

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2017-144**

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██████████ LCDR

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on April 26, 2017, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 14, 2018, 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 Lieutenant Commander (LCDR), asked the Board to correct his record by taking the following actions:

- Raise his marks in the following dimensions from a 5 to a 6<sup>1</sup> on his April 30, 2012, Officer Evaluation Report (OER1): Results/Effectiveness, Adaptability, Professional Competence, Writing, Developing Others, Directing Others, Workplace Climate, Judgment, Professional Presence, and Health & Well-being;
- Raise his marks the following dimensions from a 5 to a 6 on his April 30, 2013, Officer Evaluation Report (OER2): Professional Competence, Developing Others, Judgment, Professional Presence, and Health & Well-being;
- Raise his marks in the dimension of Judgment from 4 to 5 on his April 30, 2014 Officer Evaluation Report (OER3), raise the following dimensions from a 5 to a 6:

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<sup>1</sup> On an Officer Evaluation (OER) form (CG-5310B), Coast Guard officers are rated in eighteen different performance categories, such as "Adaptability," "Professional Competence," "Teamwork," and "Judgment" on a scale of 1 (worst) to 7 (best). A mark of 4 means that the officer has met the expected standard of performance.

Results/Effectiveness, Professional Competence, Directing Others, Teamwork, and Initiative, and raise his comparison scale mark from a 5 to a 6;<sup>2</sup>

- Change the following terms on OER1:
  - “International Port Security (IPS) Program Team Member” in block 2 (Primary Duty) to “Foreign Port Auditor”;
  - “Team mbr” in block 3 (Comments) to “auditor”; and
  - “Team mbr” in block 7 (Reporting Officer Comments) to “auditor”;
- Change the following terms on OER2:
  - “International Port Security (IPS) Program Team Member” in block 2 to “Foreign Port Auditor”; and
  - “IPS Program Team Member” in block 7 to “Foreign Port Auditor”;
- Promote the applicant retroactively to Commander as if he had been selected for promotion in 2014 (Promotion Year (PY) 2015) and award him all back pay and allowances;
- If the applicant is not retroactively promoted as requested above, then hold a Special Selection Board (SSB) to consider promoting him to Commander effective PY 2015 and award him all back pay and allowances if he is selected for promotion;
- If neither of the prior two requests are awarded, then strike both of his non-selections for promotion<sup>3</sup> and place him in the next in-zone promotion group for Active Duty Promotion List Commander Selection Board and, should he be selected, award him back pay and allowances to retroactively position him to PY 2015;
- Remove the Personnel Record Review Board (PRRB) decision from his record; and
- Update the BCMR’s online library to include all final decisions since September 2013 to present.

The applicant provided a twenty-five page statement with his application to the Board. He stated that his record is in error or is unjust because the Coast Guard violated policy and his command “executed capricious and arbitrary actions.”<sup>4</sup> The applicant had many complaints regarding his command’s actions.

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<sup>2</sup> In his application to the BCMR, the applicant made no specific requests regarding what marks he wanted changed in OER3. After the Board inquired about his Personnel Records Review Board (PRRB) application (as discussed below in Further Proceedings), the applicant provided his lengthy PRRB application thirteen months after his BCMR application was docketed. The applicant requested that certain marks be changed in OER3 in his PRRB application, and this Board will presume that he is requesting the same marks be raised here.

<sup>3</sup> At the time he submitted his application he had been non-selected for promotion once. He informed the Board before it met to consider his case that he was again non-selected for promotion, so the Board will assume that he is requesting that both non-selections be struck from his record.

<sup>4</sup> The applicant makes reference to his PRRB application and allegations therein, but the Board notes that he did not provide a copy of the PRRB application when he submitted his initial BCMR application. He listed his PRRB application as reference (a) of his submission to this Board. However, it was not included in the packet of materials the Board received in April 2017.

The applicant stated that he became aware of the injustices and substantive errors in his OERs after the twenty-one day Reported-on Officer reply period.<sup>5</sup> He stated that he became aware of the “full negative career effect of these injustices” after he researched the PRRB, this Board, and applicable policy. He stated that he understood the full effect once he was not selected for promotion to Commander “due to the command’s creation of an unlevel playing field not allowing this officer to compete for promotion on a level playing field that included all the reporting periods.” He also stated that his concerns with the OERs were “not solely related to performance issues.” He stated that there were major administrative and substantive errors in his OERs as well. He added that he received an Achievement Medal on August 20, 2014, which he asserted “provided a more holistic picture of [his] performance and denoted the glaring inconsistency of the rating chain’s sworn statements and the citation language of ‘Superior Performance,’ which was beyond the 21 day timeline.” He stressed that he did apply to the PRRB within the one-year timeline for the April 30, 2014, OER to exhaust his administrative remedies. He noted that his application to this Board is timely.

The applicant stated that his “command limited [his] work scope by not allowing [him] to continue to pursue the Head of Delegation (HOD) qualification to which [he] was evaluated against, but was not in [his] description of duties.” He alleged that he received lower evaluation marks because he was held against the HOD standard even though he was not allowed to qualify despite the fact that he had repetitively expressed a desire to complete the qualification. The applicant separately argued that his command chose to stop his qualification process based on “an unverified mental health condition.” He stated that his command used a false medical diagnosis in an email<sup>6</sup> as a “possible cause of odd behavior or poor performance.” He asserted that his supervisor and reporting officer were not mental health providers and were therefore not qualified to make a diagnosis and they erred by “using, considering, or even speculating on a false medical diagnosis regarding [his] performance as a part of the determination to limit [his] work scope.” The applicant stated that he was never relieved for cause and was permitted to continue in his primary duty as Foreign Port Audits. He stated that he did not believe that it was a requirement for all O-4/GS-13s to qualify as HODs because he did not believe that it was formal policy or in the official position description. He asserted that his command “arbitrarily and capriciously applied this paygrade requirement.” The applicant noted that he was accused of being unable to qualify as HOD after three years but stated that this was inaccurate because these “three evaluation periods covered only two years, ten months, and twenty days.” In addition, he stated that his command only allowed him to seek qualification during the first reporting period and “discontinue[d] the opportunity” thereafter.

Regarding the marks on the three OERs, the applicant noted that he received one 4 throughout the three OERs, on OER3. He also noted that he received two marks of 5 on the comparison scale on OER1 and OER2 but received a mark of 4 on the comparison scale on OER3. He stated that his command recommended him for promotion but lowered his comparison scale rating to a 4 on his third OER. He acknowledged that a Federal Court<sup>7</sup> has found that a mark of 4

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<sup>5</sup> Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3A, Article 5.A.7.e.3.

<sup>6</sup> This email was not provided in the applicant’s original submission, but the Board has access to the reporting officer’s January 27, 2014, declaration, discussed in the Summary of the Record. The email the applicant is referencing was included in the his PRRB submission, which was received by this Board in May 2018.

<sup>7</sup> *Quinton v. United States*, 64 Fed. Cl. 118 (2005).

is not derogatory but he argued that a promotion board “assessing officer records in a competitive environment, a reduced mark on the comparison scale or a performance area in a later reporting period while assigned the same duty or similar rating chain may be considered disparaging.” The applicant also alleged that his command used arbitrary and capricious standards, claiming that he received a 5 in Results/Effectiveness on one OER but received a 6 on the next OER despite the fact that he still had not qualified as HOD. He claimed that his supervisor did not understand how to follow the instructions for assigning marks and argued fervently that he should have received a 6 in multiple dimensions. For many of the dimensions, the applicant argued, his “performance exceeded the standard mark of 4 in the performance dimension that means the ‘officer’s performance met the expected high standards of all Coast Guard officers’ and with more than suitable performance for the assigned primary duty of Foreign Port Audits.” The applicant pointed out several negative things that his chain of command stated about him in their declarations (written in response to his PRRB application) and alleged that those negative comments were inconsistent with his positive marks and comparison scale marks of 5.

The applicant stated that he received a Coast Guard Achievement Medal at the end of his tour for “superior performance” and “exceptional diplomacy.” He asserted that he would not have received this medal at the end of his tour if his performance had not been excellent and offered this as proof that he should have received better marks and a better comparison scale mark.

The applicant asserted that his supervisor and reporting officer failed to follow Coast Guard policy, specifically Articles 2.E.4. and 2.F.2. of the Coast Guard Officer Evaluation System Procedures Manual (hereinafter “OES Manual”), PSCINST M1611.1A, when they failed to select the appropriate marks on his OERs and then write comments in the blocks following each evaluation area citing specific performance and behavior for any mark that deviated from a 4. The applicant claimed that his supervisor ordered him to write his own OER and stated that his supervisor then used the applicant’s prepared OER to create the final version.

The applicant complained that both his supervisor and reporting officer, civilian employees, failed to verify their completion of Officer Evaluation System (OES) training. He stated that civilians are required to complete OES training in accordance with the Officer Accessions, Evaluations, and Promotions manual (hereinafter “Officer manual”), COMDTINST M1000.3A, Article 5.A.2.c.(2)(h). However, his supervisor and reporting officer had not completed this training prior to any of the three disputed OERs. Because they had not completed their training, the applicant argued, his supervisor and reporting officer were unable to “ensure accurate, fair and objective evaluations” and therefore had “no business being in the rating chain process.” The applicant stated that the Personnel Service Center (PSC) also failed to ensure that the civilian members of his command were properly trained before they validated his OERs for three years in a row. He stated that his supervisor and reporting officer pointed to their years of military experience, but the applicant asserted that this is not in accordance with the policy in the Officer manual.

The applicant claimed that there was a negative workplace climate at his command. The applicant noted that the PRRB acknowledged that there had been a workplace climate issue, but stated that he “ardently disagree[d]” with their conclusion that his command had fully addressed the issues. He stated that there was one colleague in particular at his command with him for two

and half years whom he stated attested to that fact that his “experience was the norm rather than the exception.”<sup>8</sup> He asserted that at least three other colleagues, military and civilian, also stated the workplace climate adversely impacted them.

The applicant complained extensively about the PRRB’s decision. He asserted that the PRRB openly acknowledged that his command had violated policy by failing to ensure his supervisor and reporting officer had completed OES training and that the command had a negative work place climate. The applicant therefore argued that “it is not necessary for the Board of Corrections for Military Records to determine whether all the ‘applicant’s allegations are true’ ... and thus must be presumed true.”<sup>9</sup> He stated that despite these findings the PRRB chose to believe his rating chain’s declaration’s thereby placing a “heavy dependence on a non-authoritative source.” The applicant had several complaints about the composition and the procedures of the PRRB as well. The applicant stated that he “strongly disagree[d]” with the PRRB’s recommendation to grant no relief because they failed to consider all of his allegations in his over one-hundred page submission package. He argued that the PRRB failed to point out any negative comments in his OERs to justify the marks he received.

### *Applicant’s Documentation*

In support of his application, the applicant provided many documents, some of which are discussed below in the Summary of the Record. He provided printouts from several pages of the slideshow training that civilian employees are required to take if they are responsible for OER duties. The first page of the slideshow states that “civilian employees who perform the duties of either supervisor or reporting officer, prior to assignment of OES responsibilities, shall obtain training from Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) per COMDTINST M1000.3A, Article 5.A.2.c.(2)(h).” Page 7 of the slide show which includes a bullet that states that Commanding Officers (COs) are responsible for ensuring that civilians in the rating chain are properly trained. Another unnumbered slide includes a bullet that states that civilians in the rating chain “must receive formal and documented training from OPM-3.” He also provided an online print-out from the Officer Personnel Management Division, Officer Evaluations Branch of the Personnel Service Center (CG PSC-opm-3). He circled the following paragraph:

There is a requirement for formal training for civilians per COMDTINST M1000.3A, Article 5.A.2.c.(2)(h). Commands are reminded that OES Rating Chain responsibilities must be incorporated into the civilian employee’s core competencies. CG PSC-opm-3 will prepare training certification letters for civilians who complete the training. If, for some reason, a civilian rating chain member is unable to attend the training, the command can direct them to read Chapter 5.A. and review the CG PSC-opm OES power point presentation. Once the command is comfortable that the civilian staff member understands the OES process and can carry out their responsibilities, the command can notify the CG PSC-opm-3 that the training requirements have been completed.

## **SUMMARY OF THE RECORD**

The applicant took his Oath of Office as an Officer in the Coast Guard Reserve on June 21, 1999. On August 13, 1999, he signed a contract for a three-year extended active duty tour, to end

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<sup>8</sup> The applicant stated that her statement was included in his submission to the PRRB.

<sup>9</sup> The applicant cited BCMR Docket No. 2012-109.

on August 12, 2002. He began Initial Active Duty Training on August 14, 1999. He extended his active duty contract to end on June 30, 2004. On April 28, 2003, following his promotion to lieutenant, he was integrated into the regular active duty Coast Guard. His substantive OERs are summarized in the table below with the marks the applicant requested to be changed highlighted. (Because the applicant was assigned to DUINS (Duty Under Instruction) from July 24, 2004, through June 23, 2006, and received OERs with “Not Observed” marks for this period, his 2005 and 2006 OERs are not included in the table.)

PERFORMANCE DIMENSION	2003	2004	2007	2008	2009	2010	2011	2012*	2013*	2014*	2015	2016	2017
Planning & Preparedness	6	7	6	6	6	5	6	6	6	6	6	5	6
Using Resources	5	6	5	6	7	6	6	6	6	6	5	6	6
Results/Effectiveness	5	6	6	6	6	5	6	5	6	5	6	6	6
Adaptability	5	5	5	5	5	4	5	5	6	6	6	6	6
Professional Competence	5	6	5	6	6	5	5	5	5	5	6	5	7
Speaking & Listening	5	5	5	5	5	4	5	5	5	5	5	6	6
Writing	5	5	5	5	6	5	5	5	6	6	5	6	6
Looking out for Others	5	5	6	6	6	5	6	6	6	6	6	6	7
Developing Others	6	6	5	6	6	5	6	5	5	6	5	5	6
Directing Others	5	6	5	5	6	4	6	5	6	5	5	5	5
Teamwork	5	6	5	6	7	4	6	6	6	5	6	5	6
Workplace Climate	5	5	5	5	5	5	5	5	6	6	5	5	6
Evaluations	4	6	4	4	4	5	4	5	5	5	5	6	6
Initiative	5	5	6	6	7	5	6	6	6	5	6	5	6
Judgment	5	6	5	5	5	4	6	5	5	4	5	5	5
Responsibility	5	6	6	6	6	5	5	6	6	6	6	6	6
Professional Presence	5	6	5	6	6	4	5	5	5	5	5	6	6
Health & Well-Being	5	5	5	5	6	5	5	5	5	6	5	6	7
<b>Average for OER</b>	<b>5</b>	<b>5.7</b>	<b>5.2</b>	<b>5.5</b>	<b>5.8</b>	<b>4.7</b>	<b>5.4</b>	<b>5.3</b>	<b>5.6</b>	<b>5.4</b>	<b>5.4</b>	<b>5.6</b>	<b>6.1</b>
Comparison Scale	5	5	5	4	5	4	4	5	5	4	5	5	5

\*If the applicant received all of the upgrades on the marks he requested, his average marks for OER1 would be **5.8**, for OER2 would be **5.9**, and for OER3 would be **5.8**.

The first disputed OER, OER1, is for the period of June 11, 2011, to April 30, 2012. In the eighteen performance dimensions, he received twelve 5s and six 6s. He received a mark of 5 on the comparison scale, denoting an “excellent performer, give toughest, most challenging leadership assignments.” There were no negative comments on OER1. Comments included phrases such as “diligently managed scarce travel funds”; “conducted seventeen foreign port facility security assessments”; “adeptly led discussions with ... port officials”; “effectively / accurately mentored a fellow service member”; “well-prepared, comprehensive, and timely OER input eased command preparation”; and “exceptionally strong logistical and technical skills along with the ability to quickly adapt” (*see* enclosure 3).

OER2 covers the period of May 1, 2012, to April 30, 2013. He received seven 5s and eleven 6s. He received a mark of 5 on the comparison scale. There were no negative comments on the OER. Comments included phrases such as “exceedingly adaptable in a highly dynamic international environment”; “aggressively sought professional development”; “meticulously edited assessment reports”; “exemplified diplomacy, tact, and cultural sensitivity required for int’l overseas missions”; “created innovative vaccine tracking system”; “very technically proficient

officer that pay meticulous attention to detail” and “consistently proposed novel solutions to complex [International Port Security] Program challenges” (*see* enclosure 4).

OER3 covers the period of May 1, 2013, to April 30, 2014. He received one 4, eight 5s, and nine 6s. He received a mark of 4 on the comparison scale, denoting a “good performer, give tough, challenging assignments.” There were no negative comments on the OER. Comments included phrases such as “validated ... port security commitment in high risk areas without incident”; “drafted & edited dozens of assessment reports detailing country/port facility security risks”; “conducted ... vessel arrival research after poor security noted in their ports”; “accurately assessed and documented foreign port security against international standards”; “displayed great technical acumen while advising very senior int’l gov’t and port security officials and U.S. Embassy staff during int’l port security assessments”; and “initiated unit security audit identifying weaknesses” (*see* enclosure 5).

On May 23, 2014, the applicant received a Coast Guard Achievement Medal. The citation stated that the applicant was cited for “superior performance” and had demonstrated “exceptional diplomacy, logistical acumen, and security expertise in the performance of 59 individual port facility security assessments spanning 17 countries.”

The applicant provided an email dated September 16, 2014, from PSC to the applicant. The member from PSC confirmed per the applicant’s request that the applicant’s supervisor and reporting officer had not completed “the civilian OER training per COMDTINST M1000.3A; Article 5.A.2.c.(2)(h).” The supervisor and reporting officer were copied on the email, and the PSC member asked that if they had taken the training to let her know and if not to contact her so that she could get them certified. The applicant subsequently applied to the PRRB and asked that board to raise some of the marks in OER3.

#### ***Declaration of the Supervisor to the PRRB***

The applicant’s supervisor provided a four-page declaration for the PRRB dated January 27, 2015. He started by saying that before he addressed the applicant’s individual points he wanted to state that he “categorically disagree[d] with the applicant’s comments that amount to no less than overt character assassination as part of the application.” The supervisor stated that the applicant’s statements in his PRRB application were without context and “cherry-picked to make his former supervisor and reporting officer appear in the worst light to discredit their leadership and evaluation of his performance.” The supervisor rejected the applicant’s assertion that he had been treated unfairly or unjustly and noted that many of his statements in the application appeared to be vindictive in nature rather than objective.

The supervisor noted that he has been in the Coast Guard “continuously in a reserve, active duty, or civilian status for 40 years.” He had been writing OERs for twenty-four years on active duty and eight years as a civilian. He stated that at the command in question, officers in the O-4 rank were expected to qualify as a Head of Delegation (HOD). The command provided an initial two-week training session for members new to International Port Security (IPS). The supervisor explained how the applicant did not qualify as HOD, so he was more aptly described as a “team member” per the command’s position titles than an “auditor” in the body of the OER, despite the

fact that he was in a Foreign Port Auditor billet. The supervisor gave specific examples as to why the marks on OER3 should remain as they were originally assigned (*see* enclosure 6). Ultimately, he stated that he believed “the applicant was treated fairly, his OER accurately reflect[ed] his performance over the time period in question, and he was not treated unjustly.” The supervisor stated that to the contrary, the applicant received a significant amount of training, coaching, and mentoring from the command in an effort to make him as successful as possible.

#### ***Declaration of the Reporting Officer to the PRRB***

The applicant’s reporting officer provided a two-page declaration for the PRRB dated January 27, 2015. He stated that much of the applicant’s “strange and verbose” PRRB application concerned events that were outside of the reporting period for OER3. He first addressed the applicant’s complaints about the workplace climate. Although he called much of the PRRB application “character assassination,” the reporting officer stated that there were in fact some issues at the command and he was aware of them. He stated that he travelled to the unit and “met individually with every member of the detachment to gauge the problem.” The reporting officer “gave course corrections” on every issue to the supervisor, who reported directly to him, and to several others at that command. The reporting officer stated that he goes to that command annually to ensure that he stays “in touch with the morale and climate of the office.” He emphasized that these issues occurred outside of the reporting period in question and were resolved to the chain of command’s satisfaction “long before the period of the OER in question.”

Another issue that the reporting officer stated was outside of the reporting period was the applicant’s contention that the supervisor and reporting officer had violated policy by mentioning their concern that the applicant might have some form of autism such as Asperger’s. The reporting officer acknowledged that including a comment regarding a medical or psychological diagnosis on an OER is prohibited. However, he stated that the applicant failed “to understand that there is no prohibition on management personnel privately discussing what might be a possible cause of odd behavior or poor performance.” He stated that neither he nor the supervisor made reference to a medical condition on the OER. He also denied the notion that the issues may have had any influence on “any of [his] decisions about managing” the applicant. He quoted an email dated April 26, 2012, “in [the applicant’s] case, I wouldn’t dare suggest he has Asperger’s; I would be way outside my expertise.” The reporting officer stated that this email was outside of the reporting period and noted that within this email he dismissed the notion that the applicant might be autistic. He had brought up the idea because he witnessed behavior from the applicant that he “had never encountered from an officer in [his] many years of managing.” He stated that the applicant was “frequently socially inept in the extreme.” However, he emphasized that his speculation to try to explain the applicant’s odd personality had no bearing on the marks on OER3.

The reporting officer stated that he carefully reviewed every mark that he approved and that he assigned and stood by them all. He also stood by the comparison mark of 4 in comparing the applicant to the officers he had known in his twenty years as a commissioned officer and eleven years as a civil servant. The reporting officer asserted that the applicant “was a mediocre officer.” He stated that he based his assessment of the applicant on his observations of the applicant in person or, more frequently, based on telephone interactions and “observations of his performance during international port security assessments that qualified heads of delegation relayed to [him]



after international missions.” He stated that the applicant’s primary duty was “Foreign Ports Audits” but he primarily served as a “member of small teams that travelled to international ports to assess their security.” He therefore asserted that the phrasing in blocks 2 and 7 was correct (*see* enclosure 7).

### ***Declaration of the OER Reviewer to the PRRB***

The applicant’s reviewer provided a declaration dated January 16, 2015. He stated that the unit in question was one of six units that he managed so he had limited capacity to interact directly with most individuals at his units. He stated that he had not met the applicant personally. He did, however, interact with the applicant’s reporting officer on a daily basis regarding the management and oversight of the unit and to discuss personnel issues. He stated that he specifically remembered discussing OER3 with the reporting officer when he received it. His assessment “was that the comments accurately supported the assigned marks.” He discussed the OER with the reporting officer to ensure that the OER was fair and objective. The reviewer specifically recalled pressing the reporting officer on the mark of 4 in Judgment and the comparison scale. He stated that he did not recall the specific response but he remembered that the reporting officer’s reply “was more than sufficient to explain how the applicant earned those two marks.”

The reviewer asserted that the reporting officer was well-versed in the OES, as he had “used it for hundreds of officers over the course of more than 30 years.” The reviewer argued that to “suggest that lacking an online training session somehow disqualifies his ability to use the OES accurately is ludicrous.” He also stated that the applicant showed a clear bias against civilian members of the rating chain and indicates that they were “categorically incapable of understanding the implications of the OER on an officer’s career.” He asserted that the applicant claimed he would substantiate his claims but then failed to provide evidence to support why the OER was inaccurate. The applicant instead “spent the majority of his efforts assassinating the character of his review chain and fabricating an outlandish assertion that they medically diagnosed him and used that diagnosis to influence their evaluation of his performance.” The reviewer argued that the applicant did not take accountability for his actions in his 116-page application and did not substantiate any of his claims (*see* enclosure 8).

### ***Decision of the PRRB***

On April 20, 2015, the PRRB sent the applicant a copy of their final decision. The applicant had applied to the PRRB requesting that OER3 be changed to reflect a 6 instead of a 5 in the performance dimensions Results/Effectiveness, Professional Competence, Directing Others, Teamwork, and Initiative. He requested that the performance dimension Judgment be changed to reflect a 5 instead of a 4. He requested that the comparison scale be changed to a 5 to denote an excellent performer and he asked that the comments in the comparison scale section reflect an “excellent performer.” The applicant asked that his description of duties be changed in block 2 and 7 to “Foreign Port Audit” and he asked to be retroactively promoted to Commander.

The PRRB stated that it considered the enclosures that the applicant provided as a part of his application and the applicable Coast Guard policy. The PRRB also considered the declarations from the applicant’s chain of command. The PRRB compared the evidence to the disputed OER

and disagreed with the applicant's assertion that the OER inaccurately captured his performance during the reporting period. Regarding the applicant's assertion that "there might have been a workplace climate issue," the PRRB stated that the "concern was acknowledged by the rating chain that workplace climate issues were indeed addressed during the OER period." However, the PRRB stated that they did not find substantive evidence that these issues biased the applicant's OER. The PRRB did not find that the applicant should be retroactively promoted to Commander because his record "went before the Commander Selection Board as prescribed by law and policy, and the member was subsequently not selected for promotion."

Regarding the applicant's assertion that the civilian members of his rating chain were required to receiving OER training, the PRRB found that this failure to complete the training did not cause an injustice against the applicant "as both of these members are retired Coast Guard officers with many years of experience in evaluating Coast Guard members and are familiar with the OES." The PRRB ultimately found that the applicant's chain of command carried out their OER responsibilities in accordance with Coast Guard policy. The PRRB stated that the disputed OER represented an "accurate reflection of the rating chain's view of the applicant's performance during the period of report and thus the marks should not be changed." The applicant failed to substantiate an error or injustice existed with respect to the disputed OER and did not overcome the presumption of regularity. The PRRB recommended that no relief be granted. On April 20, 2015, the Director of Civilian Human Resources, Diversity and Leadership approved the recommendation.

On September 26, 2017, the applicant emailed the Board and stated that he had again been non-selected for promotion to Commander.

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

On October 20, 2017, the Judge Advocate General 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 a memorandum prepared by the Personnel Service Center (PSC).

PSC noted that the application is timely and therefore should be considered on the merits by the Board. PSC stated that the applicant did not file a Reported-on Officer Reply as authorized for any of the three disputed OERs. The applicant submitted a PRRB application for OER3 and received no relief, but failed to submit a PRRB application for OER1 or OER2. PSC argued that the applicant failed to substantiate his claim that the disputed OERs are erroneous or unjust. PSC stated that the applicant did "not present clear and convincing evidence that overcomes the presumption of regularity with respect to the disputed OERs." The applicant quoted awards he received and comments in the OERs to support higher marks, but PSC stated that this is not sufficient evidence to support an increase in his marks because "these small snap shots are highlights that do not show how a member meets or exceeds all the criteria needed for the requested changes."

The applicant also claimed that his OERs were not completed by each member of his rating chain independently because he drafted his own OERs and submitted them to his supervisor. PSC

acknowledged that an officer drafting his own OER is not a best practice, but noted that the applicant stated that his chain of command made edits to the evaluations he submitted. PSC asserted that the chain of command therefore did complete his evaluations independently while using his submissions as supporting documentation. The applicant had also stated that his supervisor and reporting officer had a “consensus.” PSC stated that the reporting officer selected the “Concur” option in Block 7 of the OERs which means that he was in consensus with the supervisor; however, there was “no evidence provided to prove the rating chain members did not perform their responsibilities” as required by policy.

The applicant had also complained that the civilian members of his rating chain were required to obtain training from OPM-3 on the OES and had not. PSC stated that the applicant was correct that the civilian members of his rating chain had not been properly certified by OPM-3 at the time any of the disputed OERs were completed. However, PSC stated that the “knowledge that they both had gained in their years of service as Active Duty members would have provided the same information that the OPM-3 training would have provided, and therefore, this is considered an administrative error that had no impact on the OERs.” PSC pointed out that the knowledge and experience of the supervisor and reporting officer was attested to by the reviewer. PSC recommended that the Board deny all of the applicant’s requests because he failed to prove by a preponderance of the evidence that an error or injustice exists in his record.

With its advisory opinion, PSC provided three additional declarations from the applicant’s rating chain prepared in response to this application. The applicant’s reviewer from OER1 provided a declaration dated June 6, 2017. He stated that he was not physically located at the unit in question, had no direct contact with the applicant and did not directly observe his performance. He stated that this was not uncommon in a large, geographically dispersed command. He stated that the applicant provided no evidence that his performance warranted raising his marks from a 5 to a 6 in the various performance dimensions. He also stated that he did not support the change to “Foreign Port Auditor” in the comment block because the applicant did not present any justification for the change and the change would not accurately describe the duties he performed. The reviewer noted that the applicant expended “a great deal of energy in his relief application asserting that since his supervisor and reporting officer did not have documentation of OER training on file, the evaluation process was suspect and he is due relief.” The reviewer stated that the Office of Personnel Management website notes that in lieu of formal training commands may substitute the “reading of official policy and viewing a power point presentation.” Additionally, he asserted that there is no requirement for military personnel involved in the OER process because they are inherently familiar with the process. The reviewer stated that both the supervisor and reporting officer were retired Coast Guard officers and he was therefore comfortable that they fully understood the OER process and that they could carry out their duties (*see* enclosure 11).

PSC provided a declaration from the applicant’s reviewer for OER2 dated June 8, 2017. He stated he was the Division Chief from August 2012 to July 1, 2013. He stated that he carefully reviewed OER2 and believed that the “verbiage and content support[ed] and just[ified] the numerical marks assigned.” He stood by the marks assigned by the supervisor and reporting officer which he then reviewed. He stated that he had no position on changing the position to “Foreign Port Auditor” in blocks 2 and 7 (*see* enclosure 12).

The applicant's supervisor provided a five-page declaration dated June 15, 2017. He stated that he was the applicant's direct supervisor for the entire period in question. He listed his qualifications to render observations to the Board. He also provided background and context for the IPS program (*see* enclosure 9). Given the needs of the program and the fact that the applicant could not qualify as an HOD, the supervisor stated that the applicant was not treated unfairly with his assignments. The applicant did not "meet the HOD standards related to interpersonal and diplomatic skills" and the reports that the supervisor received consistently indicated that the applicant should not have been "designated as an HOD and should not [have led] IPS Program delegations on foreign port assessments." However, the feedback indicated that the applicant could be a team member, a position in which he was not the delegation's leader. He asserted that the applicant was given "sufficient opportunity to qualify and improve, he was counseled by his leadership and peers, and offered training (some of which he did not complete)." The supervisor stated that it was his opinion that the applicant was placed into a position that was outside of his skillset, as not all officers are suited for all positions in the Coast Guard.

With regard to the applicant's workplace climate allegations, the supervisor stated that his assertion "that the leadership is to blame for any discontent that may have existed is more likely related to the leadership not agreeing that his performance was as superior as he thought it was." He stated that he stood by the marks he assigned in all three OERs and recommended not elevating the marks as the applicant requested. He noted that the applicant had referenced the Achievement Medal he received at the end of his tour. The supervisor stated that based on his experience "most O-4s completing a tour of duty in the IPS Program receive Commendation Medals and some have received Meritorious Service Medals. [The applicant's] personal award reflects his level of performance and achievement compared with others who have served in the IPS Program."

The applicant's reporting officer provided a declaration dated June 15, 2017. He stated that he was the applicant's reporting officer for the entire period in question. He stated that he reviewed the application to the Board and the three OERs several times. He asserted that all of the marks accurately reflect the applicant's performance for the three years he was at the IPS unit. The reporting officer stated that he followed the existing policy in evaluating him. He stated that he discussed OER3 in particular "at great length" with the supervisor and "at greater length with the reporting officer" because the reporting officer had marked the applicant lower than on OER1 and OER2. He "wanted to ensure that [he] was being fair" and his recollection is that he spent much more time on that OER than the years before.

The reporting officer stated that he overall found the applicant to be a mediocre officer, which was particularly troubling for the type of work performed out of that unit. He noted that the applicant had "poor interpersonal skills, an inability to see the big picture, or understand nuance [and he] frequently got lost in minutiae." He stated that these shortcomings were the reason that the unit did not allow him to qualify as HOD, which is the IPS Program's most difficult qualification, despite the fact that he was expected to qualify as HOD due to his billet. The reporting officer stated that his "inability to perform at that level is the reason his 2014 evaluation was lower" (*see* enclosure 10).

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

On November 3, 2017, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The applicant responded on November 30, 2017, and stated that he disagreed with the advisory opinion as it was "not in keeping with judicial case precedent and Board for Correction of Military Records case history." He reiterated many of his complaints regarding the PRRB process and complained that the Coast Guard did not address these procedural wrongs. He argued that PSC's opinion failed to understand his requested relief or his stated error or injustice discussed in the application. He stated that PSC acknowledged that his rating chain erred by not ensuring that the civilian members received the proper certification. He claimed that this issue was not exclusive to just the command at issue, as he learned a unit he was at since had the same problem. The applicant stated that he strongly disagreed with PSC that this error had no effect on his OERs because, he asserted, it placed him "on an unlevel playing field in the competition for promotion against all other officers in from of the promotion board."

The applicant also asserted that the advisory opinion is not reliable because it places a great deal of reliance on his rating chain's declarations. He stated that the Coast Guard should not have relied so heavily on these declarations, as he had proven by a preponderance of the evidence that his rating chain was inconsistent and had repeatedly violated policy. The applicant asserted that his rating chain was repeatedly inconsistent between what was in the comment section of the OERs and the Achievement Award and then what they wrote in their declarations for the PRRB and this Board. He stressed that he was held to the standard of a member who had an HOD qualification despite the fact that he was not allowed to obtain that certification and that it was not in his official job description. He felt that he was punished for this particularly in OER3, because his marks were higher in OER2 but then he received lower marks in OER3 and he believed this was because he was held to an arbitrary and capricious standard of a member with an HOD qualification.

With his response, the applicant provided several additional documents. He provided a statement from a Commander whom the applicant stated observed his performance during OER3's reporting period. The Commander stated that he observed the applicant's interactions with embassy personnel and government officials during an embassy social event while the applicant was in the country performing a Port Security Visit. The Commander stated that he was "greatly impressed" with the applicant's diplomatic skills, his analytical skills, and his ability to make appropriate social responses. During his observation of the applicant while in the country, the commander stated that he was impressed with "his insightful knowledge of his role as a Coast Guard representative." He stated that he was "dismayed that [the applicant's] outstanding performance in [the country] was not properly reflected" in his OER. He asserted that his observations of the applicant during the week were "the norm" for him as he traveled to other countries. The Commander claimed that he was concerned that the applicant's performance during the reporting period may not have been accurately evaluated by civilian employees who were not formally trained. He stated these "arbitrary and capricious actions directly impacted [the applicant] by receiving lowered performance marks and a lowered comparison scale rating [which] placed him on an unlevel playing field for later promotion boards which then later led to his non-selection for promotion." He therefore "strongly recommend[ed]" that the Board grant relief.

### FURTHER PROCEEDINGS

On May 24, 2018, the Chair emailed the applicant and notified him that the Board believed he had intended to provide a copy of his PRRB application with his original application to the BCMR but failed to do so. The Chair informed the applicant that his options were to “have the Board issue its decision without reviewing the PRRB application” or he could submit “the PRRB application for the Board to review.” If the applicant chose to submit the PRRB application, he was informed that it would be considered as late evidence and it would delay the Board’s decision.

The applicant responded on the same day and stated that he did “not concur.” He stated that his application to this Board listed as references (a) and (b) his PRRB submission and response, respectively. He therefore argued that these documents are “NOT new or late submitted evidence.” He asserted that it should have already been reviewed within the ten month statutory deadline by the Board particularly because the documents “are available/held/managed in the USCG System of Record and can be made available by the USCG.” Nevertheless, the applicant chose to send a copy of his PRRB application and attachments “to expedite the internal government ... in order to conduct a full review” of his application. The applicant complained that the Board had sufficient time from April 2017 until the present (May 2018) and did not contact the applicant sooner. He therefore requested that the Board continue without an extension because, he argued, the PRRB application was not new evidence to the Board as it was “referenced” in his original BCMR application.

#### *PRRB Application*

The PRRB has a statute of limitations of only one year. The applicant applied to the PRRB on January 5, 2015, and therefore the PRRB had jurisdiction only over OER3. He made the requests noted above in Applicant’s Request and Allegations regarding OER3 as well as the retroactive promotion requests. In his twenty-eight page brief to the PRRB, he spoke at length regarding his complaint that his superiors had made inappropriate medical comments. In the PRRB application, the applicant provided much more detail about some of the incidents he had referenced in his BCMR application.

In reference to the applicant’s HOD qualification, he stated that about six months into his first reporting period he had a conference with two officers and three civilians regarding the qualification process. He asserted that nothing during that meeting indicated to him that there were any “show stoppers” to his qualification process. He stated that he was told of three positive areas of performance and four areas he could improve upon. The applicant asserted that other than this “informal group meeting” he was never given “a full evaluation board similarly executed for other unit qualifications executed within the Coast Guard.” The applicant claimed that his supervisor kept a personnel file on all members that he supervised to note “anything negative, any mistake, all infractions so that he would have ‘ammunition’ against them to protect himself.”<sup>10</sup> The applicant claimed that this personnel file was a “potential violation of the Privacy Act,” although he did not specify in what way. The applicant asserted that he was able to review his personnel file, and he claimed that there were no comments or specific feedback from his deployments from his HOD deployments. He asserted that this meant that the command did not

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<sup>10</sup> The applicant later stated in his brief that his supervisor gave him this personnel file in June 2012.

actually speak to the active HOD or members in the field when deciding to stop training the applicant, despite the fact that the command stated that their decision was based on a “consensus of opinion.” He stated that he was informed on April 30, 2012, that his command was no longer going to be training him to become the HOD but instead he would continue on as a Team Member. He accused his command of considering the needs of the unit above officers’ professional development.<sup>11</sup> The applicant complained that after he was told he would no longer be trained to become HOD, he stopped receiving performance reviews from his supervisor even if he asked for feedback and also complained that his supervisor “micro-managed over exceptional [sic] minute details that added no value to mission accomplishment.” Later in the applicant’s brief, in complaining that OER3 was “absolutely shocking,” he asserted that “officers are supposed to receive daily feedback from their Supervisors regarding their performance.”

In regards to the comments on the applicant’s potential medical condition, he stated that to his knowledge his supervisor and reporting officer were not formally trained mental health professionals. The applicant stated that in the personnel file mentioned above (that only contained negative information) was an email that states “he has a very high functioning form of autism – like Asperger syndrome.” The applicant stated that has no knowledge of his supervisor or reporting officer receiving his medical records through an approved means. Instead, he argued, they made a “false medical diagnosis” and based a personnel decision on that diagnosis in order to limit his scope of work. He argued that this was illegal discrimination because it was an intentional action that resulted from adverse treatment due to a person’s disability.<sup>12</sup> The applicant also argued that by passing this false diagnosis to officers outside of his chain of command “it poisoned the command climate against [him] during [his] remaining tour length.” The applicant noted that the speculative medical condition was not noted in his actual OER, but argued that it “clearly negatively impacted [his] assigned Officer Evaluation Report performance marks.” He asserted that if the command truly believed he suffered from Asperger’s, the command would have sent him for a Mental Health Evaluation, but instead they “only limited [his] scope of work and continued to deploy [him] for continued international engagements.”

The applicant noted many times throughout his brief that he received an Achievement Medal at the end of his tour. The citation for this medal noted his “exceptional diplomacy” which he asserted was highly ironic given the inconsistent feedback from his supervisor. He asserted that the medal citation was in direct contradiction to his supervisor’s prepared statement noting that he had a lack of “interpersonal relations and diplomacy.” The applicant made many of the same arguments regarding his supervisor and reporting officer being civilians and allegedly lacking the proper training to be a part of his rating chain. The applicant also claimed that his supervisor based the Evaluations performance dimension score on how well the applicant prepared and drafted his own OER. He rested heavily on statements he gathered and provided in support of his PRRB application as evidence that his rating chain created an “unlevel playing field.”

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<sup>11</sup> The applicant claimed a similar situation happened to another member and stated that although it was “not identical to [his] own situation, it is obvious that the command took license to redirect an officer’s scope of work to meet unit demands without any apparent consideration to an officer’s professional development.”

<sup>12</sup> COMDTINST M1600.2, Article 2.B.1.

*Documents Provided with PRRB Application*

On April 26, 2012, the reporting officer emailed the supervisor and two other individuals with a subject line “Sensitive – do not forward this email.” The applicant submitted an excerpt of this email, which states the following:

After I emailed the info from [C], I also spoke with [B] - I believe I mentioned that I would do that. Please see below. [B] considers [the applicant] a friend and was very reluctant to do this, but I insisted. The first story he relays is quite disturbing. I can't quite get my arms around it. It is almost like he has a very high functioning form of autism – like Asperger syndrome. At any rate, I am not at all sure that he will ever be qualified as an HOD and there is clearly need to proceed very slowly on that score.

The applicant's supervisor responded to this on the same date. The applicant provided two excerpts:

This is why I have been trying to travel with both [the applicant] and .... I need to see them in action. I have noted [the applicant's] “lack of filter” in daily interaction but thought we could mentor and coach him to be more observant and diplomatic. I think we have had some success with this. The customs form issue is bizarre. I very much want an opportunity to travel with [the applicant]. It does not matter where (except not to

accomplish this. I do not see him getting promoted to O5. His evaluations are not strong enough for that.

Let me know if you like my strategy. Perhaps we should have a phone conversations about this.

Thanks for the feedback on [the applicant].

Later on April 26, 2012, the applicant's supervisor was responding to the reporting officer in a separate email chain with the subject line “Friday's Conference Call.” The only email from this chain provided by the applicant states:

Understood. Does ... know she has Asperger's? If so, she is aware of her limitations. I have no idea if [the applicant] is self-aware of his limitations. We may be breaking this to him. Not a fun thing to do.

Speaking of pop psychology, I was diagnosed with “narcissistic personality disorder” by a former IPSLO [International Port Security Liaison Officer]. I self-medicate with red wine and all is good.

The applicant provided the following excerpt from an email after the preceding email. The only context provided is that it is from his reporting officer.

more sense. He really does sound like he has Asperger's or another form of high functioning autism. FYI, ... has Asperger's. She does some things extraordinarily well. She has terrible social skills though – she would be a disaster as an HOD. I don't want to be a pop psychologist. But the main point is that I do not think mentoring and coaching is going to solve the problem. I think we are at a fork in the road and [the applicant] should take a different path. We can talk more tomorrow, but I want everyone to know what my current thinking is.

The applicant provided an email dated April 27, 2012, from his reporting officer sent to his supervisor and four other members of his chain of command. The email states the following:

Long but important email on a sensitive subject. I have taken a decision to stop the HOD qualification process for [applicant]. My leadership folks have discussed this at some length and we do not intend to spend more



time counseling, coaching, or mentoring him to be an HOD. Rather, we will pursue using him as a team member solely. We will also support an early rotation for him, should he prefer that.

The notes below are feedback from three officers on three separate trips with [the applicant]. This isn't easy for us. But you will see that the problems below are quite significant when you consider the environment in which we operate. I have put these in bullets for ease of reading – they come from three separate email narratives. This is an aptitude problem in my view; he simply does not possess the ability to become and [sic] HOD.

I also wanted to point out that this is indicative of this kind of service we get from OPM with regard to assignments. [The applicant] should never have been given orders to the IPS program unless these difficulties are not reflected in his previous OERs. I find that hard to believe though. This is the fifth officer who has either failed to qualify for HOD or has had his or her qualification revoked. The other are: [listed].

[The applicant's supervisor] will be discussing this with [the applicant]; he has not had that conversation with him yet.<sup>13</sup>

The applicant provided a document which he stated was what his supervisor had prepared in order to inform the applicant that he would no longer be training to become an HOD. The document states:

I solicit candid feedback, both positive and otherwise, on the field performance of all my subordinates. I require such feedback to assess my subordinate's performance and progress in the IPS Program. Based on observations of your performance in the field during five Country Visits, the consensus of opinion by HODs and ... leadership is that you do not possess the personality qualities or interpersonal skills essential for serving as an IPS Program Head of Delegation. Therefore, you will not undergo an HOD check-ride or sit for an HOD board. However, the consensus of opinion from the same group of people is that you are an excellent Team Member and will continue to be assigned to country visits in that role. You will also be assigned special projects, as are all IPS Program members. This decision is final and not negotiable.

Your OER will reflect that your primary assignment is a foreign port assessor / country visit delegation Team Member and highlight your accomplishments in that role. [The applicant was informed of some of his strengths that would make him a good Team Member]. Note that the consensus of opinion is that you have demonstrated much improvement in your role as a country visit Team Member. The above list reflects your improvements.

As you know, your IPS Program mission carries a great deal of institutional risk for the Coast Guard and the U.S. at the international level. Those leading delegations to foreign countries represent the U.S. Government as well as the Coast Guard. Such leaders much have superior technical, interpersonal, cultural, and diplomatic skills. Not everyone possesses the aptitude to serve in the HOD capacity. Your performance over the past ten months has been high in the technical area but less than sufficient in the areas of interpersonal relations and diplomacy to serve in the role of HOD.

The applicant also provided spreadsheets showing how many days he was on operational deployments and at port facility assessments during the three reporting periods. He also provided his bulleted OER input for OER1, OER2 and OER3.

The applicant provided several statements with his PRRB application. The first is from LCDR R who was stationed at the unit in question until 2013. He stated that he served with the applicant for two years. He stated that in his opinion, the chain of command micromanaged and

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<sup>13</sup> Although it is clear from the text of the email that there was more included in this email, the applicant only provided this portion.

disregarded recommendations. He stated that he observed the applicant's supervisor treat different people differently depending on how the supervisor felt towards them. LCDR R stated that he would rank the applicant as "one of the better Team Members" he had worked with on country visits. He stated that the applicant was proactive yet self-sufficient.

The second statement is from LCDR T, who stated that he was assigned to the same unit until September 2012. He asserted that he observed "questionable leadership" and civilian leadership that exhibited "favoritism, lack of positive feedback, fiefdom mentality, and false opinions/determinations." LCDR T claimed that the applicant was "a target of these actions." LCDR T stated that he personally observed the applicant's performance in the field during country visits and Embassy meetings. He stated that the applicant "was a professional, effectively contributed to international security analysis, and was cordial to foreign and US Embassy partners." LCDR T stated that when not on travel, the applicant often had to work in conditions including being ignored by the chain of command yet he was "friendly, honest, professional, and an excellent team member, very proficient with policy review and documentation."

The third is a nine-page statement from LCDR M, who retired from the Coast Guard in December 2010. He stated that the applicant reached out to him regarding his time at the unit in question because the applicant was assigned there after LCDR M had retired. The applicant had asked him about his experiences and "the workplace climate, program management, and, overall observations related to detachment employee's individual interactions with the civilian detachment supervisor." LCDR M went on to describe the overall atmosphere of the unit while he was assigned to it and also described many specific incidents involving the applicant's supervisor and other members of his chain of command.

The applicant provided a print-out from a social media online chat from a civilian employee who had worked at the unit, Ms. E. She stated that during her more than thirty-eight years in the Federal Government she had seen good and bad supervisors, and the applicant's supervisor (also her supervisor) "was, by far, the worst." She made many complaints about the way she was treated at the unit and explained why she retired when she did. Ms. E asserted that the "work environment was extremely negative and toxic" including during the time the applicant was at the unit. She claimed that the supervisor was "too much trouble and effort for upper management to take on the responsibility to solve or correct" so instead he was ignored or protected by upper management.

### **APPLICABLE REGULATIONS**

The Coast Guard Officer Evaluation System Procedures Manual, PCSINST M1611.1A, Article 1.A. states that the Reported-On Officer or supervisor may use an Officer Support Form (OSF) "as an aid to establishing a clear understanding of job expectation and assist the Supervisor in providing constructive performance feedback and in preparing proper evaluations." Article 1.B.3. states that one of the functions of the OSF is to bring to the supervisor's attention "significant accomplishments or aspects of performance which occurred during the period."

Article 2.E.4.b. describes how a supervisor marks an OER:

For each evaluation area, the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor

must carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor must take care to compare the officer's performance and qualities against the standards — not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form. Refer to Table 2-2 Performance Dimension Marking ... in determining the appropriate mark to assign to each performance dimension. Inflationary markings dilute the actual value of each evaluation, rendering the OES and the OER itself ineffective.

Article 2.E.4.d. states that the comments section are for the supervisor to include “comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four (if applicable). The supervisor draws on their observations, those of any secondary supervisors, and other information accumulated during the reporting period.” Article 2.E.4.e. states that the comments should “amplify and be consistent with the numerical evaluations (if applicable). They should identify specific strengths and weaknesses and performance.”

Article 2.F.2.b. discusses the reporting officer's responsibilities regarding an OER:

For this evaluation area, the Reporting Officer reviews the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Reporting Officer carefully reads the standards and compares the Reported-on Officer's performance to the level of performance described by the standards. The Reporting Officer takes care to compare the officer's performance and qualities against the standards - not to other officers and not to the same officer in a previous reporting period. After determining which standard best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer selects the appropriate mark. Refer to Table 2-2 ... in determining the appropriate mark to assign for each performance dimension.

Article 2.F.2.d. states that in the comments section the reporting officer must include comments “citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The reporting officer draws on his or her own observations, information provided by the supervisor, and other information accumulated during the reporting period.”

The Officer Accessions, Evaluations, and Promotions manual, COMDTINST M1000.3A, Article 5.A.2.c.(1) states that COs must ensure that OERs are accurate, fair, and objective for all officers in their command. Article 5.A.2.c.(2)(h), states that COs are responsible for ensuring that members of their rating chain carry out their OES responsibilities. COs must obtain “trainings from Commander (CG PSC-OPM-3) or (CG-PSC-RPM-1) for civilian employees of the Coast Guard who must perform the duties of either supervisor or reporting officer. Civilians should not be assigned to a rating chain before receiving OES training certification from Commander.”

Article 5.A.7.e. of this manual authorizes the Reported-on Officer to reply to any OER. Article 5.A.7.e.3. states that he must submit an OER to his supervisor within twenty-one days from receipt of the original, validated OER.

Article 5.A.7.f.[5] states that members of the rating chain may not mention “any medical or psychological conditions, whether factual or speculative.”

The Military Separations manual, COMDTINST M1000.4, Article 1.A.1.a., states that the “President appoints regular Coast Guard and Coast Guard Reserve officers to an indefinite term. Once and individual legally accepts a commission or warrant in the Coast Guard and executes the oath of office, he or she acquire a status which continues until it is legally terminated.” Article 1.A.1.c. describes terminating active duty as including retirement, but specifically states that this does not completely separate an individual from the Coast Guard.

Title 14 U.S.C. § 263, enacted in Public Law 1120213, Title II, § 208(a), on December 20, 2012, states the following:

(b) Officers considered but not selected; material error.--

(1) In general.--In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 251, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that--

(A) an action of the selection board that considered the officer or former officer--

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

## 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 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.<sup>14</sup>

3. The applicant alleged that his three OERs for the period June 21, 2011, to April 30, 2014, should be corrected because they are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OERs in an applicant’s military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OERs are erroneous or unjust.<sup>15</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.<sup>16</sup> To be entitled to relief, the applicant cannot “merely allege or prove that [OERs seem] inaccurate, incomplete or subjective in some sense,” but must prove that the disputed OERs were adversely affected by a

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<sup>14</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>15</sup> 33 C.F.R. § 52.24(b).

<sup>16</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

“misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>17</sup>

4. The applicant asked that ten marks on OER1, five marks on OER2, and five marks on OER3 be raised from 5s to 6s and one mark on OER3 be raised from a 4 to a 5. The disputed OERs do not contain any negative or even mediocre marks or comments (except the one mark of 4 on OER3). The applicant produced 4 statements from other members and a civilian employee who praised his work and/or criticized his rating chain, but in their declarations, the members of the applicant’s rating chain repeatedly supported the accuracy of the marks and recommended that they not be corrected to both the PRRB and to this Board. The applicant argued that his supervisor and reporting officer were arbitrary and capricious in their rating standards, but failed to substantiate this claim. He also asserted that his “performance exceeded the standard mark of 4” in many of the performance dimensions. The Board agrees, as he received marks of 5 and 6, save the one mark of 4 on OER3. The citation for the applicant’s Achievement Medal highly praises his performance during his tour of duty, but in the Board’s experience, an Achievement Medal is not a high end-of-tour medal for a LCDR. Therefore, despite the laudatory language on the medal citation and comments of others, the Board finds that the applicant has not proven by a preponderance of the evidence that any of the contested OER marks in the three OERs are inaccurate or that they are unsupported by the comments. The comments meet the requirements of the OES Manual, Articles 2.E.4.d. and 2.F.2.d. because there is at least one comment supporting each mark that deviates from a mark of a four. The Board will therefore not raise the marks on OER1, OER2, or OER3.

5. The Board acknowledges that in discussing the applicant’s performance via email, his rating chain speculated that he may have a form of autism such as Asperger’s. Supervisors should not base evaluations on mental health speculations, but the emails do not lead the Board to conclude that the applicant’s rating chain based his marks on anything other than a legitimate, non-discriminatory assessment of his performance.

6. The applicant asked that his title be changed in blocks 2, 3, and 7 to read “Foreign Port Auditor” on OER1 and OER2 and to “auditor” in blocks 3 and 7 on OER1. The applicant’s rating chain specifically stated that he was referred to as a “team member” in the body of the comments because it better described his position and duties despite the fact that his billet title was “Foreign Port Auditor.” The rating chain stated that one of the hallmarks of a Foreign Port Auditor is to be qualified as an HOD, which is something the applicant did not do. The applicant did not show that a Foreign Port Auditor is not supposed to be a qualified HOD, and he did not qualify as an HOD. Therefore, he failed to prove by a preponderance of the evidence that OER1 and OER2 were adversely affected by a “misstatement of significant hard fact” by his rating chain using the term “team member” in the body of the disputed OERs.<sup>18</sup> The Board sees no reason to disturb the comments as written by his chain of command, which are presumptively correct.<sup>19</sup>

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<sup>17</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

7. The applicant claimed that his supervisor and reporting officer failed to complete the OES training as required for civilian raters by Article 5.A.2.c.(2)(h) of the Officer manual. He provided a September 16, 2014, email from PSC confirming that his supervisor and reporting officer had not completed the training required for civilians. The record shows that the supervisor and reporting officer are currently civilian employees of the Coast Guard but they are also retired Coast Guard officers and so legally they remain military members of the Coast Guard.<sup>20</sup> Therefore, whether the OER training requirement for civilians legally applies to them is unclear. Assuming it does apply, however, the resulting violation of Article 5.A.2.c.(2)(h) would only warrant correction or removal of the OERs if the applicant had shown that the violation was prejudicial. The violation would be deemed prejudicial if the applicant had shown that their failure to attend a civilian OER training class left them untrained in OER preparation in comparison with military raters. But the applicant has not shown that either his supervisor or reporting officer lacked OER training in comparison with military raters. In their declarations, the applicant's reviewers attested to their confidence in both the supervisor and the reporting officer due to their respective decades of active duty service in the Coast Guard as commissioned officers, giving them as many or more years of experience in preparing OERs than most military officers have. Like the OER reviewers, the PRRB found that these retired officers had the OER training and experience received by military officers to accurately prepare the applicant's OERs. Given the supervisor's and reporting officer's many years of preparing OERs as military officers, the Board finds that the applicant has not proven by a preponderance of the evidence that their failure to attend OER training, which is required for civilians but not military officers, was prejudicial to their preparation of his OERs.

8. The Board finds that the applicant has not proven by a preponderance of the evidence that the OERs were adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>21</sup> The Board will therefore not raise any of the marks or change any of the comments on OER1, OER2, or OER3.

9. The applicant requested that he be retroactively promoted to Commander from PY 2015 and awarded all back pay and allowances. He alternatively requested a Special Selection Board, which, if relief were entitled, would be the only relief available to him in accordance with 14 U.S.C. § 263. Since he has applied to the Board, he has been non-selected for promotion a second time. The question before the Board is whether his record contained a "material" error within the meaning of 14 U.S.C. § 263, because if so, the Board should direct the Coast Guard to convene an SSB for the applicant as the statute requires. As discussed above, the Board has found no errors in OER1, OER2, or OER3. All three OERs are presumptively correct and the applicant's chain of command, who all have years of experience in preparing OERs as military officers, have repeatedly affirmed the marks assigned to him. The applicant has not proven by a preponderance of the evidence that his record contained material error or injustice when it was reviewed by the selection boards. Therefore, the Board finds no grounds for disturbing the results of those boards

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<sup>20</sup> According to the Military Separations manual, Article 1.A.1.a., a Coast Guard officer is appointed for an indefinite term which continues until it is legally terminated. Article 1.A.1.c. states that retirement terminates active duty but does not completely separate a member from the Coast Guard. Therefore, the supervisor and reporting officer were still members of the Coast Guard although also employees of the Coast Guard.

<sup>21</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

or for directing PSC to convene a SSB. Accordingly, the applicant's requests regarding promotion to Commander should be denied.

10. The applicant had many complaints regarding the PRRB. However, this Board reviews applications *de novo*. The PRRB decision is reviewed only as evidence of record. The applicant has not shown that the PRRB decision is not an accurate reflection of that board's proceedings and decision. Therefore, the Board finds no grounds for removing the decision of the PRRB.

11. The applicant made numerous allegations with respect to the actions of his rating chain. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and are not dispositive of the case.<sup>22</sup>

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

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

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<sup>22</sup> 33 C.F.R. § 52.24(b); *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").

**ORDER**

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

September 14, 2018

