

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-008



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 October 13, 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 August 17, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an active duty [REDACTED] asked the Board to correct his record by removing four Officer Evaluation Reports (OERs) dated January 14, 2005; June 10, 2005; January 31, 2006; and May 28, 2007. During this period, he served as a "Team Member" at a [REDACTED] (for the last OER his position was [REDACTED]). He asked that his non-selection for promotion to LCDR for Promotion Year (PY) 2012 be removed from his record and that his signal number be reinstated. He asked that his non-selection to Commander (CDR) for PY 2018 be removed from his record, that his signal number be reinstated, that he receive a Special Selection Board for consideration for promotion without the erroneous OERs, and that he receive all associated back pay and allowances.

The applicant alleged that all four OERs were prejudiced by a violation of Article 10.A.2.e.1.e. of the Personnel Manual, which states that "civilian members of the Coast Guard Senior Executive Service (SES) can be both Supervisor and Reporting Officer for their immediate subordinates." He stated that a GS-14 signed the four OERs as both his Supervisor and Reporting Officer in violation of policy. He argued that these "four OERs in particular constitute a significant portion of [his] reviewable record by selection boards" and he asserted that they demonstrate a complete lack of understanding of the Officer Evaluation System (OES) by his civilian Supervisor at the time. The applicant argued that as a result of this error and injustice he was not afforded a fair and accurate assessment of his performance as required by Coast Guard policy. He stated that subsequent promotion boards reviewed his entire record as they are required to do. He therefore

argued that it was “very conceivable to deduce that these material errors likely contributed to [him] being non-selected for Lieutenant Commander and Commander during [his] first opportunities of eligibility.”

The applicant argued that the preparation of the disputed OERs violated policy by not affording him a separate evaluation by a second person and commissioned officer in sections seven through ten.¹ He stated that these sections “give a more complete picture of [his] performance and potential” and because they did not include a separate Reporting Officer’s input, the OERs are “incomplete and inaccurate.” The applicant emphasized multiple times throughout his argument that his OERs were still entered into his record despite “undergoing multiple reviews.”

The applicant argued that the LCDR PY12 and the CDR PY18 selection boards did not have before them “material information required to be presented” by Coast Guard policy.² He asserted that because the erroneous and unjust OERs were part of his file, it is likely that the selection boards in question made determinations “based on erroneous and incomplete assessments of [his] performance.” He stated that the four OERs contain white space in the comments section, and alleged that such white space “is universally understood by Coast Guard officers ... to be detrimental and perceived negatively.” He argued that his record was prejudiced by these “material errors” and his record therefore appeared worse than it would have in the absence of these errors.

Regarding the timeliness of his application, the applicant stated that he discovered the alleged errors on September 18, 2017, while “further reviewing [his record] after having been non-selected for promotion to Commander.”

SUMMARY OF THE RECORD

Below is a table of all of the applicant’s OERs that were available in his record. The disputed OERs have been shaded in gray. Duty Under Instruction (DUINS) OERs are omitted.

PERFORMANCE DIMENSION	3/03	9/03	1/04	6/04	1/05	6/05	1/06	5/07	5/08	5/09	7/10	5/11	5/12	8/13 ³	4/16	4/17
Planning & Preparedness	5	5	5	5	5	4	4	5	5	6	7	7	6	6	7	7
Using Resources	6	5	5	5	5	4	4	5	6	7	6	6	7	7	6	6
Results/ Effectiveness	5	6	4	6	6	4	4	5	5	7	7	6	7	7	5	7
Adaptability	5	5	5	5	5	5	5	6	5	6	6	7	6	6	6	7
Professional Competence	5	4	5	5	5	4	4	5	5	6	6	6	6	6	5	6
Speaking & Listening	5	5	5	5	6	4	4	4	4	6	6	5	6	6	6	6
Writing	5	4	5	4	5	4	5	5	5	6	5	6	6	6	7	7

¹ Section 7 is Reporting Officer Comments, section 8 is Personal and Professional Qualities marks and comments, section 9 is the comparison scale mark, and section 10 is for comments on the evaluatee’s leadership and potential and for recommendations for promotion.

² The applicant did not explain what “material information” was missing.

³ The applicant received Duty Under Instruction OERs in 2014 and 2015.

Looking out for Others	5	5	5	4	6	5	5	5	5	6	7	6	6	7	6	7
Developing Others	6	6	4	4	5	4	4	5	5	7	7	7	6	6	6	6
Directing Others	5	6	5	5	5	4	4	4	5	7	6	6	6	6	6	6
Teamwork	6	5	5	6	6	5	5	5	6	7	6	6	7	7	6	7
Workplace Climate	4	4	5	5	5	5	4	4	5	6	5	5	5	5	6	6
Evaluations	5	4	5	5	5	5	4	4	5	6	5	5	5	5	6	7
Initiative	5	5	5	5	5	4	4	4	6	6	6	6	7	7	6	7
Judgment	5	4	4	5	5	4	4	4	5	7	7	6	6	7	6	6
Responsibility	6	5	5	5	5	4	4	5	6	6	6	6	6	6	6	7
Professional Presence	5	5	5	5	6	5	5	5	5	7	7	7	7	6	6	7
Health & Well-Being	5	5	5	5	6	5	5	5	6	6	6	6	6	6	6	7
Average for OER	5.2	4.9	4.8	5	5.3	4.4	4.3	4.7	5.2	6.4	6.2	6.1	6.2	6.2	6	6.6
Comparison Scale	5	4	5	5	5	4	4	4	5	5	5	5	5	5	5	5
Reviewer's Comparison Scale					4	4	4	4								

On the January 14, 2005, OER, one GS-14 employee signed as the applicant's Supervisor and Reporting Officer. The Reviewer, a captain, attached a special page of comments, which states "Promote with peers." The applicant also received a mark in the fourth spot on the comparison scale from the Reviewer (he received a better mark in the fifth spot on the comparison scale from the GS-14).

On the June 20, 2005, OER, one GS-14 employee signed as the applicant's Supervisor and Reporting Officer. The Reviewer again attached a special page of comments and assigned the applicant a mark on the fourth spot on the Reviewer's comparison scale. The Reviewer's comments state:

I fully concur with the marks and comments of the Reporting Officer. Continues to display strong sense of organizational acumen and ability to learn as he does. A valued team member who came through after the unexpected loss of 2 of his team. Member's quick ability to grasp concepts and relentless drive to succeed have made him a reliable, credible, and valued asset to the ... Division. [Applicant] is well rounded in all facets of life; showing desire for personal as well as professional growth. His initiative toward further educational opportunities and participation in local community sporting and charity events conveys a dedication to mental, physical and emotional improvement.

Highly recommend for promotion at first opportunity. He has demonstrated the capacity, capability and commitment to excel in the most challenging assignments making him an outstanding candidate for future leadership positions as part of ... Teams or other challenging positions.

On the January 31, 2006, OER, one GS-14 employee signed as the applicant's Supervisor and Reporting Officer. The Reviewer again attached a special page of comments and assigned the applicant a mark on the fourth spot on the Reviewer's comparison scale. The attached Reviewer comments state:

I fully concur with marks and comments of supervisor/reporting officer.

Continuously demonstrated value to the team and support for the goals of the ... industry safety program. Produced exceptionally detailed and thorough work repeatedly. Demonstrated critical thinking skills & problem solving skills. As confidence developed, initiated more; resulted in improvements to program administration.

A quick learner w/drive to succeed; persistence in each task & assignment regardless of desirability of same. Demonstrated the capacity, conscientiousness, and commitment to succeed in further challenging assignments. Excellent candidate for advanced education, challenging assignments in any field. Interested in Intelligence assignments. Also expressed desire for early rotation to field assignment – I wholeheartedly support such an opportunity.

On the May 28, 2007, OER, one GS-14 employee signed as the applicant's Supervisor and Reporting Officer. The Reviewer again attached a special page of comments and assigned the applicant a mark on the fourth spot on the Reviewer's comparison scale. The attached Reviewer comments state:

I concur with the marks and comments of the Supervisor/Reporting Officer.

[Applicant] has learned the ropes of getting business done at HQ. This is a distinct advantage over his peers that have not had the opportunity. Served effectively as a valued team member of a high performing team pulled his share of the lead & learned many leadership lessons along the way. Showed enhanced maturity and sense of responsibility this marking period. Took the burden of working with the 17 members of the ... Committee. Similarly showed the importance of the federal government being responsive to the needs of the industry by working with those ... owners in the [REDACTED] to understand the procedures for and obtain citizenship waivers. At the same time enhanced safety within the industry by involving other stakeholders in the safety assessment process.

I support his assignment to a Sector leadership position. Has the dedication and qualities to be successful.

Also has the dedication and intelligence for post graduate school. Continue assignments with increased responsibility. On track with peers for promotion.

There is no negative documentation in the applicant's record. He has received many awards and has attended several training programs.

VIEWS OF THE COAST GUARD

On May 15, 2018, 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 and therefore should be considered on the merits. PSC noted that the applicant did not submit Reported-on Officer reply or an application to the Personnel Records Review Board (PRRB) as authorized by policy for any of the disputed OERs. PSC stated that the OERs "were not prepared and submitted in accordance with policy" because the civilian who signed as a Supervisor and Reporting Officer was not an SES employee, but a GS-14. However, PSC argued that the applicant did not contest nor did he provide evidence to show that the performance documented in the OERs was incorrect. PSC asserted that there is no Coast Guard policy prohibiting white space in OERs. In addition, in accordance with policy each

OER had the Reviewer's comments and comparison scale rating attached which was signed by an O-6. PSC also argued that an O-6 would have been "very familiar with the proper execution of OERs, including the implications of excessive white space." PSC pointed out the Coast Guard policy that for consideration for promotion to Commander the most significant portion of the member's service record will be the last seven years of immediate previous service.⁴

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 25, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. June 17, 2018, the applicant responded and stated that he disagreed with the Coast Guard's advisory opinion.

He stated that he disagreed with the Coast Guard's assertions that there were no errors in the OERs. He alleged that there were errors "in content by omission in all four OERs." He stated that having only two people in his rating chain, instead of three, "resulted in an independent assessment of [his] performance being omitted." He stated there was also an error "in the content by bias" in the OERs. He stated that not having three independent assessments resulted in his marks and comments "being unfairly weighted towards the opinion of one of the two individuals." Lastly, he asserted that there was an error in content by timeliness. He stated that for his January 14, 2005, OER, his Reviewer submitted the OER 137 days after the OERs date. He stated that the January 31, 2006, OER was submitted 167 days after the OERs date, whereas Coast Guard policy requires them to be submitted within 45 days following the end of the marking period.

The applicant stated that he did not submit an applicant to the PRRB because he discovered the alleged errors in 2017 after a third-party review. He stated that the PRRB has jurisdiction for only one year so he was unable to submit an application to that board. He stated that he received guidance to apply to this Board for relief.

The applicant disagreed with the Coast Guard's opinion that the "disputed OERs were not considered by selection boards." The applicant stated that the Personnel Manual directs promotion boards to consider a member's entire record, with six years of immediate previous service considered as the most significant portion for consideration to LCDR.⁵ The applicant alleged that two of his OERs (January 31, 2006, and May 28, 2007) fell into the six-year window for his promotion consideration to LCDR.

The applicant lastly requested expedited consideration because he was to go before the PY 2019 CDR selection board on July 23, 2018.

APPLICABLE REGULATIONS

The Personnel Manual, COMDTINST M1000.6A, was in effect when the applicant received the disputed OERs. Article 10.A.1.b.1. states that COs "must ensure accurate, fair, and objective evaluations are provided to all officers."

⁴ Personnel Manual, Article 14.A.4.d.

⁵ For promotion to LCDR, the previous six years are considered the most significant. For promotion to CDR, the previous seven years are considered the most significant.

Article 10.A.2.a. states that the rating chain must provide “the assessment of an officer’s performance and value to the Coast Guard through a system of multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting.” Article 10.A.2.b.1. states that COs must “ensure members of the rating chain carry out their OES responsibilities.”

Article 10.A.2.b.2. states that Cos must designate and publish the command’s rating chains and provide copies to OER Administrators.

Article 10.A.2.d.1.a. states that the Supervisor is normally the person to whom the member answers on a daily or frequent basis and from whom the member receives most of their direction. Article 10.A.d.1.b. states that “U.S. government civilian employees may serve as Supervisors.”

Article 10.A.2.e.1.b. states that “U.S. government civilian employees may serve as Reporting Officers.” Article 10.A.2.e.1.e. states “civilian members of the Coast Guard Senior Executive Service (SES) can be both Supervisor and Reporting Officer for their immediate subordinates” and that any exemptions “must be authorized by Commander (CGPC-opm) or Commander (CGPC-rpm).”

Article 10.A.2.f.2.a. states that the Reviewer must ensure that the “OER reflects a reasonably consistent picture of the [member’s] performance and potential.” Article 10.A.2.f.2.b. states that the Reviewer may add comments as necessary that address the “performance and/or potential of the [member] **not otherwise provided by the Supervisor or Reporting Officer**. For any officer whose Reporting Officer is not a Coast Guard commissioned officer [or] member of the Coast Guard Senior Executive Service ... the Reviewer shall describe the officer’s ‘Potential’ and include an additional ‘Comparison Scale’ mark.” (Emphasis in original.) The comparison scale need only been included when Reviewer comments are mandatory.

Article 14.A.4.d. states that promotion boards “must consider an officer’s entire record.” However, for promotion to CDR, the following is “the most significant portion of the record evaluated: Seven years of immediate previous service or all service in present grade, whichever is greater.” For promotion to LCDR the “most significant portion of the record evaluated [is] Six years of immediate previous service or all service in present grade, whichever is greater.”

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.⁶

⁶ *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).

2. The applicant alleged that his OERs dated January 14, 2005; June 10, 2005; January 31, 2006; and May 28, 2007, should be expunged because they are erroneous and unjust due to a GS-14 signing as both the applicant's Supervisor and Reporting Officer. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.⁷ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.⁸ To be entitled to correction of an OER, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OERs were adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁹

3. The applicant argued that the four disputed OERs were prepared in violation of Article 10.A.2.e.1.e. of the Personnel Manual because a GS-14 employee prepared and signed them as both his Supervisor and Reporting Officer, whereas Coast Guard policy states that only civilians of the Senior Executive Service may do so. PSC stated that the OERs "were not prepared and submitted in accordance with policy" but noted that the applicant did not dispute the content of the OERs.

4. Article 10.A.2.b.2. of the Personnel Manual then in effect required COs to publish the rating chain(s) of their units, and Article 10.A.2.e.1.e. provided that any exemptions to the rating chain policy "must be authorized by Commander (CGPC-opm) or Commander (CGPC-rpm)." Neither PSC nor the applicant could provide the Board with a copy of the published rating chain in question. There is likewise no remaining evidence showing whether a rating chain exemption had been approved to authorize the GS-14 civilian to serve as both Supervisor and Reporting Officer, as permitted in Article 10.A.2.e.1.b., because more than ten years have passed since these OERs were created. The applicant was assigned to a Headquarters office during the period in question, and his OER Reviewer was a captain (O-6) who was presumably very familiar with OER policy. In addition, the published rating chain and the disputed OERs would have been repeatedly reviewed by personnel specialists assigned to the Personnel Command at the time. The composition of the applicant's rating chain for the disputed OERs is entitled to a presumption of regularity,¹⁰ and so the Board presumes that a rating chain exemption was in effect that authorized the GS-14 to serve as both Supervisor and Reporting Officer on the applicant's rating chain. The Board finds that the applicant has not overcome the presumption of regularity with respect to the composition of his rating chain for the disputed OERs. He has not submitted the published rating chain or otherwise shown that there was no authorized exemption in effect.

5. Even if the applicant had overcome the presumption of regularity and proven by a preponderance of the evidence that no rating chain exemption was in effect, he has not shown that

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁹ *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).

¹⁰ 33 C.F.R. § 52.24(b); *Arens* at 1037.

he would be entitled to relief because only a *prejudicial* violation of a regulation warrants removal of an OER, and the applicant has not shown that having the GS-14 complete the OERs was prejudicial. The applicant complained that the comments do not entirely fill the comment blocks, but there is no requirement that they do so. The applicant has submitted no evidence casting doubt on the accuracy of the disputed OERs, and the Reviewer, a captain, concurred with the civilian's marks and comments and attached special comment pages to each OER with the Reviewer's own assessment.

6. The applicant also complained that his rating chain did not complete all of his OERs within the allotted period following the end of the evaluation periods. The Board has long held, however, that untimeliness *per se* does not warrant removal of an otherwise valid performance evaluation.

7. The applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that the disputed OERs were adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹¹ Therefore, the Board finds no grounds for removing the disputed OERs, and the applicant has not proven by a preponderance of the evidence that his record contained any material error of fact or material administrative error when it was reviewed by the PY 2012 and PY 2018 selection boards. With no material error or material administrative error, there are no grounds for removing his non-selections or for directing the Coast Guard to convene a Special Selection Board.¹²

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

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ *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).

¹² *Id.*

ORDER

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

August 17, 2018

