

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-037



FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on February 12, 2015, 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 December 11, 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, an active duty [REDACTED] in the Coast Guard, asked the Board to correct his military record by removing his semiannual Officer Evaluation Report (OER) dated September 30, 2013, and by amending his two subsequent OERs dated January 31, 2014, and May 16, 2014, by removing "derogatory and inflammatory" comments, adding new comments, and raising his low marks of 3 in the performance categories "Adaptability," "Professional Competence," "Teamwork," "Evaluations," and "Professional Presence" to standard marks of 4. Furthermore, the applicant requested reconsideration for his failure to receive an end-of-tour award. The applicant received all three disputed OERs while assigned to a cutter as a Deck Officer.

The applicant alleged that the marks and comments on his OERs dated September 30, 2013 (OER1), January 31, 2014 (OER2), and May 16, 2014 (OER3), are incorrect and that he was never properly counseled with regard to potentially negative OERs. Nor was he ever told he had to "shape up or [his] career would be 'sabotaged,'" which would have motivated him to improve. The applicant stated that he received feedback only from the Operations Officer prior to receiving OER1, and the Operations Officer told him that he would be "sat down, counseled, and given a plan to shape up" if he were ever in danger of receiving a bad OER. But this never happened.

The applicant also stated, however, that a chief warrant officer who headed the Deck Department, known as the “First Lieutenant,” counseled him two or three times between May and August 2013 and advised the applicant that he had not been recommended for a Deck Watch Officer qualifying board. The applicant stated that he followed the First Lieutenant’s advice to the best of his ability. During a response to a gas rig explosion in August 2013, however, the First Lieutenant became dissatisfied with the applicant’s performance and told him, in a stateroom with the door open, that he was not working hard enough and started to yell at him. In self-defense, the applicant stated, he yelled back and reported the matter to the Executive Officer (XO). A half-hour later, the XO summoned him, counseled him about his performance, and warned him that he would receive marks of 3 on his September OER. The applicant tried to change the XO’s mind, but his mind was made up. Therefore, the applicant requested a “transfer or removal from the service” but was told such decisions were made at a higher level. The applicant alleged that he was also told that a bad OER as an ensign “would have limited impact on [his] career, no impact on [his] next assignment, but might impact [his] ability to seek positions of great responsibility within the service.”

The applicant alleged that their follow-on counseling sessions “proved very unproductive in terms of laying out a framework for correcting [his] alleged deficiencies” and he was not allowed to transfer to another unit. He was told that he needed to gain the confidence of the command, and while “there were a few moments where I could have done better professionally,” “these were spot corrected and I was never presented with a formal log listing what, where, and when I had done something wrong. There were no skills that once brought to my attention I was unable to correct. ... Instead, the CO and XO developed an attitude of ‘the jury is out on you’ and perpetuated a situation much longer than it should have gone without providing a means to qualify” as a Deck Watch Officer. The applicant noted that qualifying was difficult because the cutter was underway very little.

The applicant alleged that during the reporting period he received his daily tasking from the cutter’s Operations Officers and so pursuant to regulations, the Operations Officers should have served as his supervisors for OER purposes, rather than the cutter’s XO, who signed the disputed OERs. The applicant stated that he submitted his OER input to the Operations Officers, and was shocked to have the XO sign his OERs. The applicant alleged that his interactions with the XO were quite limited as the XO sent him usually simple administrative tasks by email only and normally responded with a simple “thanks” when the tasking was done.

The applicant asked the Board to expunge OER1 in its entirety; to raise the marks of 3 in OER2 and OER3 to marks of 4; to remove these comments from OER2: “Unqualified in primary watch station; able to adequately perform while under instruction of qual’d DWO ...” and “while continuing to pursue DWO qualification through unit & TAD opportunities”; and to remove these comments from OER3: “Unqualified in primary watch station; able to adequately perform while under the instruction of a qualified DWO. Did not demonstrate the requisite ‘big picture’ awareness, knowledge of own organizational role. Lacked Command’s confidence to lead watch on own.”

The applicant also asked the Board to add¹ to OER3 the following positive comments: “Oversaw cutter’s administrative division consisting of independent duty storekeeper and yeoman and corpsman”; “Championed for establishment of Support Division Officer position-duties similar to Support Department Head on several WLBs”; and “Helped plan and paid \$500 for a wetting down morale event for shipmates and guests.”

The applicant also alleged he should not have been denied an end-of-tour award as it was a regular occurrence whenever someone transferred from the unit. He alleged that every officer he witnessed depart received a certificate, plaque, Achievement Medal, and recognition of some kind, but he was denied an award without reason. He alleged that the one other member who departed the cutter without an end-of-tour award had received numerous negative Page 7s and poor evaluations and was punished at mast.

The applicant also described work he accomplished during the evaluation periods that, he argued, warranted marks higher than 3s.

SUMMARY OF THE RECORD

The applicant [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On his first semiannual OER, dated September 30, 2012, the applicant received ten “standard” marks of 4 and eight “above standard” marks of 5 from the XO and CO in the various performance categories and a mark in the fourth (middle) spot on the officer comparison scale and a recommendation for promotion from the CO. The CO wrote that the applicant “is adapting well to onboard responsibilities and has gained operational knowledge while progressing toward Deck Watch Officer qualification.”

On his second semiannual OER, dated March 31, 2013, the applicant received seven marks of 4, eight marks of 5, and three marks of 6 from the XO and CO in the various performance categories; another mark in the fourth spot on the comparison scale; a recommendation for promotion; and the CO’s comments that he “diligently performs assigned duties onboard while continuing to pursue a Deck Watch Officer qualification” and “possesses an interest in law and finance; this officer’s talents and skill would best be utilized in those areas. Recommended for law school and MBA post graduate programs ...”

The third OER the applicant received aboard the cutter is disputed OER1, dated September 30, 2013. It was completed by the XO and the new CO of the cutter and contains five below-standard marks of 3, five marks of 4, seven marks of 5, and one mark of 6 in the performance categories and another mark in the fourth spot on the comparison scale. OER1 contains many positive comments but also the following:

¹ The applicant’s memorandum actually asked the Board to remove these comments, but because they are position comments, the Board believes these are the comments he previously mentioned adding.

- Struggling to earn DWO qualification; lacked ‘big picture’ awareness & did not improve as expected. Prepared by studying nautical refs & CG policy, but unable to fully actualize theory into application. Performed adequately during routine events & initial planning for complex evolutions. However, displayed substandard ability both on & off watch to correctly react to changing environment, especially when under pressure or plans shifted.”
- “but has been less successful as a team member & demonstrated a level of cooperation less than expected from a JO. Often failed to fully engage w/ crew, actively accept feedback or assist w/ responsibilities that did not align w/ own vision of role; decreased crew cohesiveness & value as a team participant.”
- “OER input late despite supervisor deadline.”
- “While normally calm & reserved, lost composure under stress, resulted in breach of military bearing w/ Dept Head/XO.
- “While [he] continues to pursue Deck Watch Officer qualification, he possesses sound operational planning & excellent C4IT skills making him a natural fit for any technical or analytical billet. Highly recommended for Intel Community or Sector Response billets. ... Recommended for promotion to O3 with peers after successful completion of 2nd tour.”

On November 19, 2013, the applicant, who had been promoted to lieutenant three days earlier, submitted an OER Reply to OER1. He alleged that he had received no formal counseling, only nonspecific criticisms, and should have been qualified in September 2013. In this regard, he noted that other crewmembers had qualified for DWO within eight months of reporting aboard; that his Academy classmates had qualified timely on other cutters; and that he never felt outmatched by other DWOs. He alleged that he never received “a plan of action ... to fix my alleged discrepancies as a DWO.” He alleged that he had never known that he had to have his OER input submitted 21 days prior to the end of the evaluation period; was told his input was due only the day before it was due; and requested and received an extension from an Operations Officer. Therefore, he argued, he should not have been criticized and marked down for submitting his OER input late.

Regarding the claim that he had lost his composure, the applicant stated that the First Lieutenant had called him to his stateroom, told him that the CO had approved the meeting, and proceeded to shout at him. Because the First Lieutenant was bigger, older, and stronger than him, the applicant was concerned for his safety and alerted the XO. The applicant stated that the cutter had leadership issues, and the officers “should have sat down and sorted out what our issues were and where they arose. I think this would have prevented my situation from occurring ... while I arranged several one-on-one meetings, I was limited by my role and status.”

In his endorsement to this OER Reply, the XO stated that the applicant “struggled in situations that require leadership, teamwork, or adaptability.” He noted that during counseling sessions, the applicant had “expressed an entitled attitude with regards to his performance – in his words, he has ‘put in his time without any discipline issues,’ as if showing up to work and not causing trouble was all that is required. ... Unfortunately, he is also highly resistant to feedback and counseling. Despite having very little experience, [he] often assumes that he is correct despite attempts by more senior or experienced members to guide him to the right answer.” In addition, the XO stated, the applicant had “expressed an attitude of ‘it’s not my job’.” After a heated exchange with the First Lieutenant because the applicant had failed to ensure that a

communication was properly made, the applicant “entered my stateroom unannounced, interrupting a meeting and declared that ‘you need to get your BOSN [the First Lieutenant] under control.’” In subsequent counseling sessions, the applicant expressed that his own ideals and those of the Coast Guard were not compatible. Regarding his watchstanding, the XO stated that the applicant had “stood watch with numerous qualified DWOs, including First Class Petty Officers, Chiefs, Warrant Officers, Jos, and two Commanding Officers – all of whom have expressed the opinion that he lacks the judgment, adaptability, and decision making ability necessary to be the person responsible for the safety of the cutter and crew.”

In endorsing the applicant’s OER Reply, the CO stated that the applicant had “struggled to balance the art and science of leadership and lacked the judgment required to be a qualified Deck Watch Officer. He displayed adequate technical proficiency in collateral duties, but failed to fully develop teamwork and judgment skills. I do not expect or desire Ensigns to be experts. Instead, I expect them to be fully trainable and possess humble can-do attitudes. During the marking period, [the applicant] lacked the self-awareness or humility necessary to internalize feedback and meet that expectation. In addition, I did not have the confidence necessary to qualify [him] as an Underway Officer of the Deck (OOD). Though he met minimum written pre-requisites, he needed additional development in both close quarters conning ... and big picture awareness ... One of the biggest impediments to his overall performance is that he often came across as arrogant and unreachable. ... [He] sometimes displayed a cavalier attitude or presumptuousness toward peers and more experienced personnel.” The CO noted that during a buoy evolution in September 2013, the E-6 petty officer who was trying to train the applicant “felt so strongly that [the applicant] ignored his coaching, that he came to me to express discomfort and concern. ... [T]here is a pattern of behavior and [the applicant] did not change after feedback. During counseling sessions, he continually asked for specific examples and would then attempt to justify each incident instead of recognizing a trend in his performance. These blinders also inhibited his development on the bridge.” The CO noted that the applicant told him during OER counseling that “OOD qualification should not be that hard to get and that the requirement for my confidence seemed an arbitrary and potentially unreachable bar.”

On OER2, dated January 1, 2014, which was the applicant’s first as an LTJG/O-2, he received one mark of 3 for “Professional Competence,” supported by the comment, “Unqualified in primary watch station; able to ...,” that he has asked the Board to remove; five marks of 4; and twelve marks of 5 in the various performance categories; another mark in the fourth spot on the comparison scale; and his CO’s recommendation for “future promotion to O3 with peers” since he had recently been promoted to O-2. The CO noted that the applicant was making progress toward qualifying as a DWO.

On April 24, 2014, the applicant submitted an OER Reply to OER2. He stated that he had been underway just 20 days during the evaluation period for OER2 and that 6 of those days were aboard another vessel, which used different procedures. He stated that except for the Operations Officer, XO, and CO, “those possessing a negative opinion of my deck watch officer abilities did not find it necessary to discuss their concerns with me” and that the qualification process was subjective and it depended upon others’ recommendations. He stated that although being a DWO was his primary duty, he spent only a fraction of his time at it since the cutter was

rarely underway, which made obtaining a mark for “Professional Competency” above a 3 impossible and had a negative ripple effect on other marks.

In his endorsement to the OER2 Reply, the CO acknowledged that the applicant had had a limited amount of underway time during the evaluation period. He stated that the applicant’s close quarters ship handling had improved but he “did not make enough progress with ‘big picture’ awareness, knowledge of own organizational role, or compliance with standing orders.” The CO stated that the command had arranged for the applicant to have temporary duty on another vessel to provide the applicant with additional underway opportunities and to get an alternative “observation and evaluation of [the applicant’s] technical proficiency to ensure our assessment of performance was not off base.” However, the CO stated, the other cutter’s command sent the following comments about the applicant, which confirmed his lack of confidence in the applicant’s skills as a DWO and the mark of 3 for “Professional Competence”:

- “Overall, I expected to see a higher degree of functional proficiency in terms of ship handling and knowledge of the WLB platform from an officer 18 months or so into his first tour.”
- “Did not demonstrate satisfactory knowledge or application of NAVRULS.”
- “[He] seemed reticent in his willingness to acknowledge there may be another way to accomplish a task or challenge in a manner or process different than the way he in fact did.”

OER3, dated May 16, 2014, was completed upon the applicant’s departure from the cutter. He did not receive an end-of-tour award, and he again received a mark of 3 for “Professional Competence,” as well as eight marks of 4, nine marks of 5, another mark in the fourth spot on the comparison scale, and his CO’s recommendation for future promotion to O-3 and for “C4IT, finance and law post graduate programs.” The mark of 3 was supported by the comment about the applicant being unqualified at his primary watch station, which the applicant asked the Board to remove.

On November 3, 2014, the applicant submitted a Reply to OER3. He stated that OER3 failed to mention his supervisory position of the cutter’s administrative division from February to May 2014 or his rooting for the creation of a Support Division. He stated that he had been underway only 7 days during the evaluation period, and the command had not allowed him to extend his tour so that he could take advantage of future extended underway periods. The applicant stated that he was told the command would not qualify him and that “[a]t no point was I counseled on specific weaknesses aside from ‘command confidence.’” He stated that he was told it would be nearly impossible for him to get a responsible assignment on a cutter in the future because the command had not qualified him as a DWO. He also stated that when he was promoted to LTJG, he was “highly encouraged” to organize and spend \$500 on his “wetting down party for the crew,” which he did.

In his endorsement of the OER3 Reply, the XO admitted that the cutter’s underway time had been limited during the evaluation period and that the applicant had “continued to struggle” to qualify as a DWO. He noted that the applicant’s temporary assignment aboard the other cutter had straddled the reporting periods for OER2 and OER3 and that the comments received from the other vessel’s command had validated the CO’s lack of confidence. He noted that one such comment was, “Troubling ... was his lack of recognition of – or willingness to acknowledge that

merely agreeing to stay out of the other vsls way may not lead to a safe and prudent compliance of the rules on the part of either vsl.” The XO also stated that the applicant was not the only junior officer to transfer from the cutter without an award and that five members had left within the last year without one. The XO noted that awards “are not expectations” and that the applicant did not qualify for one because he did not qualify as a DWO—his primary duty.

In his endorsement of the OER3 Reply, the CO stated that the applicant did not earn his confidence as a DWO because the CO did “not feel he would make the right call at the right time.” The CO stated that a lieutenant commander visiting the cutter as a prospective CO had made “similar observations regarding [the applicant’s] readiness. In particular, during one watch, the cutter experienced a loss of the dynamic positioning system. [The applicant] did not immediately recognize the symptoms of this casualty and did not take rapid and appropriate initial action.” After this incident, the visiting officer “approached me without solicitation, noting that [the applicant] didn’t seem to internalize the gravity of the casualty response and even tended to blame the qualified DWO.” In addition, the cutter’s department heads, non-supervisory DWOs, and the XO continued to note the applicant’s difficulties. The CO stated that since assuming command in the summer of 2013, he had qualified three other crewmembers as CWOs and that in qualifying DWOs, he sets a high bar, but it is a reasonable bar that comports with Coast Guard standards. In addition, the CO noted that the applicant’s work as the Administrative Division Officer and championing a unified Support Division during the evaluation period is included in the comments in block 7 of OER3.

On June 2, 2014, the applicant reported for duty at a District waterways management division. On his OER for this work, dated January 31, 2015, he received primarily marks of 5 and 6 in the performance categories, a mark on the fifth spot on the comparison scale, and a strong recommendation for post-graduate studies in law or business and for promotion to lieutenant.

Before applying to the BCMR, the applicant asked the Personnel Records Review Board (PRRB) to make the same corrections requested here. The PRRB solicited declarations from the applicant’s rating chain, who strongly supported the accuracy of the disputed OERs and the XO’s position as OER supervisor for the junior officers. The PRRB also solicited a declaration from the CO of the vessel where the applicant performed temporarily, who provided substantially negative comments about the applicant’s performance. The PRRB found that the applicant had failed to submit any evidence to support his claims and that, although the applicant complained about a lack of counseling, his own statements and the declarations show that he received multiple counseling sessions. The PRRB also noted that officers are responsible for managing their own performance and seeking feedback from others.

VIEWS OF THE COAST GUARD

On August 13, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in the memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the applicant's rating chain—the XO, CO, and OER Reviewer—carried out their responsibilities and completed the disputed OERs in accordance with policy and have supported the OERs in declarations regarding the applicant's poor performance. The declarations submitted to the PRRB and the BCMR are attached.

PSC stated that the applicant complained about not receiving formal feedback or counseling but did not attempt to initiate meetings or counseling with the XO, CO, or OER Reviewer. However, PSC noted, the applicant did receive a number of counseling sessions from his XO and CO and others, but was reluctant to accept criticism and feedback.

Finally, PSC noted there is no policy that entitles an officer to an end-of-tour award and that the cutter's designated Awards Board apparently found that he had not met the criteria for an award. PSC concluded that the applicant has failed to substantiate that his record contains an error or injustice and recommended that the Board deny the applicant's request for relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 23, 2015, the applicant responded to the advisory opinion, stating that the Coast Guard's response did not serve to prove anything. He stated that if the Board agreed with the Coast Guard, it would be tantamount to "saying that there isn't a single objective thing to getting a Deck Watch Officer qualification and being evaluated in the Coast Guard. Instead, it is about how much you conform to what others around you, particularly those above you, want you to be and do 'whatever it takes' to get the job done." He stated that his CO's lack of confidence was based on speculative fantasies because "there is no record of any incident in which I endangered the ship or crew." The applicant described how ships pass each other at sea (slowing down, moving to the right, and "rarely .. within 10 football fields of each other"); how there are normally three people on the bridge maintaining a sharp lookout and assisting the DWO; and how the scenario is also depicted on a screen in the CO's stateroom and the cutter's Engineering Control Center. Thus, he argued, "asserting that the entire fate of the ship is only in your hands is a bit of an overstatement." He also noted that his cutter, a buoy tender, was able to "turn on a dime" and was "equipped with a dynamic positioning system that enables it to drive itself." He noted that the CO admitted that he had met the minimum pre-requisites for being a DWO and argued that perfection is not required. Even qualified DWOs sometimes make mistakes and are verbally counseled about it.

Regarding criticism that he often failed to communicate with the electronics technicians, which hindered repair efforts, he noted that the electronics technicians "were not even in my department" and it was "difficult to get them away from their assigned department to do the work that they were supposed to be doing."

Regarding the criticisms of the CO of the other vessel he served on, the applicant stated that the CO "is a harsh critic" who fired his Operations Officer and failed to qualify another first tour junior officer as a DWO. The applicant also alleged that he has heard that the XO of the other vessel "wrote me positive feedback."

The applicant also complained that many of the performance incidents described in the declarations of his rating chain and others are undocumented, unverifiable, minor, and should be considered inadmissible hearsay. Regarding his argument with the First Lieutenant, for example, the applicant stated that he had trained the quartermasters how to use the iridium phone and given them written instructions, so he was not pleased to be called to the bridge to explain it again when he was off duty, and other people could have been called. However, the First Lieutenant harassed him by constantly relying on him to handle problems that the electronics technicians or qualified quartermasters could have handled.

The applicant reiterated his claims about the lack of counseling and argued that not every discussion of work can be considered feedback or counseling. He also noted that the command did not document any formal counseling in his record. Regarding his response to feedback, the applicant stated that “there was a lot of nit-picking that went on over very minor details.”

Regarding his request for an end-of-tour award, the applicant speculated that “they are fairly commonplace and are given out to nearly everyone, including those that allide with piers.” The applicant stated that he is only aware of one other O-2 and an E-4 who did not receive some recognition, although the command claimed there were others.

The applicant claimed that the Coast Guard had not actually challenged any of his assertions and so they are unchallenged. The applicant also argued that the claim that he submitted no evidence is untrue because he provided his own descriptions of his performance and his personal statement about the lack of any documentation of poor performance and the lack of counseling.

The applicant concluded that “[e]ven if I were the worst junior officer anyone had ever laid eyes on, I don’t believe that the administrative actions that were taken were warranted, and I don’t think the Coast Guard has shown sufficient evidence to justify themselves.”

In support of his allegations, the applicant submitted a blank counseling form, which his command could have but did not use to document his alleged poor performance; an article entitled, “The Age of Unmanned Shipping”; Navigation and Vessel Inspection Circular No. 12-14 with Enclosure (1), “Discussion of Qualification Requirements for Officer in Charge of a Navigational Watch on Vessels of 500 GT or More,” and Enclosure (2), “Assessment Guidelines for Officer in Charge of a Navigational Watch on Vessels of 500 GT or More.”

APPLICABLE REGULATIONS

In September 2013, instructions for evaluating officers were contained in Article 5.A of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (“Manual”).

Article 5.A.1.c.1(d) of the Manual states the following about performance feedback:

(d) Performance Feedback. Performance feedback is an essential part of every officer's career development.

[1] Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If feedback is not fully understood, it is the reported-on officer's responsibility to immediately seek clarification and the rating chain's responsibility to provide it.

[2] Performance feedback by use of the Officer Support Form (OSF), Form CG5308, is the prescribed format for ensigns and lieutenants (junior grade). However, rating chains are strongly encouraged to provide timely performance feedback during and at the end of each reporting period for all officers. Rating chains are strongly encouraged to provide a copy of the completed OERs to reported-on officers prior to submission of the OERs to Commander (CG PSC).

Article 5.A.2.c.1. of the Manual states that Commanding Officers "must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers."

Article 5.A.2.d.(1) states that it is the responsibility of each officer to—

(a) Learn the intent and procedures of the OES and identify the members of the rating chain from the published list.

(b) Request an appointment with the supervisor at the beginning of each reporting period, if clarification of duties and areas of emphasis is needed. This information may be delineated on the Officer Support Form (OSF), Form CG5308, or other format as specified by the supervisor. A meeting shall be requested as soon as possible after reporting aboard a new unit. All reported-on officers in the grades of ensign and lieutenant (junior grade) must request initial and end-of-period meetings with their supervisors.

(c) Individual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback from the supervisor during the period, and using that information to meet or exceed standards.

(d) Forward the OER to the supervisor not later than 21 days before the end of the reporting period.

(e) Submit to the supervisor not later than 21 days before the end of the reporting period a listing of significant achievements or aspects of performance which occurred during the period along with a copy of their updated Employee Summary Sheet (ESS). The Officer Support Form (OSF), Form CG-5308, is optional for all officers except ensigns and lieutenants (junior grade). Supplemental information may be submitted through the end of the reporting period.



(k) Assume ultimate responsibility for managing their own performance, notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough, and that OERs and associated documentation are timely and accurate.

Article 5.A.2.d.(2)(a) states that the supervisor “is normally the individual to whom the reported-on officer reports to on a daily or frequent basis and from whom the reported-on officer receives the majority of direction and requirements. The following guidance is provided for the designation of the supervisor:

[1] Coast Guard officers, officers of other U.S. Armed Forces, officers of foreign armed services (who serve in a supervisory capacity for the reported-on officer), U.S. Public Health Service officers, and U.S. government civilian employees may serve as supervisors. The supervisor of a reserve officer may be either an active duty or reserve officer or individual stated above.

[2] The 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.

[3] When an officer responds to more than a single individual for different functions, the commanding officer shall appoint one individual to the position of supervisor (to whom all secondary supervisors will provide evaluation input). ...

Article 5.A.2.d.(2)(b) of the Manual states that a supervisor must—

[1] Evaluate the performance of the reported-on officer in the execution of their duties.

[2] Provide direction and guidance to the reported-on officer regarding specific duties and responsibilities.

[3] Discuss at the beginning of the period, upon request, or when deemed necessary, the reported-on officer’s duties as prescribed by Article 5.A.2.d.(1) of this Manual and areas of emphasis.

[4] Encourage the use of the Officer Support Form (OSF), Form CG-5308, (required for ensigns and lieutenants (junior grade) or other convenient means, to note important aspects of the reported-on officer’s performance during the reporting period. Significant events, problems, achievements, shortcomings, or personal qualities should be noted.

[5] Provide timely performance feedback to the reported-on officer upon that officer’s request during the period, at the end of each reporting period, and at such other times as the supervisor deems appropriate.

[6] Counsel the reported-on officer at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discusses duties and responsibilities for the subsequent reporting period and makes suggestions for improvement and development.

[7] Finalize the optional or required Officer Support Form (OSF), Form CG5308, if used. ...

Article 5.A.2.d.(3)(b)[6] states the reporting officer shall “[p]rovide timely performance feedback to the [ROO] at the end of each reporting period and at such other times as the reporting officer deems appropriate.”

Article 1.B.2. of the Medals and Awards Manual, COMDTINST M1650.25D, states that “military decorations are awarded in recognition of individual and/or sustained acts of heroism, meritorious achievement, or meritorious service above and beyond that ordinarily expected, and which distinguish an individual or unit from among those performing similar acts or services.”

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 pursuant to 10 U.S.C. § 1552. The application was timely filed.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.²

3. The applicant alleged that three of his OERs are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.³ 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.⁴ 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.⁵

4. The applicant alleged that the XO should not have signed his OERs as supervisor because he received most taskings from the Operations Officer. However, he admitted receiving taskings from the XO and the First Lieutenant, and Article 5.A.2.d.(2)(a)(3) states that “[w]hen an officer responds to more than a single individual for different functions, the commanding officer

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 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *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).

shall appoint one individual to the position of supervisor (to whom all secondary supervisors will provide evaluation input).” Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his CO erred in making the XO his supervisor for OER purposes even if he received most of his taskings from the Operations Officers.

5. The applicant argued that he was arbitrarily deprived of DWO qualification by his CO and thus unjustly assigned low marks and negative comments in the disputed OERs because he had completed the prerequisites for DWO by the end of his tour of duty but had not gained his CO’s confidence. The fact that the applicant had completed the minimum prerequisites for DWO qualification and the fact that unmanned shipping is under consideration do not persuade the Board that the applicant’s CO arbitrarily withheld the applicant’s DWO qualification. The applicant submitted no witness statements supporting his claim that he should have been qualified or that his CO withheld the qualification arbitrarily. Nor is there any evidence of bias or some other impermissible factor in the CO’s decision-making. The record shows that the CO had found other crewmembers qualified but because of the applicant’s performance, did not qualify the applicant. The XO of the cutter and the CO of another vessel have supported the CO’s decision in declarations. The Board finds that the applicant has not proved by a preponderance of the evidence that his CO erred or committed an injustice in refusing to qualify the applicant as a DWO, although it was the applicant’s primary assigned duty on the cutter.

6. Because qualifying and serving as a DWO was the applicant’s primary assigned duty aboard the cutter and one he did not timely accomplish, the Board finds that the applicant has not proven by a preponderance of the evidence that the low marks of 3 he received for Professional Competence in the disputed OERs were erroneous or unjust. These low marks are properly supported by comments explaining why he failed to meet the requirements for a standard mark of 4. These marks and comments are presumptively correct,⁶ and the applicant has not overcome the presumption of regularity.

7. The applicant alleged that the marks of 3 he received in OER1 for Adaptability, Teamwork, Evaluations, and Professional Presence are erroneous and unjust. However, the low marks are properly supported by comments and are presumptively accurate, and the applicant did not submit any evidence of error apart from his own claims. Moreover, the applicant’s rating chain has submitted declarations supporting the accuracy of the disputed marks and comments. The Board finds that the applicant has failed to show that the disputed OERs have been adversely affected by a “misstatement of significant hard fact.”⁷

8. The applicant alleged that all three disputed OERs, but OER1 in particular, are unjust because he was not formally counseled and told to “shape up.” He also alleged that the feedback he did receive was often too vague. The applicant admitted, however, that the First Lieutenant, head of the Deck Department, counseled him two or three times between May and August 2013 about not qualifying as a DWO. The XO and CO also claim to have counseled the applicant in their declarations. The Board finds that the preponderance of the evidence shows that the applicant was counseled about his performance several times during the evaluation

⁶ 33 C.F.R. § 52.24(b).

⁷ *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).

period for OER1 from April 1 to September 30, 2013, as well as during the reporting periods for OER2 and OER3. Therefore, the Board is not persuaded that the low marks in those OERs constituted an unfair surprise. In light of the feedback the applicant clearly did receive and the regulations regarding performance feedback in Article 5.A. of COMDTINST M1000.3A, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed OERs are erroneous or unjust because of the alleged lack of formal counseling.

9. The applicant asked the Board to add certain comments about his performance to OER3. However, as the CO noted, block 7 already contains comments similar to two of the three comments the applicant wants added. The absence of the third comment, which concerns the fact that the applicant organized and paid for his own “wetting down” party—a long tradition in the Coast Guard—does not render the disputed OER erroneous or unjustly incomplete. The Board finds that the applicant has not proven by a preponderance of the evidence that the OER is inaccurate or unjust in the absence of the additional comments he requested.

10. The Board finds that the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that the disputed OERs are adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial [REDACTED]

[REDACTED] alleged that he should have received an end-of-tour award because almost all of the other officers and members did. Because the applicant failed to qualify in his primary duty, however, the Board is not persuaded that his failure to receive an end-of-tour award constitutes an error or injustice. As the Coast Guard noted, individual awards must be earned by strong performance and are not entitlements.

12. The applicant made numerous allegations with respect to the actions and attitudes of various members of his command on the cutter. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

ORDER

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

December 11, 2015

