

**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. 2017-203**

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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 June 20, 2017, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 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 AND ALLEGATIONS**

The applicant, a [REDACTED] now on active duty, asked the Board to correct his record by raising marks on his May 31, 2012, Officer Evaluation Report (OER).<sup>1</sup> The OER documents his service as a [REDACTED] from July 1, 2010, through May 31, 2012, when he was a lieutenant in the Coast Guard Reserve. During those 23 months, he served 33 days on active duty and performed 127 four-hour drills. He asked that the following marks be raised:

- Adaptability from 4 to at least a 5;
- Professional Competence from 4 to at least a 5; and
- Directing Others from 3 to at least a 4.

The applicant stated that he recently learned that the Reporting Officer (RO) for this OER, who was the Executive Officer (XO) of the [REDACTED] was "pressured, coerced and threatened" by their

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<sup>1</sup> On an OER, officers receive marks on a scale of 1 to 7, with 7 being the highest, in 18 performance dimensions, as well as a "comparison scale" mark on which the RO compares the officer to others of the same rank whom the RO has known throughout his career.

Commanding Officer (CO), who was also the OER Reviewer,<sup>2</sup> to downgrade the applicant's marks in the OER after the RO had submitted "a fair and accurate OER." The applicant stated that he arrived at the [REDACTED] in August 2009 and "effectively prepared the division for what was a hugely successfully 8-month ... deployment." This success was captured in his first OER from the [REDACTED] from August 2009 to June 2010. The applicant complained that he received only one additional OER during his time at the [REDACTED] which covered almost two years of service – July 2010 to May 2012.<sup>3</sup> He asserted that the disputed OER "can reasonably be described as a 'negative OER' and is starkly opposite from [his] 2009/2010 OER." He explained that for a majority of the period he was stationed at the [REDACTED] the CO was the same. A few months before the disputed OER was submitted, however, there was a change in command. The applicant asserted that the new CO "coerced and threatened the RO to downgrade [his] OER and implied that if RO did not, the RO and Operations Chief [the applicant's Supervisor] would receive negative OERs."

The applicant stated that the [REDACTED] had failed a Ready for Operations assessment in May 2012 while he was the [REDACTED]. He stated that he took full responsibility for that failure due to his position at the unit. He asserted that the RO had told him that the failed assessment was the reason the new CO ordered that the applicant receive lower OER marks and negative comments. The applicant argued that "one incident should not over-shadow all the positive contributions [he] made" to the unit and the Coast Guard during the entire reporting period, "including leading a division through a time of massive personnel and equipment losses, including not having boats for approximately one year after returning home from deployment." He discussed his accomplishments over the course of the reporting period and stated that his achievements were why his RO had originally drafted a more favorable OER. The applicant stated that the RO had sent him a draft of the OER before it was finalized. The applicant informed the RO of his plan to appeal the OER and his command changed a few marks in the OER to "pacify" the applicant enough to "prevent [him] from appealing." He asserted that this alone is irregular and "potentially in violation of CG directives and instruction." The applicant stated that after some back and forth he reluctantly agreed to sign the disputed OER.

The applicant asserted that the lower marks and less favorable comments are "possibly catastrophic" for his career given the current promotion climate in the Coast Guard for officers. He asserted that the CO who coerced the RO into lowering the marks on the OER did not even observe the applicant for most of the reporting period. The applicant complained that the previous CO did not have an opportunity to contribute to the OER despite the fact that he was the CO for one and a half years of the 23-month period that the OER covers. The applicant asserted that in a recent conversation with the previous CO, he had stated that the OER would have been considerably more favorably had he been able to contribute.

Regarding the timing of his application, he stated that after speaking with the RO for his 2012 OER in May 2017, he learned that the OER may have been completed in error and not completed in accordance with Coast Guard policy. He therefore asked that the Board consider his

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<sup>2</sup> Coast Guard officers are evaluated by a "rating chain" of superior officers, including a Supervisor and Reporting Officer, who assign marks and comments, and an OER Reviewer. The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 5.A.1.c.(4).

<sup>3</sup> Pursuant to Article 5.A.3. of COMDTINST M1000.3, Reserve officers normally receive OERs on a biannual schedule.

request in the interest of justice. In support of his application, [REDACTED] applicant provided several documents that are described below in the Summary of the Record. He also provided a typed-up [REDACTED] of a text message from the previous CO that the applicant received on May 7, 2017. The applicant stated that the text message read:

[REDACTED]

There has been something procedurally wrong with the preparation of the OER. In your case, I would say there was. A CO has minimal input into a JO [Junior Officer] OER, and nothing to do with the marks. Your supervisor was ... and the marks should have been all his. The Reporting Officer was ... and his only input would be in block 7, Reporting Officer comments where he can concur or not with supervisor marks. The Cos only chance to comment is in block 10, potential. Most of the time that is already filled out for the CO, but I like to fill that in myself ... Even [the RO] should have nothing to do with changing marks. All he could do (if following the manual) would be to concur or not concur with [the Supervisor's] marks.

### SUMMARY OF THE RECORD

The applicant's first OER from the [REDACTED] covers the period August 1, 2009, to June 30, 2010. During this period, he served on active duty from April 10, 2009, to February 27, 2010, and was deployed overseas with the [REDACTED] for several months. On the OER, he received one 4, five 5s, six 6s, and one 7 from his Supervisor in the performance dimensions, and one 5, three 6s, and one 7 from the RO, as well as a mark in the sixth spot on the comparison scale indicating he was an "exceptional officer." The comments include phrases such as "expertly facilitated the safe passage of over 100 coalition vessels"; "effectively transitioned to post-deployment role as [REDACTED] Boat Officer overseeing 50 personnel"; "flawless planning and foresight"; "used focused and articulate communications"; "demonstrated superior leadership"; "always sought to assist peers & subordinates with professional or personal concerns"; "excelled in risk assessment & management"; "seasoned & highly-qualified officer"; "projected a confident, self-assured command presence"; and "top recommendation for promotion ahead of peers" (see enclosed).

The disputed OER covers the period July 1, 2010, to May 31, 2012. It is signed by the same Supervisor but a new RO and Reviewer. The contested marks—a 4 for Adaptability, a 4 for Professional Competence, and a 3 for Directing Others—were assigned by the Supervisor, who also assigned him seven other marks of 4, two marks of 5, and one mark of 6. The new RO concurred in the Supervisor's marks and assigned the applicant four marks of 4, one mark of 6, and a mark in the fourth spot on the comparison scale indicating that he was a "good performer, give tough, challenging assignments." The supporting comments include phrases such as "developed training plan for post-deployment influx of new personnel"; "steady performer yielding positive results"; "mode [REDACTED] adaptable"; "struggled to set appropriate task prioritization to meet short notice tasking/additional divisional readiness requirements, particularly during unit Ready for Operations inspection, resulting in Boat Division failure"; "used focused and articulate communications"; "consistently looked out for others"; "created an environment of fairness, candor & respect"; "struggled to achieve sufficient work-life balance"; "good operational judgment"; "demonstrates a superior acumen for investigation & analysis with strong potential for special assignment"; and "recommend promotion with peers" (see enclosed).

The applicant's previous CO wrote him a letter of recommendation dated July 9, 2012, for the U.S. Air Force Reserve Recruiting Command. The CO stated that he had known the applicant since January 2009, when they worked at a [REDACTED] together. The CO described some of the applicant's job duties and spoke highly of his skills and dedication. He stated that the applicant

“performed [his] job flawlessly, showing great diplomacy, innovation and stamina.” The CO gave his highest recommendation for the applicant based on his “observations as his Commanding Officer.”

The applicant submitted an email chain dating from October 21 to 29, 2012. The first email is from the RO to the applicant. The RO stated that based on their discussion the previous day, he had spoken with the Supervisor and CO and “adjusted several comments and scores accordingly.” The email states that an OER was attached and had been submitted to the CO for review and signature.

The applicant responded to the RO two days later and thanked him for taking the time to alter the OER. He stated that he still respectfully disagreed with the evaluation. He stated that he did not get the sense that the previous CO had had the opportunity to weigh in on the OER despite the fact that he was the CO for most of the reporting period and the new CO was only there for three months. He stated that he vehemently disagreed with the mark of 3 for Judgment (which does not appear in the final version of the OER). He asserted that he had “always done more with less while ensuring [his team took] a safety-first mentality in everything.”

The applicant requested that the comment “failure to achieve work-life balance” be removed from the OER because his personal life issues were following the loss of his close friend who was also a Coast Guard member and were reasonable. He also requested information on some of the specific comments. He asserted that the OER covers a period of almost 3 years<sup>4</sup> which reflected 75% of his time at the [REDACTED]. Therefore, this OER would be “seriously considered for advancement, which is why [he] intended to appeal this decision.” He asserted that he had a “hugely successful pre-deployment” and that their deployment had been “extremely impressive” to the other military units. He asserted that the OER suggested he was taking a fall for the Ready for Operations assessment failure, which he claimed was a “small fraction” of his time at the [REDACTED].

The RO replied almost a week later and stated that he and the CO had discussed the points the applicant had raised. The RO stated that the CO was “still hung up with the RFO [Ready for Operations] and other issues surrounding it.” The RO stated that he was unsure if the CO would revise the OER any further. He stated that he understood the applicant’s position, but he was only the RO and not the final authorizing official.

In June 2012, the applicant was reassigned to a District Intelligence Branch and began drilling as an Intelligence Watch Officer. In 2014, he began serving on extended active duty in that office.

On May 15, 2017, the applicant received an email from the RO regarding the disputed OER. The RO stated that he had received the applicant’s request for more information about the OER. The RO asserted that he could state “without reservation there was undue command influence by [the CO] in the preparation of this evaluation.” The RO stated that he had worked very closely with the Supervisor in preparing the OER. He stated that they had tried very hard to

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<sup>4</sup> The OER covers a period of almost 2 years. This may have been a typo, but at another place in the email he also stated that the OER covered a 2 year, 10 month period, although it actually covers 23 months.

prepare a fair and balanced evaluation given that the applicant had [REDACTED] several difficulties during the reporting period, including:

[REDACTED] rebuilding a boat division severely impacted by departures & rotations of boat crew members after the unit's [deployment], the designation of [a Chief] who was new to the unit with no prior [REDACTED] ... experience ... and the sudden death of LT [S] (our former unit Landside Security officer and [the applicant's] close personal friend) as well as personal family matters [the applicant was] addressing at the time.

The RO stated that throughout the reporting period, he and the applicant had discussed the applicant's deficiencies. The RO stated that he felt that the applicant had been working on rectifying those deficiencies. He stated that although "many of the comments accurately reflected [the applicant's] performance," many of the issues "targeted" by the new CO and negatively reported in the OER were the result of the new Chief allowing boat crews to argue with the command, inaccurate reporting, and the new CO holding meetings with junior enlisted members (which he asserted bypassed the applicant's [REDACTED] authority and undermined his credibility). The RO alleged that he and the Supervisor addressed these issues with the new CO and the CO stated that "he would not approve the OER [REDACTED] less certain scores were adjusted and comments revised, and made thinly veiled comments about [REDACTED] being concerned about [their] own OERs." The RO claimed that the CO created a "significant chilling effect" on their ability to contest the marks and comments that they believed were fair and accurate.

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

On December 28, 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 stated that the application is timely because it was submitted within two months of the applicant's discovery of the alleged error or injustice and therefore should be considered on the merits. PSC noted that on November 1, 2017, the applicant was selected for promotion to Lieutenant Commander with the disputed OER in his record. PSC stated that the applicant's claims about the disputed OER are "troubling" but that the assertions are not supported by his Supervisor "who had the actual responsibility of assigning the marks in question." PSC also stated that Coast Guard policy clearly states that an RO cannot change the Supervisor's marks, so the email between the RO and the applicant would have been relevant only to the RO's marks and comments. PSC therefore recommended that the [REDACTED] deny relief.

PSC provided a declaration December 10, 2017, from the applicant's Supervisor, who assigned the disputed marks and signed the OER. He stated that he recalled "very well the review process" for this OER. He stated that he originally prepared the OER with two marks of 3 – one for Directing Others and one for Initiative. The rest of the marks were 4s and 5s with two 6s. He asserted that the reason for the low marks "centered around [the applicant's] performance that led to the Boat Division failing to achieve a satisfactory readiness score in the April 2012 ready for operations (RFO) evaluation." The Supervisor stated that despite taskings to the applicant and assurances from the applicant that work had [REDACTED] completed, critical tasks had not been done, and so the Ready for Operations team could not conduct boat drills during the assessment. He stated

that there were “robust discussions” between himself, the RO, [REDACTED] the new CO regarding the applicant’s “subpar performance and how it would be reflected in his OER.” The Supervisor stated [REDACTED] they “struggled to identify meaningful contributions by [the applicant] to the Boat Division for the marking period.” He stated that there were several factors that made it difficult to raise his marks:

The first was his failure to properly direct subordinates and follow through on their taskings. The second was his lack of initiative, where [the applicant] required constant command supervision to ensure deadlines were met and reports were accurate. The other factor in general was that [the applicant’s] 4s represented efforts that were enough to get by, but were not exceptional or above average. Our discussions included an honest assessment of things that [the applicant] performed well, and reasons that may mitigate his struggle with taskings for the [Ready for Operations].

The Supervisor stated that the final OER had a raised mark of 4 for Initiative. He asserted that “great care” was taken that the marks were well supported with the comments and were based on a truthful assessment of the applicant’s performance. The Supervisor stated that the CO wanted to ensure that the OER was fair and objective, particularly in light of the difficulties the applicant had been through during the reporting period. He stated that the CO did influence him during the process “to ensure that each mark was properly supported by the comments, but the marks ... given were accurate and [he stands] by them today.”

#### APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD [REDACTED]

On January 22, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. The applicant replied on January 29, 2018, and stated that he disagreed with the advisory opinion.

The applicant stated that PSC’s recommendation rests largely on his Supervisor’s declaration. The applicant asserted that the declaration did not take into account the statements from his RO or the text message from his previous CO. He complained that his previous CO’s input should have also been sought by PSC and not just his Supervisor’s input. He argued that this was a procedural error “at the most basic level.”

The applicant stated that his Supervisor cited the Ready for Operations assessment failure as the sole justification for the negative OER marks and comments. The applicant claimed that upon the unit’s return from deployment there were no boats because they were shipped from the international location to another [REDACTED]. He stated that new boats did not arrive for approximately one year. He also claimed that the Division “suffered catastrophic losses” of personnel upon return from deployment so the number of unqualified members “was staggering.” The applicant stated that he repeatedly informed his Supervisor of this issue but it fell on deaf ears. He claimed that when the new boats finally arrived there was simply not enough time to get the new members trained before the Ready for Operations assessment. He stated that he made this clear to his Supervisor on several occasions and “pleaded” with him to postpone the assessment but he believes his Supervisor never took any action to postpone it.

The applicant also mentioned the loss of his close friend and Coast Guard member, who had also been his roommate while on deployment. This member had died in January 2012. The

applicant stated that when he returned back to work at the [REDACTED] he “had a difficult time reengaging.” He stated that he realized this and because he was in a demanding position at the [REDACTED] he asked his Supervisor if he could step down as Boat Officer. The applicant claimed that his Supervisor would not consider the request. The applicant stated that he “admittedly was not in a mindset to take on the demands of the Boat Officer position,” which is why he had attempted to temporarily step down. The applicant added that he loves the Coast Guard and one of the reasons is that it is a small branch and “careful consideration is typically made for the individual person.” However, he stated, no consideration was given to him after the death of a close friend and instead he was punished for this in an OER that spanned a period of almost two years for a few months of slightly subpar performance. He thanked the Board for its time and again requested that relief be granted.

### APPLICABLE REGULATIONS

The Officer Accessions, Evaluations [REDACTED] Promotions Manual, COMDTINST M1000.3 (“Manual”), Article 5.A.1.b.1. of the Manual states that Commanding Officers “must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers.”

Article 5.A.4.c.4. of the Manual provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks in Article 5.A.4.c.7.):

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

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

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

Article 5.A.2.f.(2) of the Manual lists the following among the responsibilities of an OER Reviewer:

(a) Ensures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.

(b) Adds comments as necessary, using Reviewer Comments, Form CG-5315 (series), which further addresses the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer. ...

(c) Ensures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES and meet all submission schedules. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed (unless the comment is prohibited under Article 5.A.4 f. of this Manual).

(d) Counsels Reporting Officers whose evaluation habits deviate significantly from the prescribed procedures. Deficiencies in OES performance on the part of Reporting Officers and Supervisors should be noted for performance feedback and considered in the respective officers' OERs.

Article 5.A.4.g. of the Manual allows the reported-on officer to submit an OER Reply "to express a view of performance which may differ from that of a rating official," which will be included in the officer's record as part of the OER. Members of the rating chain may include comments in their endorsements to the OER Reply.

### 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. An applicant must apply to the Board within three years of discovering the alleged error or injustice to be corrected,<sup>5</sup> but the limitations period is tolled while a member is on active duty.<sup>6</sup> Although the applicant received the disputed OER as a reservist in 2012, his OERs indicate that he has been serving on active duty since 2014. Therefore, the application was timely filed.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.52, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>7</sup>

3. The applicant alleged that three of his marks on his May 31, 2012, OER are erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in an applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of evidence that the disputed information is erroneous or unjust.<sup>8</sup> 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."<sup>9</sup> When challenging an OER, an applicant cannot "merely allege or provide that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a

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<sup>5</sup> 10 U.S.C. § 1552(b).

<sup>6</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

<sup>7</sup> *See Steen v. United States*, No. 436-74, 1977 U.C. Ct. Cl. LEXIS 585, at \*21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

<sup>8</sup> 33 C.F.R. § 52.24(b).

<sup>9</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 clear and prejudicial violation of statute or regulation.<sup>10</sup>

4. The applicant requested that his May 31, 2012, OER be amended by raising his mark for Adaptability from a 4 to a 5, his mark for Professional Competence from a 4 to a 5, and his mark for Directing Others from a 3 to a 4. He claimed that his CO, the Reviewer for the OER, exerted undue influence over both his Supervisor and his RO and coerced them into changing their original marks and comments. The applicant’s claim is somewhat supported by his RO, who stated that in preparing the OER, he and the Supervisor had discussed the applicant’s deficiencies, tried to prepare a fair evaluation given that the applicant had faced difficulties, and took into account that he was working on rectifying his deficiencies, but the CO “would not approve the OERs unless certain scores were adjusted and comments revised.” The RO also claimed that the CO “made thinly veiled comments about ‘being concerned about [their] own OERs’” which had a “significant chilling effect” on their ability to contest the marks and comments that they believed were fair and accurate. The RO did not identify marks that he was directed to lower but concluded that “there was undue command influence by [the CO] in the preparation of this evaluation.”

5. Under Article 5.A.2.f.(2) of the Manual, an OER Reviewer is supposed to:

(c) Ensure[] the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES and meet all submission schedules. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed (unless the comment is prohibited under Article 5.A.4 f. of this Manual).

(d) Counsel[] Reporting Officers whose evaluation habits deviate significantly from the prescribed procedures. Deficiencies in OES performance on the part of Reporting Officers and Supervisors should be noted for performance feedback and considered in the respective officers’ OERs.

The RO’s statements show that the CO fully exercised these authorities as OER Reviewer and suggests—without providing specifics—that the CO exceeded these authorities. The Supervisor, on the other hand, who was responsible for assigning the three disputed marks, has reaffirmed their accuracy and stated that the CO properly influenced the preparation of the OER “to ensure that each mark was properly supported by the comments.” The Supervisor also stated that the CO ensured that the OER was prepared in a fair and objective manner,<sup>11</sup> particularly in light of the difficulties the applicant encountered during the reporting period. Given the lack of specifics in the RO’s statement and the fact that it is the Supervisor who assigned the three disputed marks, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed marks are erroneous or unjust because of any coercion or abuse of authority by his CO as the OER Reviewer.

5. The applicant claimed that his performance warranted the higher scores that he had requested. He asserted that the marks on an OER spanning an almost two-year period should not be lowered so dramatically because of the failure of the Ready for Operations assessment. However, a biannual OER schedule is prescribed for Reserve officers under Article 5.A.3.a. of the

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<sup>10</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>11</sup> Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, Article 5.A.1.b.1.

Manual, and in the 23 months covered by the disputed OER, the applicant performed 33 days of active duty and 127 four-hour drills. Although he initially acknowledged fault for the failed assessment, in his response to the Coast Guard's advisory opinion, he claimed that his unit had had little time to prepare for the test and that he had pleaded with his Supervisor to postpone it to no avail. However, his Supervisor reported that the applicant had confirmed that tasks had been completed when they had not and, as a result, the boats were unable to perform the drills needed to complete the assessment. Even the RO, who supported the applicant's request, noted the applicant's "deficiencies" and stated that "many of the [OER] comments accurately reflected [the applicant's] performance." The Board finds that the applicant has not proven by a preponderance of the evidence that the marks assigned in the disputed OER are erroneous or unjust or not sufficiently supported by comments as required by Articles 5.A.4.c.4. and 5.A.4.c.7. of the Manual.

6. The applicant complained that his rating chain failed to consult his prior CO before preparing the disputed OER. A rating chain is not required to consult a previous OER Reviewer about an officer's performance, however. Instead, Article 5.A.2.d.(2)(j) of the Manual states that when the Supervisor changes during a reporting period, the outgoing Supervisor should provide the incoming Supervisor with a draft OER, and under Article 5.A.3., an OER is normally prepared whenever the RO departs the unit more than halfway through a reporting period. But the prior CO was not the applicant's Supervisor or RO, and the applicant's rating chain was not required to request his input about the applicant's marks. Therefore, the lack of such a consultation does not render the disputed OER erroneous or unjust.

7. The Board finds that the applicant's evidence is insufficient to overcome the presumption of regularity with respect to the disputed OER. Although he alleged that the disputed OER marks are erroneous and unjust because of his new CO's overemphasis on a failed Ready for Operations test and undue influence and the lack of input from his prior CO, he has not shown 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 clear and prejudicial violation of statute or regulation.<sup>12</sup> The Board finds no grounds for amending the disputed OER marks or for directing the Coast Guard to convene a special selection board.

8. Accordingly, the application should be denied.

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

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<sup>12</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).

**ORDER**

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

June 22, 2018

