DEPARTMENT OF HOMELAND SECURITY BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of the Coast Guard Record of:

BCMR Docket No. 2014-154

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 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.

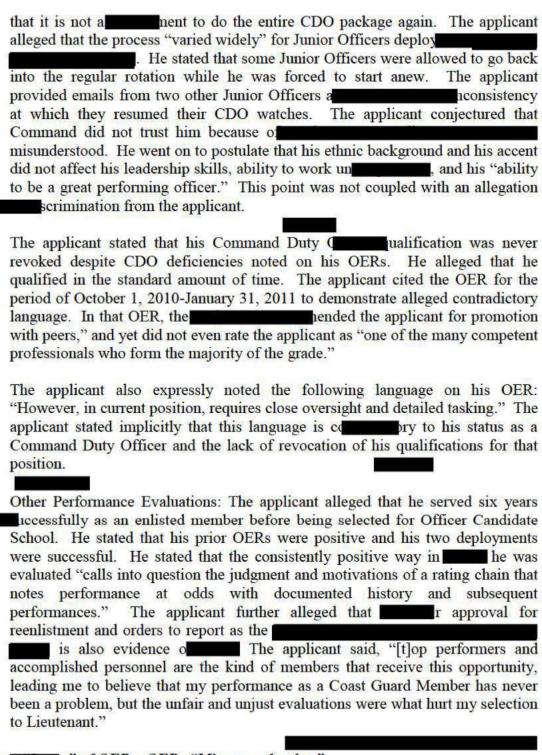
APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who as a temporary officer was twice non-selected for promotion to lieutenant and subsequently discharged, 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 author 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 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

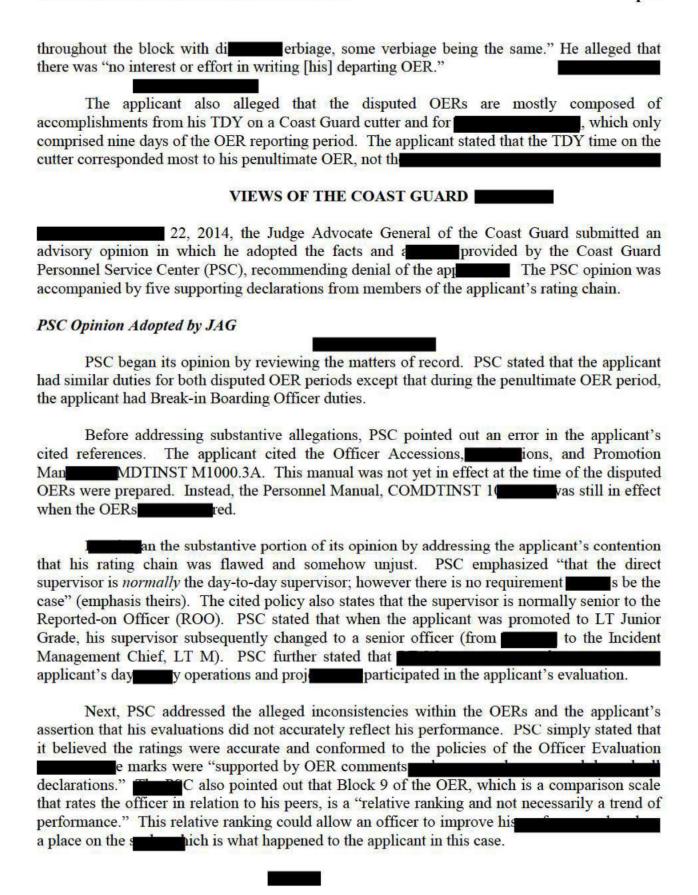
¹ When an individual is passed over for promotion two consecutive times, that officer is normally separated from the service. The applicant did reenter the Coast Guard as an enlisted member. *See* COMDTINST M1000.6A, Article 1.A.8.a.1(a) (in effect at the time of the applicant's disputed OERs).

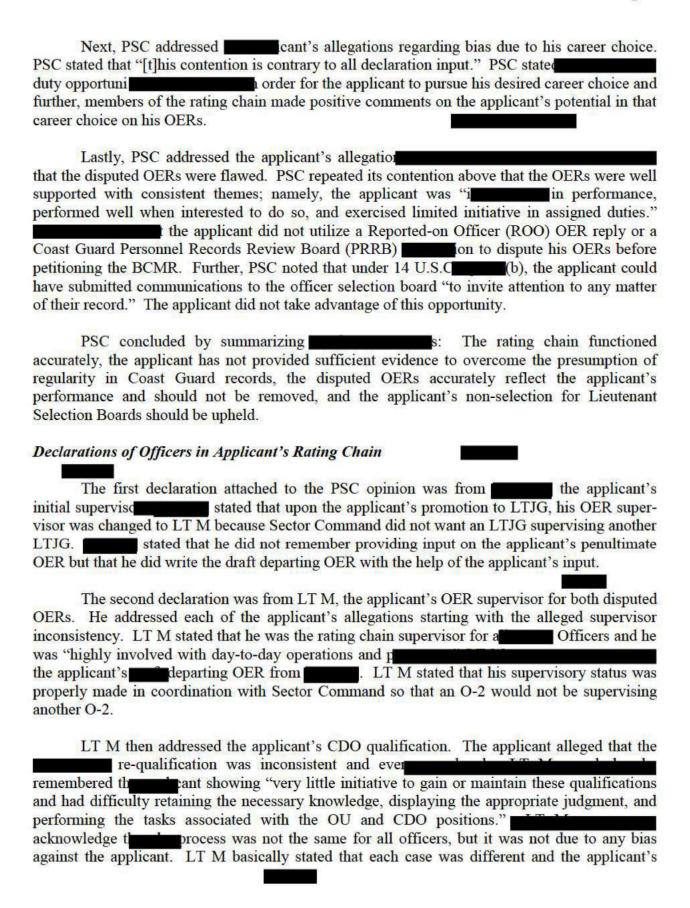
in writing [his] departing Oleman styly, the applicant supported his arguments generally by stating his alleged performance deficiencies were never otherwise document certifications where the applicant's specific allegations are summarized below.
Error Based Supervisor Inconsistency
The applicant alleged that his direct supervisor, disputed periods, rendering them inaccurate. He stated that the Incident Management Chief authored the OERs. The applicant cited COMDTINST M1000.3A, 2.d(2)(a), which states that "[t]he supervisor is normally the individual to whom the reported-on officer receives the majority of direction and requirements." The applicant alleged that "had more knowledge of [his] performance" than the Incident Management Chief, which put 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 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.
The applicant alleged that the disputed OERs are unjust became Command "was unfairly biased 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 bia tentionally 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 no prize prized of these orders and that he could not effectively zation. His attempts 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 qualifications lapsed during deployment ." 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 . 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 that the could have been put back into the rotation and

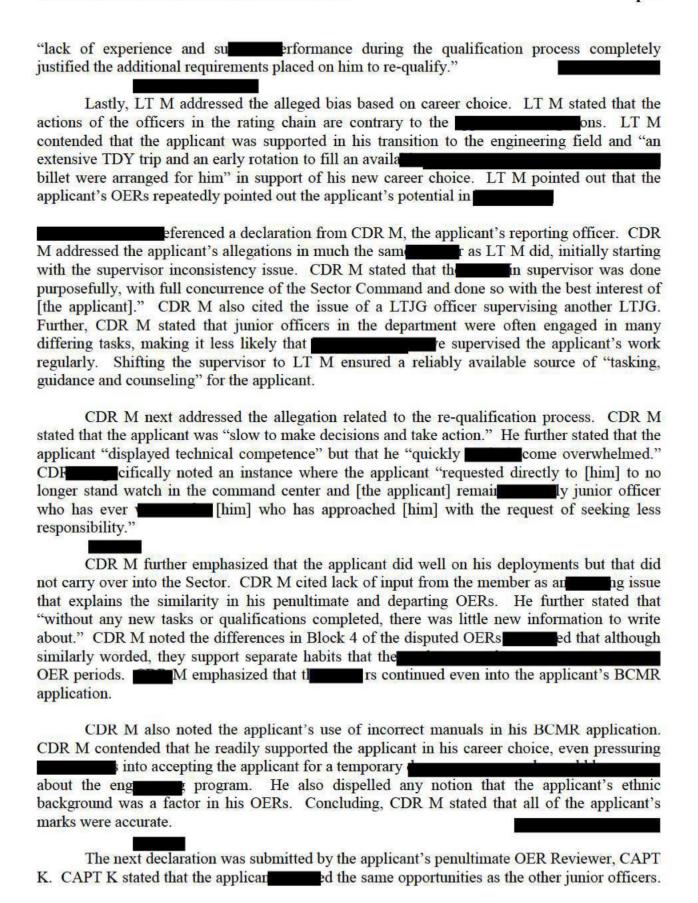


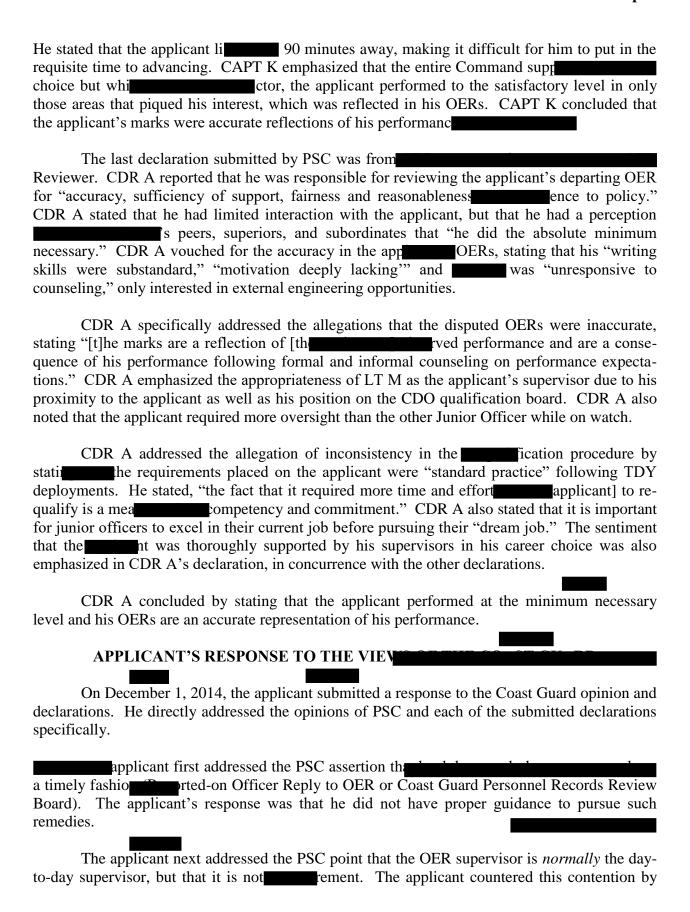
Error Based of e" of OERs; OERs "Mirror each other"

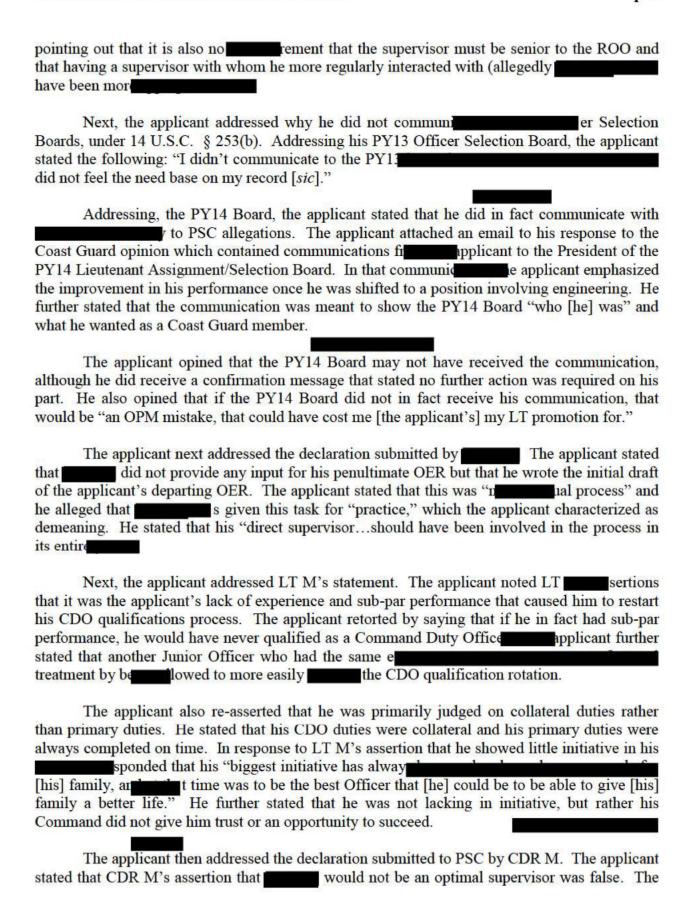
The applicant alleged that the similarity between the disputed OEI erroneous and specially when considering that they were both unlike his previous OERs. For example, he alleged, regarding the Block 5 comments in both OERs, "it is the same message

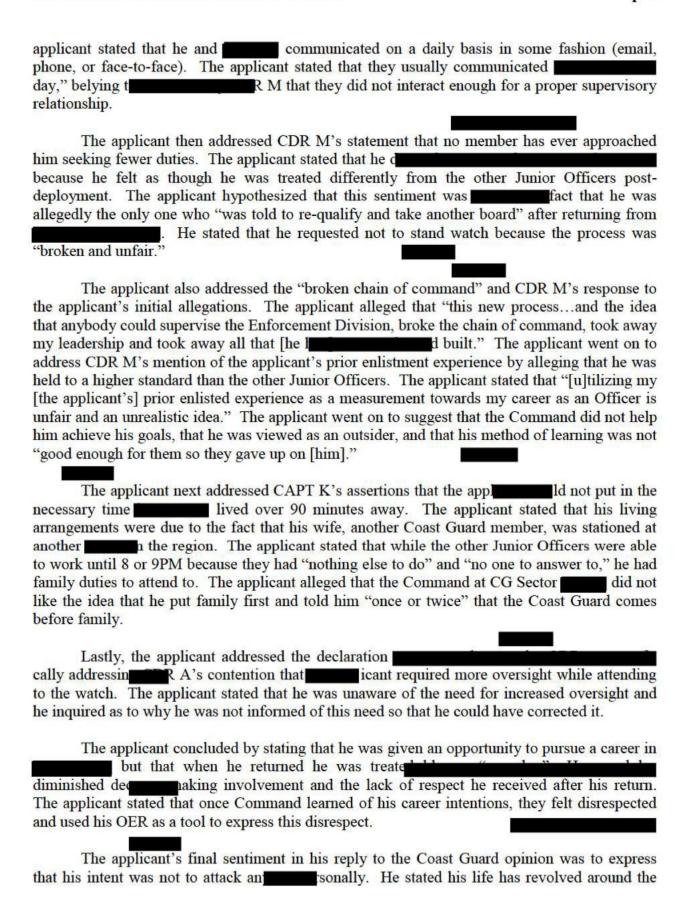












Coast Guard for over ten year at lack of help and guidance impeded his ability to be the best Coast Guard officer he could be.
APPLICABLE LAW
Performance Expectations and Feedback- COMDTINST M1000.6A
Article 10.A.1.b.2. of the Personnel Manual in effect in 2011 provides that "[i]ndividual officers are responsible for managing their performance. This responsible to the tails determining job expectations, obtaining sufficient performance feedback, and using that information to meet
Article 10.A.2.c.2.c states that it is the responsibility of tred-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 Report of the supervisor 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 me accurate, fair, and objection are provided to all officers under their command."
Article 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 ficer receives the majority of direction and requirements."
Article 10.A.2.d.1.c states that "[t]he Supervisor will normally be senior to exported 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 observation, the state of 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 a summary of the most important aspects of the summary of the most important aspects of the summary of the most important aspects of the summary of the most important aspects, and customer and supplier identities should be included."
Article 16.8 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.² The Board concurs in that recommendation.³

² 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).

³ 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.⁴ 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.⁵ 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.⁶
- 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. 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 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

⁴ 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)).

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

⁶ 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).

⁷ "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 was the same rank as the applicant, which placed them in potential competition for future promotions.

- 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 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 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
- 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.⁸
- 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.

⁸ Grieg v. United States, 640 F.2d 1261, 1269 (Ct. Cl. 1981).

- 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.⁹ 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.¹⁰
- 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. 11
 - 13. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁹ 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).

¹⁰ 33 C.F.R. § 52.24(b).

¹¹ Engels v. United States, 678 F.2d 173, 176 (Ct. Cl. 1982).

ORDER

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

February 27, 2015

