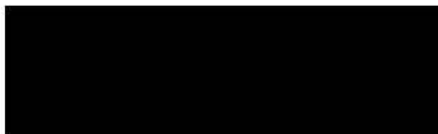


DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-161



FINAL DECISION

This proceeding was conducted in accordance with the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the application upon receipt of the applicant's completed application on May 11, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 22, 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

The applicant is a former [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. He asked the Board to correct his record by raising his marks¹ and amending the supporting comments on his annual Officer Evaluation Reports (OERs) dated May 31, 2014, and May 31, 2015. The disputed OERs document a two-year tour of duty as the Operations Officer of a [REDACTED]-foot cutter. Before reporting to the cutter in June 2013, the applicant had served as a Deck Officer on a [REDACTED]-foot cutter and as the Weapons Officer on a [REDACTED]-foot cutter.

The applicant also asked the Board to remove his non-selections for promotion to lieutenant commander (LCDR) and convene a Special Selection Board (SSB) to consider him for selection for promotion after his OERs have been corrected. If selected for promotion by the SSB, he asked that his date of rank be backdated to what it would have been had he been selected for promotion in 2016 and that he be awarded corresponding back pay and allowances. The applicant also stated that if he is not selected for promotion in 2017 while the disputed OERs are still in his record and not selected by the 2016 SSB, he should receive an SSB as a result of the 2017 non-selection as well.

¹ On an OER form, officers are rated in 18 performance dimensions on a scale from 1 (worst) to 7 (best) and on an officer comparison scale with 7 spots ranging from "unsatisfactory" to "best officer of this grade."

The corrections to the OER marks requested by the applicant are shown in the table below. His Supervisor, the Executive Officer (XO) of the cutter, assigned the marks in the first thirteen performance dimensions in the table, and his Reporting Officer, the Commanding Officer (CO) of the cutter, assigned marks for the last five and the comparison scale.

	Planning/Preparedness	Using Resources	Results/Effectiveness	Adaptability	Prof. Competence	Speaking & Listening	Writing	Looking Out for Others	Developing Others	Directing Others	Teamwork	Workplace Climate	Evaluation	Initiative	Judgment	Responsibility	Professional Presence	Health & Well-Being	Comparison Scale
2014 OER	5	5	5	5	5	5	5	5	4	6	5	4	5	5	5	5	6	4	
Request				6	6				5				6						5
2015 OER	6	5	6	6	6	5	5	5	5	6	5	5	6	6	6	6	6	6	5
Request		6				6							6						

The applicant also asked the Board to make the following changes to the comments in his 2014 and 2015 OERs:

- From the Reporting Officer’s comments in block 8 of the 2014 OER, delete the comment, “Able to accept constructive feedback, modify practices & move forward; willingly reported errors & attempted to correct errors immediately.”
- In block 10 of the 2014 OER, replace the Reporting Officer’s comments on the applicant’s potential with new comments as shown below:

Existing comments: “[The applicant] is a dedicated officer with excellent stamina and work ethic completing his initial reporting period in a challenging and dynamic █████ OPS position. He is advancing in his professional development as a mariner and department head with potential for greater responsibility as CO of a FRC/WPB. His experience during afloat and honor guard tours coupled with OPM/EPM knowledge make him ideally suited for District, Area, or HQ staff assignments w/ potential to enhance organizational goals and resource capabilities. Recommended for post graduate opportunities in Intelligence, Public Administration and War College. Recommended for promotion with peers.”

Requested replacement: “[The applicant] is a talented, effective leader & a skilled operator who consistently exceeds expectations & has unlimited potential. Highest recommendation for promotion with very best of peers and is an ideal choice for WPB and FRC Cmd afloat in the most challenging operating environments. An ideal officer who’s [sic] previous experience coupled with current experience make him well suited for special assignments such as Flag/SES/POTUS Aide, White House Situation Rm, Joint Service Ops, CGLO within DHS & DOD and program reviewer. Strongly recommended for most challenging PG programs including Intel, War College and Public Admin.”

- In block 7 of the 2015 OER, replace the following Reporting Officer’s comment with a new comment as shown below:

Existing comment: “Increased proficiency in patrol planning/management & adaptability exhibited during final year as OPS w/ 03 patrols & 108 DAFHP.”

Requested replacement: “Demonstrated expertise in patrol planning/management & adaptability exhibited [sic] during final year as OPS w/ 03 patrols & 108 DAFHP.”

- In block 8 of the 2015 OER, replace the following Reporting Officer’s comment with a new comment as shown below:

Existing comment: “Demonstrated satisfactory ship handling skills & knowledge; coach, safety or NSTT lead for 40 restricted water xsits/mooring.”

Requested replacement: “Demonstrated professional ship handling skills knowledge [sic]; coach, safety or NSTT lead for 40 restricted water xsits/mooring.”

- Replace the Reporting Officer’s comments on the applicant’s potential in block 10 of the 2015 OER with new comments as shown below.

Existing comments: “[The applicant] is an energetic officer w/ excellent work ethic & devotion to duty. His stamina coupled w/ experience gained over the past two years have contributed to [the cutter’s] successes & will serve him well at the [new unit]. His professional development as a mariner & Ops dept head on a dynamic, high optempo [cutter] makes him an excellent candidate for future afloat tour as CO of a WPB/FRC. Prior experience gained from intel, honor guard & OPM/EPM tours make him well suited for CGLO or Joint Service spec. assignments along w/ District, Area or HQ staff assignments with potential to shape organizational direction. Highly recommend for promotion with peers.”

Requested replacement: “[The applicant’s] experience & contributions to [the cutter’s] operational successes resulted in well-deserved, successful screening for Junior Command Afloat. A professional officer whose maturity, tenacity, experience, leadership ability & demonstrated capability to bring about superior results make ideal choice for WPB/FRC CO and MEC XO afloat. Highly recommended for special assignments such as Flag/SES/POTUS Aide, White House Situation Room, Joint Service Ops and CGLO within DHS & DOD. Strongly recommended for Post Grad programs including Strategic Intelligence, War Colleges & Public Admin. Highly recommended for promotion.”

APPLICANT’S ALLEGATIONS

The applicant alleged that the requested corrections are warranted because he suffered a hostile work environment on the cutter, and it resulted in inaccurate OERs. The applicant alleged that he prepared a complaint package regarding the hostile work environment in 2014 but did not submit it for fear of retribution and retaliation. He alleged that the situation was bad enough that the Commander of the Area’s Cutter Forces, who served as his OER Reviewer, once contacted him to ask if he was okay. But again he made no report for fear of retribution and retaliation.

The applicant stated that after he was not selected for promotion in 2016, he contacted the Reporting Officer for the disputed OERs, who had been the CO of the cutter. He shared with the CO “the circumstances and actions that fostered the hostile working environment and demonstrated that some performance information was not considered or included in my OERs.” The CO concurred, reviewed the OERs and the applicant’s OER input, and recommended corrections.

The applicant alleged that some of the marks and the comparison scale mark in his 2014 OER are inconsistent with some of the comments, “and nothing in the evaluation of my performance on the disputed OER supports the comparison scale mark,” which is a mark in the fourth (middle) spot of seven and denotes a “good performer; give tough, challenging assignments.” The applicant stated the marks and comments in his prior OERs, the recommendations for command afloat that he has received, his cutter-based successes, his OER input, and the awards he “received while assigned to the cutter clearly demonstrate that the marks are not commensurate with the comments or documentation.”

The applicant pointed out that he has received much better OERs in the past and more recently and that he was selected for Junior Command Afloat. He also noted that on an OER he received for temporary duty as a Deck Watch Officer on a -foot cutter for two months in 2017, he received all marks of 6 and 7 in the performance dimensions, a mark in the fifth spot on the comparison scale, and a very strong recommendation for promotion.

The applicant alleged that the erroneous OER marks caused his non-selection for promotion in 2016. He stated that several superior officers have reviewed his record and agreed with this assessment. Therefore, he argued that his non-selections should be removed from and should be convened to review his record. If selected for promotion by the SSB, he should receive the LCDR date of rank he would have had if selected for promotion in 2016 and back pay and allowances.

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

- In a letter to the Board dated May 5, 2017, the CO of the cutter, who signed the disputed OERs as the applicant's reporting officer, stated that the applicant's "role as Operations Officer was pivotal in the overall success of the cutter. I relied on him to help us execute mission tasking and achieve effective and successful mission priorities." He noted that the applicant reported directly to "regarding all activities that directly affected the operation of the ship" but that the XO was the applicant's direct Supervisor and was "extensively involved" in the applicant's progress. The CO further stated that the XO was an

extremely conscientious and detail oriented professional that was very meticulous regarding the activities of the Department Heads. His dedication, attention to detail and exhaustive efforts were a large part responsible for the cutter's high performance in every inspection. Given the XO's leadership experience from previous assignments and proven performance, I placed a large amount of trust and faith in his decision making and leadership.

No doubt, the Executive Officer (and I) demanded high standards and high levels of performance of the crew. Our Officers and Chiefs mess were fully on board with this and expected nothing less. [The XO] required extensive support and justification of evaluations and task reporting. When reviewing evaluations, we went to great lengths to try and create performance evaluations of each and every crew member that was as accurate and justified as possible. ... On several occasions, we had lengthy discussions regarding [the applicant's] performance and evaluation. It was evident that [the XO] had a lower overall impression of [the applicant's] performance than I. In every case regarding [the applicant's] evaluations, I reviewed the justification and the XO's overall assessment to come to an equitable resolution. I was unaware of the level of friction between them that possibly led to low marks, diminished performance and potential.

The CO noted that in completing the applicant's OERs, they did not consider his performance in prior assignments and considered only his "current performance, achievement, dedication and leadership. My overall assessment of [the applicant's] performance, achievement and dedication was excellent. I believe that he struggled in some areas of leadership given some internal departmental reports that I received primarily during the first marking period." The CO stated that upon "further reflection of the tour and our accomplishments [on the cutter], review of additional information provided by [the applicant], and with a greater awareness of the challenging relationship with the Execu-

tive Officer, I agree [the applicant's request for raised marks as shown in the table on page 1 of this decision." He concluded that the applicant "deserves a second chance to demonstrate his capability."

- The applicant's input for his 2014 OER includes bulleted examples of his performance for each dimension and his own draft comments for the OER comment blocks. His OER input shows that the XO used most of the comments he drafted (the applicant provided more comments than would fit in the spaces provided on an OER form) but removed a few adverbs, such as "expertly," "seamlessly," and "continuously." The CO used the applicant's draft comments, but in block 8, where the applicant had requested the comment, "Extremely reliable/ethical, earned confidence & trust of command; willingly reported errors, correcting issues immediately," the CO wrote the comment that the applicant has asked the Board to remove from the 2014 OER: "Able to accept constructive feedback, modify practices & move forward; willingly reported errors & attempted to correct errors immediately." The applicant's draft comments for block 10 of the 2014 in his OER input are the same as the requested replacement comments shown above.
- The applicant's input for his 2015 OER includes bulleted examples of his performance for each dimension and his own draft comments for the OER comment blocks. His OER input shows that the XO used most of the comments he drafted (the applicant provided more comments than would fit in the spaces provided on an OER form) but rearranged some and changed a "meticulously" to "efficiently." The CO likewise used many of the applicant's draft comments, but in block 8, where the applicant had requested a comment about "exceptional ship handling skills," the CO wrote "satisfactory ship handling skills," which the applicant has asked to be changed to "professional ship handling skills." The block 10 comments that the applicant drafted for the 2015 OER are very similar to those he has asked the Board to insert, but in the applicant's draft he requested to insert "Highest recommendation for promotion with peers," while he is asking the Board to insert, "Highest recommendation for promotion with very best of peers."
- The applicant submitted a Commandant's Letter of Commendation and the citation for the Achievement Medal he received for his tour aboard the cutter; a citation for a Meritorious Team Commendation for conducting a successful change in the cutter's homeport in 2014; a citation for a Meritorious Unit Commendation for migrant interdiction operations from December 2014 to February 2015; a citation for a Meritorious Team Commendation for executing successful flight operations during three days of training in June 2015; a memorandum awarding the crew of the cutter an Operational Readiness "E" Award for its performance during training in April 2015; memoranda authorizing crewmembers to wear a Special Operations Service Ribbon for the cutter's participation in Operation Unified Resolve to increase drug interdiction in the Caribbean; and citations for other medals the applicant has received for other assignments.
- The applicant submitted his resume showing his training and experience; several emails from or forwarded by the XO and CO expressing appreciation for the applicant's work; many emails he and others sent reflecting successful operations; the cutter's FY14

\$34,000 operations budget; copies of his 2011 and 2013 OERs; a chart of his OER marks from February 2007 through May 2016.

VIEWS OF THE COAST GUARD

On October 17, 2017, the Judge Advocate General submitted the Coast Guard's advisory opinion in which he recommended that the Board deny relief and adopted the findings and analysis provided in a memorandum on the case prepared by PSC.

██████████ noted that the applicant did not file OER Replies upon receiving the disputed OERs and did not submit applications to the Personnel Records Review Board (PRRB) to request their correction. PSC also noted that the applicant waited until he had been passed over for promotion to contest the OERs.

PSC submitted a declaration from the XO of the cutter (summarized below), who prepared the Supervisor's parts of the disputed OER. PSC stated that the XO's declaration and the CO's letter to the Board, which was submitted by the applicant, show that they met to discuss the OERs and had agreed upon a resolution. PSC noted that the CO, as the Reporting Officer, did not return the OERs to the XO, the Supervisor, for inconsistency, as he was allowed to do. PSC also noted that most of the marks that the applicant is contesting were assigned by the XO, rather than the CO, and the CO is not allowed to state those marks.

PSC stated that the XO's affidavit provides a "well supported list of why the Applicant received the marks that he did" and also states he held counseling sessions with the Applicant over performance concerns." PSC also submitted brief affidavits from the OER Reviewers for the disputed OERs and noted that while the Reviewers "say positive things about the Applicant, they do not dispute the marks" in the OERs.

Regarding the alleged hostile work environment, PSC submitted the cutter's climate survey and noted that "most of the climate complaints were against the Applicant rather than against the command." PSC stated that the XO's statement and submissions refute the alleged hostile work environment.

PSC concluded by recommending that the Board deny relief because the applicant has not substantiated his claim that the OERs are incomplete or unjust, and his allegation of a hostile work environment is countered by the XO's statement.

Declaration of the XO

The XO, who prepared the Supervisor's parts of the disputed OERs, disagreed with the applicant's claims. He stated that the applicant "was marginally effective as the OPS on board and his performance evaluations accurately reflect his mediocre performance." He noted that he had discussed both OERs with the CO and they had come to an agreement each time with the CO raising a few of the marks in his part of the OERs. The XO also noted that the CO

4. ... was not privy to all conversations, professional development sessions, feedback and recommendations [he provided to the applicant] to assist him in his responsibilities as OPS. Many times the products

and recommendations [the CO] received from [the applicant] were following numerous corrections and adjustments made by me. On board a CG cutter, the CO should only receive the most accurate and founded products and recommendations from his OPS. The XO is there for senior level review and discussion of all products and recommendations going to the CO. It is reasonable [that the CO] had a different perspective of [the applicant's] performance than I did given the above and the fact he did not see the substandard products and recommendations [the applicant] was planning to provide to him.

5. [The applicant] had a difficult time with the most basic navigation and voyage planning tasks including time, speed and distance calculations. These basic skills are paramount for any operational planner and certainly an OPS on board a major CG cutter. His inability to properly plan and adjust to changing environmental conditions to meet required waypoint ETAs caused [the cutter] to miss or re-schedule [redacted] and planned events or it required a significant increase of cutter speed which in turn consumed more fuel limiting our time on scene to conduct operations. An OPS is responsible for the development of navigation briefs for evolutions where the cutter is transiting close to known hazards and/or shoal water. The XO reviewed [redacted] navigation briefs provided by OPS before going to the Commanding Officer for final signature. Ninety-five percent of the navigation briefs I received from [the applicant] required correction. Errors ranged from incorrectly labeled course tracklines, incorrect compass headings, tracklines crossing obstructions, hazards, or and shoal water, and incorrect tidal and current information. The very basic errors should have been detected by [the applicant] in his development of the brief and during his review process. His lack of navigation skills endangered the cutter. Once I had reviewed the navigation briefs and made corrections, they were then provided to the Commanding Officer. I did not inform the Commanding Officer every time of all corrections I made to [the applicant's] navigation briefs nor should I have. Therefore, he may have operated under the assumption [the applicant] was able to develop accurate, precise voyage planning and navigation briefs.

6. The Operations Officer on board a major cutter is required to be the ship's designated Navigator To qualify as a Navigator, a person must complete the Navy Personnel Qualification Standards (PQS) task list for Navigator. Most OPS have previously qualified Navigator on a prior unit. [The applicant] had not. Completion of the Navy [redacted] PQS for a Lieutenant with 2+ years of sea time should have taken no more than one month. [The applicant] did not complete his PQS and pass a qualification board with the Commanding Officer and become the designated Navigator on board [the cutter] until July 2014 or 14 months after he reported on board. [The applicant] showed limited interest in completing the PQS and [redacted] Navigator despite the requirement and clear direction to do so from both the Commanding Officer and I. As the XO, I served as the ship's qualified Navigator from when I reported in July 2013 until July 2014. The XO should not serve as the primary Navigator on board a major cutter. ...

7. [The applicant's] accusation of a hostile work environment is absolutely fabricated and not true. I encourage anyone to engage other Officers, Chief Petty Officers, Petty Officer and non-rated personnel on board [the cutter] who reported directly to [the applicant] to highlight this baseless claim. [The cutter's 2013 and 2014 command climate survey] results highlight the frustration from the crew with [the applicant's] lack of leadership ability, inability to manage people and incompetence in areas of his work responsibility. ...

8. [The applicant's] underperformance created significantly more work for other department heads and command cadre as we worked to react to [his] inability to properly plan while ensuring [the cutter] was prepared to execute operations. The Commanding Officer and I recognized the OPS position on a [redacted] is a very challenging, dynamic and demanding assignment. We further recognized that [the applicant] was still a junior officer who required professional development and guidance from both the CO and I to best execute his responsibilities. We provided significant professional development, training and guidance to [him] through the course of our two years together. We conducted a mid-period counseling session with [him] in January of 2014 and 2015 and at those mid-period counseling sessions his performance was significantly lower than the OERs signed at the end of the marking period. His performance did improve after each mid-period counseling session and his second reporting period OER did show improvement from the first. [The applicant] had a difficult time multi-tasking and crucial details were often lost in his communication. He did not delegate appropriately which left him trying to accomplish everything himself. ...

9. [The applicant] lacked the ship handling skills and professional competence to appropriately train, coach and develop Junior Officers. The Commanding Officer and I worked with him in all of his deficient areas, but [he] did not take constructive criticism well. My relationship with him was always professional and my feedback to him was never personal. ... The Chief Petty Officer Mess on board counseled [him] on numerous occasions for belittling his subordinates, department management and in proper leadership techniques. The Commanding Officer and I had had very frank discussions with [him] concerning his potential, leadership, and performance. ...

10. [The applicant's] poor communication skills contributed to confusion/frustration among the crew, confusion with our Operational Commander and often required command intervention to properly articulate the situation/circumstance. ... These incidents frustrated the crew, caused additional work at [REDACTED] on the Command.

11. [The applicant] is using the operational success of the cutter to justify his request for increased marks. This is in [REDACTED] 76 persons were responsible for the operational success of the cutter. Operations products were intensely updated and corrected after my review. As XO, I devoted significantly more time to operational needs and reports than an XO should. This was all in effort to provide the best products to the CO and OPCON and to ensure the mission execution of the cutter.

The XO also stated that the Coast Guard Investigative Service (CGIS) had investigated the applicant in August 2014 on a charge that was not substantiated but that during the investigation, CGIS determined that the applicant had sent inappropriate texts to persons other than his spouse. The XO concluded that the applicant "does not have the professional competence, leadership or decision-making skills to command a CG Cutter."

In support of his allegations, the XO submitted the following:

- On a Page 7 dated July 17, 2013, the CO appointed the XO to serve as the cutter's Navigator.
- On a Page 7 dated July 16, 2014, the CO congratulated the applicant for having completed the PQS, training, and oral examinations to qualify and be appointed as Navigator for the cutter.
- Comments from crewmembers pursuant to climate surveys aboard the cutter generally praised the CO and XO but were less than complimentary about the OPS (the applicant): "New CO is awesome, new XO is awesome, new OPS has a awesome command to learn from"; "Make OPS less awkward and make him realize how much he belittles his people (even though he may not be aware). His department is less productive with him as a department head and he is not competent for the job"; "The very top of the command structure is able to communicate very well and motivate the team to perform at its best. Once it gets below the XO, things seem to deteriorate, communications get lost which causes confusion and the inability to perform"; "There is also an issue with certain members feeling the need to micromanage any crewmembers that are subordinate to them. ..."; "I believe that all but one member of the command works together to get the job done. One O-3 seems to not be in control of what is going on and makes extra work for people. I have no trust in his backing of mine or others career. He does not work to help his department work as a team and hurts morale of the department."
- Emails indicate mistakes had been made by the applicant.

- Documentation shows that in August 2014 CGIS investigated an allegation against the applicant but found it unsubstantiated by corroborating evidence. CGIS did find, however, that the applicant had sent many inappropriate texts reflecting inappropriate relationships with persons other than his spouse, and he was encouraged to attend counseling.

Declarations of OER Reviewers

The Reviewer for the 2014 OER, who was the Deputy Commander of Area Cutter at the time, stated that acting as the OER Reviewer was “the extent of my relationship to [the applicant].” He stated that as Reviewer, he read OERs “for accuracy and content and barring any legal insufficiencies. I signed the report as Reviewer.”

The Reviewer of the 2015 OER, who was the Acting Deputy Commander for Area Cutter Forces, noted that the applicant had been a student of his when the applicant attended Officer Candidate School in 2006 and 2007. He stated that he had not observed the applicant’s performance but knew him to be an officer of character who always presented himself professionally and who represented the Coast Guard well.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 13, 2017, the applicant responded to the views of the Coast Guard and disagreed with them. He also submitted significant new evidence with his response.

Regarding his failure to file an OER Reply or apply to the PRRB, the applicant stated that he consulted his mentors, who told him that selection boards do not look favorably on OER Replies. He also stated that PSC’s policies “are designed to protect the Coast Guard” but not explain how this prevented him from applying to the PRRB. Regarding the fact that he waited to challenge the OERs until after his first non-selection for promotion, the applicant claimed that it is a “moot point” because waiting to apply to the BCMR until after a non-selection is not prohibited.

The applicant stated that the XO slandered him and tried to prejudice the Board against him by mentioning the CGIS investigation and the command climate surveys. Therefore, he asked the Board not to consider those. Regarding the CGIS investigation, he stated that the accusation was false and that the XO should no longer have a copy of the documentation because it contains private information. Regarding the command climate survey, the applicant stated that the survey was designed to be anonymous and that it is not clear that the negative comments that the XO pointed out are about the applicant because some do not mention him by name. He also stated that the XO should not have this report since he is no longer the XO of the cutter.

The applicant alleged that he received mid-period counseling only in February 2014, not in January 2014 and 2015, as the XO alleged. He noted that the February 2014 counseling occurred only three months before the end of the reporting period. He also stated that contrary to the XO’s claims, “[n]ot once in two years did the Executive Officer ever pull me aside to discuss performance issues, or make any indication to me that I was missing the mark. I believed I was

on target and tracking in performance as I continually received ‘good job’ emails from both the Commanding Officer and tactical commanders.” He stated that the CO was unaware of all of the XO’s counseling sessions with the applicant “because there were none.” He stated that the only frank discussions he had with the XO were during counseling in March 2014 and at the end of his tour in May 2015. The applicant also stated that he did not receive “a significant amount of professional development, training, and guidance as [the XO] would lead one to believe.”

Regarding the XO’s claims about his navigational skills, the applicant stated that most of them are “grossly false.” He noted that he had qualified as a Deck Watch Officer on [redacted] and [redacted] cutters, which required knowledge of safe navigation and navigation principles. He stated that the cutter was always on time, and he could not recall having to reschedule any events. The applicant denied ever having laid down a trackline that crossed an obstruction or shoal water. He stated that the only time the cutter was in danger was during a search and rescue case when the XO was the Conning Officer. The applicant stated that his completion of an exhaustive update, augmentation, and improvement of the CO’s standing orders for the Officer of the Deck (OOD) Underway and Navigation Standards shows that he demonstrated significant ship handling and navigation skills, as does his creation of an exhaustive patrol planning spreadsheet. He also noted the OER does not support the XO’s claim that he was incompetent.

The applicant stated that, contrary to the XO’s claim, he had qualified as a Navigator shortly before his tour ended aboard the [redacted]-foot cutter in 2011, but he had not timely entered the qualification letter in his record because he was busy moving his household and he could not find it when he reported aboard the cutter in 2013. He stated that in 2013 and 2014, the CO did not appoint him as Navigator of the cutter during his first year aboard for “a myriad of reasons, the primary of which was due to not having received support from [the XO]. I was technically qualified as a Navigator. Of the 45,000 nautical miles of trackline planned aboard [the cutter, the XO] only reviewed approximately 1,000 nautical miles. Most navigation decisions were directly to the Commanding Officer from me.” He stated that when he could not find the letter, he printed out the PQS for Navigator, tabbed it for signature, and gave it to the XO, but he does not believe the XO ever gave it to the CO, and he stopped asking the XO about it because their relationship became adverse. The applicant stated that when he finally found his qualification letter, the CO appointed him as Navigator right away. He stated that he “served all duties as the Navigator with little oversight by [the XO], with the exception of restricted water trackline review, which is Coast Guard policy.”

The applicant stated that the XO’s claim that he could not train junior officers because of his lack of ship handling skill is inaccurate. He stated that if he had been incompetent, the CO would have removed him, but he was not removed. He stated that he “constantly trained the junior officers in ship handling and coached many restricted waters transits.” He alleged that when the XO was on leave, he demonstrated exceptional ship handling skills as the Conning Officer during a port call, with the CO serving as the Navigational Coach. He “navigated the cutter close aboard the cargo ship with only 10’ of navigable water to our outboard side and 5’ of water on the cargo ship side with little input from [the CO],” who told him that he had done it expertly. Other members on the bridge also complimented him on a job well done.

The applicant stated that there “were not too many instances where [the XO] returned items to me, and those that were returned contained minor edits, mostly regarding style.” The XO “did not ‘intensely update or correct’ my work.” However, he noted, the XO “physically threw documentation at me multiple times, routinely gave me the ‘hand’ in meetings, and was dismissive and belittled me in front of my peers and subordinates.” He also complained that the XO “routinely attempted to usurp my responsibilities by ‘racing’ to provide information to the Captain before I could. I often found myself following him into the Captain’s Cabin or overheard conversations to hear that he was briefing items that I was preparing to brief and he made no attempt to consult with me to ensure deconfliction or cease duplicate efforts.”

The applicant stated that even though the XO and CO met to discuss and agree on his OERs, that agreement was made when his CO was unaware of “the adverse relationship” between the applicant and the XO. He stated that two of the emails the XO submitted, in which the applicant apologized to the XO for oversights, “do not demonstrate poor performance,” and another concerns an email the applicant sent to a mentor and also does not demonstrate poor performance. The applicant stated that the excellent quality of the rest of his performance record shows that the disputed OERs are resulted of the XO’s “underlying and personal dislike of me.” The applicant alleged that the XO once lied to the CO about the applicant having ordered a petty officer to work on Easter Sunday, who then threatened to hurt himself, when it was the XO who had insisted that the work get done that Sunday because of an inspection taking place on Easter Monday.

The applicant stated that the excellent OER and Commandant’s Letter of Commendation he received for two months of temporary duty as a Deck Watch Officer aboard a -foot cutter in 2017 shows how “a different set of afloat officers observed my performance in the same functional environment and identical duties, less the adverse conditions created by my supervisor, evaluated me with straight 6s and 7s and recommended me for leadership positions and that I was a must select for LCDR.” He stated that this OER “corroborates the bias” and inaccuracy of the disputed OERs.

The applicant also amended his request for relief. He stated that if the Board does not raise his marks for Adaptability, Professional Competence, and Directing Others in the Supervisor’s section of his 2014 OER, then block 7 should be corrected to indicate that the CO did not concur with the marks assigned by the XO and by adding the following to the CO’s comments: “I disagree with the Supervisor in the following dimensions and evaluate Adaptability as 6, Professional Competence as 6, and Directing Others as 5.” Similarly, he stated that if the Board does not raise his marks for Using Resources, Speaking and Listening, and Evaluations in the Supervisor’s section of his 2015 OER, then block 7 should be corrected to indicate that the CO did not concur with the marks assigned by the XO and by adding the following to the CO’s comments: “I disagree with the Supervisor in the following dimensions and evaluate Using Resources as 6, Speaking and Listening as 6, and Evaluations as 6,” which, he stated, could replace the comment, “Possessed strong grasp of computer, electronic & security systems; proved invaluable to cutter ops.”

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

- A memorandum dated March 21, 2011, states that the applicant had completed the final qualifications and demonstrated the ability to perform the duties of Navigator aboard the [REDACTED]-foot cutter, reflecting the CO's confidence in [REDACTED] abilities and judgment. The applicant transferred from this cutter on May 17, 2011.
- A message dated November 14, 2012, stating that the applicant had been selected for potential assignment to junior command afloat.
- In a letter dated June 30, 2014, which the applicant states that he never sent, the [REDACTED] [REDACTED] stated an audience because he felt disadvantaged and feared retribution for reporting a hostile work environment. He noted that he had recently seen his 2014 OER, which he attributed to a hostile work environment and "unrealistic expectations I am subject to on board." [REDACTED] He stated that the hostile work environment had changed him from a very energized and caring individual to a reclusive and fearful one. He denied that he was the "average performer" shown as shown on the OER, given his prior OERs and the fact that he had "screened" for the assignment. The applicant submitted his OER input and additional information that he had provided to his rating chain "in an attempt to justify an increase to several performance dimensions." He also submitted the following statement regarding the alleged hostile work environment:

[REDACTED] In make the following statement in support of a claim that I am subject to an individual specific hostile work environment and am daily concerned for fear of retaliation and retribution. ... My direct supervisor has created an environment where my normal personality and work performance have changed for a myriad of reasons. ... After meeting with my supervisors to discuss the version of OER that [REDACTED] going to provide to [the Area Command], it has become e [REDACTED] nce that I can no longer keep this to myself.

... However, at this command, I have been pushed to [the point of quitting or resigning his commission] multiple times. The job and rigors of being an Operations Office on a [REDACTED] are not my issue. ... It is my supervisor situation that causes me to dislike coming to work.

I have worked with whom I feel are bad supervisors, or supervisors that I did not see eye to eye on, but evaluations were always fair and unbiased. However, I feel that this evaluation and my work environment are biased due to personal feelings and based on the claims of people that are not used to being empowered, some have been discharged from the CG and others do not like criticism and take everything personal. ...

My supervisor consistently makes me feel like I am inadequate and treats me as though I am a brand new Ensign, feeling the need to explain even the most benign tasks step-by-step when in fact I know how to execute most all tasks he gives me. My supervisor belittles me in such a way in front of my colleagues regularly. Such behavior is displayed in many department head meetings. Because this has happened so many times, I visibly shut down and become passive and just agree with the hopes that he will leave me alone. For example, one day my supervisor and I walked around one of my spaces to discuss potential work projects and discussed potential [REDACTED] ways ahead. He developed a worklist for all department heads. At a department head meeting shortly thereafter, he went through the list line-by-line. When he arrived at the OPS department list, we covered the first few items. Then I noticed that a few of the items were discussed in our walk around, I skipped over them to talk about items we had not already discussed. But, he said wait and went back to rediscuss the very same topics in front of everyone, breaking everything down again as if I was a new Ensign right off the street explaining PR processes, ways to find vendors, ways to PPP things, etc – all in front of my colleagues. It was not necessary to do so. I firmly believe that he intentionally uses these opportunities to belittle me in front of everyone. In another situation, I reviewed an under-sized net-mesh fisheries violation case package and missed a transposition of two digits in a measurement. Upon his discovery of the oversight, he proceeded

to subject me to a quasi-basic math lesson to discuss the difference between digits and to count on his figures [sic] to prove the point. Furthermore, similar elementary explanations are made when I am discussing something, or share information but do not use the exact right word or the discussion point is misunderstood and I am oftentimes halted before my explanations are complete. I am now at the point where I do not feel like my thoughts or opinions are valid or worth sharing.

As the Operations Officer, I am responsible for all communications to and from the ship - this includes patrol summaries following patrols. Our last patrol was very busy with fisheries enforcement, search and rescue cases, training and administrative items. I delegated the first draft of the patrol summary to two of my junior officers who had also prepared the first [redacted] previous patrol summary. When I turned the patrol summary in, I could hear my supervisor getting upset in his stateroom making [redacted] statements. He then went to the Captain's Cabin to tell the Captain the draft was absolutely unacceptable and it would be reworked. He then came to my stateroom and threw the 8 page patrol summary at me and told me it was crap and to redo it from scratch. I was beside myself and backed away for fear of what else he might do since he had just thrown the package at me. Both of the officers that prepared the message were not feeling well and had late watches, so I took the message and reworked it until 0200 the following morning, the same morning we were pulling in to homeport.

... Over the past year, I have worked an average of 16-20 hours a day, 7 days a week underway 16-18 hours a day, 6 days a week inport in the support of the cutter. As a geo-bachelor, I worked extensively, sacrificing time with my family when at home to ensure many tasks are completed so that I would not be accused of sub-performance and to ensure mission success. Even [redacted] supervisor has informed me that I need to determine what my priority is and decide what is important to me - the ship or my family. My performance has proven that I have been forced to sacrifice my family time because, according to my supervisor, it seems that the ship is more important. I believe it is important to balance the two, but I am unable to effectively do so because of the unrealistic expectation of my supervisor. I am routinely given tasking after working hours when I am in [redacted] with my family that requires I stop what I am doing to address issues and concerns.

As a result of constant emotional ridicule, I am afraid to approach my supervisor because each time I do, he makes me feel ignorant and inadequate. Furthermore, my supervisor claims to care about training officers, but when it comes to me, I do not believe that to be the case. This is impacting my professional development on several fronts. Specifically, I have approached my supervisor many times over the course of the year to complete my Navigator PQS. Each time I did, he was always too busy. On those occasions where I managed to carve some time and gained the fortitude to reapproach him, I was tasked with a mission change or some other immediate project that demanded my attention. All said, I know my supervisor knew the PQS was something I needed to finish. He held onto my PQS for the entire patrol and the day before we pulled in from our last patrol, he thought enough to place the PQS on my rack. This indicated to me that he knew it needed to be done; yet he never made an attempt to find time to assist me with it. This situation is even more frustrating because I previously completed the PQS and obtained a Navigator letter at a previous unit, but I am unable to find it subsequent to a piece-meal PCS from the unit that I earned the letter from. In a separate situation, my supervisor shared the PG kick-off message with the Wardroom. I told my immediate supervisor that I was taking the GRE so that I could apply for PG programs this assignment year. I requested leave for my test date, which he approved. Another supervisor signed necessary documents for me to add items to my record after I reviewed it for completeness prior to the PG application deadline. My application for the PG process is wholly my responsibility and I recognize that. After discussing our future with my spouse, I made the decision to not apply for PG this assignment year. It just troubles me that both of my supervisors knew I had the desire to apply for programs, yet neither of them made an attempt to check on my progress when the deadline was approaching.

... On one occasion, my supervisor told me curtly that three of the OERs I prepared were of poor quality and he expected more. I was in shock because I prepared them similar to previous commands that felt my work was of high quality. Furthermore, on several occasions, I have been

informed that my enlisted evaluations were too high, unrealistic and not commensurate with those of the same pay grade throughout the cutter. On several occasions my evaluations of personnel were raised or lowered. I am told by my supervisors that they expect me to make accurate evaluations of my personnel, which I felt I did. I should not expect my supervisors to validate my evaluations, but when one is told over and over again that they are not accurate, what is a person to do? I evaluate personnel against the standard, and I cannot win for losing - a classic Catch 22.

I have been accused of taking defensive postures and see certain situations as personal attacks. This is mostly true due to the fact that I have been conditioned to react in such a manner as a result of the zero mistake environments I am required to work in.

I underwent what some might say is a routine surgery. However, I experienced complications with my surgery, which resulted in extended convalescent leave. My supervisor expected me to take regular leave just four days following my surgery and continued to insist on my submitting regular leave even though I informed him that convalescent leave was warranted. It took the CG Clinic in [redacted] to inform my supervisor that I was authorized up to two weeks of convalescent leave to recover before the subject was dropped. Furthermore, while at home on medical leave and on narcotics due to the immense pain I was experiencing, on two separate occasions my supervisor required me to electronically sign an OER and 29 other routine documents. I did not have the capability of signing the documents at home. I informed my supervisor of that fact, but he made it clear that the documents needed to be signed on those respective days. Because I am afraid of my supervisor and wanted to avoid conflict, I drove to TISCOM even though I knew it was unsafe, to sign onto a CG SWS so I could sign said documents. Even sitting at TISCOM was very painful. Over 12 people saw me at TISCOM on both occasions and can attest to the fact I was in a great deal of pain. I should not feel like I have to compromise my health and safety because I fear I will get in trouble for not responding to a supervisor's request within a few hours.

The Operations Department is billeted for three (3) officers and one (1) CPO. Upon my reporting, one officer was on extended TAD and I reported with two (2) of the Ensigns that were to make up the remainder of the Ops Dept officer corps. I was placed in a situation where I not only had to learn and execute my own position and ensure the operational success of the cutter, but I also had to serve and complete many of the responsibilities of the absent and new junior officers, which was not conducive to teaching the junior officers every aspect of their positions as much as I desired to. I had to ensure the cutter met all missions as required. Furthermore, I experienced many significant challenges with the resistance of the previous OPS department BMC who did not support me or my endeavors. Only when forced to execute tasks by the XO and CO did tasks get accomplished. All of [the cutter's] operational missions and inspections were successful. I was constantly told to delegate tasks because I could not do everything; however there were some tasks that I could not delegate because of the lack of experience of my junior officers and I did not have the luxury of teaching them in order to meet deadlines. Or, I knew the workload of my officer's and did not want to delegate items because the project would have been more overwhelming than they might otherwise be able to effectively handle. I have been made to feel as though I am not a good supervisor for prioritizing and delegating or not delegating even though I am looking out for my people.

In closing, I operate in a daily environment where I am told that mistakes are going to happen and are acceptable; however, in practice and in deed as evidenced in documentation, I am not permitted to make mistakes and my decisions are driven accordingly. I fear that even the most benign situation will turn into an adverse situation. It seems that one mistake in an area here or there results in a broad brush of failure being painted across the board and I live in a perpetual state of Catch 22's. The expectation that I should do one thing and when I do that one thing, I am wrong is causing me to become weary.

- A message issued on November 15, 2014, shows that the applicant had been selected as among the best qualified for command afloat positions for lieutenants.
- On November 15, 2013, the applicant issued to his subordinates a 12-page memorandum concerning his expectations of and guidance for the Operations Department.

- On his May 31, 2017, OER as Chief of a Watch Division, the applicant received six marks of 5, eleven marks of 6, and one mark of 7 in the performance dimensions; a mark in the fifth spot of seven on the officer comparison scale, and the comment, “Definitely promote to O4 with peers.”
- On an OER documenting the applicant’s temporary duty as a Deck Watch Officer aboard a 100-foot cutter for about two months in 2017, the applicant received all marks of 6 and 7 in the performance dimensions, a mark in the fifth spot of seven on the officer comparison scale, and the CO’s “strongest recommendation for immediate selection to LCDR w/ best of peers.”
- A Commandant’s Letter of Commendation dated September 15, 2017, states that the applicant had been an integral part of the cutter’s bridge team during many evolutions and canal transits and that his “willingness to teach break-in bridge personnel resulted in the qualification of an additional Underway Officer of the Deck and five Shipping Officers and Navigation Evaluators.” The letter states that among other accomplishments, the applicant had stepped up to lead the cutter’s Navigation and Seamanship Training Team when the Operations Officer departed and successfully led more than 40 drills.
- The applicant submitted his statement concerning a “minor collision” between the cutter and a disabled boat that the cutter was trying to take in tow in bad weather in [REDACTED]. This collision is the incident that he claimed shows that the XO had endangered the cutter. During this operation, the applicant was the Deck Officer, managing work on the deck; the XO was the Conning Officer driving the cutter from the bridge; and two boatswain’s mates were in charge of the fantail crew. According to the applicant’s description, the XO initially decided to make a 45-degree approach from the upwind side, but then backed up to better position the cutter based on the conditions. Because the vessels were about 75 yards apart—too far apart to reach the boat with a heaving line—as the Deck Officer, the applicant directed the fantail crew to send the boat a throwing line first and then a messenger line. When someone on the boat tying the messenger line to the boat’s forward cleats, he instructed them by radio to keep heaving on the messenger line until they received the towing bridle attached to a fender. When the boat crew was attaching the towing bridle, a rain squall came, and the applicant received two garbled communications from the fantail about the towline. With the distance between the vessels closing, the XO directed the starboard engine to start for about a minute to increase pitch and distance, but then the boat in tow spun 180 degrees because, it turned out, the towing hauser had become fouled on one of the cutter’s shafts. The applicant said, “No official report [about the fouled line] had been passed to me as the Deck Officer from the fantail.” The XO ordered an all stop and the fantail reported that the towing hauser might have been caught in the screw. Then the vessels began drifting together, and the fender detail was ordered to the starboard side in case the vessels collided. However, the fender detail was unable to rig the fenders in time because the boat operator was standing on the boat’s bow, and the boat’s “tuna tower” struck the side of the cutter. After the boat’s crew cast off the towing bridle, the vessels drifted apart. The CO then relieved the applicant as Deck Officer for the remainder of the evolution, so he went below to make a report to the command center.

APPLICABLE LAW AND POLICY

Officer Manual

Article 5.A.2.c.(1) of the Officer Accessions, Evaluations, and Promotions Manual (Officer Manual) COMDTINST M1000.3A, states that CO's "must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

Article 5.A.1.c.(d)[1] states that "[p]erformance 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."

Article 5.A.2.d.(1)(c) states that "individual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards." Similarly, Article 5.A.2.d.(1)(k) states that the Reported-on Officer "assumes 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)(b)[1] states that the Supervisor must evaluate the performance of the Reported-on Officer in the execution of her duties. Article 5.A.2.d.(2)(b)[5] states that the Supervisor must provide "timely performance feedback to the Reported-on Officer upon that officer's request during the reporting period, at the end of each reporting period, and at such other times as the Supervisor deems appropriate."

Article 5.A.2.d.(3)(b)[1] states that the Reporting Officer must base his evaluation on direct observations, the Reported-On Officer's input, other information provided by the Supervisor, and other reliable reports and records.

Article 5.A.2.d.(3)(b)[3] states that the Reporting Officer must ensure that the Supervisor meets the responsibilities for administration of the Officer Evaluation System. Reporting Officers must return OERs for correction if the Supervisor's submission is inconsistent with actual performance or unsubstantiated by the comments. The Reporting Officer cannot direct marks or comments to be changed unless a comment is prohibited by policy.

Article 5.A.2.d.(4)(b)[1] states that the OER Reviewer must ensure that the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.

Article 5.A.7.e.(4) states that an officer may submit an OER Reply within 21 days of receiving the OER. Rating chain members may endorse the OER Reply with or without additional comments in response to the Reply.

OER Manual

Article 2.E.4. of the Officer Evaluation System Procedures Manual (OER Manual), PSCINST M1611.1A, states that the Supervisor must review the Reported-on Officer's performance observed during the reporting period. To pick a numerical mark for each performance dimension, the Supervisor must read the written standards for the numerical marks and compare the Reported-on Officer's performance to the performance described in the standards. A mark of 4 is the "expected standard of performance." In the corresponding comment block, the Supervisor must include comments citing specific aspects of performance and behavior for each mark higher or lower than a mark of 4. The corresponding comment should be consistent with the assigned numerical mark. Similar instructions for the Reporting Officer appear in Article 2.F.2.

Article 6.A. states that an officer may file an OER Reply to any OER within 21 days of receipt to express a view of performance different from that of a rating official.

Article 6.C. refers officers to COMDTINST 1070.1, "Correcting Military Records," for information on correcting erroneous OERs through the PRRB or the BCMR.

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 to the Board is timely.²

2. The applicant alleged that certain marks and comments in his 2014 and 2015 OERs and his subsequent non-selections for promotion are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."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

² 10 U.S.C. § 1552(b) (requiring application within 3 years of the applicant's discovery of the alleged error).

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992).

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).

3. As explained below, the Board finds that the applicant has not proven by a preponderance of the evidence that any changes to his 2014 and 2015 OERs are warranted. He has not shown that the disputed OERs were adversely affected by any “misstatement of significant hard fact”; factors, such as bias, “which had no business being in the rating process”; or a prejudicial violation of a statute or regulation.⁶

a. The applicant has not proven by a preponderance of the evidence that the XO created a hostile work environment for him. He did not claim that the XO discriminated against him based on a protected status, such as race or gender, and he submitted no evidence corroborating the alleged hostile work environment except his own complaints. The CO stated that the XO was an extremely conscientious and detail-oriented officer, who was “very meticulous regarding the activities of the Department Heads.” He also noted that both he and XO “demanded high standards and high levels of performance of the crew.” But there is no evidence supporting the applicant’s claim that the XO singled him out for humiliating treatment, used belittling language toward him, or made it impossible for the applicant to perform well based on the XO’s alleged personal dislike of the applicant. The Board notes that for a hostile work environment to exist, occasional hostile or humiliating words and actions are insufficient.⁷ Factors that courts consider include the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating or merely offensive; and whether the conduct unreasonably interfered with an employee’s work performance.⁸ A “hostile work environment” in the civilian sector exists “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”⁹ An XO who insists on reviewing everyone’s lists line-by-line during department head meetings, so that all will know the status of the work, and who explains what he wants subordinates to do in what they consider to be unnecessary detail cannot be considered to have created a hostile work environment even if a subordinate’s reaction to this style of leadership is to feel belittled.

b. The applicant has not proven by a preponderance of the evidence that any of the marks or comments on the disputed OERs are erroneous or unjust. He submitted emails showing that his CO sometimes praised him for his work. He also submitted a statement from the CO who, after hearing from the applicant about his non-selection for promotion and the alleged hostile work environment, recommended raising a few of the marks. All but two of the disputed marks were assigned by the XO, however, who strongly affirmed their accuracy. The CO has no authority to raise those marks. Moreover, the CO wrote in his statement that he had discussed the applicant’s performance and OERs at length with the XO, reviewed the applicant’s input, and raised some of the marks recommended by the XO (presumably in the Reporting Officer’s part of the OERs) before signing them. In addition, the record shows that after viewing a draft of the 2014 OER, the applicant submitted more information for the XO and CO to review. The applicant has not shown that the XO misrepresented the applicant’s performance to the CO

⁶ *Id.*

⁷ See *Overton v. N.Y. State Div. of Military and Naval Affairs*, 373 F.3d 83, 99 (2d Cir. 2004) (Pooler, J., concurring).

⁸ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

⁹ *Id.* (citations omitted).

when they were preparing the OERs, and the CO had interacted with and observed the applicant's performance on a daily basis during the reporting periods before signing the OERs. The Board finds that the CO's recommendation for raised marks based only on the applicant's non-selection for promotion and unsubstantiated allegations about a hostile work environment constitutes "retrospective reconsideration" and so does not justify raising any of the marks.¹⁰

c. The applicant also asked the Board to change certain OER comments, as well as the notation showing that the CO concurred with the XO's marks and comments in the disputed OERs. There are no grounds for making these changes. He has not shown that any of the comments contain misstatements of fact or fail to support the assigned, corresponding numerical marks, as required by Articles 2.E.4. and 2.F.2. of the OER Manual. Nor has he shown that the CO did not concur with the XO's marks based on his own observations of the applicant's performance when he signed the OERs in 2014 and 2015.

d. The Board finds that the applicant has not proven by a preponderance of the evidence that he was denied performance feedback and so was unfairly surprised by the disputed OERs. The applicant alleged that he received almost no performance counseling but also alleged that he received so much negative feedback from the XO that he lost confidence and withdrew. As Article 5.A.1.c.(d)[1] of the Officer Manual states, "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). ... 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." Article 5.A.2.d.(1)(c) states that "individual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards." The Board finds no grounds for amending the disputed OERs based on the alleged lack of formal counseling.

4. Because the applicant has not proven by a preponderance of the evidence that the disputed OERs are erroneous or unjust, there are no grounds for removing the applicant's non-selections for promotion and directing the Coast Guard to convene an SSB to reconsider him for promotion. Under 14 U.S.C. § 263(b)(1), the Secretary may convene an SSB if the Secretary determines that "(A) an action of the selection board that considered the officer or former

¹⁰ *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[t]he supporting statement by the senior rater is a case of retrospective thinking motivated by the knowledge of the applicant's non-selection for promotion to major."); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976) (noting that the letters submitted by two members of the plaintiff's rating chain did not identify any misstatements of fact and offered "only opinions they no longer entertained"); Decision of the Deputy General Counsel in BCMR Docket No. 84-96 (denying relief because the CO's statement arguing that the marks should be raised constituted "retrospective reconsideration"); see also BCMR Docket Nos. 2011-179 (denying relief and finding that a CO's statement constituted "retrospective reconsideration" that did not warrant changing the OER); 67-96 (denying relief because three statements by the rating chain supporting the application "constituted 'retrospective reconsideration' induced by the applicant's failure of selection"), 189-94 (denying relief and finding that a Supervisor's claim that a mark should be raised because the applicant was never counseled about the deficiency constituted "retrospective reconsideration" that did not justify raising the mark); 24-94 (finding that a Reporting Officer's statement that "had I known then what I know now I would have marked him differently" constituted retrospective reconsideration that did not justify changing the OER).

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 offi[REDACTED] or former officer did not have before it for consid[REDACTED] on material information.” The Board finds that (A)(i) does not apply because the applicant has not shown that the 2016 or 2017 LCDR selection boards acted in a way that was contrary to the laws governing selection boards. Nor does (A)(ii) or (B) apply because the applicant has not shown that the selection boards’ decisions not to select him “involved material error of fact or material administrative error” or that the selection boards did not have material information that should have been in the record before those boards. The applicant has not shown that his non-selections for promo[REDACTED] base[REDACTED] oneous, unjust, or incomplete information in his record.

5. Accordingly, the applicant’s requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ORDER

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

June 22, 2018

