

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-212



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on September 28, 2014, and prepared the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 10, 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 asked the Board to remove from his record a special, derogatory Officer Evaluation Report (OER) covering his service from May 2 to July 17, 2011, and to replace it with a Continuity OER. The disputed OER documented his removal from his assigned new position as the Operations Officer (OPS) of a cutter [REDACTED] and contains numerous low marks and negative comments.

The applicant alleged that the disputed OER is a product of bias on the part of his commanding officer (CO). He stated that his CO "had a strong aversion toward me – the reasons for this aversion were never clearly articulated and thus, unbeknownst to me." As evidence of this bias, he noted that he was removed from his duties after just a few weeks, including, he alleged, just sixteen non-consecutive days underway. Therefore, he argued, his removal violated Article 1.F.2.b. of the Assignments Manual, COMDTINST M1000.8A,¹ which states that an officer may be removed from his primary position if, among other reasons, "[a]fter an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties."

¹ The original Assignments Manual, COMDTINST M1000.8, first went into effect in September 2011 and so is not applicable to the applicant's removal. Unlike other articles in this manual, Article 1.F. was not copied from the 2011 Personnel Manual, but was a new policy section promulgated in the new manual.

The applicant stated that the CO's unexplained aversion caused the CO to remove him from his position for "loss of confidence," which requires documentation in a special, derogatory OER. Therefore, the disputed OER is a product of the CO's aversion and "adversely affected by misstatements of significant hard facts, severe contradictions within the OER, and prejudicial violations of Coast Guard regulation."

The applicant stated that most of the comments in the disputed OER are based on his performance while underway, and he only got underway on the cutter for one 11-day patrol, a 3-day patrol, and a 2-day patrol. He alleged that these short periods did not allow him sufficient time to demonstrate his competence. Nor was there sufficient time to evaluate his "performance or perceived deficiencies."

Moreover, the applicant noted, the other prospective OPS officers of cutters heading to [REDACTED] were able to complete "thorough reliefs in excess of five days" with their predecessors, whereas his relief with his predecessor "was arbitrarily limited to a three-day relief conducted entirely inport" before the departing OPS left the cutter. Therefore, he had no chance to observe the prior OPS at work, was significantly disadvantaged in comparison to other incoming OPS officers, and had "to direct [the cutter's] execution of entirely unfamiliar operations in one of the most challenging theaters in the Coast Guard while seeing those operations for the very first time." Besides this great disadvantage, he noted, it was his first assignment as an OPS; his first time underway on a 110' patrol boat; and his first exposure to [REDACTED] area of operations, where the cutter carried "as much or more armament, classified material, and a more extensive secure communications suite than a 210' WMEC (Medium Endurance Cutter) state-side, which has an experienced LT assigned to head the Operations Department." In addition, he had not attended the Prospective OPS course or the Tactical Warfare Overview course; six of his seven subordinates in the Operations Department were newly reported and had not previously served on a 110' patrol boat; and the only experienced subordinate, the Lead Navigation Petty Officer, was on leave during his first week underway aboard the cutter.

The applicant stated that if he had been allowed to remain on the cutter, he would have qualified as an Officer of the Deck (OOD). In this regard, he noted that his CO had trusted him to stand watch alone on the bridge for extended periods of time during [REDACTED]

The applicant stated that on June 30, 2011, his CO informed him that he was being sent to a "sister ship" for "a second evaluation as an underway OOD" and believed that his performance aboard the second ship² would determine his future as the OPS of his assigned cutter. The applicant alleged that he received a "very good" evaluation from the CO of the second cutter, with many positive comments, and yet was never allowed to return to his assigned cutter.

The applicant complained that the disputed OER comments "are not sufficiently specific to present a complete picture of [his] performance and qualities" during the reporting period, as required by Article 5.A.7.h.1. of the Officer Accession, Evaluation, and Promotion (OAEP) Man-

² Although the two vessels are essentially identical, for the sake of clarity, this decision refers to the applicant's permanently assigned vessel as his cutter, while the vessel where he served on temporary duty for 4 days is referred to as the ship or sister ship.

ual, COMDTINST M1000.3.³ He explained that the comments do not reflect his positive performance aboard the sister ship and so do not present a complete picture of his performance, contrary to the regulation.

The applicant noted that the disputed OER is very inconsistent with all of the other OERs in his record, on which he was rated “an exceptional officer”—even on subsequent OERs prepared in part by the same Reporting Officer and Reviewer.⁴ This huge inconsistency, he argued, is strong evidence that his removal as OPS resulted from the strong, unexplained aversion of his CO, a lieutenant who prepared much of the OER as his Supervisor. The applicant also made the following allegations concerning specific entries on the disputed OER:

- a. **Block 1.j.: Period of Report**—The applicant alleged that the period of report shown in block 1.j., May 2 through July 17, 2011, is erroneous because he did not actually report for duty until May 13, 2011, and he did not perform any duties for the cutter after leaving for a stint on the sister ship on June 30, 2011. The stated period of report is also unjust, he argued, because it suggests that he served aboard the cutter and was evaluated for a longer period than he actually was.
- b. **Block 3 comment: “[F]ailed to properly plan/position WPB for sched’d anchoring evolution, lost opportunity/time.”**—The applicant stated that “[a]s a junior officer in training, I requested on three separate occasions multiple days ahead of the evolution for the CO to review the anchoring position/brief I presented the position/brief to all available crew with expertise such as the 1st LT, BM1 [H], for review with no issues. As a new Operations Officer and new to anchoring evolutions, I sought guidance from the CO but did not receive any.” The applicant also noted that because it was a training evolution, there was no negative impact on the cutter’s operations. Therefore, he argued, the comment violates regulations because it is “not sufficiently specific to present a complete picture of my performance by excluding pertinent facts to incorrectly portray actual events.” Without this comment, he argued, the low mark of 3 for the performance category “Planning and Preparedness” is not adequately supported, as required by the OER regulations.
- c. **Block 3 comment: “[S]hips logs failed to be corrected & submitted for signature for 2 months despite repeated reminders”**—The applicant stated that under COMDTINST M3123.12, the responsibility of reviewing, signing, and forwarding the logs rested with the CO and XO and that he himself “was not qualified nor designated as the unit navigator.” Moreover, he was present aboard the cutter for only 1.5 months, “making it impossible for me to correct and submit 2 months of logs.” He noted that he did submit one month’s worth of logs, “but was ordered to cease” when he was sent to the sister ship. Therefore, he argued, this comment is clearly erroneous.

³ The original OAEP Manual, COMDTINST M1000.3, first went into effect in September 2011 and so is not applicable to the disputed OER. A similar provision appeared in the 2011 Personnel Manual, however.

⁴ A Coast Guard officer is normally evaluated by a “rating chain” of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally the supervisor’s supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations. The system provides for “multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting.” U.S. Coast Guard, COMDTINST M1000.6A, Personnel Manual, Article 10.A.2.a (Change 42, April 2010) (hereinafter PERSMAN).

- d. **Block 3 comment: “[I]mpressive prep for [REDACTED] transit, plotted previous AAR info on chart for nav evaluator to reference; greatly increased vsl safety in unfamiliar area.”**—The applicant alleged that this positive comment about his top priority as OPS and about “the most dangerous evolution [the cutter] conducted while I was onboard” contradicts the mark of 3 he received for “Planning and Preparedness.” He noted that two months later, a 121’ [REDACTED] patrol boat ran aground on the same river.
- e. **Block 3.d. Mark of 3 for “Adaptability”⁵**—The applicant alleged that none of the negative comments in block 3 of the OER address his performance in the category “Adaptability” and so the low mark of 3 is unsupported, contrary to OER regulations, which require comments justifying any marks lower or higher than a middle mark of 4.
- f. **Block 3 comment: “Lacks seagoing aptitude; does not grasp basic fundamentals of cutter movement, seamanship & ops; did not qualify as u/w OOD.”**—The applicant argued that this comment does not “present a complete picture of my performance” because it fails to reflect his “strong positive performance” aboard the sister ship from July 5 to 10, 2011. He alleged that his CO simply dismissed the report about his positive performance from the CO of the sister ship even though, in preparing an OER, the regulations require a Supervisor to draw on the observations of secondary supervisors, as well as their own observations. The applicant alleged that this comment is also strongly contradicted by comments in block 5 of the disputed OER, which state that he “brought experience to navigation div” and “made significant improvements to nav div,” and in block 7 of the OER, which state that his “proper reaction setting Alert One when spotting two inbound contacts at a high rate of speed; solid decision increased [the cutter’s] safety/reaction time.” Therefore, he concluded, this comment also violates OER regulations.
- g. **Block 3.e. Mark of 3 for “Professional Competence”**—The applicant alleged that the mark of 3 is strongly contradicted by the comments quoted in the bullet above from blocks 5 and 7 of the OER. He argued that because the OER is internally inconsistent, it is clearly erroneous and not in compliance with OER regulations.
- h. **Block 3 comment: “[D]angerous high speed close aboard situation w/ stationary vsl during active [REDACTED] relieved of conn in both situations for vessel safety.”**—The applicant alleged that he was never relieved of the conn out of concern for the cutter’s safety. He stated that during the sector incursion, he was conning the vessel under the supervision of the CO, who was training him how to drive cutters in high-speed maneuvers. In addition, he claimed, there was no incident with [REDACTED] [REDACTED]. He stated that the cutter’s logs do not reflect either alleged instance of him being relieved of the conn and logs are required to reflect all dangers and safety hazards encountered on a cutter. He argued that if he had been relieved of the conn due to safety concerns, his CO would not have allowed him to stand watch on the bridge for extended periods of time while the cutter was guarding the oil platforms. Therefore, he argued, the comment that he was relieved of the conn in both situations due to safety concerns is clearly false.
- i. **Block 4.a. Mark of 3 for “Speaking and Listening” and comment “inability to clearly communicate impacted watch standing ability & effectiveness as ops off/dept head.”**—

⁵ Coast Guard officers are evaluated in 18 different performance categories, such as “Teamwork” and “Judgment,” on a scale of 1 (worst) to 7 (best). A middle mark of 4 means that the officer’s performance met the expected high standards of all Coast Guard officers for that category. PERSMAN Article 10.A.4.c.4.g.

The applicant argued that this low mark and negative comment are contradicted by comments in block 5 of the OER about his being a compassionate supervisor, interacting personally with crewmates, frequent meetings, and empowering delegation. He also argued that the comments “are not sufficiently specific to present a complete picture” of his performance during the period and ignore the good report about his performance from the CO of the sister ship.

- j. **Block 5.f. Mark of N/O (not observed) for “Evaluations”**—The applicant alleged that his supervisor violated the OER rules by failing to include an explanation of why he received a mark of N/O for this performance category. He argued that the absence of an explanation constitutes a prejudicial violation of OER rules.
- k. **Block 8.b. Mark of 3 for “Judgment” and comment, “became overwhelmed during abnormal events that require quick reaction: mult-tasking during ██████████ sector incursion unacceptably slow. Methodical thinker, required time to process info;”**—The applicant alleged that this mark and comment are contradicted by the positive comment in the same block, “Proper reaction setting Alert One when spotting two inbound contacts at a high rate of speed; solid decision increased [the cutter’s] safety/reaction time.” The applicant alleged that this positive comment about his response to a potential threat when he was alone on the bridge is inconsistent with the low mark of 3 for “Judgment” and with the negative comments claiming that he became overwhelmed and was unacceptably slow in response to an incursion. He stated that the two inbound contacts mentioned in the positive comment constituted the greatest threat that the cutter had faced, and he maintained his composure and followed proper procedures, which improved the safety of the ship. The applicant argued that his reaction during this event proves that the mark of 3 for “Judgment” and the comment about being unacceptably slow in his decision-making are erroneous and unjust. He also argued that the block 8 comments violate policy by not painting a complete picture of his performance because they fail to address his positive performance aboard the sister ship during the reporting period.
- l. **Block 8 comment: “Despite giving OPSEC training to the crew, own failure to adhere to basic OPSEC policies resulted in a reported OPSEC incident aboard [the cutter]; even after counseling failed to grasp concept, resulted in second incident.”**—The applicant alleged that this comment contains a misstatement of fact. The applicant stated that as explained in his addendum to the OER. In the addendum, he accepted responsibility for the first OPSEC violation because he did not completely understand the policy in the ██████████ then he conducted training for the crew, and the second such event “was recognized and terminated before it became a reported OPSEC violation.” The applicant argued that the OER comment is erroneous because it states that there were two OPSEC incidents, when there was only one, and it states that both incidents occurred after he conducted the OPSEC training, whereas he conducted the training based on his own experience in causing the first incident. The applicant also alleged that this comment is inconsistent with the recommendation in block 10 that he be assigned to the Intelligence community since that community handles classified information daily.
- m. **Block 8.d. Mark of 3 for “Professional Presence”**—The applicant alleged that this low mark is inconsistent with the comment “truly lived by honor, respect & devotion to duty; unwavering loyalty to Command & Coast Guard” because abiding by the core values is one of the requirements for a mark of 4 for “Professional Presence.” The applicant argued that

there is no comment in block 8 that justifies this low mark of 3, and such justification is required for marks that deviate from a 4. The applicant argued that the lack of a comment supporting the mark of 3 proves that it is erroneous and violates OER rules.

In support of his allegations, the applicant submitted the following documents:

- Copies of his OERs, including the disputed OER with his addendum and the rating chain's endorsements.
- Copies of the cutter's logs for the OER reporting period. For each four-hour watch period, the logs include a short paragraph of remarks on the cutter's status (underway/moored), the working condition of the cutter's systems and equipment, training and fueling activities, and which crewmembers are standing various watches or have "the conn."

The logs do not show what date the applicant reported aboard, but he is first mentioned in the logs when he "assumed the conn" at 0749 on May 26, 2011, which is about two weeks after May 13, 2011, when he claims to have reported aboard. During those two weeks, the cutter had remained moored for maintenance. The cutter got underway that day at 0808, and at 0915, the CO "relieved the deck and conn." The applicant got the conn back for about a four-hour watch at 1125 and then again at 2334 while the cutter remained underway. The applicant took the conn for a watch period on May 27, but is not mentioned in the log on May 28 and took the conn for about 100 minutes on May 29, while the cutter remained underway. In the logs, only the CO, XO, and a BM1 relieve both the conn and the deck as qualified underway OODs.

The logs show that the cutter moored on the morning of May 30, and the applicant "relieved the deck" for 15 minutes before the cutter moored. Except for switching berths, the cutter remained moored until June 8, when the cutter got underway at 0915, and the applicant relieved the conn for about an hour starting at 1037; for almost 2 hours starting at 1244; and for 4 hours starting at 1929. On June 9, the cutter remained underway, and the applicant took the conn for a 4-hour period and a 3-hour period. The crew performed several drills that day. On June 10, the cutter moored again, and on June 11, the applicant assumed the conn while the cutter switched berths.

According to the logs, the cutter got underway again the next day, June 12. The applicant relieved the conn while the CO relieved the deck for two separate 4-hours periods. They repeated these same periods of duty while underway on June 13, 14, and 15, and the crew conducted various training exercises. On June 16, the applicant and the CO again relieved the conn and deck, respectively, for about an hour until the cutter was about to moor, when the BM1 relieved the applicant at the conn. The cutter got underway again the next day, and on June 17, 18, and 19, the applicant and the CO continued to perform the same watches at the conn and deck, respectively. On June 20, the applicant served on a boarding team for a tug and then relieved the conn when the cutter entered port for to moor and refuel. The next night, June 21, the cutter got underway again with the applicant at the conn and the CO taking the deck watch for 4 hours. On June 22, they relieved the conn and deck, respectively, for just a few minutes. The cutter made for port and moored again overnight. On June 23, the applicant assumed the conn for 3 hours while the cutter got underway with the BM1 and then the XO relieving the deck. Later that day, he took the conn while the cutter moored.

On June 24, the cutter got underway again. The applicant and the CO relieved the conn and the deck, respectively, for a 4-hour watch in the morning, and again for an hour mid-day for an anchoring exercise. On June 25, the applicant served on an early morning boarding team before taking the conn while the CO relieved the deck. The applicant served on another boarding team mid-morning before returning to the conn. The applicant and the CO relieved the conn and the deck, respectively, for another 4-hour period that evening. On June 26 and 27, the applicant and the CO relieved the conn and the deck, respectively, for the same two 4-hour periods. On June 28, the cutter moored. It remained moored until June 30, which according to the applicant, was his last day aboard the cutter. His name does not appear in the cutter's July logs. On July 8, the cutter got underway without the applicant, and on July 16, a new LTJG—presumably the applicant's replacement as OPS—began relieving the conn for watches.

None of these logs report any of the incidents—positive or negative—described in the disputed OER comments.

- Copies of the sister ship's logs for the period June 30 to July 8, 2011. The ship's logs show that the applicant reported aboard for temporary duty on July 5, while the ship was underway. The CO and the applicant relieved the deck and the conn of the ship, respectively, for a 4-hour watch that same night. On the morning of July 6, the CO and the applicant served a 3-hour watch together before the ship moored for about 36 hours. The ship got underway again on July 8. The applicant relieved the deck and the conn “under the instruction of [the CO]” for the watch from 0805 till 1135 and then again under the CO's instruction from 2029 till 2341.
- An undated email to the applicant from the CO of the sister ship, which the applicant served aboard for four days, states the following:

During [the four days], you “broke in” as an underway OOD under my supervision. In my opinion, you stood solid watches and were an effective OOD.

On one occasion, we ran a loss of steering drill while you were the OOD. Although under my supervision, you executed the correct initial actions and effectively managed all efforts to regain steering without assistance from a qualified OOD. Most importantly, you never stood the ship in danger.

On several occasions, you were confronted with complicated rules of the road situations involving many small fishing [REDACTED] [REDACTED]. In particular, on our transit back to homeport, you were confronted with numerous [REDACTED] [REDACTED] at night. Despite their tendency to operate erratically, you maintained situational awareness the entire time and made sound recommendations to me in order to decrease risk of collision. As a result, we safely navigated the vessel back to homeport.

In addition, you effectively managed your watch teams, expecting thorough reliefs and clear reports. Although you did not earn a qualification letter, I trusted in your abilities enough that I went to the open bridge for an extended discussion with several of my crew, leaving you in charge of the bridge team. There were no incidents during this time. Furthermore, during your off time, you were always found on the bridge or the mess deck studying relevant publications and operational tasking.

Although I did not observe you as operations officer, your performance as an underway watchstander during your period aboard [the sister ship] was very good.

SUMMARY OF THE RECORD

The applicant attended the Coast Guard Academy and was commissioned an ensign on May 20, 2009. He was first assigned to a large cutter to serve as a Deck Watch Officer (DWO). On his first semiannual OER, dated September 30, 2009, he received primarily marks of 5 (out of 7) in the various performance categories but was rated an “exceptional officer” in the sixth spot on the comparison scale⁶ and was highly recommended for promotion to LTJG and for assignment as a CO of a patrol boat. His supervisor highly praised his rapid qualification as an underway DWO and “[k]een grasp of ship handling forces during 3 conning evolutions. Extensive and in-depth study in complex maneuvering situations resulted in sound understanding of conning fundamentals and superior execution required minimal coaching.”

On his second OER as a DWO, dated March 31, 2010, the applicant again received primarily marks of 5 and was rated an “exceptional officer” in the sixth spot on the comparison scale. The comments note that the applicant had quickly qualified as an underway DWO while on temporary duty on an 87’ cutter; had shown “phenomenal performance as qualified inport OOD during bomb threat to ship”; and had served as the conning officer “for multiple dynamic [REDACTED] a mooring/unmooring evolutions through rain/wind/snow & night time conditions.” The applicant had also qualified as a Boarding Officer and as a day and night helicopter landing officer. He was recommended for promotion “ahead of his best of his peers” and for assignment as the CO of an 87’ cutter or as the XO of a 110’ cutter.

On his third OER as a DWO, dated September 30, 2010, the applicant received primarily marks of 6 and another mark in the sixth spot on the comparison scale. He was strongly recommended for assignment as the CO of an 87’ cutter or as the XO of a 110’ cutter or for graduate school. The OER notes that he had recently been selected for promotion to LTJG and was “[a]lready progressing towards O3.” The applicant was promoted to LTJG with his peers on November 20, 2010.

On his fourth and final OER as a DWO, dated May 1, 2011, the applicant received all marks of 6 and 7 in the performance categories and another mark in the sixth spot on the comparison scale. He was “[h]ighly recommended for rapid promotion to O3 with best of peers.” In addition, the applicant received the command’s “strongest possible recommendation for continued assignment afloat as CO, XO or OPS of a CPB/WPB. Will certainly excel in upcoming assignment to PATFORSWA Ops afloat on WPB.”

On May 1, 2011, the applicant detached from the large cutter to transfer to his new position as OPS of a [REDACTED]. According to the applicant, he reported for duty aboard this cutter on May 13, 2011. The disputed OER covers the reporting period May 2 through July 17, 2011—the period of his assignment—and documents his removal from his primary duty as OPS. The explanation in block 2 of the OER states that the OER was “submitted under Article 10.A.3.c.1.a. [of the Personnel Manual] due to performance notably

⁶ On an OER comparison scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his or her career. Although the marks on the scale are not numbered, there are 7 possible marks. PERSMAN Article 10.A.4.c.8.a.

different from previous reporting period and is a Derogatory Report per Article 10.A.4.h.1; officer removed from primary duties on 17 July 2011.”

The OER disputed includes six low marks of 3 for “Planning and Preparedness,” “Adaptability,” “Professional Competence,” “Speaking and Listening,” “Judgment,” and “Professional Presence,” as well as five marks of 4, five marks of 5, one mark of 6, and a mark of N/O for “Evaluations.” Many of the supporting comments are negative. The applicant received a mark in the fourth spot on the comparison scale, denoting “one of the many competent professionals who form the majority of this grade.” He was strongly recommended for promotion but also “highly encouraged to avoid further pursuit of an operations afloat career path.” The OER and its attachments are incorporated in this decision by reference only.

The applicant submitted an addendum for the disputed OER in which he explained the challenges he faced with a short relief and mostly newly reported crewmembers. He strongly disputed the low marks and negative comments and admitted some shortcomings.

The CO of the cutter, as the applicant’s supervisor, endorsed his addendum and forwarded it without comment. The Reporting Officer, the Deputy Commander of [REDACTED], stated that he fully supported the CO’s decision to remove the applicant, stating that the applicant had failed to qualify as an underway OOD in a “satisfactory amount of time” and had not “grasp[ed] all the demands of being an Operations Officer and underway OOD within this combat theater as he had difficulty processing many tasks and making quick decisions.” The Reporting Officer stated that the CO “couldn’t allow any more time for [the applicant] to learn from his mistakes and progress towards qualifying as an OOD; he needed a qualified OOD and Operations Officer who could adequately function” in the region. The Reporting Officer claimed that the applicant “became too focused and didn’t allow himself to fully handle all the challenges presented to him” but “possesses many excellent qualities and competencies required of an officer to succeed in the Coast Guard, just not in the operations afloat community.”

[REDACTED] served as the OER Reviewer and also fully supported the CO’s decision to remove the applicant. He stated that the applicant had “fail[ed] to effectively multitask prior to and during operational evolutions” and had shown an “inability to make quick, safe operational and maneuvering decisions within the dynamic, [REDACTED] area of operations.” The [REDACTED] noted that if the cutter had been operating in a different region, “more time would have been warranted to facilitate his training and qualifications,” but the “high threat and high consequence nature of coalition surface operations [REDACTED] necessitated his removal for mission execution, international relations, and unit safety purposes.” The [REDACTED] noted, however, that the applicant is “an extremely dedicated, highly motivated Coast Guard officer who possesses an outstanding level of drive and professionalism that will allow him to exceed [sic] in any future Coast Guard assignment.”

Following his removal from the cutter, the applicant was reassigned as the region’s Assistant Operations Officer, responsible for scheduling operations, maintenance, and training for [REDACTED] [REDACTED] [REDACTED] [REDACTED]. On his first semiannual OER for this service, dated January 31, 2012, the applicant received primarily marks of 6 in the various performance categories and a mark in the sixth spot on the comparison scale, denoting an “exceptional

officer.” The Deputy Commander strongly recommended the applicant for graduate school and gave him his “highest recommendation for promotion to LT w/peers.” On the applicant’s second and final OER for this service, dated May 16, 2012, he received all marks of 6 and 7, another mark in the sixth spot on the comparison scale, and another very strong recommendation for promotion with “best of peers.” In addition, the [REDACTED] added a page of comments highly praising the applicant and giving him his “highest possible recommendation for promotion with the very best of his peers.”

In May 2012, the applicant reported for duty as a Marine Inspector Apprentice and the Assistant Division Chief for waterways management [REDACTED]. On his first OER in this position, dated January 31, 2013, he received primarily marks of 6 and 7, another mark in the sixth spot on the comparison scale, and strong recommendations for assignment to graduate school and for “promotion w/ best of peers.” The applicant was selected for promotion to LT in 2012 and promoted to that rank with his peers on May 20, 2013. On his second OER at the Sector office, he received primarily marks of 6 and a mark in the fifth spot on the comparison scaled, denoting an “excellent performer; give toughest, most challenging leadership assignments.” He was again strongly recommended for graduate school and for “promotion w/ best of peers.”

VIEWS OF THE COAST GUARD

On March 20, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief.

Regarding the applicant’s allegation that he was unjustly removed from his primary duty as OPS after a few weeks and not given sufficient time to perform, the JAG argued that under Article 1.F.2.b.(2) of COMDTINST M1000.8A,⁷ an officer may be considered for removal from his primary duties—

- if the officer “fails to perform primary duties such that [his] performance significantly hinders mission accomplishment or unit readiness”; or
- if, “after an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties.”

The JAG argued that affidavits submitted by the applicant’s superior officers, which are incorporated by reference, amply support the decision to remove him from his primary duties. The JAG stated that although the applicant is clearly a skilled officer in other areas, he lacked the

⁷ The JAG acknowledged that this manual did not go into effect until after the applicant was removed from his position aboard the cutter. The JAG alleged that the provision the applicant cited “is identical to that of the manual in effect at the time of the applicant’s removal, M1000.8.” However, M1000.8 also did not go into effect until after the applicant was removed from the cutter. The BCMR staff asked the JAG if the same or a similar provision was in effect when the applicant was removed from his position and received no response. The Personnel Manual, M1000.6A, which was in effect when the applicant was removed and from which most of the regulations in M1000.8 and M1000.8A were taken, does not contain regulations prescribing how or when officers (other than COs) may be removed from their primary duties.

fundamental aptitude to succeed as the OPS of the cutter, and his inability “significantly hindered” the Coast Guard’s mission in the [REDACTED]

The JAG also adopted the findings and analysis provided in a memorandum submitted by Commander, Personnel Service Center (PSC). PSC stated that the period of report of the disputed OER accurately reflects the time the applicant was assigned to the cutter.

Relying on the affidavits of the applicant’s superior officers, PSC recommended denying relief. PSC stated that his rating officials carried out their duties properly and that the applicant has failed to submit evidence of an error or manifest injustice in his treatment. PSC also alleged that the applicant’s claim that his CO had a strong aversion toward him is unsubstantiated. PSC stated that the fact that the applicant’s performance hindered the cutter’s mission is shown in the OER comments, in the affidavits, and in the applicant’s own addendum to the OER. In this regard, PSC noted that the applicant stated in his addendum that he had understood and learned from his mistakes.

With regard to the applicant’s good performance on the sister ship for four days in July 2011, PSC alleged that in preparing the OER, “the rating chain considered *all* of the applicant’s performance throughout the period of report; however, the applicant’s weaknesses and substandard performance far exceed any high level of performance and thus negate it. The disputed OER reflects the applicant’s achievements while holding him accountable for his shortcomings.”

PSC argued that the applicant has submitted insufficient information to overcome the presumption of regularity. PSC concluded that the disputed OER accurately reflects the applicant’s performance during the rating period and should not be removed.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 23, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

APPLICABLE REGULATIONS

In the spring and summer of 2011, instructions for evaluating officers were contained in Article 10.A. of the Personnel Manual (Change 42). Article 10.A.1.b.1. of the manual states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.4.c.1.i. states that the period of report for an OER “commences on the day after the ending date of the previous regular OER ... and ends on the date of the occasion for the current report.”

Article 10.A.4.h.1. of the Personnel Manual states that an OER that documents “adverse performance or conduct that results in the removal of a member from his or her primary duty or position” is “derogatory,” and “[d]erogatory reports are OERs that indicate the Reported-on Officer has failed in the accomplishment of assigned duties.” Likewise, Article 10.A.3.c.1.a.

states that an OER “documenting removal from primary duties is derogatory and must be submitted in accordance with Article 10.A.4.h.”

Article 10.A.4.c.4. provides the following instructions for Supervisors completing their section of an OER (similar instructions are provided for Reporting Officers in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. ... After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

d. In the “comments” block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.

• • •

g. A mark of four represents the expected standard of performance. ... [Emphasis added.]

Article 10.A.4.c.8.a. of the Personnel Manual states that on the Comparison Scale in an OER, a Reporting Officer “shall fill in the circle 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.h.2 states that when an officer receives a derogatory OER, he may respond to the marks and comments in an addendum before the OER is passed to the reviewer. The Supervisor and Reporting Officer may add comments to the addendum before forwarding it to the Reviewer, who ensures that the information in the OER is consistent and that the derogatory information is substantiated.

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.

2. The applicant alleged that the disputed OER documenting his removal as the OPS of a cutter is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a

preponderance of the evidence that the disputed information is erroneous or unjust.⁸ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁹ 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.¹⁰

3. The applicant made many allegations about disputed OER comments not being specific enough, not “painting a complete picture” of his performance, and being inconsistent with numerical marks in other blocks of the OER. Under Articles 10.A.4.c.4. and 10.A.4.c.7. of the Personnel Manual, however, the rating chain picks numerical marks by comparing the officer’s performance, not to the comments in the OER, but to the written standards on the OER form. After picking the numerical mark that best describes the officer’s performance in comparison with the written standards on the form, the rater adds one or two comments with examples of performance to support/explain—i.e., be consistent with—the choice of each numerical mark. The manual provides that in preparing OER comments, the rating chain should “cit[e] specific aspects” of performance, “identify specific strengths and weaknesses in performance,” and “paint a succinct picture of the officer’s performance and qualities.” In light of this guidance and the very small space for comments on an OER form, the Board is not persuaded that the applicant’s rating chain erred in drafting the comments. The comments do cite specific aspects of the applicant’s performance, identify strengths and weaknesses, and paint a succinct picture of his performance and qualities while serving as the OPS of the cutter.

4. The applicant alleged that his CO removed him from his duties and prepared the derogatory OER because the CO had a strong, unexplained aversion towards him. The applicant submitted nothing to support this allegation, and the CO and other rating chain members denied it. The Board finds that the applicant has not overcome the presumption of regularity accorded his CO or proven by a preponderance of the evidence that his removal and the OER were products of bias or any impermissible factor that should not have affected the CO’s decisions.

5. The applicant complained that the reporting period for the OER is unfairly long because he was not actually aboard the cutter on some of those days. However, Article 10.A.4.c.1.i. of the Personnel Manual provides that the starting date of a reporting period is the day after the date of the previous OER and the end date is the date of the occasion for the report. Under this regulation, every day of service must be covered by an OER and because transfers between duty stations often require days of travel, OER reporting periods normally include days when the officer is not actually aboard the cutter. The applicant has not shown that the reporting period for the disputed OER is erroneous or unjust in light of Article 10.A.4.c.1.i.

⁸ 33 C.F.R. § 52.24(b).

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁰ *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).

6. The applicant alleged that his removal so soon after reporting for duty as OPS was unjust and that he could have succeeded if given more time.¹¹ He alleged that the cutter was underway for only 16 days while he was aboard. The logs he submitted show, however, that the cutter was underway on more than 16 dates and that the applicant took (assumed or relieved) the conn while the cutter was underway or moving in some fashion on May 26, 27, and 29; and June 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and 27. In fact, on most of these 22 dates, the applicant had the conn for both a morning watch and an evening watch, while the CO occupied himself with the deck watch. Based on these logs and the descriptions of the applicant's performance in the disputed OER and affidavits, the Board finds that the applicant has not proven by a preponderance of the evidence that the decision to remove him as OPS was made precipitously, unjustly, or without sufficient reason despite the fact that the CO of the sister ship reported that the applicant had "stood solid watches and [was] an effective OOD" while aboard that ship for four days.

7. The applicant alleged that the CO never relieved him of the conn and pointed to the logs as proof. He admitted, however, that he once became so absorbed watching a gauge that he might have driven the cutter into a tug and that the collision was avoided by his CO's intervention. This admitted incident does not appear in the logs, which are very brief and obviously do not reflect most of the events aboard the cutter. Therefore, the Board is not persuaded that the logs prove that his CO did not have to intervene and take over the conn twice at least briefly while the applicant had the conn.

8. The applicant complained that the OER comments about OPSEC incidents erroneously imply that he failed to adhere to the policies *after* giving OPSEC training. The comments indicate that the applicant, who was the Command Security Officer, twice failed to adhere to OPSEC policies "despite" giving the training, and that his second failure in this regard occurred "even after" counseling. The Board finds that the applicant has not submitted sufficient evidence to prove by a preponderance of the evidence that these OER comments are erroneous or unjust.

9. The applicant made many allegations with respect to the OER and his command's actions. Those allegations not specifically addressed above are unsupported by substantial evidence and so are not dispositive of the case.¹²

10. 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.¹³ Therefore, his request to have the OER removed from his record should be denied.

¹¹ The Board notes that in addressing this issue both the applicant and the JAG cited manuals that did not go into effect until after the applicant was removed from the cutter.

¹² See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

¹³ *Hary*, 618 F.2d at 708.

ORDER

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

July 10, 2015

