

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

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Application for the Correction of  
the Coast Guard Record of:

BCMR Docket No. 2014-154

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**FINAL DECISION**

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

This final decision, dated February 27, 2015, 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 as a temporary officer was twice non-selected for promotion to lieutenant and subsequently discharged,<sup>1</sup> asked the Board to correct his military record by removing his officer evaluation reports (OERs) for the periods October 1, 2010, through January 31, 2011, and February 1 through July 8, 2011 (see attached). The applicant alleged that these two OERs are in error and unjust. He also requested that his temporary commission as an officer be reinstated, allowing him to compete for promotion before the next Lieutenant Selection Board.

The applicant challenged the disputed OERs based on several premises. First, he alleged that his direct supervisor did not authorize his OERs, thereby rendering them inaccurate. The applicant also alleged that the Command unjustly used his performance collateral duties as a basis for lowering his marks in the OERs. Next, the applicant alleged that the rating chain was biased against him and lowered his marks because he was switching career fields to engineering. He further alleged that the disputed OERs are contradicted by statements within his other OERs and his service record. The applicant also alleged that the "scope" of the second OER was incorrect because the two OERs in question "mirror[ed] each other, as if there w[ere] no interest

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<sup>1</sup> When an individual is passed over for promotion two consecutive times, that officer is normally separated from the service. The applicant did reenter the Coast Guard as an enlisted member. See COMDTINST M1000.6A, Article 1.A.8.a.1(a) (in effect at the time of the applicant's disputed OERs).



in writing [his] departing OER. [REDACTED]stly, the applicant supported his arguments generally by stating his alleged performance deficiencies were never otherwise documented [REDACTED] certifications with [REDACTED]. The applicant's specific allegations are summarized below.

### *Error Based Supervisor Inconsistency*

The applicant alleged that his direct supervisor, [REDACTED] disputed periods, rendering them inaccurate. He stated that the Incident Management Chief authored the OERs. The applicant cited COMDTINST M1000.3A, [REDACTED] 2.d(2)(a), which states that "[t]he supervisor is normally the individual to whom the reported-on officer reports to [REDACTED]ent basis and from whom the reported-on officer receives the majority of direction and requirements." The applicant alleged that [REDACTED] "had more knowledge of [his] performance" than the Incident Management Chief, which put [REDACTED] in a better position to evaluate the applicant.

The applicant acknowledged that supervisors can be unavailable or disqualified, but stated that he knew of nothing that would [REDACTED] from acting as his supervisor for OER purposes. Further, the applicant stated that he had five consecutive OERs authored by the Enforcement Division Chief, unlike the two disputed OERs which were authored by the Incident Management Chief. The applicant alleged that although he was technically under the Incident Management Division, all of his duties were performed under the Enforcement Division.

### *Bias Based on Career Choice*

The applicant alleged that the disputed OERs are unjust because [REDACTED] Command "was unfairly biased [REDACTED]h] because of [his] career choices." The applicant stated that a variety of reasons led him to pursue engineering instead of response. He alleged that this choice resulted in "a bias [REDACTED]entionally or unintentionally was punitive in nature." The applicant alleged the following examples demonstrate this bias:

- Boarding Team Supervisor Issues- The applicant stated that while he was the Sector Boarding Team Supervisor, his team received orders from several other officers on many occasions. He stated that he was not [REDACTED]pprised of these orders and that he could not effectively [REDACTED]ization. His attempts [REDACTED]y the issue were allegedly ignored.
- CDO Re-Qualification Process- The applicant's departing OER stated that he "[q]ualified as Boarding Team Member, Operations Unit Controller and Command Duty Officer, but failed to recertify and stood no watches after [REDACTED] qualifications lapsed during deployment [REDACTED]. The applicant stated that this statement was "not an accurate representation of what transpired." He alleged that he was told that he needed to redo his entire CDO Practical Factors after returning from [REDACTED]. The applicant did not say who told him this. He alleged that the manner he was told to requalify was "a deviation from how re-qualifications are typically conducted..." He stated [REDACTED]t he could have been put back into the rotation and



that it is not a [REDACTED]ment to do the entire CDO package again. The applicant alleged that the process “varied widely” for Junior Officers deploy [REDACTED]. He stated that some Junior Officers were allowed to go back into the regular rotation while he was forced to start anew. The applicant provided emails from two other Junior Officers a [REDACTED] inconsistency at which they resumed their CDO watches. The applicant conjectured that Command did not trust him because o [REDACTED] misunderstood. He went on to postulate that his ethnic background and his accent did not affect his leadership skills, ability to work un [REDACTED], and his “ability to be a great performing officer.” This point was not coupled with an allegation [REDACTED] discrimination from the applicant.

The applicant stated that his Command Duty C [REDACTED] qualification was never revoked despite CDO deficiencies noted on his OERs. He alleged that he qualified in the standard amount of time. The applicant cited the OER for the period of October 1, 2010-January 31, 2011 to demonstrate alleged contradictory language. In that OER, the [REDACTED] ended the applicant for promotion with peers,” and yet did not even rate the applicant as “one of the many competent professionals who form the majority of the grade.”

The applicant also expressly noted the following language on his OER: “However, in current position, requires close oversight and detailed tasking.” The applicant stated implicitly that this language is c [REDACTED] rry to his status as a Command Duty Officer and the lack of revocation of his qualifications for that position.

- Other Performance Evaluations: The applicant alleged that he served six years [REDACTED] successfully as an enlisted member before being selected for Officer Candidate School. He stated that his prior OERs were positive and his two deployments were successful. He stated that the consistently positive way in [REDACTED] he was evaluated “calls into question the judgment and motivations of a rating chain that notes performance at odds with documented history and subsequent performances.” The applicant further alleged that [REDACTED] r approval for reenlistment and orders to report as the [REDACTED] [REDACTED] is also evidence o [REDACTED]. The applicant said, “[t]op performers and accomplished personnel are the kind of members that receive this opportunity, leading me to believe that my performance as a Coast Guard Member has never been a problem, but the unfair and unjust evaluations were what hurt my selection to Lieutenant.”

***Error Based o [REDACTED] e” of OERs; OERs “Mirror each other”***

The applicant alleged that the similarity between the disputed OE [REDACTED] erroneous and [REDACTED] specially when considering that they were both unlike his previous OERs. For example, he alleged, regarding the Block 5 comments in both OERs, “it is the same message [REDACTED]



throughout the block with di[REDACTED]erbiage, some verbiage being the same.” He alleged that there was “no interest or effort in writing [his] departing OER.” [REDACTED]

The applicant also alleged that the disputed OERs are mostly composed of accomplishments from his TDY on a Coast Guard cutter and for [REDACTED], which only comprised nine days of the OER reporting period. The applicant stated that the TDY time on the cutter corresponded most to his penultimate OER, not th[REDACTED]

### VIEWS OF THE COAST GUARD [REDACTED]

[REDACTED] 22, 2014, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he adopted the facts and a [REDACTED] provided by the Coast Guard Personnel Service Center (PSC), recommending denial of the app[REDACTED]. The PSC opinion was accompanied by five supporting declarations from members of the applicant’s rating chain.

#### *PSC Opinion Adopted by JAG*

[REDACTED] PSC began its opinion by reviewing the matters of record. PSC stated that the applicant had similar duties for both disputed OER periods except that during the penultimate OER period, the applicant had Break-in Boarding Officer duties.

Before addressing substantive allegations, PSC pointed out an error in the applicant’s cited references. The applicant cited the Officer Accessions, [REDACTED]ions, and Promotion Man[REDACTED]MDTINST M1000.3A. This manual was not yet in effect at the time of the disputed OERs were prepared. Instead, the Personnel Manual, COMDTINST 10 [REDACTED] was still in effect when the OERs [REDACTED]red.

[REDACTED]an the substantive portion of its opinion by addressing the applicant’s contention that his rating chain was flawed and somehow unjust. PSC emphasized “that the direct supervisor is *normally* the day-to-day supervisor; however there is no requirement [REDACTED]s be the case” (emphasis theirs). The cited policy also states that the supervisor is normally senior to the Reported-on Officer (ROO). PSC stated that when the applicant was promoted to LT Junior Grade, his supervisor subsequently changed to a senior officer (from [REDACTED] to the Incident Management Chief, LT M). PSC further stated that [REDACTED] applicant’s day [REDACTED]y operations and proj[REDACTED] participated in the applicant’s evaluation.

Next, PSC addressed the alleged inconsistencies within the OERs and the applicant’s assertion that his evaluations did not accurately reflect his performance. PSC simply stated that it believed the ratings were accurate and conformed to the policies of the Officer Evaluation [REDACTED]e marks were “supported by OER comments [REDACTED] declarations.” [REDACTED]C also pointed out that Block 9 of the OER, which is a comparison scale that rates the officer in relation to his peers, is a “relative ranking and not necessarily a trend of performance.” This relative ranking could allow an officer to improve his [REDACTED] a place on the s[REDACTED] which is what happened to the applicant in this case.

[REDACTED]



Next, PSC addressed [REDACTED] cant's allegations regarding bias due to his career choice. PSC stated that "[t]his contention is contrary to all declaration input." PSC stated [REDACTED] duty opportunity [REDACTED] in order for the applicant to pursue his desired career choice and further, members of the rating chain made positive comments on the applicant's potential in that career choice on his OERs. [REDACTED]

Lastly, PSC addressed the applicant's allegation [REDACTED] that the disputed OERs were flawed. PSC repeated its contention above that the OERs were well supported with consistent themes; namely, the applicant was "i [REDACTED] in performance, performed well when interested to do so, and exercised limited initiative in assigned duties." [REDACTED] the applicant did not utilize a Reported-on Officer (ROO) OER reply or a Coast Guard Personnel Records Review Board (PRRB) [REDACTED] on to dispute his OERs before petitioning the BCMR. Further, PSC noted that under 14 U.S.C. [REDACTED] (b), the applicant could have submitted communications to the officer selection board "to invite attention to any matter of their record." The applicant did not take advantage of this opportunity.

PSC concluded by summarizing [REDACTED] s: The rating chain functioned accurately, the applicant has not provided sufficient evidence to overcome the presumption of regularity in Coast Guard records, the disputed OERs accurately reflect the applicant's performance and should not be removed, and the applicant's non-selection for Lieutenant Selection Boards should be upheld.

#### *Declarations of Officers in Applicant's Rating Chain* [REDACTED]

[REDACTED] The first declaration attached to the PSC opinion was from [REDACTED] the applicant's initial supervisor [REDACTED] stated that upon the applicant's promotion to LTJG, his OER supervisor was changed to LT M because Sector Command did not want an LTJG supervising another LTJG. [REDACTED] stated that he did not remember providing input on the applicant's penultimate OER but that he did write the draft departing OER with the help of the applicant's input. [REDACTED]

The second declaration was from LT M, the applicant's OER supervisor for both disputed OERs. He addressed each of the applicant's allegations starting with the alleged supervisor inconsistency. LT M stated that he was the rating chain supervisor for a [REDACTED] Officers and he was "highly involved with day-to-day operations and p [REDACTED] the applicant's [REDACTED] departing OER from [REDACTED]. LT M stated that his supervisory status was properly made in coordination with Sector Command so that an O-2 would not be supervising another O-2.

LT M then addressed the applicant's CDO qualification. The applicant alleged that the [REDACTED] re-qualification was inconsistent and even [REDACTED] remembered the [REDACTED] cant showing "very little initiative to gain or maintain these qualifications and had difficulty retaining the necessary knowledge, displaying the appropriate judgment, and performing the tasks associated with the OU and CDO positions." [REDACTED] acknowledge t [REDACTED] process was not the same for all officers, but it was not due to any bias against the applicant. LT M basically stated that each case was different and the applicant's [REDACTED]



“lack of experience and sub[redacted] performance during the qualification process completely justified the additional requirements placed on him to re-qualify.” [redacted]

Lastly, LT M addressed the alleged bias based on career choice. LT M stated that the actions of the officers in the rating chain are contrary to the [redacted] ons. LT M contended that the applicant was supported in his transition to the engineering field and “an extensive TDY trip and an early rotation to fill an available [redacted] billet were arranged for him” in support of his new career choice. LT M pointed out that the applicant’s OERs repeatedly pointed out the applicant’s potential in [redacted]

[redacted] referenced a declaration from CDR M, the applicant’s reporting officer. CDR M addressed the applicant’s allegations in much the same [redacted] as LT M did, initially starting with the supervisor inconsistency issue. CDR M stated that the [redacted] in supervisor was done purposefully, with full concurrence of the Sector Command and done so with the best interest of [the applicant].” CDR M also cited the issue of a LTJG officer supervising another LTJG. Further, CDR M stated that junior officers in the department were often engaged in many differing tasks, making it less likely that [redacted] supervised the applicant’s work regularly. Shifting the supervisor to LT M ensured a reliably available source of “tasking, guidance and counseling” for the applicant.

CDR M next addressed the allegation related to the re-qualification process. CDR M stated that the applicant was “slow to make decisions and take action.” He further stated that the applicant “displayed technical competence” but that he “quickly [redacted] come overwhelmed.” CDR [redacted] specifically noted an instance where the applicant “requested directly to [him] to no longer stand watch in the command center and [the applicant] remain [redacted]ly junior officer who has ever [redacted] [him] who has approached [him] with the request of seeking less responsibility.”

CDR M further emphasized that the applicant did well on his deployments but that did not carry over into the Sector. CDR M cited lack of input from the member as an [redacted]g issue that explains the similarity in his penultimate and departing OERs. He further stated that “without any new tasks or qualifications completed, there was little new information to write about.” CDR M noted the differences in Block 4 of the disputed OERs [redacted]ed that although similarly worded, they support separate habits that the [redacted] OER periods. [redacted]M emphasized that the [redacted]rs continued even into the applicant’s BCMR application.

CDR M also noted the applicant’s use of incorrect manuals in his BCMR application. CDR M contended that he readily supported the applicant in his career choice, even pressuring [redacted] into accepting the applicant for a temporary [redacted] program. He also dispelled any notion that the applicant’s ethnic background was a factor in his OERs. Concluding, CDR M stated that all of the applicant’s marks were accurate. [redacted]

The next declaration was submitted by the applicant’s penultimate OER Reviewer, CAPT K. CAPT K stated that the applicant [redacted]ed the same opportunities as the other junior officers.



He stated that the applicant lived 90 minutes away, making it difficult for him to put in the requisite time to advancing. CAPT K emphasized that the entire Command supported the applicant's choice but when the applicant's supervisor, the applicant performed to the satisfactory level in only those areas that piqued his interest, which was reflected in his OERs. CAPT K concluded that the applicant's marks were accurate reflections of his performance.

The last declaration submitted by PSC was from [redacted] Reviewer. CDR A reported that he was responsible for reviewing the applicant's departing OER for "accuracy, sufficiency of support, fairness and reasonableness in accordance to policy." CDR A stated that he had limited interaction with the applicant, but that he had a perception from the applicant's peers, superiors, and subordinates that "he did the absolute minimum necessary." CDR A vouched for the accuracy in the applicant's OERs, stating that his "writing skills were substandard," "motivation deeply lacking" and [redacted] was "unresponsive to counseling," only interested in external engineering opportunities.

CDR A specifically addressed the allegations that the disputed OERs were inaccurate, stating "[t]he marks are a reflection of [the applicant's] observed performance and are a consequence of his performance following formal and informal counseling on performance expectations." CDR A emphasized the appropriateness of LT M as the applicant's supervisor due to his proximity to the applicant as well as his position on the CDO qualification board. CDR A also noted that the applicant required more oversight than the other Junior Officer while on watch.

CDR A addressed the allegation of inconsistency in the qualification procedure by stating that the requirements placed on the applicant were "standard practice" following TDY deployments. He stated, "the fact that it required more time and effort [for the applicant] to re-qualify is a measure of competency and commitment." CDR A also stated that it is important for junior officers to excel in their current job before pursuing their "dream job." The sentiment that the applicant was thoroughly supported by his supervisors in his career choice was also emphasized in CDR A's declaration, in concurrence with the other declarations.

CDR A concluded by stating that the applicant performed at the minimum necessary level and his OERs are an accurate representation of his performance.

#### APPLICANT'S RESPONSE TO THE VIEW

On December 1, 2014, the applicant submitted a response to the Coast Guard opinion and declarations. He directly addressed the opinions of PSC and each of the submitted declarations specifically.

The applicant first addressed the PSC assertion that the applicant did not request a timely fashion a Port-on Officer Reply to OER or Coast Guard Personnel Records Review Board). The applicant's response was that he did not have proper guidance to pursue such remedies.

The applicant next addressed the PSC point that the OER supervisor is normally the day-to-day supervisor, but that it is not a requirement. The applicant countered this contention by



pointing out that it is also no [redacted] requirement that the supervisor must be senior to the ROO and that having a supervisor with whom he more regularly interacted with (allegedly [redacted]) have been more [redacted].

Next, the applicant addressed why he did not communicate [redacted] Officer Selection Boards, under 14 U.S.C. § 253(b). Addressing his PY13 Officer Selection Board, the applicant stated the following: "I didn't communicate to the PY13 [redacted] did not feel the need base on my record [sic]."

Addressing, the PY14 Board, the applicant stated that he did in fact communicate with [redacted] to PSC allegations. The applicant attached an email to his response to the Coast Guard opinion which contained communications from [redacted] applicant to the President of the PY14 Lieutenant Assignment/Selection Board. In that communication [redacted] the applicant emphasized the improvement in his performance once he was shifted to a position involving engineering. He further stated that the communication was meant to show the PY14 Board "who [he] was" and what he wanted as a Coast Guard member.

The applicant opined that the PY14 Board may not have received the communication, although he did receive a confirmation message that stated no further action was required on his part. He also opined that if the PY14 Board did not in fact receive his communication, that would be "an OPM mistake, that could have cost me [the applicant's] my LT promotion for."

The applicant next addressed the declaration submitted by [redacted]. The applicant stated that [redacted] did not provide any input for his penultimate OER but that he wrote the initial draft of the applicant's departing OER. The applicant stated that this was "a [redacted] process" and he alleged that [redacted] given this task for "practice," which the applicant characterized as demeaning. He stated that his "direct supervisor...should have been involved in the process in its entirety [redacted]."

Next, the applicant addressed LT M's statement. The applicant noted LT M's assertions that it was the applicant's lack of experience and sub-par performance that caused him to restart his CDO qualifications process. The applicant retorted by saying that if he in fact had sub-par performance, he would have never qualified as a Command Duty Officer [redacted] applicant further stated that another Junior Officer who had the same experience [redacted] treatment by [redacted] allowed to more easily [redacted] the CDO qualification rotation.

The applicant also re-asserted that he was primarily judged on collateral duties rather than primary duties. He stated that his CDO duties were collateral and his primary duties were always completed on time. In response to LT M's assertion that he showed little initiative in his [redacted] responded that his "biggest initiative has always [redacted] [his] family, and [redacted] time was to be the best Officer that [he] could be to be able to give [his] family a better life." He further stated that he was not lacking in initiative, but rather his Command did not give him trust or an opportunity to succeed. [redacted]

The applicant then addressed the declaration submitted to PSC by CDR M. The applicant stated that CDR M's assertion that [redacted] would not be an optimal supervisor was false. The



applicant stated that he and [REDACTED] communicated on a daily basis in some fashion (email, phone, or face-to-face). The applicant stated that they usually communicated [REDACTED] day,” belying t [REDACTED] R M that they did not interact enough for a proper supervisory relationship.

[REDACTED]

The applicant then addressed CDR M’s statement that no member has ever approached him seeking fewer duties. The applicant stated that he d [REDACTED] because he felt as though he was treated differently from the other Junior Officers post-deployment. The applicant hypothesized that this sentiment was [REDACTED] fact that he was allegedly the only one who “was told to re-qualify and take another board” after returning from [REDACTED]. He stated that he requested not to stand watch because the process was “broken and unfair.” [REDACTED]

The applicant also addressed the “broken chain of command” and CDR M’s response to the applicant’s initial allegations. The applicant alleged that “this new process...and the idea that anybody could supervise the Enforcement Division, broke the chain of command, took away my leadership and took away all that [he [REDACTED] d built.” The applicant went on to address CDR M’s mention of the applicant’s prior enlistment experience by alleging that he was held to a higher standard than the other Junior Officers. The applicant stated that “[u]tilizing my [the applicant’s] prior enlisted experience as a measurement towards my career as an Officer is unfair and an unrealistic idea.” The applicant went on to suggest that the Command did not help him achieve his goals, that he was viewed as an outsider, and that his method of learning was not “good enough for them so they gave up on [him].” [REDACTED]

[REDACTED]

The applicant next addressed CAPT K’s assertions that the app [REDACTED] ld not put in the necessary time [REDACTED] lived over 90 minutes away. The applicant stated that his living arrangements were due to the fact that his wife, another Coast Guard member, was stationed at another [REDACTED] h the region. The applicant stated that while the other Junior Officers were able to work until 8 or 9PM because they had “nothing else to do” and “no one to answer to,” he had family duties to attend to. The applicant alleged that the Command at CG Sector [REDACTED] did not like the idea that he put family first and told him “once or twice” that the Coast Guard comes before family.

[REDACTED]

Lastly, the applicant addressed the declaration [REDACTED] cally addressin [REDACTED] R A’s contention that [REDACTED] icant required more oversight while attending to the watch. The applicant stated that he was unaware of the need for increased oversight and he inquired as to why he was not informed of this need so that he could have corrected it.

The applicant concluded by stating that he was given an opportunity to pursue a career in [REDACTED] but that when he returned he was treated [REDACTED] diminished de [REDACTED] making involvement and the lack of respect he received after his return. The applicant stated that once Command learned of his career intentions, they felt disrespected and used his OER as a tool to express this disrespect. [REDACTED]

[REDACTED]

The applicant’s final sentiment in his reply to the Coast Guard opinion was to express that his intent was not to attack an [REDACTED] sonally. He stated his life has revolved around the



Coast Guard for over ten years [REDACTED] at lack of help and guidance impeded his ability to be the best Coast Guard officer he could be. [REDACTED]

**APPLICABLE LAW**

***Performance Expectations and Feedback- COMDTINST M1000.6A***

Article 10.A.1.b.2. of the Personnel Manual in effect in 2011 provides that “[i]ndividual officers are responsible for managing their performance. This responsibility includes determining job expectations, obtaining sufficient performance feedback, and using that information to meet [REDACTED]”

Article 10.A.2.c.2.c states that it is the responsibility of [REDACTED] reported-on officer to “[a]s necessary, seek[] performance feedback from the Supervisor during the period.”

Article 10.A.2.d.2.e states that one of the supervisor’s responsibilities is to “[p]rovide[] timely performance feedback to the Reported-on Officer [RO] on that officer’s request during the period, at the end of each reporting period and at such other times as the Supervisor deems appropriate.”

***OER Responsibilities and Timing- COMDTINST M1000.6A***

Article 10.A.1.b.1 states that “[c]ommanding officers must ensure that evaluations are accurate, fair, and objective. Evaluations are provided to all officers under their command.”

Article [REDACTED] states that an officer’s supervisor is “[n]ormally the individual to whom the Reported-on Officer [ROO] answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements.”

Article 10.A.2.d.1.c states that “[t]he Supervisor will normally be senior to the Reported-on Officer. However, in appropriate situations, the Supervisor may be designated, regardless of grade relative to the Reported-on Officer.”

Article 10.A.2.e.2.a states that the Reporting Officer shall “[c]onduct a performance observation, through direct observation or other information provided by the Supervisor, and other reliable reports and records.”

Article 10.A.2 is the section of the Personnel Manual devoted to the preparation and processing of evaluation reports. Article 10.A.4.c.2.a of that section states that “[t]he Supervisor shall include a summary of the most important aspects of the Reported-on Officer’s primary duties, collateral duties, special projects, key processes, and customer and supplier identities should be included.”

Article 10.A.4.p.8 states that the Reporting Officer shall fill in the comparison scale circle (block 9) that most closely reflects the RO’s ranking of the ROO relative to all other officers of the same grade the RO has known. Article further states that this relative ranking is not



necessarily a trend of performance and thus, from period to period, an officer could improve in performance but drop a category.

Article 10.A.2.f.2 dictates that each OER is reviewed, usually by the Reporting Officer's supervisor, to ensure that it "reflects a reasonably consistent picture of the Reported-on Officer's performance and potential" and that "the Supervisor and the Reporting Officer have adequately executed their responsibilities."

#### ***Replies to OERs- COMDTINST M1000.6A***

Article 10.A.4.g states that within 21 days from the date he receives a validated OER, any Reported-on Officer may submit a written reply to the OER for inclusion in his record "to express a view of performance which may differ from that of a rating official." The OER reply is forwarded through his rating chain, where each evaluator may comment on the reply in their endorsements.

#### ***Promotion Board Communication- 14 U.S.C. § 253(b)***

14 U.S.C. § 253(b) allows any officer eligible for consideration by a selection board to send communications to the board to invite attention to any matter of their record. In this case, the applicant did send a communication to the PY14 Board, but not the PY13 Board.

### **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 concerning this matter under 10 U.S.C. § 1552. The application is timely.
2. The Board finds that the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to him, as required by 33 C.F.R. § 52.13(b). Although the Coast Guard PSC made the point that the applicant did not submit an official reply to his OERs or a petition to the PRRB, those remedies had already lapsed at the time of the applicant's BCMR application.
3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to her authority under 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing.<sup>2</sup> The Board concurs in that recommendation.<sup>3</sup>

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<sup>2</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>3</sup> *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").



4. The applicant alleged that his OERs for the periods of October 1, 2010, through January 31, 2011, and February 1 through July 8, 2011, should be corrected (or expunged) because they are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OERs in an applicant's military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OERs are erroneous or unjust.<sup>4</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.<sup>5</sup> To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>6</sup>

5. The applicant repeatedly alleged that the duties he was rated on were collateral in nature and so argued that his performance of those duties should not have been evaluated in his OERs. However, he offers little to no evidence in support of his characterization of the duties in which he was rated negatively as collateral. Furthermore, there is no policy in the Personnel Manual in effect at the time of his OERs that supports his position that an officer should not be evaluated based upon his performance of collateral duties. In fact, COMDTINST M1000.6A, Article 10.A.4.C.2.a, which concerns preparation of OERs, draws no distinction between collateral and primary duties.<sup>7</sup> Therefore, even assuming that the low marks and negative comments in the disputed OERs are based primarily on the applicant's performance of collateral duties—which he has not proved—he has not shown that this alleged fact makes the disputed OERs erroneous or unjust.

6. The applicant alleged that the disputed OERs are in error or unjust because they were not authored by the officer who should have, according to the applicant, been his supervisor during the rating period. To support this argument, the applicant cited the section of the Personnel Manual that states that the supervising officer does not necessarily have to be senior to the reported-on officer (ROO). He couples this with the allegation that [REDACTED] was the most appropriate officer to supervise him based on the frequency and nature of their interactions. However, Coast Guard officers do not get to pick who evaluates their work, and PSC and the officers in the applicant's rating chain have confirmed that LT M was an appropriate supervisor for the applicant. Moreover, Article 10.A.2.d.1.a. of the Personnel Manual states that a supervisor "normally" has consistent day-to-day interactions with his supervisee, which means that daily interactions are not required and effectively dispels the applicant's argument. The

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<sup>4</sup> 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)).

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

<sup>6</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

<sup>7</sup> "The Supervisor shall write a summary of the most important aspects of Reported-on Officer's job. Primary duties, collateral duties, special projects, key processes, and customer and supplier identities should be included."



emphasis in this section denotes that a supervisory relationship can exist even if there is not daily interaction. The Board finds that the applicant has not submitted sufficient evidence to overcome the presumption that LT M was properly designated as his supervisor for evaluation purposes, especially given that [REDACTED] was the same rank as the applicant, which placed them in potential competition for future promotions.

7. The applicant alleged that his OERs were biased based on his career choice. He alleged that he was treated differently by the Command after he made the choice to switch careers. For example, he claimed, but failed to prove, that some officers began undercutting his authority by issuing orders to his team that contradicted his own orders. However, the applicant received highly positive comments regarding his performance as an [REDACTED] in both his penultimate and departing OERs. But he was also consistently marked negatively on the performance of his other duties. The applicant's departing OER stated that he "exemplified superb effectiveness responding to critical, ambiguous and challenging [REDACTED] obstacles while TDY, yet unwilling to display the same in assigned duties – shied away from or ignored opportunities to adjust work methods despite highly detailed guidance and frequent feedback on performance." This sentiment is repeated throughout the disputed OERs and the subsequent declarations by the officers in his rating chain. The applicant failed to adequately address the reports of lackluster performance in his OERs. The record shows that the applicant was uninterested in and put insufficient effort into performing duties outside the [REDACTED].

8. The applicant argued that his eventual qualification as a CDO proves that the disputed OERs are erroneous and a product of bias against his career choice. However, as LT M noted in his declaration, finally achieving qualification as a CDO does not prove that an officer did not struggle and perform poorly along the way. LT M stated that the applicant, as a result of his poor performance, was required to restart the qualifications process. Nowhere does LT M or anyone else in the rating chain suggest that because of his prior poor performance, the applicant could not have re-qualified. Furthermore, no Coast Guard regulation in effect at the time of the disputed OER periods dictates that an officer's CDO qualification prevents him from receiving negative OER marks or comments.

9. The applicant argued that the fact that he has received better evaluations for his performance during other periods and in other capacities proves that the disputed OERs are erroneous. However, the applicant's superior performance during other reporting periods and in other assignments does not prove that the disputed OERs are erroneous.<sup>8</sup>

10. The applicant alleged that the "scope" of the disputed OERs was in error or unjust because they "mirrored" each other. However, a review of the OERs, as well as the submitted declarations of the officers in the rating chain, proves this claim to be inaccurate. Each OER comment on both of the disputed OERs offers differing language corresponding to different duties, qualifications, accolades, and shortcomings. Any similarity in the language could be attributable to the applicant's own input for the OERs and to the fact that the same officers worked on preparing the OERs. Nor is there any regulation in the Personnel Manual in effect in 2011 that prohibits similar comments in successive OERs.

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<sup>8</sup> *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981).



11. The Board finds that the applicant has not proven by a preponderance of the evidence that the disputed OERs are adversely affected by any mistake of significant hard fact, factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>9</sup> Therefore, there are no grounds for amending or expunging the OERs. The applicant’s allegations mostly consist of explanations for his negative performance, rather than actual facts that expose a detrimental error or injustice committed by the Coast Guard. Moreover, the comments in the disputed OERs and the declarations submitted by the applicant’s rating chain effectively support all of the positive and negative ratings the applicant received, which are presumptively correct.<sup>10</sup>

12. Although the applicant submitted a communication to the PY 2014 selection board to explain his circumstances, that selection board, like the PY 2013 board, did not select the applicant for promotion. Nothing in the record supports the applicant’s conjecture that the PY 2014 board did not receive his communication. Because the applicant has not proven by a preponderance of the evidence that his record was prejudiced by error or injustice when it was reviewed by the selection boards, he is not entitled to the removal of his non-selections or reinstatement as an officer.<sup>11</sup>

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

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

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<sup>9</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>10</sup> 33 C.F.R. § 52.24(b).

<sup>11</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

**ORDER**

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

February 27, 2015

