptional officer,” on the comparison scale; and his reporting officer’s strongest recommendation for command afloat and for promotion. The applicant was not selected for promotion to [REDACTED] [REDACTED] and the results of the 2014 selection board for promotion have not yet been announced.

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

On July 28, 2014, the Judge Advocate General (JAG) submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG argued that the Board should deny the applicant's request for relief because there is no prejudicial error in the disputed OER and the applicant has failed to meet his burden of proof against the strong presumption that the "military superiors involved in the case discharged their duties correctly, lawfully, and in good faith." In order to overcome the presumption of regularity, the JAG argued, the applicant should be required to provide "clear, cogent, and convincing evidence" of error, and he has not. The JAG stated that the applicant has not presented sufficient evidence to reasonably suggest that the rating chain did not discharge its duties properly in the completion of the disputed OER. The JAG stated that normally an officer receives an OER when he detaches from his unit on permanent change of station (transfer) orders, and so the applicant's rating chain prepared the disputed OER with an end date of June 10, 2011, because he was being reassigned to another unit. The JAG noted that the end date was technically an error because the applicant could not receive permanent transfer orders until [REDACTED]

[REDACTED] The JAG argued, however, that the error makes the applicant's record appear better because if the end date had been July 31, 2011, in accordance with policy, the time from June 10 through July 31, 2011, would have been reported as "unobserved" time on the disputed OER.

Regarding the applicant's complaint that the disputed OER was signed by [REDACTED] his prior supervisor, who left the command on May 15, 2011, the JAG noted that [REDACTED] only left the command after the applicant had served his last day as CO of the cutter and so [REDACTED] was the applicant's supervisor throughout his performance as CO. Moreover, the JAG stated, the new supervisor, [REDACTED] did not report to the unit July 1, 2011, and he never supervised the applicant. In addition, the JAG noted that the applicant has not shown that [REDACTED] preparation of the disputed OER was a prejudicial error.

Regarding the applicant's allegation that block 1.i. of the OER does not properly report the 49 days from [REDACTED] as time "unobserved" even though the applicant was [REDACTED] the JAG stated that this error is not prejudicial because the applicant was not actually performing duties during that period. The JAG also admitted that the OER was not prepared within 45 days of the end of the reporting period but argued that the applicant has not shown that the delay in the preparation caused any further error or injustice.

Regarding the applicant's claim that the disputed OER is based on incomplete information because he did not submit additional OER input after February 2011, the JAG noted that under Coast Guard policy, the applicant had until July 10, 2011, to submit additional input for his OER and could have done so, but he did not. The JAG also noted that the applicant could have submitted an OER Reply to include his additional input in the OER, but he did not. Instead, the JAG noted, the applicant waited until his BCMR application in 2014 to claim that missing information about his performance as CO from late February through [REDACTED] prejudiced his OER. The JAG argued that the applicant has failed to present sufficient evidence to prove this claim and concluded that the applicant has not proven by a preponderance of the evidence that particular marks or the OER as a whole is erroneous or unjust. Therefore, the JAG argued, the Board should not expunge or amend the OER and should not remove the applicant's non-selection(s) for promotion.

The JAG also adopted the findings and analysis provided in a memorandum submitted by the Commanding Officer, Coast Guard Personnel Service Center (PSC). PSC stated that the Coast Guard disagrees with the applicant's claim that his OER should have been for the period of August 1, 2010 to July 31, 2011, instead of August 1, 2010 to June 10, 2011. PSC noted that Coast Guard policy clearly states that the OER will end at the occasion that triggers the report. In the applicant's case, PSC alleged, his detachment from the cutter on June 10, 2011, so that he could be reassigned to a [REDACTED] was the occasion for report. Regarding the applicant's allegation that the OER is based on incomplete information, PSC noted that policy states that an officer *may* submit OER input up to twenty-one days before the end of the reporting period but is not required to do so and that he also failed to submit an OER Reply. Regarding the applicant's claims about block 1.i. and the delay of the OER, PSC admitted these errors but noted that they did not affect the quality or accuracy of the OER.

PSC argued that there are no grounds for raising the disputed marks or expunging the OER and submitted declarations signed by the rating chain to support this claim. PSC stated that the declarations show that the rating chain accurately and fairly assessed the applicant's performance during the evaluation period. Therefore, PSC concluded, the Board should not remove the applicant's non-selection(s) for promotion.

***Declaration Submitted by the Supervisor, [REDACTED]***

[REDACTED] operations for the District and the direct supervisor of the applicant until May 15, 2011, several weeks after the applicant began [REDACTED]. [REDACTED] stated that the nature of his relationship with the applicant as his supervisor included "regular telephone and e-mail conversations, occasional face to face meetings during the evaluation period and [REDACTED] visited] with him while [the applicant] was [REDACTED]. He stated that the disputed OER is "fair and accurate based on what I observed personally, what he submitted to me in writing and what we discussed verbally throughout the period ... . No actions took place that excluded important information that would have otherwise influenced my evaluation of his performance."

[REDACTED] also stated that the applicant never protested providing OER input to him in February 2011 and that he did not leave a draft OER with the incoming supervisor upon his departure since he departed the District before the arrival of the new supervisor. [REDACTED] stated that the applicant could have provided additional OER input, either verbally or in writing/electronically, at any point but did not.

***Declaration Submitted by the Reporting Officer, [REDACTED]***

[REDACTED] was assigned as Chief of the District's [REDACTED] during the reporting period for the disputed OER.

Regarding the identity of the applicant's supervisor for the OER, [REDACTED] stated that the OER was prepared and signed by [REDACTED] because [REDACTED] was the applicant's supervisor until he became incapacitated and [REDACTED] replacement, [REDACTED] did not report for duty until July 1, 2011, and never supervised the applicant.

Regarding the preparation of the OER, ██████ stated that he chose the end of period date of June 10, 2011, instead of July 31, 2011, because that was the date that the Office of Personnel Management created a ██████ at a local Sector office and that was the date the applicant officially detached from the cutter and reported to the Sector office. He submitted a copy of an email in which the applicant acknowledged having received orders to report to a new unit on June 10, 2011. Regarding block 1.i, ██████ said they did not report days since the applicant's ██████ as "unobserved" because he was still technically the CO of the cutter, though ██████ and at the time he thought it was possible that the applicant could be found fit for duty and returned to the cutter. Regarding his failure to mark whether or not he concurred with the supervisor's section of the disputed OER, ██████ submitted emails showing that PSC had caught his mistake during the OER validation process, and the error was corrected before the OER was entered in the applicant's record.

Regarding the delay of the OER, ██████ stated that in the summer of 2011 ██████ was "consumed by his new duties as CO of [a large cutter]," which was deployed to the ██████ ██████ was not able to send ██████ his part of the OER until August 18, 2011, and then ██████ own work on the OER was delayed by "competing demands, TAD, and leave." The OER Reviewer had retired on July 31, 2011, began extensive travel, and was not back in the area until late October.

██████ stated that ██████ did provide him with a copy of the applicant's OER input when they were preparing the OER and he also relied on other, "far more" information he received about the applicant's performance. ██████ explained that he and ██████ split the work load so that one of them was always in the office and the other was usually visiting a subordinate command. ██████ visited the junior commands, such as the applicant's cutter, while ██████ visited the senior commands, but they "kept each other constantly informed so that there was never a gap in either of our awareness of the status of the fleet." ██████ kept him informed of all the main issues with the applicant, and ██████ also reviewed all of the daily, monthly, and other operational and administrative reports, emails, etc., from the cutter and throughout the District, concerning the cutter. ██████ also spoke with the applicant about various issues when ██████ was not available.

Regarding the marks in the disputed OER, ██████ stated that in preparing the OER, particular attention was paid to ensure that the applicant's ██████ were neither addressed nor alluded to in his OER and that the OER was a fair and accurate reflection of the applicant's performance. In addition, he noted that the OER was a challenging one to write because—

[o]n one hand we had a competent and highly regarded CO who met mission on an old cutter with a material condition that was consistently praised. His advice was sought out by a wide network of people at all levels of the Coast Guard. On the other hand ... we had a CO who failed to maintain a positive working climate with the Sector which he relied upon for daily support, failed to make sufficient progress on a key project, and who neglected the administration of his unit.

██████ noted that the cutter had experienced ██████ ██████ A contributing factor ██████ was a lack of supervision and attention to the training of the ██████



Department personnel.” ██████ stated that the applicant was a “strong verbal communicator who made emphatic arguments but he was not a strong listener,” which led to significant problems in his relationship with Sector personnel. In fact, ██████ stated, at the time of the applicant’s ██████ the District was contemplating commencing a formal investigation into the applicant. On April 15, 2011, ██████ had received a complaint from a key Sector department head that their relationship with the applicant “had deteriorated to an unacceptable level and the climate between the commands was toxic.” The applicant was described to ██████ by more than one department head as a “bull in a china shop” with an attitude of “I don’t work for you” and “the rules don’t apply to me,” which his crew had begun imitating. As a result of this complaint, which was being raised with the District Chief of Staff, ██████ visited and met with the applicant and Sector leadership on ██████ reported to ██████ that their working relationship was unacceptable and could cause a project that the applicant was responsible for coordinating to fail. However, the applicant ██████ a few hours after ██████ left and, under the circumstances, ██████ did not initiate an investigation, which could have led to the applicant’s relief for cause as CO. The uncertainty of the applicant’s condition and whether he would ever be able to return to work were deciding factors in not initiating the investigation.

Regarding the mark of 4 for Responsibility, ██████ stated that at the time of his ██████ the applicant had failed to make satisfactory progress since the summer of 2010 in disaggregating the ██████ part of his unit, which was supposed to be moved to Sector control. After the applicant’s ██████ sent two members to meet with the Sector and cutter’s ██████ personnel to broker a mutually agreeable way to stand up the unit within the Sector. In addition, ██████ stated, the new, temporary CO of the cutter reported that many of the cutter’s “administrative programs were deficient especially the unit training program, armory and accountability of its ██████ inventory.”

██████ stated that in June 2011, PSC was considering returning the applicant to the cutter as CO, but the District’s senior leadership told PSC that this was “not an acceptable alternative due to our fuller understanding of the deficiencies on [the cutter] under [the applicant’s] leadership.” Therefore, PSC reassigned the applicant to a ██████ ██████ noted that the applicant did not receive an end-of-tour award for his tour of duty as CO, and “he was not permitted to participate in [the cutter’s] change of command ceremony when the permanent relief took command in August.”

Regarding the comparison scale mark in the fourth spot, ██████ stated that it “accurately reflects my judgment of [the applicant’s] potential as demonstrated during the period of the report. It was based on my experience from nearly 11 years of sea time including two commands and nearly three years to that point of supervising nine cutter COs .... [The applicant] demonstrated he was a highly competent operator but one who neglected the management of his unit.” Therefore, ██████ recommended that the applicant receive further opportunity to develop his skills before being placed in command again.

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

On August 14, 2014, the Chair of the BCMR sent the applicant a copy of the Coast Guard's views and invited him to submit a written response within thirty days. Even though the Coast Guard's advisory opinion recommended denial of relief, the applicant responded on September 9, 2014, stating that he had no objection to the Coast Guard's recommendation in the advisory opinion.

## APPLICABLE LAW AND POLICY

Article 10.A.1.a. of the Coast Guard Personnel Manual in effect during the reporting period for the disputed OER states that the Coast Guard Officer Evaluation System (OES) has been designed to (1) provide information for important personnel management decisions. Especially significant among these decisions are promotions, assignments, and career development; (2) set performance and character standards to evaluate each officer; (3) prescribe organizational values by which each Coast Guard officer can be described; and (4) provide a means of feedback to determine how well an officer is measuring up to the standards.

Article 10.A.1.b. of the manual states that COs must ensure accurate, fair, and objective evaluations are provided to all officers under their command. Article 10.A.2.b.2.j. states that COs shall ensure that officer with medical conditions that limit their performance or require reassignment "do not receive below standard evaluations strictly as a consequence of these circumstances."

Article 10.A.2.c.2.e. of the manual states that the Reported-on Officer may submit to the Supervisor not later than 21 days before the end of the reporting period a listing of significant achievements or aspects of performance which occurred during the period. Submission is at the discretion of the Reported-on Officer, unless directed by the Supervisor. The optional OSF worksheet may be used. Supplemental information may be submitted through the end of the reporting period.

Article 10.A.2.d.2. of the manual states that the Supervisor both evaluates the performance of the Reported-on Officer in the execution of duties, and provides direction and guidance to the Reported-on Officer regarding specific duties and responsibilities.

Article 10.A.2.e.2. states that the Reporting Officer must base his evaluation on direct observation, the OSF or other information provided by the Supervisor, and other reliable reports and records. The Reporting Officer must also describe the demonstrated leadership ability and the overall potential of the Reported-on Officer for promotion and special assignment such as command. It is also the Reporting Officer's responsibility to prepare the reporting officer sections of the OER.

Article 10.A.2.f.2. states that it is the Reviewer's responsibility to ensure the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.

Article 10.A.3. of the Personnel Manual states that a CWO3 normally receives a regular, annual OER every July 31<sup>st</sup>. However, preparation of an OER is required when a CWO has permanent change of station (PCS) orders to detach from the unit and more than six months have elapsed since the officer's last regular OER.

Article 10.A.4. of the manual states that when preparing an OER, the Supervisor or Reporting Officer compares the Reported-on Officer's performance to the written standards on the OER form to choose a numerical mark and the, in the comment block following the evaluation area, includes comments citing specific aspects of the officer's performance and behavior for each mark that deviates from a four. In doing so, the Supervisor and Reporting Officer draw on their own observations and other information accumulated during the reporting period.

Article 10.A.4.c.8.a. states that the Reporting Officer completes the comparison scale on an OER by choosing the mark "that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known."

Article 10.A.4.c.9 states that the Reporting Officer shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard in block 10. The comments shall be limited to performance or conduct demonstrated during the reporting period and reflect the judgment of the RO.

Article 10.A.2.f.2. states that the Reviewer ensures that the OER "reflects a reasonably consistent picture" of the officer's performance and potential and submits the OER to PSC within 45 days of the end of the reporting period.

Article 10.A.4.g. states an officer may submit an OER Reply to any OER to express a view of performance which may differ from that of a rating official.

## 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 filed because the applicant has remained on active duty since the disputed OER was entered in his record.<sup>1</sup>

2. The applicant asked the Board to remove from his record his OER for the period August 1, 2010, through June 10, 2011, and his subsequent non-selection for promotion and to backdate his date of rank and award him back pay and allowances if he is selected for promotion. The applicant alleged that procedural violations and inaccurate marks rendered the disputed

---

<sup>1</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).

OER, as well as his non-selection(s) for promotion, erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that a 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>2</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>3</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>4</sup>

3. Regarding the end date of the disputed OER, under Article 10.A.3.a.3. of the Personnel Manual, the detachment of an officer on PCS orders requires submission of an OER if none has been submitted within six months. Although the applicant was reassigned from his cutter on June 10, 2011, he was sent on a temporary assignment to another billet and did not receive PCS orders. Therefore, under the rules, the end date of the disputed OER should be July 31, 2011, and the time from June 10, 2011, to July 31, 2011, should have been counted as 49 "unobserved days" in block 1.i. of the disputed OER instead of observed days of performance under the applicant's next OER. The applicant did not allege or prove that this technical error caused him any harm or prejudice, however, and the Board agrees with the Coast Guard that the error is in the applicant's favor. Therefore, no correction of the end date of the disputed OER is warranted.

4. Regarding ██████ preparation of the OER as Supervisor, the Board finds that his preparation of the OER as Supervisor was proper and fair because he was the applicant's designated Supervisor throughout the time when the applicant served aboard the cutter as the CO. The applicant has not shown that while he was CO of the cutter he answered to another officer as Supervisor or reasonably expected any other officer to serve as his Supervisor. Therefore, ██████'s preparation of the disputed OER was not an unfair surprise and does not warrant removal or amendment of the OER.

5. The Coast Guard has admitted that the disputed OER was not prepared and submitted within 45 days of the end of the reporting period, as required by Article 10.A.2.f.2. of the Personnel Manual. Although the rating chain clearly did not comply with the deadlines in the Personnel Manual, the Board has long held that late preparation *per se* does not invalidate an otherwise valid OER.<sup>5</sup> The applicant has failed to provide any evidence to show that the late preparation caused the OER to be erroneous or that he suffered an injustice as a result of the OER being submitted late to PSC. Therefore, the Board finds that the delay does not warrant removal or amendment of the OER.

---

<sup>2</sup> 33 C.F.R. § 52.24(b).

<sup>3</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>4</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).

<sup>5</sup> See, e.g., CGBCMR Docket Nos. 2012-073, 2010-141, 2005-053, 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

6. The applicant alleged that the comparatively lower marks in the disputed OER are inaccurate reflections of his actual performance, and he submitted statements from the XPO and Engineering Petty Officer of his cutter who highly praised his performance and leadership. The declarations of ██████████ show, however, that the lower marks that the applicant received were based not on his communications, relations, and responsibility toward the ██████████ command cadre but toward Sector personnel with whom he was expected to cooperate to achieve certain goals. Both ██████████ have strongly affirmed the accuracy of the OER marks, and ██████████ noted that they were careful to ensure that the OER was not adversely affected by the applicant's ██████████, as required by Article 10.A.2.b.2.j. of the Personnel Manual.

7. The applicant alleged that the OER marks are based on incomplete information because ██████████ requested his OER input in mid February 2011, two months before the applicant had to leave the cutter ██████████. LCDR D did not deny making this request but pointed out that the applicant was free to submit additional input at a later date but did not do so. The record shows that the applicant expected the end date of the OER to be July 31, 2011, so he clearly knew that his command was preparing an OER and that he could submit input about his performance up through at least July 10, 2011, pursuant to Article 10.A.2.c.2.e. of the Personnel Manual. The Board finds that his rating chain's failure to require him to submit additional input does not constitute an error or injustice. The applicant has not proven by a preponderance of the evidence that any marks or comments in the disputed OER are inaccurate or based on incomplete information about the applicant's performance.

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.<sup>6</sup> Therefore, the Board finds that no correction to the OER is warranted and that the applicant has not shown that his record was prejudiced by error or injustice when it was reviewed by the selection boards in 2013 and 2014. In the absence of a proven prejudicial error in his record, the Board finds no grounds for removing his non-selection(s) for promotion to ██████████.<sup>7</sup>

9. Accordingly, the applicant's request should be denied.

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

---

<sup>6</sup> *Hary*, 618 F.2d at 708.

<sup>7</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (holding that in deciding whether to remove a non-selection for promotion, the Board should answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?").

**ORDER**

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

December 5, 2014

