

**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. 2020-097**

  
LCDR /O-4

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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. § 2507. The Chair docketed the case after receiving the completed application on March 25, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 30, 2023, 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 Lieutenant Commander (LCDR/O-4) in the Coast Guard Reserve, asked the Board to correct his record by replacing his annual Officer Evaluation Report (OER), dated May 31, 2018, which was finalized in his official personnel record in Fall 2018, with recommended inputs provided by his direct active duty supervisor LCDR M in one of the Supervisor's original drafts of the OER. The applicant also asked the Board to remove the OER Reviewer's Comments page (CG-5315) completed on June 18, 2019, from the OER.

The applicant alleged that the error and injustice in his record occurred on November 13, 2018, and that he discovered it that same day. That is the day, he alleged, that he was retaliated against in his OER as a whistleblower. The applicant alleged that on or about October 5, 2017, he had a conversation with his Reporting Officer, who was the Senior Reserve Officer (SRO) at his Base, concerning a junior member's request to be excused from a drill period All Hands. The applicant alleged that during this conversation, the SRO asked him to obtain HIPAA-protected information from the junior member. The applicant further asserted that he later reported the SRO for this HIPAA violation and was retaliated against as follows:

[April 20, 2018] reported HIPAA violation (hostile work environment) of private medical information of special needs child of junior enlisted reserve member by BASE [redacted] Senior Reserve Officer and Senior Enlisted Reserve Advisor to [Base] XO. Provided documentation of violation, and advised (2) Chief Petty Officers had previously brought notice of violation to [Base] CMC but no action was initiated. [Base] XO reassured he would address the issue directly, and not disclose identity due to violation was by member in

OER rating chain. The next six months was harassed by Senior Reserve Officer regarding OER content/development. REPORTING OFFICER AUTHENTICATION Sections A, B, C, and D provided by Senior Reserve Officer contradict true performance and character documented by OER Supervisor throughout period – do not correlate with EVALUATION Sections 3A, 3B and 3C per OER policy. OER contradiction resulted with Reserve Personnel Management OES Manager to direct OER Reviewer to complete CG-5315 to provide justification of contrast between Supervisor (LCDR [M]) and Reporting Officer (CDR [V]) evaluation for period. Senior Reserve Office [CDR V] retaliated in response to HIPAA violation reported by lowering OER evaluation summary, providing negative comments of performance/character and intentionally reducing future promotion potential of military career.

To support his application, the applicant provided print-outs of several emails and texts, which have been included in the Summary of the Record below. He also provided copies of draft and final OERs, which are also included in the Summary of the Record below:

- (1) the first draft of the disputed OER, which his Supervisor, LCDR M, submitted on May 14, 2018;
- (2) the second draft of the OER, which his Supervisor submitted on July 23, 2018;
- (3) his final OER received November 13, 2018;
- (4) another version of the OER with a marking period changed by the SRO, dated January 16, 2019, which was never validated;
- (5) the CG-5315 with Reviewer Comments; and
- (6) his OER for the period June 1, 2018 through October 31, 2019.

The applicant also submitted three letters from fellow members in support of his application:

- On March 1, 2019, an ET2 with an autistic child signed the following statement addressed to the BCMR with the subject line “Hostile Work Environment (HIPAA violation)”:

I have been attached to BASE [] Reserves since OCT 2011, and assigned to ESD [BASE] as reserve Lead Petty Officer. From OCT 2016 to SEP 2018 [BASE] Reserves were operating under a hostile work environment established by the Senior Reserve Officer (SRO) [] and Senior Reserve Enlisted Advisor (SERA), []. The reserve command climate was the antithesis of what our service requires, which is an empowering and supportive work environment for all members. The SRO and SERA created an environment of intimidation and fear among junior officers down to the junior enlisted. Members were fearful of coming to monthly drill weekends – worried about what negative or abrasive treatment they would be exposed to by SRO/SERA. Openly at monthly All Hands meetings the SRO or Asst. SRO would threaten members with negative Page 7s. The stress created by the behavior and actions of these individuals was the worst experience of my 18 year career.

Additionally, in August 2017 I requested to be excused from OCT drill weekend due to conflict with care of my special needs child. I arranged with active-duty supervisor to complete required drills the Thursday/Friday prior to OCT drill weekend, and would confirm all required training and administrative tasks were completed via active duty supervisor []. Instead of approving excusal from OCT drill weekend, in the following weeks I received a phone call from SERA asking me to describe ‘where on the autism spectrum is my child’s condition?’ This after I was previously forced to divulge specific information on my child’s federally protected medical condition. Furthermore, SRO via text instructed direct reserve supervisor, ITC [], to find out exact details of my special needs child’s medical condition so he could make a valid command decision. From AUG to OCT 2017 my family and I were unfairly subjected to high levels of

stress from the SRO and SERA regarding this situation. ITC [] personally took the issue to the Command Master Chief and Reserve Command Master Chief but no action was taken to help resolve the issue or ensure no other member would be treated this way. Then [the applicant] besides ITC [], was the only supervisor who acted to help resolve hostile work environment, and follow up to ensure my family was doing well.

- On March 1, 2019, a Master Chief assigned to the Base also signed a statement with the subject line “Hostile Work Environment/HIPAA Violation”:

I have been attached to BASE [] Reserves since OCT 2014 and assigned to Engineering Dept. as the RSV senior enlisted member. From OCT 2015 to SEP 2018 [BASE] Reserves were subjected to a hostile work environment established by the Senior Reserve Officer (SRO), CDR [V], and the Senior Reserve Enlisted Advisor (SERA), []. Instead of fostering an open and supporting command climate per the Coast Guard’s Core Values, the SRO and SERA created an abusive and harassing environment affecting all members - from junior officers down to junior enlisted. There were more negative CG-3307s issued to reserve members within this period than any other time of my career, and the worst example of leadership I have ever witnessed. The episodes of hostile work environment or concerning leadership were numerous. The following few [examples] will provide a picture of how [BASE] reserves were being mistreated and fearful of coming to drill weekends every month:

1. At a meeting with the reserve Chiefs Mess during drill weekend the SRO tells all Chiefs that he does not trust any of them. The only senior enlisted he trusted was the SERA.
2. When SRO was going to counsel one of my E6s in regard to issue that could affect his career and retirement I requested to sit in to witness per request of the member. SRO denied saying I was not authorized, and he would decide how meeting would progress. During meeting with member SRO tried to pressure member to sign documents without providing member appropriate access to legal counsel. If member had not been provided legal counsel they could have lost their retirement and medical benefits for life.
3. ET2 [] was harassed by SRO and SERA for requesting to be excused from OCT 2017 All Hands Drill weekend. It came to the point where ET2 was pressured to reveal HIPAA protected medical information of his special needs child to be excused from drill. Additionally, his department chief, ITC[], pressed the issue stating ET2 had covered all his readiness and training requirements required to be completed during the all hands weekend. For his actions ITC was also harassed by the SRO and SERA, eventually leading to his abrupt retirement in MAR 2018.
4. When several members experienced damage during Hurricane Harvey the SRO would not excuse any member [f]rom drill to take care of their families and residences. SRO stated in a meeting to reserve command members ‘the damage is not that bad.’

This is just a snapshot of the negative behavior inflicted monthly, and disregard for members’ safety and rights while in uniform. Reserve members should never be exposed to this lack leadership when they attend drill weekend. They should be respected, supported, and empowered to achieve success and fulfillment in their careers like all other employees of the Coast Guard.

- On May 6, 2019, the applicant’s Supervisor for the disputed OER signed a “Character Reference Letter” addressed to the BCMR, in which she stated the following:
  1. From July 2015 to June 2018, I served as the C4IT Operations Officer in [Base] C4IT Department. [The applicant] served as my lead reserve C4IT manager in the department from approximately September 2017 to June 2018. He served with distinction during and after the historic 2017 Atlantic Hurricane Season. His leadership and bias for action helped multiple Electronic System Support Detachment (ESDs) restore vital information technology (IT), communications, and command and control systems for District [redacted] afloat and shore units.

2. [The applicant] expertly balanced the needs of our demanding professional network and technical expertise, he rapidly identified win-win personnel resource recommendations for understaffed ESDs throughout the Coast Guard in support of the Department of Defense mandated enterprise Windows 10 migration while still facilitating 24/7 post-hurricane restoration efforts. He additionally teamed with ESD [location] to optimize electronics preventative maintenance at Remote Communication Facility [location] and sustain the transmission of vital maritime services to Coast Guard assets, other agencies, and mariners. When faced with unscheduled personnel changes at the largest ESD in the Coast Guard, [the applicant] stepped forward without hesitation and assumed the duties and responsibilities as the acting reserve ESD [ ] Supervisor. He effectively and efficiently improved overall command climate, reserve readiness, and ESD maintenance statistics in short order.
3. As of a leader of integrity, I could count on him to do the right thing for the right reasons, regardless of the circumstances. When faced with the most challenging post-storm logistics to date, I heeded [the applicant's] safe counsel and well-thought recommendations. He was my 'right-hand man' because of his innate ability to identify force multipliers and effectively achieve mission objectives. For months after Hurricanes Irma and Maria, he ensured the personal well-being of all department members including me. [The applicant] exemplifies the best qualities of servant leadership.
4. [The applicant] is a valuable asset to the Coast Guard. Every effort should be made to retain specialized reserve officers like him to meet the cybersecurity challenges of tomorrow.

### SUMMARY OF THE RECORD

The applicant enlisted on active duty in the Coast Guard on July 16, 1996, and was released into the Reserve on May 29, 2001. He served in the Selected Reserve and was appointed an Ensign (O-1) in the Reserve on September 8, 2006. He continued serving in the Selected Reserve and was promoted to Lieutenant Junior Grade (O-2) in 2008 and to Lieutenant (O-3) in 2010.

#### *2017 Email and Text Conversation Submitted by the Applicant*

In an email dated August 19, 2017, an ET2 at the Base that the applicant was later assigned to asked his chief, an ITC, about being excused from drills in late October 2017 to care for his special needs child. He explained that his wife had planned six months earlier to be out of town that weekend and their "usual caregiver" would be unavailable "tending to a family affair."

The texts submitted by the applicant are dated October 5<sup>th</sup>, with no year shown. But in an April 20, 2018, email (quoted below), he mentioned the issue as having occurred "last fall"—i.e., in October 2017—and they appear to follow up on the August 19, 2017, email. On his application, the applicant identified the texters as the ITC and their SRO, CDR V.

In the texts, the ITC asked about whether an ET2 was excused from duty later in October and noted that the member had an autistic child. The SRO stated that he was very familiar with autism and asked about the child's primary and secondary caregivers. The ITC explained that the primary caregiver (the mother) would be out of town and the secondary caregiver (an aunt) would be unavailable due to hospitalization. Then the SRO asked about the child's age and the possibility of hiring a babysitter. The ITC stated that the child was about 6 years old and could not be left with a stranger because of his condition. The SRO said, "Can you ask him to tell us where on the spectrum his child is"; "Believe me I'm sympathetic to his child's condition but I just need to know

more information for decision”; and “I’m very familiar with ASD. There are high functioning children, there are children that are not high functioning. You’re telling me that he cannot be with strangers. That makes his condition relevant to my decision. I have to be honest, I’m not inclined to grant the decision but if I have more information I will utilize those facts to make a decision. You can’t just say ‘this kid has autism’ and not expect me to ask about it. If he’s going to utilize it to not perform military [duty].”

The ITC replied in the texts that he thought the information sought by the SRO was “a little personal” but that he would ask the ET2. Then he told the SRO, “I spoke with ET2 and he feels targeted by the questions. I am having a tough time with this as well. I want what is best for the member while meeting the needs of the CG. He said his child is high functioning with medications.” The SRO replied as follow:

Let’s do this: let’s use the chain of command properly in the situation. I should be taking the advice of my SERA and [Assistant] SRO. Please engage with both of them and they will bring me their recommendations. If you ask me right now then my question [sic] is no he is not excused. However, please advise [SERA] and [Assistant SRO] and I will consider his request with their advice.

### ***Applicant Assigned to Base***

In November 2017, having been selected for promotion to LCDR, the applicant was reassigned and reported for duty as a Reserve Field Operations Officer and team leader for a Command, Control, Communications, Computers, Information Technology (C4IT) Department at a Coast Guard Base. (He was subsequently promoted to LCDR/O-4 on July 1, 2018.)

On April 20, 2018, the applicant met with CDR M, the Base Executive Officer (XO). The next day, on April 21, 2018, at 8:11 PM, the applicant sent an email with the subject line “[Base] (Hostile Work Environment)” to the XO, copying both his Supervisor (LCDR M) and his Reporting (the SRO, CDR V), as well as others, to document his meeting with the XO.

### ***“Hostile Work Environment” Email from the Applicant to the XO dated April 21, 2018***

I am sending this email to summarize the events that transpired since I met with you Friday morning at 0730, April 20, 2018, in your office (you and I were the only members present). During the meeting I informed you since reporting in November 2017 I witnessed actions and behaviors from both the SRO and SERA [Senior Enlisted Reserve Advisor] which fall within a hostile work environment.

1. Violation of HIPAA towards an enlisted member’s special need child and harassment of the member & family. The member had scheduled drills prior to All Hands weekend, worked out getting all Admin required actions completed with active duty with ESD Supervisor to verify. The member had done their due diligence to meet requirements to the Coast Guard Reserve but [for] some reason (he and the Chief) were harassed. This situation transpired last Fall, attached are copies of texts between SRO and ITC pressing for HIPAA protected information of member’s child. NOTE: This situation got so ‘out of hand’ the [District] Gold Badge was sought out for assistance by members. Additionally, the active duty ESD Supervisor in conversation was not happy with the way his best performing Reserve member/family was treated. I stated ITC [V] submitted his retirement paperwork short notice (after the above situation) for MAR 2018. Furthermore, I stated my remaining ITC passed<sup>[1]</sup> ITC [V] retired due to the harassment and unprofessional

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<sup>1</sup> In the Coast Guard, “passed” is sometimes used to mean “informed me that” or “informed us that.”

treatment of himself/member by SRO and SERA. Also, passed my remaining ITC stated in phone conversation recently [Base] Reserves are threatened/fearful of what they will experience during drill weekend.

2. Jan 2018 – [Base] Reserve members are threatened verbally with Negative 3307s [Page 7s] at morning muster by Reserve CMD member.
3. NOV 2017 to FEB 2018 – several Senior enlisted members passed directly to myself in conversation the ‘work environment’ at [Base] Reserves has [n]egatively affected overall morale to the point most enlisted members ‘dread coming to the drill weekend, fear what treatment they may receive and do not feel safe.’
4. MAR 2018 – enlisted member directly requested for ADOS from CEU from APRIL-SEP 2018 (urgent need to support active duty mission). I approved verbally, LCDR [M] approved verbally and I sent text to Reserve CMD informing them of request/action – never received any feedback. Enlisted members gets text from SERA informing member they did not follow the ‘correct process’ via the Reserve CMD. Member contacted myself, expressed they felt threatened/berated for trying to be proactive to fulfill ADOS role. Note: Member stated they (nor myself) have never received any training or guide from a reserve CMD member regarding ADOS submission process. April 6, 2018 I receive texts from SRO stating (regarding above situation) ‘SRO has FINAL approval on people going on ADOS orders.’ I passed directly to you verbatim in meeting. After brief discussion of topic you replied ‘the SRO is not the FINAL approver of requests for active duty orders’ and that will be addressed or guidance provided. In addition, in later text from SRO he stated he is tired of members using side or backchannels to usurp his chain on command.’
5. MAR 2018 – Reserve ITC previously selected for billet at CG CYBER CMD. Directed via email by CYBER POC to submit CMD endorsement ASAP. ITC [e]ntered request into DA and sent email to SRP requesting CMD endorsement (highlighting the time critical importance). No action on endorsement for two weeks. ITC could not get a hold of SRO, had to contact LCDR [M] to approve/route in DA.

At the conclusion of our meeting you informed me my name would be left out of this situation due to nature and possibility of retribution/retaliation by the members in question. You also stated you would address issue with members in question directly and advise the CO.

April 21, 2018

You and CO attend [Base] Reserves morning muster. After end of muster/unit photo CO pulls myself aside and asks me directly about situation at [Base] Reserves. I passed brief summary of noted questionable actions/behavior by our SRO and SERA. CO stated he and you would address the issue with the members in question directly.

0927 – I receive phone call from SRO to report to the CMD conference room. Once I arrived the following members, besides you and CO, were present: CDR [V]/SRO, Chief W/SERA, LT [L], CWO [S], CWO [K].

NOTE: I was directed into a meeting to confront two members I had expressed were the root cause of the hostile work environment in previous private meeting with you on Friday morning, April 20, 2018 at 0730. One of the members in question is the Senior Reserve Officer (CDR) which is in my rating chain (Reporting Officer). The other member in question is a female Chief Petty Officer (E7).

The CO informed the group the CMD has received information/feedback from personnel there are issues or problems ongoing throughout [Base] Reserves. CO stated he directed the Reserve CMD present in the room to meeting to seek information/opinions on the current climate within Reserve force. CWO [K] noted working relationship between chiefs mess and SERA, noted several points from his perspective and experience in the last several months. Also, he noted it felt there was ‘micro-managing’ down into the departments from the Reserve CMD. LT [L] next spoke about several personnel issues within her department but those addressed/resolved, nothing else to note.

CO next directed myself to provide input/feedback. I stated at recent retirement of ITC [V] he passed, in his opinion, [Base] Chiefs Mess are not being treated like Chiefs. They were being left out of personnel issues/actions of members and not being involved by Reserve CWD. Additionally I stated this was my first unit where ALL Reserve officers and chiefs did not meet regularly to discuss plans/tasks/trainings etc. SRO interjected that was not the case but since being at [Base] Reserves for last six months this has not happened. SRO stated years previously this action was being conducted but 'taking several hours' to complete, so meetings were cancelled. The discussion then focused on meetings between Reserve officers and chiefs – suggested at least to meet once a quarter.

SERA spoke about her role, current and ongoing actions for all [Base] Reserve members and workload.

At his time CO informed he needed to address pending issues – he and you departed the conference room.

Next SRO stated he was surprised to be pulled into a meeting with you and CO. He next requested us to provide insight/feedback on discussed issues. CWO [K] spoke mostly, referencing a drastic change of leadership style from previous SRO to under CDR [V]. He again noted issues between several chiefs and SERA. SERA became upset, excused herself from the meeting. After she departed CWO [K] stated directly to SRO 'Sir, a major part of these problems is the SERA – her personality and methods of conducting business.' There was additional talk on this subject.

Next, SRO stated he needed to speak to you directly prior to you departing and left to talk with you in your office – this lasted maybe 15 minutes. We stayed in conference room and spoke with SERA, providing positive feedback and support.

Not long after we all were departing conference room and SRO approached me, after departing your office, and requested to speak to me alone in office down the passageway. SRO stated he wanted to explain to me 'the whole situation involving ITC [V] and how it transpired.' He explained in detail, from his perspective, the chain of events. He next stated he requested specific information from ITC regarding the symptoms of members child's autism – where was it within the autism spectrum? He stated 'to me it is not an issue, I would request it of any member requesting to be excused from drill in this situation.'

Next the talk went to my OER and where do I want to take my career/next unit. I spoke briefly and then meeting was done.

I want to express that it was not a coincidence or 'by chance' at that very moment the SRO, after a private meeting with you alone, decided to speak to me about the HIPAA violation, my upcoming OER and my career. I feel it was improper that I was forced to confront my Senior Reserve Officer, who is directly in my rating chain, and also the person in question involving a HIPAA violation.

### ***First Draft of OER Emailed by Supervisor, LCDR M, to the Reporting Officer/SRO, CDR V***

On May 14, 2018, the applicant's Supervisor forwarded a draft copy of the applicant's OER for the period ending May 31, 2018, to the Reporting Officer/SRO:

CDR,

Attached is [the applicant's] OER for your review. This is a RSV OER and timelines are the same as the AD 03 OER. . . .

I'd like to counsel the mbr before I leave on [June 15]. In the event the review process cannot be expedited, I should still be able to login in while transiting to DC. I also anticipate receiving my White House email soon, so I'll pass that along once in receipt.

In the attached draft OER, which was unsigned,<sup>[2]</sup> the applicant's primary duties and responsibilities during the year were summarized as:

Primary Duty: RESERVE (RSV) FIELD OPS, Position Title: BASE [redacted] ELECT DIV (EE). Leads 20 plus personnel from 7 Electronics Support Detachments (ESDs) in support of primary active duty (AD) support missions for cmd, control, computers, comm & info tech (C4IT) sys in District [redacted]. Supervises 2 E7 & POs. Coordinates among C4IT OPS, ESD Supervisors, Senior Reserve Officer (SRO) & [District] RSV Mgmt to maximize mbr(s) skillset in augmentation of AD, execute [District] continuity of ops (COOP) sys support, optimize short/long term training schedule & fulfill readiness metrics.

For the section 3a evaluating his performance of duties, on a scale from 1 (worst) to 7 (best), the applicant received three marks of 7 (Using Resources, Results/Effectiveness, Adaptability) and four mark of 6 (Planning and Preparedness, Professional Competence, Speaking and Listening, Writing). The Supervisor included the following comments to support these marks:

Exemplary planner & resource mgr. Exploited personnel shortage for high visibility enterprise Windows 10 migration project to facilitate augmentation request for 2 highly skilled techs at behind schedule ESD; invoked course of action enabled ahead-of-schedule completion of 5k plus workstations in [District] to meet mandated DOD cybersecurity reqs. Proactively engaged ESD supervisors & RSV workforce to identify opportunities to bolster RSV mbrs' tech competencies thru increased preventative maintenance tasks; transitioned completed 125 plus manhours of maint, improving Base C4IT performance metrics. Empowered and mobilized 2 RSV mbrs for Hurricane HARVEY/IRMA; enabled post-storm recovery efforts for SECs [two cities redacted] incident mgmt. teams while fostering mbrs' professional dev/ICS quals. Spearheaded RSV [District] Facilities College for 15 AD & RSV mbrs at SEC [location] on specialized port security tactics & safety practices; prepare mbrs for successful completion of FI boards. Effectively optimized FY 18 ADT periods for 7 RSV techs as stopgap solution to mitigate unplanned AD personnel shortfalls & AY 18 xfer season at ESD; sustained ESD mission effectiveness in high [District] optempo. Skillfully executed O4 role in RSV DWE.

For the section evaluating his leadership skills, the received five marks of 6 (Developing Others, Directing Others, Teamwork, Workplace Climate, Evaluations) and one mark of 7 (Looking Out for Others). The Supervisor included the following comments to support these marks:

Advocated FYI 18 ADT opportunities for 10 RSV mbrs to bolster op readiness of SEC [location]; created win-win solution for RSV mbrs & unit needs to address interim mission-impacting AD staffing gaps. Meticulously planned & professionally executed 2 RSV retirement ceremonies for [District] senior enlisted per CG regs; honors mbrs' legacy & brought great credit to Base [redacted]. Mentored RSV PO in change of rate request procedures & process; mbr received approval from IT RFMC to join IT rate re better lever honed civilian IT skillsets. Consistently briefed 30 plus RSV mbrs on status changes/workaround of enterprise remote access sys & leveraged ESD Duty IT assistance to troubleshoot hardware & software issues; maximized mbrs' productivity &

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<sup>2</sup> In his application, the "first" draft OER that the applicant attached to the May 14, 2018, email shows that it was electronically signed by his Supervisor, LCDR M, on July 23, 2018, which is the date she submitted the second draft OER. Therefore, it appears that the applicant attached his Supervisor's second draft OER to the email dated May 14, 2018, by which she submitted the first draft OER, and he attached her first draft OER to her email dated July 23, 2018. This conclusion is supported by the SRO's critique of the first draft OER in an email to the Supervisor dated July 20, 2018, in which he criticized her use of the phrase "holding steadfast" and the lack of supporting comments for the marks for Evaluations, Judgment, and Responsibility. These criticisms are valid for this unsigned draft OER, but not for the draft OER that the Supervisor signed on July 23, 2018, which does not include the phrase "holding steadfast" and includes comments that support the marks for Evaluations, Judgment, and Responsibility, as required by the applicable manuals and instructions.



engagement w/AD to remain deployment-ready. Sustained supportive work environment thru insightful employee engagement activities incl. in-depth career reviews & coaching; significantly boosted dept. morale & job satisfaction.

For the section evaluating his personal and professional qualities, the applicant received one 5 (Health and Well-Being), three 6s (Initiative, Judgment, Professional Presence), and one 7 (Responsibility). The Supervisor included the following comments to support these marks:

Spearheaded initiatives to enhance RSV mbr. engagement & readiness of geographically separated subunits by leveraging best RSV/industry mgmt. practices & own AD tech background; resulted in synergistic partnerships w/ AD to deliver top-notch C4IT support while lowering RSV absenteeism & turnover. Held steadfast on cmd endorsement for mbr's early xfer upon mbr's acceptance into CG CYBER workforce; CG-RMP successfully assigned mbr to CYBER w/Fall 2018 start date. Leveraged field experience to successfully complete Explosive Handling Supv. course. Completed ICS trng incl Safety Officer, Comms Unit Leader, Marine Transpo Sys Recovery Unit Leader (MTSL3); qualified as MTSL3. On-track w/ completing USN War College JPME certification; completed 1 course. Championed use of VA benefits. Promoted active lifestyle; 17 mbrs met weight std.

The Supervisor also recommended that the Reporting Officer assign a comparison scale mark in the fifth spot of seven, denoting "One of many high performing officers who form the majority of this grade," and a promotion scale mark of "Already selected to next pay grade."<sup>3</sup> The recommended Reporting Officer's comments on this first draft were as follows:

[Applicant] was successfully selected to next pay grade & already performing at the O4 level. Since reporting in NOV 2017, ROO continuously has exceeded expectations & excelled in all leadership positions/roles assigned. ROO is well-respected by AD & RSV peers, supervisors, & subordinates because of ROO's excellent leadership skills, professionalism, tenacity/quick learning, & depth/breadth of RSV mgmt. Sustainment of [location] RSV's high operational & readiness metrics in dynamic [District] optempo is the direct result of ROO's unwavering commitment to successful AD & RSV partnerships. Will excel in challenging RSV billets; highest recommendation for PSU OPS/XO, DOD-Interagency Ops (Joint Staff, CORIVRN & COCOM), SRO, Sector Dept Head & Strike Teams. Highly recommended for senior service school at earliest opportunity & staff billets.

This first draft OER was not signed by any member of the rating chain.

***Email from CWO/ENG2 to the Applicant, dated May 20, 2018***

Thank you for your support during the past several drill weekends regarding the command and personnel issues within the [redacted] Reserve Unit. April's meeting with the CO, XO, SRO, CMC, SERA and the Reserve Officers, appeared that I would be the lone voice of reason in what otherwise appeared to be a witch hunt/injustice towards the [location] reserve chiefs. I was comfortable in the defense of the reserve personnel that were not present at the meeting, while still maintaining my professionalism because the CO, XO and CMC were acting as a third party mediator allowing me to speak freely. However, I was pleasantly surprised when you not only provided support for my view of the issues at hand, but that you also provided a similar view based on your observations since joining us in November. I believe that we provided the Command with information that was either not conveyed and/or incorrectly transmitted, thereby appropriately adjusting their viewpoint. It's unfortunate that some of these issues made it to the level of the CO as it appears this is

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<sup>3</sup> On the promotion scale, if the officer has already been selected for promotion to the next higher grade or was recently promoted, the Reporting Officer may choose marks saying as much. Otherwise, the Reporting Officer must choose from six possible marks: (1) Do not promote; (2) Promotion potential; (3) Promote; (4) Promote w/top 20% of peers; (5) In-zone reorder; and (6) Below-zone select.

a case of people not being able to mediate small issues between themselves. I want to apologize for my lack of input in this weekend's meetings, as I felt a bit uncomfortable speaking freely at that time. The member/members who are in my opinion the primary cause/causes of the past issues were present and any statement made in that regard may have turned that meeting into a free-for-all. I am also a person who looks forward and not back and generally like to focus on the solutions and try to shy away from placing blame (witch hunting). I just wanted to thank you for being truthful in your evaluation of the events.

### ***Email Chain Dated June 26, 2018, through June 29, 2018***

The applicant provided emails dated June 26, 2018, through June 29, 2018, that pertain to the climate associated with the applicant's draft 2018 OER. In an email dated June 26, 2018, at 1:46 pm, CDR V (the SRO and the applicant's Reporting Officer) asked the applicant to contact him regarding "another issue that has nothing to do with the OER." In the next email in the chain, dated June 29, 2018, 12:37 pm, from the applicant to his Supervisor, LCDR M, the applicant apologized for the delay in emailing his Supervisor due to the work computer network being down, and stated, "Once CDR answered the phone he stated he contacted [LCDR M] regarding OER, and that she was 'being handled'. To the best of my knowledge he stated the following next sentences to me:

I want to know what is your problem with me?  
What did I do?  
I am not stupid, I know what is going on.  
I want to air it out and speak openly, I can take it.

The applicant stated in the email that he immediately ended the call with the SRO due to the disturbing nature of the phone conversation, which made him feel uncomfortable and not safe. The applicant further stated that while on the phone with the SRO, his coworker heard the conversation which was on speakerphone. On June 28, 2018, the coworker gave the applicant a signed statement in which she wrote that she had overheard the conversation and corroborated the information in the June 29, 2018, email drafted by the applicant.

On July 1, 2018, the applicant was promoted to LCDR as scheduled based on his selection for promotion in 2017.

### ***Emails between the Supervisor and SRO Regarding the Draft OER***

The applicant also submitted copies of emails between his Supervisor and Reporting Officer/SRO, as well as other officers, in which they discussed proposed edits to the applicant's 2018 OER. (The applicant was not a recipient.)

On the morning of July 20, 2018, the SRO replied to the Supervisor's May 14, 2018 email forwarding the unsigned first draft of the OER and wrote the following:

Please see returned OER per 3b[3]. I do not believe the OER is consistent with actual performance. Perhaps that is because no accompanying support was sent to me and/or I do not understand the full context.

VERY IMPORTANT TO KEEP IN MIND – My intention was to simply smooth out the OER, clarify things with the member, and forward as I have with the rest of the OERs. I contacted [the applicant] to engage with him about it and then received the attached email in response. The member specifically requested you

‘complete’ the Supervisor’s sections. It’s odd that he screen shot the text and noted that I texted him on his ‘personal phone.’ FWIW – I text all of the officers and chiefs on their personal phones as they do me.

Nonetheless, and towards his request:

Please forward accompanying OSF, 5308, or any other reliable reports and records.

Here is an example (but not all of) of the 3b(3) issues:

‘Empowered & mobilized 2 RSV mbrs for Hurricane HARVEY/IRMA; enabled post-storm recovery efforts for SECs [locations] incident 11gmt. teams while fostering mbrs’ professional dev/ICS quals.’ I do not think that two of his subordinates getting called up warrants a 6 or 7 in adaptability (or frankly any of other section Performance of Duties section.)

‘Exemplary planner & resource mgr: Exploited personnel shortage for high visibility enterprise Windows 10 migration project to facilitate augmentation request for 2 highly skilled techs at behind schedule ESD; invoked course of action enabled ahead-of-schedule completion of 5k plus workstations in [District] to meet mandated DoD cybersecurity regs.’ The way I read this: these two members are responsible for 5k workstations. This is where the esoteric nature of the work comes in. I am looking for some context.

Held steadfast on cmd endorsement for mbr’s early xfer upon mbr’s acceptance into CG CYBER workforce; CG-RMP successfully assigned mbr to CYBER w/Fall 2018 start date’

Is this Chief S? What does it mean to hold steadfast? Chief was always support by this command to go to Cyber. Again, context is needed. This has been in ‘looking out for others’ 3(b)(a).

There are no comments to support Evaluations.

There are no comments to support Professional/Presence. In this section where you would expect to find remarks about Professional Presence you itemize completed ICS training, etc. This would be better under ‘Professional Competence’, 3a(e).

There are no comments for Judgment.

There are no comments for Responsibility.

I am not directing you to change any marks, but here are a few suggestions to make the OER stronger and support the marks you have given.

1) Refrain from distinguishing RSV unless it’s reserve specific and necessary. A reserve promotion board is going to know this is a reserve OER. i.e. Proactively engaged ESD supervisors & RSV workforce to identify opportunities to bolster RSV mbrs’; Meticulously planned & professionally executive 2 RSV retirement; Mentored RSV PO in change of rate; Consistently briefed 30 plus RSV mbrs; Spearheaded initiatives to enhance RSV mbr engagement.

2) Generally smoot[h] it out.

3) Avoid unnecessary or self-explanatory words. Here is an example: Meticulously planned & professionally executed 2 RSV retirement ceremonies for [District] senior enlisted per CG regs; Try this: ‘Meticulously planned and executed two retirement ceremonies for senior enlisted’ – The fact they were reserve retirements is not necessary, and of course they were done per CG regs. Neither is necessary.

4) Have supporting comments for each section (i.e. judgement, professional presence, etc.).

5) The rating chain is LCDR M – RO V – Reviewer – P, so switch that around.

You can call or text me 24/7

The Supervisor replied by thanking the Reporting Officer/SRO for the feedback and noting that the applicant was a “stellar reserve” and she wanted the OER to reflect that.

In a different email chain to other officers, the SRO apologized for his delay of the OER and noted that his response had required “considered thought.” The SRO stated that the applicant “has done good technical work and planning for Base C4IT. I’ll wait for his support for the other[] areas (adaptability, judgment, etc.) before commenting or providing any feedback in those areas.”

### ***Second Draft OER***

The Supervisor replied to the SRO on July 23, 2018, by forwarding a second draft OER and stating, “I’ve made some edits to the blocks, but left the marks as is.” (However, the marks in the attached second draft are slightly lower than those on the first draft OER, but that might have been unintentional because he raised them again in the final draft.) The Supervisor’s new comments appear targeted to address each of the performance dimensions. For the section 3a evaluating his performance of duties, on a scale from 1 (worst) to 7 (best), the applicant received one mark of 5 (Writing), five marks of 6 (Planning and Preparedness, Results/Effectiveness, Adaptability, Professional Competence, Speaking and Listening), and one mark of 7 (Using Resources). The comments for this section were as follows:

Utilized exemplary planning & communication skills to fulfill DOD mandated [District] migration/upgrade to Windows 10 platform, facilitated augmentation of 2 RSV technicians at EST [location]; migration of 5300 computers within AOR completed on time. Actively engaged supervisors/RSV personnel at EST [location]. to increase preventative maint. capability; technicians completed 125 hrs & improved ESD monthly maint. reports. Empowered & assisted mobilization of 2 RSV personnel in support of HRR Harvey/Irma, mbrs assigned to SEC [location]; effectively staffed unit IMTs & completed professional ICS quals/dev. Participated & facilitated in RSV [District] Facilities College at SEC [location], specificized in port security & safety training provided to 15 AD & RSV mbrs; mbrs completed OJT, PQS & prepared for FI boards. Established effective synergy with ESD [location] Supervisor, coordinated 7 RSV technicians FY 18 ADT within periods of personnel shortfalls/AD transfer season; reduced impact of technical experience loss on EST mission capability. Captivating public speaker; fluidly fulfilled role of 04 at RSV DWE. Proficient writer; correspondence/emails clear & professional quality.

For the section evaluating his leadership skills, the applicant received one mark of 5 (Workplace Climate), four marks of 6 (Developing Others, Directing Others, Teamwork, Evaluations), and one mark of 7 (Looking Out for Others). The comments for this section were as follows:

Expertly interfaced with SEC [location] IMD Supervisor to plan/schedule FY18 training, coordinated 10 RSV mbrs ADT to address AD shortfalls/open billets during transfer season. Organized planning & logistics for 2 RSV retirement ceremonies (E9 and E7) at STA [location]; functions professional and successfully completed according to regulation. Mentored & supported RSV PO request to change rate, provided direction how to initiate process via CMS & Force Rating E9. Consistently advised [plus] 30 RSV mbrs of CG information technology projects & effects on remote access systems; requested Duty technician support to resolve technical problems for multiple RSV mbrs personal equipment/laptops. Conducted complete professional career review for 7 RSV technicians upon reporting, established supportive & respectful work environment; drastic increase of dept morale. OERs & EERs completed expediently with detailed support data per updated COMDT instruction(s).

For the section evaluating his personal and professional qualities, the applicant received one 5 (Health and Well-Being), three 6s (Initiate, Judgment, Professional Presence) and one 7 (Responsibility). The comments for this section were as follows:

Organized [District] Facilities College for 15 mbrs at SEC [location] on port security tactics & safety practices; mbrs completed FI boards. Reported violations of protected health info to cmd; improper behaviors ceased. Compelled CG-RMP to fill 2-yr gapped E-7 billet due to planned xfer of 2 E7s & removal of CWO billet; ensured continuity of RSV leadership w/in dept. Developed synergistic AD/RSV partnerships to execute ESD maint. mgmt program; enabled ESD to pass DCMS Logistics Compliance Inspection. Leveraged best practices to enhance RSV engagement; resulted in top op readiness Ivis for [District] assets & lowered mbr turnover. Briefed 30 plus mbrs on states changes of enterprise remote access sys; ensured mbrs remain deployment-ready. Planned & executed 2 retirement ceremonies; brought great credit to [Base]. Championed VA benefits and active lifestyle; 17 mbrs met wgt.

The Supervisor's section of the draft OER had been signed by LCDR M on July 23, 2018. In this second draft, the Supervisor also recommended, for the Reporting Officer's section of the OER, a higher mark in the sixth spot (of seven) on the comparison scale, which denotes "One of the few distinguished officers," than she had originally recommended and a stronger promotion scale mark of "In-zone reorder." (Although the applicant had not been promoted by the end of the evaluation period for the OER, he had been promoted on July 1, 2018.) The Supervisor also recommended the following comments for the Reporting Officer's section:

[Applicant] was successfully selected to next pay grade & already performing at the O4 level. Since reporting in NOV 2017, ROO continuously has exceeded expectations & excelled in all leadership positions/roles assigned. ROO is well-respected by AD & RSV peers, supervisors, & subordinates because of ROO's excellent leadership skills, professionalism, tenacity/quick learning, & depth/breadth of RSV mgmt. Sustainment of [location] RSV's high operational & readiness metrics in dynamic [District] optempo is the direct result of ROO's unwavering commitment to successful AD & RSV partnerships. Will excel in challenging RSV billets; highest recommendation for PSU OPS/XO, DOD-Interagency Ops (Joint Staff, CORINVRN & COCOM), SRO, Sector Dept Head & Strike Teams. Highly recommended for senior service school at earliest opportunity & staff billets.

The second draft OER was never endorsed by the Reporting Officer/SRO or by the OER Reviewer.

### ***Disputed OER***

By email dated November 13, 2018, the applicant was provided his 2018 OER for his signature. It had recently been signed by his Supervisor, LCDR M; by his Reporting Officer/SRO, CDR V; and by CDR P, the C4IT Department Head, as the Reviewer. In this final version, the Supervisor returned the numerical marks to what they had been in her first draft of the OER and revised the comments again. For section 3a, evaluating the applicant's performance of duties, on a scale from 1 (worst) to 7 (best), she assigned the applicant three marks of 7 (Using Resources, Results/Effectiveness, Adaptability) and four mark of 6 (Planning and Preparedness, Professional Competence, Speaking and Listening, Writing). The comments for this section were unchanged as follows:

Exemplary planner & resource mgr. Exploited personnel shortage for high visibility enterprise Windows 10 migration project to facilitate augmentation request for 2 highly skilled techs at behind schedule ESD; invoked course of action enabled ahead-of-schedule completion of 5k plus workstations in [District] to meet mandated DOD cybersecurity reqs. Proactively engaged ESD supervisors & RSV workforce to identify

opportunities to bolster RSV mbrs' tech competencies thru increased preventative maintenance tasks; transitioned completed 125 plus manhours of maint, improving Base C4IT performance metrics. Empowered and mobilized 2 RSV mbrs for Hurricane HARVEY/IRMA; enabled post-storm recovery efforts for SECs [locations redacted] incident mgmt. teams while fostering mbrs' professional dev/ICS quals. Spearheaded RSV [District] Facilities College for 15 AD & RSV mbrs at SEC [location] on specialized port security tactics & safety practices; prepare mbrs for successful completion of FI boards. Effectively optimized FY 18 ADT periods for 7 RSV techs as stopgap solution to mitigate unplanned AD personnel shortfalls & AY 18 xfer season at ESD; sustained ESD mission effectiveness in high [District] optempo. Skillfully executed 04 role in RSV DWE.

For the section evaluating his leadership skills, the applicant received five marks of 6 (Developing Others, Directing Others, Teamwork, Workplace Climate, Evaluations), and one mark of 7 (Looking Out for Others). The comments for this section were changed as follows:

Advocated and spearheaded FY18 ADT opportunities for 10 mbrs at SEC [location] based on needs analysis; mitigated multiple AD vacancies & gap in unit readiness 2/ cost-effective win-win solution for stakeholders. Mentored PO in change of rate procedures & process due to expert civilian IT skills; IT RFMC approved mbr's application to meet CG-wide demand for cyber professionals. Let 15 plus mbrs thru changes to ESD [location] maintenance program as interim RSV ESD Supr; decreased mbr absenteeism w/engaged leadership. Teamed with Base C4IT Dept & [District] Comms Unit LCDR to fill vital comms tech positions at multi-agency IMT's during Hurricanes IRMA/MARIA; provided timely relief for AD workforce while sustaining 24 by 7 C4IT support to 500 plus first responders in [locations]. Sustained positive work enviro by implementing in-depth career reviews & coaching; significantly boosted dept morale & job satisfaction. Drafted 17 plus EERs & several memos of high quality.

For the section evaluating his personal and professional qualities, which measures an officer's qualities which illustrate the individual's character, he received one 5 (Health and Well-Being), three 6s (Initiative, Judgment, Professional Presence), and one 7 (Responsibility). The comments for this section were changed as follows:

Organized [District] Facilities college for 15 mbrs at SEC [location] on port security tactics & safety practices; mbrs completed FI boards. Reported violations of protected health info to cmd; improper behaviors ceased. Compelled CG-RMP to fill 2-yr gapped E7 billet due to planned transfer of 2 E7s & removal of CWO billet; ensured continuity of RSV leadership w/in dept. Developed synergistic AD/RSV partnerships to execute ESD maint. mgmt. program; enabled ESD to pass DCMS Logistics Compliance Inspection. Leveraged best practices to enhance RSV engagement; resulted in top op readiness levels for [District] assets & decr'd mbr turnover. Briefed 30 plus mbrs on status changes of enterprise remove access sys; ensured mbrs remain deployment-ready. Planned & executed 2 retirement ceremonies; brought great credit to [Base]. Championed VA benefits & active lifestyle; 17 mbrs met wgt.

The Reporting Officer's section of the final OER, completed by the SRO, is very different from what the Supervisor had recommended in the first two drafts, and the SRO checked a box indicating that he did not concur with the Supervisor's evaluation. On the comparison scale, when comparing the applicant to other officers in the same grade, the SRO marked the applicant in the second spot of seven, denoting a "marginally performing officer." On the comparison scale, the SRO selected "Already selected to next pay grade." The Reporting Officer's comments were changed as follows:

ROO is technically competent officer who has positively impacted mission support through capable C4IT technical planning and execution. However, ROO needs vast improvement in communication skills, judgment and proper use of chain of command. ROO's deficiencies in these performance dimensions

prompted engaged involvement and in-person counseling with the Base Commanding Officer, Executive Officer, C4IT Department Head and Senior Reserve Officer. ROO's interpersonal skills, leadership and professional qualities are not consistent with the supervisor's marks. Currently, ROO is not performing at the O4 level. It is the hope of the undersigned that ROO can make drastic improvements during the course of his tour at [BASE] prompting consideration to the next pay grade. Anticipate invasive leadership will continue to be required for this ROO.

The OER Reviewer, who was the C4IT Department Head, marked that he concurred in the evaluation and signed the OER.

### ***Unsuccessful Attempt to Extend Reporting Period for OER***

When a Reporting Officer is transferred away or retires, each of the Reported-On Officers normally receives an OER on the date the Reporting Officer departs unless the Reported-on Officer has received another regular OER within 184 days. In an email dated January 11, 2019, the SRO, copying the OER Reviewer, asked the Supervisor to sign a fourth version of the OER, which was the same as the final version except for four significant changes:

- The end date for the evaluation period had been extended from May 31, 2018, to September 30, 2018.
- The applicant's rank had been changed to LCDR since he had been promoted on July 1, 2018.
- The reason for the OER (from a drop-down menu) had been changed from annual to "Detachment/Change of RO [Reporting Officer]."
- The promotion scale mark had been changed from "Already selected for promotion" to "Recently promoted."

In response, on January 16, 2019, the Supervisor signed and returned the new OER and asked if a waiver to extend the evaluation period had been received and whether the applicant had been notified that the period was being extended.

On February 1, 2019, the OER Reviewer emailed the Supervisor and copied the SRO regarding the applicant's new September 30, 2018 OER. The Reviewer asked the Supervisor to "Please counsel the member, have him sign, then submit to OPM. Let CDR V [the SRO] and I know once completed." That same day, the Supervisor responded as follows:

Due to POTUS ops, I do not have the bandwidth to counsel the member. Furthermore, I did not rcv response to the questions that I sent on [January 16, 2019] and am unaware of any emails from RMP regarding errors to the OER.

My recommendation is that you and/or CDR [V] counsel the member since you had made the edits to performance period. You and CDR [V] have the most details as to why the performance period was extended to a date when I was no longer attached to [the Base].

This version of the OER with an extended evaluation period was not entered in the applicant's record, but another change to the OER was made, as explained below.

*Addition of OER Reviewer's Comment Page to OER*

On April 8, 2019, CG PSC-RPM-1 emailed the OER Reviewer, CDR P, copying the SRO, CDR V, and the Supervisor, LCDR M, and stated the following:

RMP-1 has completed an initial policy review of the attached OER and will require the following updates to be considered for final validation.

1. 6a: There is a significant difference in the wording and marks in block 5 and the marks on the rest of the record. In block 6a you mark that you concur. Since there is at least a difference of opinion compared to either the RO or the Supervisor, please provide comments regarding performance and why there is a difference between your thoughts and one of the members that signed it.

Please advise in email if you have any concerns with this guidance.

On April 11, 2019, the Supervisor forwarded this email to the applicant "FYSA," meaning for your situational awareness.

On June 18, 2019, the OER Reviewer, CDR P, signed a Reviewer's Comments page for inclusion with the OER (Form CG-5315) and provided the following comments:

ROO is an overall good performer who made positive impacts to the Base C4IT reserve program related to mission support and personnel management. The RO and Reviewer both agree that the ROO had a significant lapse in judgement and poor communications by not properly utilizing the chain of command to address issues related to the officer evaluation process. Reviewer differs in opinion with the RO in that the ROO should be rated the bottom third of the bubble in Section 5.b. under 'One of the many high performing officers who form the majority of this grade.' Reviewer believes it would have been more appropriate to rate the ROO a '4' under 'Speaking and Listening' in Section 3a.f and a '4' under 'Judgment' in Section 3c.b in order to give the ROO time to correct these performance deficiencies since this occurred near the end of the performance period. ROO has already started showing improvements in these areas and has good potential to continue as an officer in this organization.

Also on June 18, 2019, the OER Reviewer forward his comments page to the applicant in an email stating, "Please review my Reviewer comments CG-5315 on your OER. Let me know if you have any issues. If good, I will forward to RPM."

On August 20, 2019, the applicant replied to the OER Reviewer's email saying, "I have thoroughly reviewed your comments on CG-5315. I accept review provided."

On August 22, 2019, the OER Reviewer forwarded the CG-5315 with his comments to PSC-RMP, noted that a mark on the on the original needed to be changed to show that Reviewer Comments were attached, stated that the applicant "concur with Reviewer comments," and forwarded the applicant's email dated August 20, 2019. (For the BCMR, the applicant annotated the copy of this email by hand to note that he had "accepted" the comments, not "concurred" with them.)

In an email dated August 28, 2019, PSC-RMP-1 advised the Reviewer that the CG-5315 and been attached to the OER in the applicant's record.



The applicant did not file a reply to his 2018 OER or submit an application to the Personnel Records Review Board (PRRB). Nor did he file an EO complaint about retaliation.

The applicant received another regular OER while assigned to the Base, dated October 31, 2019. This OER shows that he had been assigned as the Base's C4IT Department Head. He had a new Supervisor, and CDR P, who had been his OER Reviewer, served as his Reporting Officer. A new SRO served as his OER Reviewer. On this 2019 OER, the applicant received four marks of 5, eleven marks of 6, and three marks of 7 for the various performance dimensions from his new Supervisor, while CDR P assigned him a mark in the fifth spot of seven on the comparison scale, denoting "One of the many high performing officers who form the majority of this grade," and a mark of "Promote" on the promotion scale.

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

On October 20, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC), presuming administrative regularity on the part of the Coast Guard and other Government officials, and noting that the applicant has the burden of providing the existence of an error or injustice by the preponderance of the evidence. PSC also noted that the applicant did not avail himself of administrative remedies by submitting a reply to his OER or by filing an application to the Personnel Records Review Board (PRRB) within one year of receiving his OER. PSC also gathered sworn declarations (see below) from the Supervisor and Reporting Officer/SRO regarding the applicant's claims.

#### ***Declaration of the Applicant's Supervisor, LCDR M, dated July 26, 2020***

The applicant's Supervisor stated the following in pertinent part:

As of a leader of integrity, I could count on [the applicant] to do the right thing for the right reason, regardless of the circumstances. When faced with the most challenging post-Hurricanes Irma and Maria storm logistics, I heeded [his] sage counsel and well-thought recommendations. He was my "right-hand man" because of his innate ability to identify force multipliers and effectively achieve mission objectives. For months after Hurricanes Irma and Maria, he ensured the personal well-being of all department members including me. [The applicant] exemplifies the best qualities of servant leadership. When faced with unscheduled personnel changes at the largest ESD in the Coast Guard, [the applicant] stepped forward without hesitation and assumed the duties and responsibilities as the acting reserve ESD [location] Supervisor. He effectively and efficiently improved overall command climate, reserve readiness, and ESD maintenance statistics in short order.

During one of his reserve weekend in May 2018, [the applicant] approached me about an alleged HIPAA violation and the subsequent discussions he had with CDR [V] Senior Reserve Officer, and then CDR the Base [redacted] Executive Officer. The alleged HIPAA violation stemmed from some very direct questions regarding a reservist's dependent and their medical conditions. Throughout the discussion he seemed agitated that he would be placed at fault for doing the right thing and raising the HIPAA concern. At the end of the discussion, I told him to keep me abreast if subsequent additional discussions occurred.

As I continued to out-process from Base [location], I diligently worked to submit [the applicant's] OER on time. However the OER was not finalized on-time. It took months for CDR [V] and CDR [P] to finalize the

OER. ... Throughout this period, I did not receive an adequate explanation as to why the period of performance was extended or why it took so long to finalize. It appeared that the Reviewer and, to some extent, the Reporting Officer did not agree with my numeric marks and written justifications. Marking a member as being marginal requires written documentation justification, continuous counseling, and a plan to remediate in the unsatisfactory performance dimension(s). At no point throughout the performance period did CDR [V] or CDR [P] inform or direct me to correct [the applicant's] alleged marginal performance.

***Declaration of the Applicant's Reporting Officer/SRO, CDR V, dated July 24, 2020***

The Reporting Officer/SRO stated the following about the applicant's claims:

4. First and foremost, the draft [OER] language which [the applicant] seeks to have was not written by me. That language was drafted by his supervisor LCDR [M] and routed to me for consideration. I did not then, and do not now, agree with the draft language proposed by his supervisor.

5. Second, the language used in the Reporting Officer's comments was discussed with the Reviewer, Base Executive Officer, and Base Commanding Officer. The block was not haphazardly written, but rather a considered response most reflective of [the applicant] during the reporting period. I spent time and consideration before writing the Reporting Officer Comments. Ultimately, the language and content are written by me[;] however it is important to note the Reporting Officer Comments had full support of the Base Executive Officer and Commanding Officer. See Exhibit 6.

Third, the allegation of a "reported violations of protected health info to cmd" and any retaliation derived therefore are both false and misleading. [The applicant] did not then, and I suspect does not now, understand The Health Insurance Portability and Accountability Act of 1996 (HIPAA; Pub.L. 104-191, 110 Stat. 1936, enacted August 21, 1996).

The allegations of a "HIPAA violation" surround [the applicant's] approval of a member to miss a unit October all-hands event approximately a month or two before the all hands. [The applicant] did not have the authority to excuse any members as that authority was retained by the SRO (for consistency sake).

In years past at Base [location] there were differing standards for excusing members to miss the all hands, e.g., one member was approved by a Senior Chief to go to Disney while another member was not excused from the all hands to go on a similar vacation. Toward that end and due to the prior inconsistency, the SRO retained the exclusive authority to excuse a member from the all hands. The fact the SRO retained this authority was made clear to the crew at quarters and was specifically discussed with the Chiefs Mess and wardroom (including [the applicant]).

[The applicant], even though he knew that authority was retained by the SRO, approved a request by a member to be excused from the all hands and reported it up the chain of command. When asked why he approved the members excusal, [the applicant] replied that it was protected "by HIPAA" and we "did not have any business asking because we'd be violating HIPAA" or words to that effect. Any inquiry into why he excused the member and what the rationale was met with stiff and borderline insubordination: he would only reply that the member's child was "autistic" and that any fuller inquiry as to why the member could not attend the all hands "violated HIPAA." The issue was ultimately resolved directly between the member seeking excusal and the SRO. It is noteworthy that any inquiry as to why [the applicant] exercised authority he did not have was met with strange and peculiar responses. Overall, during the reporting period and in addition to the issue with the all hands, [the applicant] was hard to communicate with about almost everything except technical work.

At the actual all hands, [the applicant] tracked down the Base Commanding Officer and reported the "HIPAA Violation" and other inequities he felt were not "done the way they were done at his last unit," or words to that effect. A meeting was held the same day with the Base Commanding Officer, Executive Officer,

Assistant SRO, and the SRO. In a nutshell, the chain of command and proper use thereof was explained to [the applicant].

[The applicant's] behavior became stranger during this period as he resisted direction from the Base CO, XO, SRO, and Assistant SRO. While technically sound in his specialty, his behavior and performance as a Coast Guard officer was below standard. He was evasive, passive aggressive and difficult to speak with. He was easy to communicate with regarding technical tasking but difficult to communicate with regarding almost everything else; most notably engaging the wardroom and SERA. He consistently jumped the chain of command regarding issues that had nothing to do with the "HIPAA Violation" and would randomly call the Executive Officer(s) or his Division Officer with complaints about Base procedure.

The command tried to help [the applicant] and individual counseling sessions were held at various times individually by the Assistant SRO, the undersigned, and the outgoing and incoming base XO regarding the above noted behavior. These counseling sessions failed to correct his odd behavior. There were several times [the applicant] passively alleged he was recording conversations between himself and the Assistant SRO, SRO, and base XO (not just counseling session but general USCG business). See, e.g., Exhibit 11.

As reflected in the Reporting Officer Comments, a counseling session was held with [the applicant] with the Base Commanding Officer, Executive Officer, Division Officer and the undersigned. At the meeting Base Commanding Officer was visibly upset and notably and rightfully shocked at [the applicant]'s insolence.

The Reporting Officer/SRO attached copies of numerous emails to his declaration, including the following:

- On June 26, 2018, the applicant responded by email to a text the SRO had sent him on June 24, 2018. He wrote, "In regards to your request to describe 'esoteric' content (electronics or IT specific), I respectfully request it would be beneficial for LCDR [M] (C4IT SME) to complete this action since she developed OER content and [I] engaged her routinely on work items/actions."
- In an email addressed to his entire rating chain dated July 20, 2018, the applicant stated that his OER was late. He stated that because his Supervisor had submitted it on May 14, 2018, "I expected my OER was being processed in a timely manner. On June 24 for some reason I received a text on my personal cell phone from the Senior Reserve Officer regarding my OER. He stated the following: "Also [the Supervisor] did not provide me any bullets or anything so some of the stuff I don't understand IE electrical – I want to talk with you about it so that I can make sure it gets put right. Some of it too esoteric and I want to make sure what it did accurately reflected [sic], so let me know when you can talk." The applicant then wrote that at a recent meeting a Vice Admiral had stated, when asked about senior officers completing OERs for junior officer in technical fields, that "it is the responsibility of the senior member to have a working knowledge of all departments/ members job roles and missions to enable them to properly rate performance completed by the member. ... [On June 26, 2018] I respectfully requested the Senior Reserve Office reach out to [the Supervisor], for assistance completing his requested actions since I did not develop OER content. Considering the Senior Reserve Office stated he did not understand OER content, and I only had maybe a maximum of 7 hours direct contact with the Senior Reserve Officer in a seven month period. ... Furthermore, Senior Reserve Officer responded via email on June 26 regarding my request for him to contact [the Supervisor] to clarify content with the following "If it is esoteric to me it will likely be

esoteric to a [selection] board." Additionally, I informed the Senior Reserve Officer I spoke previously to my Assignment Officer (AO) at RPM regarding technical OERs for Reserve members, and the AO replied technical OERs are not an issue because members of the board come from a variety of career fields."

- In an email dated July 21, 2018, the SRO forwarded the applicant's email to the Base CO and XO and said, "This is the kind of nonsense I am dealing with from [the applicant]. For what it's worth, I have never, nor would I ever, write to a senior officer and refer to said senior officer in the third person. It's odd, and patently disrespectful."
- In an email dated July 23, 2018, the Base CO responded to the SRO and stated, "As discussed, this type of behavior should be reflected in the member's OER. I know both you and CDR [P] has [sic] counseled [the applicant]. If you haven't already done so, I recommend you respond to him in writing, capturing how you view this type of behavior in the context of the appropriate OER performance dimension (Working with Others, Professional Presence, etc)."
- In an email dated July 24, 2018, the XO told the CO that the applicant had "just called me asking to have his rating chain changed. I told him no. He also alleged to have a recording or 'exact transcript' of what was said to him this past Saturday during drill that upset him some way. I told him if he needed to make a formal complaint then that was his prerogative."
- In an email dated July 27, 2018, to the Office of Personnel and Reserve Force Readiness, the applicant asked to have the SRO removed from his rating chain. He asked that his OER Reviewer become his Reporting Officer and that the Base XO serve as his Reviewer. He provided the following timeline to explain his request:
  1. JUN 24 - via text Senior Reserve Officer (SRO) states he does not understand technical OER content and information is "esoteric."
  2. JUN 26 - in response to email correspondence from myself noting previous RPM AO advised OER technical content will not be an issue to future board(s) SRO states "if it is esoteric to me it will likely be esoteric to a board."
  3. JUN 26 - via phone call between SRO and LCDR [M] (Active Duty Supervisor) SRO verbally expresses to LCDR [M] she did not produce a quality OER, and she needs to re-write the OER. An action which most likely could degrade the content impact and not properly reflect true performance.
  4. JUL 21- called into a meeting with Asst. Senior Reserve Officer (ASRO) at end of drill workday. ASRO highly instructs me to contact SRO via phone and "apologize" for disrespecting him. When I asked reason for this action ASRO stated it was because I respectfully requested SRO to speak directly to LCDR [M] regarding OER content. Since I had not developed the OER content provided to him LCDR [M] would be more capable of effectively answering any/all questions. Furthermore, ASRO reiterates LCDR [M] "wrote a bad OER", is a new LCDR/does not possess the capability to produce an effective OER, and does not have the "board experience" like the SRO. Additionally, ASRO threatens insubordination in the conversation. When asked by myself on what grounds ASRO replied "for disrespecting the SRO by requesting he contact Active Duty Supervisor to discuss your OER content."

Now, this email is coming from myself and what I have experienced/witnessed. I am very aware there are different sides to every situation, and no individual would be capable of making any logical decisions from this alone. I respectfully request someone from the DOL speak directly with LCDR [M] regarding the situation. (2) male Reserve officers have openly criticized/expressed on separate occasions, one of them to a subordinate officer (myself), a female Active Duty officer is incapable producing a high quality OER for a future Reserve promotion board.

- On July 29, 2018, the SRO responded to the applicant's email to his rating chain dated July 20, 2019, as follows:

I have reviewed your e-mail. This e-mail is inappropriate.

First, you are referring to me in the third person although the e-mail is directed to me. Second, I have tried several times to discuss with you your behavior and how you address your peers and seniors. As you are a CG officer, my expectation (and the Coast Guard's expectation) is that you have and use better situational awareness toward your interactions and interpersonal communications with your shipmates. This is both in person and through e-mail.

As a LCDR in the CGR, you are expected to conduct yourself better, use proper deference when needed, and employ better communication practices.

I do not want to see another e-mail like this again. I am happy to discuss these expectations with you in person or over the phone.

- On July 30, 2018, the applicant was advised by the Office of Personnel and Reserve Force Readiness that that the composition of his rating chain should be handled at the unit level.
- In a late-night email dated July 30, 2018, the applicant told the Base CO that based on instructions from the Base XO, he had contacted the Office of Personnel and Reserve Force Readiness about how to change the composition of his rating chain but had been told that the issue should be decided "at the unit level." The applicant asked the Base CO to remove the SRO from his position as the applicant's Reporting Officer and to replace him with CDR P and have the XO serve as the Reviewer. The applicant stated that he had spoken with CDR P the night before and told CDR P that the SRO had said he could not understand the OER comments. The applicant claimed that CDR P had agreed with him that the SRO should not have questioned the applicant about the comments in his OER. He stated that he had also told CDR P about a threatening conversation he had had with the Assistant SRO at his last drill meeting in which the Assistant SRO had advised him to call the SRO and apologize for insisting he call the Supervisor about the OER comments instead of him. He stated that the Assistant SRO had accused him of being insubordinate. He also told the CO that CDR P had "not wanted me to send this directly you - he requested I send it to him and 'he would smooth it over.'"
- Early on July 31, 2018, the CO emailed the XO, the SRO, and CDR P and stated, "I'd like to hold a phoncon soonest to resolve this issue. It's my belief that this member is playing both ends against the middle. I have no intent on changing the member's rating chain unless there is some compelling reason and right now I don't see it."
- In an email dated July 31, 2018, the CO responded to the applicant and stated that he was arranging a telephone conversation with the applicant and his entire rating chain. The CO

explained, “My immediate concern is that we need to establish more disciplined communications between you and your chain of command. I followed up w/ CDR [V] and CDR [P] this morning; both had different recollections of their discussions w/ you as compared to your comments below. Obviously that difference in accounts invites confusion as to the way ahead. To that end, please hold further comms on this issue until we all have a chance to speak together. If needed, I will make myself available in the evening so that this matter can be resolved as expeditiously as possible.”

- On October 21, 2018, the SRO forwarded a draft of the applicant’s OER to the CO, XO, and CDR P. He noted that the Supervisor had opted not to change her latest draft of the OER and so he had non-concurred. He stated that his own “RO comments are very strong - deservedly so in my opinion. I am sending this to you all for thoughts and consideration. I think the RO comments accurately reflect the issues and challenges by the command and member during this marking period.”
- On October 22, 2018, the CO replied to the SRO stating with a revised version, “I made some suggested edits to the last [RO’s] block. I’m not a signatory here so my suggestions are just that.”

### ***JAG’s Arguments***

According to the JAG, the applicant failed to provide sufficient evidence to meet the standard for correction of an OER. The JAG noted that “[a]s explained in *Hary v. United States*, Applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. He must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of a specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process. [Citation deleted.] Here, Applicant has failed to provide sufficient evidence to replicate any of the *Hary* factors, and cannot establish an error or injustice.”

First, the JAG argued that the applicant has not demonstrated by competent evidence that his OER contains a misstatement of a significant hard fact. According to the JAG, the applicant’s argument focused on the allegedly incorrect OER comments provided by both the Reporting Officer (RO) and the Reviewer concerning the applicant’s communications skills and on the OER allegedly being a product of generalized reprisal and bias. The JAG stated, “Contrary to [the applicant’s] assertions, the evidence indicates that the RO’s language on the applicant’s OER was not incorrect, false, or misleading. The emails provided by the applicant, in addition to RO’s declaration, indicate that in the RO’s independent view, the applicant had significant issues in following orders, using his chain of command, and using proper communication skills.” The JAG noted that the RO stated in his declaration that throughout the rating period, the applicant had been “hard to communicate with about almost everything except technical work” and that “While technically sound in his specialty, his behavior and performance as a Coast Guard officer was below standard. He was evasive, passive aggressive and difficult to speak with.” The JAG claimed that the RO accurately captured these observations in his comments and “was not alone in this estimation as the Reviewer corroborate[d] the observations” on the CG-5315. The Reviewer wrote that he agreed that “the [applicant] had a significant lapse of judgment and poor communications

by not properly utilizing the chain of command to address issues related to the Officer Evaluation Process.” The JAG noted that the applicant had “affirmatively accepted the Reviewer’s comments in the CG-5315 which memorializes this agreement.”

The JAG also emphasized that the RO’s declaration shows that the applicant’s command had made him aware of his marginal performance with respect to his communication skills. The RO wrote, “the command tried to help [applicant] and individual counseling sessions were held at various time individually by the Assistant SRO, the undersigned, and the outgoing and incoming base XO, regarding the above noted behavior. The sessions failed to correct his odd behavior.” The JAG noted that the RO had provided evidence to support his claim that the applicant was aware of his marginal performance. An email from the CO to the RO stated that the CO knew “both you [the RO] and CDR M have counseled” the applicant. Moreover, the OER itself states that mid-period counseling was conducted during the rating period. According to the JAG, the applicant’s advance notice of his conduct is important because it provides further justification for the more critical OER commentary. The additional email traffic provided by the RO further highlights the applicant’s problematic behavior and his inability or unwillingness to rectify his shortcomings. Individuals across the command agreed such workplace conduct should be reflected in the appropriate performance standard. Thus, the JAG argued, there is no injustice in the applicant’s command providing feedback on his behavior in his OER. Supported by proper notice, Coast Guard policy supports the independent views of the rating chain. The JAG noted that the judicial system has recognized that the evaluation system is not a clinically objective one.

The JAG also addressed the applicant’s argument that his OER was adversely affected by factors which had no business in the rating process, namely reprisal. The JAG stated that while the facts and incident surrounding the alleged “HIPAA violation” are uncontroverted, there is no evidence that the applicant’s report/disclosure resulted in his poor OER, not is there any nexus to his evaluation outside of the fact that the incident is perhaps another example of his poor communication skill within the chain of command. The JAG stated that it was the duty of the applicant to obey the lawful order/direction of his superior and, in the event of doubt, to seek clarification or review (servicing legal office), but otherwise, to obey. In this instance, the applicant made his own judgment with regard to the application of HIPAA and resisted the efforts of his command to ascertain whether or not a junior member had a valid excuse for missing a unit muster. While the Supervisor spun this into a positive OER comment on the applicant’s behalf, the JAG called it “one more instance in a pattern of friction and divisiveness with his RO. A pattern the OER is meant to capture by design.” The JAG noted that the applicant did not claim or prove that the incident was a turning point in his relationship with the RO or that before the incident, the RO had made any indication that he would provide the applicant higher marks or positive comments. The JAG stated that the RO’s declaration and supporting emails indicate that his assessments of the applicant were the result of a pattern of poor performance and poor communication skills and concluded that, ultimately, there is no evidence of reprisal in this case. Accordingly, the JAG concludes, the applicant has failed to meet the burden of proof necessary to show that his OER marks were the result of reprisal or otherwise described any factors which had no business being in the rating process.

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

On October 23, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The applicant did not provide a response.

### APPLICABLE LAW AND POLICY

#### 42 U.S.C.A. § 1320d-9(b) Definitions

##### (3) HIPAA privacy regulation

The term "HIPAA privacy regulation" means the regulations promulgated by the Secretary under this part and section 264 of the Health Insurance Portability and Accountability Act of 1996 ([42 U.S.C. 1320d-2](#) note).

##### (d) Enforcement

In addition to any other sanctions or remedies that may be available under law, *a covered entity that is a group health plan, health insurance issuer, or issuer of a medicare supplemental policy and that violates the HIPAA privacy regulation* (as revised under subsection (a) or otherwise) with respect to the use or disclosure of genetic information shall be subject to the penalties described in [sections 1320d-5](#) and [1320d-6](#) of this title in the same manner and to the same extent that such penalties apply to violations of this part.

#### 42 U.S.C.A. § 1320d-6. Wrongful disclosure of individually identifiable health information

##### (a) Offense

A person who knowingly and in violation of this part

- (1) uses or causes to be used a unique health identifier;
  - (2) obtains individually identifiable health information relating to an individual; or
  - (3) discloses individually identifiable health information to another person,
- shall be punished as provided in subsection (b). For purposes of the previous sentence, a person (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a *covered entity* (as defined in the HIPAA privacy regulation described in section 1320d-9(b)(3) of this title) and the individual obtained or disclosed such information without authorization.

### Reserve Policy Manual, COMDTINST M 1001.28C, December 2016

- A. Mission Authority and Statutory Basis. The Coast Guard draws status and mission authority from Titles 10 and 14 of the United States Code (U.S.C.), and so does the Coast Guard Reserve:
  1. Reference (a), Title 10 U.S.C. §10101. Identifies the Coast Guard Reserve as one of the seven Reserve components of the Armed Forces.
  2. Reference (a), Title 10 U.S.C. §10102. States he "purpose of each Reserve component is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the Regular components."



5. Reference (b), Title 14 U.S.C. §704. Specifically confers upon any member of the Coast Guard Reserve serving on active duty or inactive-duty training "the same authority, rights, and privileges in the performance of that duty as a member of the Regular Coast Guard of corresponding grade or rating."
- B. Reserve Program Overview. The Coast Guard Reserve is a fundamental component of the Coast Guard where mobilization readiness is the primary mission.
1. Reservists are members of the Coast Guard Reserve force; they are otherwise civilians and may have careers outside the military. The Reserve Component (RC) is comprised of newly accessed officers, enlisted, and prior active duty members who joined the RC voluntarily, or affiliated to complete their remaining military service obligation.
- C. Reserve Component Categories (RCC). [ ] There are three RCCs: the Ready Reserve (R), the Standby Reserve (S), and the Retired Reserve (V).
1. Ready Reserve (R). All members of the Ready Reserve are in an active status, and are subject to immediate recall to active duty. The Ready Reserve consists of the following:
- a. Selected Reserve (SELRES). Consists of members within the Ready Reserve designated as essential to contingency requirements and have priority over all other Reserve elements.
- (1) These members are assigned to a position on the Personnel Allowance List (PAL) at Coast Guard or selected Joint Service units. *SELRES members are required to train for mobilization by participating in Inactive Duty Training (IDT) and Active Duty for Training (ADT) periods for the purpose of Annual Training (AT), in accordance with Reference (a), Title 10 U.S.C. §10147 and Reference (c), Uniform Reserve, Training, and Retirement Categories for Reserve Components, DODI 1256.06.*
- B. Inactive Duty Types. There are four types of inactive duty performed with pay or without pay.
1. Inactive Duty Training (IDT) Drill. Periods scheduled for the performance of formal training, unit training or augmentation training (four hours minimum for pay; two hours minimum for retirement points only), in accordance with Reference (c), Uniform Reserve, Training, and Retirement Categories for Reserve Components, DoDI 1215.06.
- a. IDT drills are performed throughout the fiscal year (typically four drills per month), but may be batched subject to command approval and funds availability. Except as specifically provided by Commandant (CG-131), the authorized number of paid IDT periods for a member of SELRES is 48 drills per fiscal year. Unless otherwise specified (e.g., continuing resolution) members may batch up to their quarterly IDT allowance, at command discretion.
- (2) Scheduled IDT drills are approved by the command. *The member's active duty supervisor or direct chain of command must be included in the approval process.*
- (a) Non-paid drills may be authorized; the nature of duty to be performed must be equivalent to that for authorized paid drills.
- (b) *Scheduled or unscheduled IDT drills performed by a reservist without prior command authorization may not be approved.*

**Coast Guard Officer Evaluation System Procedures Manual (hereinafter, 'OES Procedures Manual'), PSCINST M1611.1D (January 2018).**

- 1.A. The Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and Reviews who present independent views and ensure fairness, accuracy and timeliness of reporting . . . (emphasis added).

17. Reported on Officer Reply

A.4. Timeline for Submission of Replies to Supervisor. Replies must be submitted to the Supervisor within 21 days from receipt of the validated OER from CG-PSC-BOPS-CMR, Military Records Section. Replies based upon receipt of local copies will not be accepted. (Emphasis added.)

## **The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, June 2017, Chapter 5**

A. Overview. This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers.

1. Purpose. The Officer Evaluation System documents and drives officer performance and conduct in accordance with Service values and standards. This information is used to support personnel management; primarily selection boards and panels, retention, and assignments.

2. Applicability.

b. All IDPL officers in the grade of W-2 to O-6 must receive officer evaluation reports (OERs).

### B. Roles and Responsibilities

2. Commander (CG PSC) has overall responsibilities for the OES. Administrative servicing of OERs is accomplished by Commander (CG PSC-OPM-3) or Commander (CG PSC- RPM-1). Servicing of an officer's personnel record is accomplished by Commander (CG PSC-BOPS-C-MR).

3. Commander (CG PSC-OPM-3) or Commander (CG PSC-RPM-1) must:

a. Maintain all forms and issue procedural instructions to implement the policies and standards of this Chapter. Make policy recommendations to Commandant (CG-133).

- Review and validate OERs for administrative and substantive errors with attention given to inconsistencies between the numerical evaluations and written comments (if applicable).

(1) May return any OER requiring significant correction or redaction to the appropriate member of the rating chain. Correct OERs containing minor administrative errors or as directed by judicial or administrative adjudications without return to the rating chain.

(2) The review is not intended to question a rating official's judgment about a subordinate's performance, but to ensure OERs have been prepared in accordance with this Chapter's policies and standards.

(3) Provide final quality control review of OERs containing substantive errors, including "restricted" remarks as outlined in Article 5.I. of this Chapter. Certain corrective measures may be taken to expedite validation of OERs, reviewer comments, OER replies, and addenda.

H. Derogatory OERs. A derogatory OER is any regular or non-regular OER that indicate the reported on officer has failed in the accomplishment of assigned duties.

1. Derogatory reports are only those OERs which:

- a. contain a numerical mark of one in any performance dimension, and/or

- b. contain an “unsatisfactory” mark by the reporting officer in comparison scale or rating scale, and/or
- c. documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position.

K. Replies to OERs. The reported-on officer may reply to any OER. Replies provide an opportunity for the reported-on officer to express a view of performance which may differ from that of a rating official.

- a. Content of Replies. Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 5.I. of this Manual apply. *Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.*
- b. Corrections. Reported-on officer replies do not constitute a request to correct a record. *An officer who believes their OER contains a major administrative or substantive error should follow the procedures to correct military records as outlined in Article 5.N. of this Manual.* This includes requests to have the OER, or a part thereof, removed from the record. Members of the rating chain who, in their review of a reported-on officer’s reply, concur with the reported-on officer that an error may be present in the OER, must return the reply to the reported-on officer and assist that officer in following the procedures of Article 5.N. of this Manual.

#### N. Correction of OERs and Military Records.

1. Quality of Comments. Comments in the OER must be sufficiently specific to present a complete picture of the reported-on officer’s performance and qualities during the period. They should be both reasonably consistent with the numerical marks assigned. On those marks indicated by Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) as not being supported, the rating chain must either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided.
2. Comments.
  - b. Marks and comments may be changed only by the original supervisor and reporting officer.
  - c. All changes to the original OER must be initialed.
  - d. The signature dates must be adjusted to reflect the date that the necessary changes and reviews were actually made. Reported-on officers must be afforded an opportunity to review and sign the updated OER.
- (4) Correction of Military Records. Coast Guard officers are encouraged to review their record periodically. While Commander (CG PSC) attempts to ensure that OERs accurately reflect officers’ performance, the possibility of administrative or substantive error still exists. Accordingly, officers may seek correction of any OER, or any portion thereof, if in their opinion the report is in error.
  - a. Those officers wishing to exercise this right should follow the procedures to correct military records contained in Correcting Military Records, COMDTINST 1070.1 (series) for forwarding the

application to the Personnel Records Review Board (PRRB) or Board for Correction of Military Records (BCMR), as appropriate.

- b. The application may be forwarded through the original rating chain at the officer's option. If the whereabouts of the original members of the rating chain are unknown, officers should submit the application directly to the PRRB or BCMR. Additionally, an officer may forward their application via the officer's current chain of command but is not required to do so and may send the application directly to the PRRB or BCMR.

### **Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1D (January 2018):**

#### Chapter 1

A. Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and reviews who present *independent views* and ensure fairness, accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure. The rating chain consists of the Reported-on Officer, the Supervisor, the Reporting Officer, and the Reviewer (if applicable).

#### 1. Reported-on Officer.

The Reported-on Officer is the subject of the OES. All Coast Guard commissioned officers are evaluated periodically except reserve officers on the Inactive Standby List and Retired Officers Recalled to Active Duty. The Reported-on Officer shall:

- a. Learn the intent and procedures of the OES and identify the members of the rating chain from the unit's published list.
- b. Be responsible for managing their performance and requesting mid-term counseling from their rating chain. This responsibility entails determining job expectations, obtaining sufficient performance feedback from the Supervisor during the period, and using that information to meet or exceed standards. Request an appointment with the Supervisor at the beginning and during each reporting period, if clarification of duties and areas of emphasis is needed. This information may be delineated on the Officer Support Form (OSF), Form CG-5308, or other format as specified by the Supervisor. A meeting shall be requested as soon as possible after reporting aboard a new unit. Officers in the grades of ensign and lieutenant (junior grade) must also request initial, mid-term, and end-of-period meetings with their Supervisors.
- c. Ensure the required mid-term counseling session takes place and is documented.
- d. Forward the OER to the Supervisor not later than 21 days before the end of the reporting period.
- e. Submit to the Supervisor, not later than 21 days before the end of the reporting period, a listing of significant achievements or aspects of performance which occurred during the period along with a copy of their updated Employee Summary Sheet (ESS). The Officer Support Form

(OSF), Form CG-5308, is optional, but highly recommended, for all officers except ensigns and lieutenants (junior grade). Supplemental information may be submitted through the end of the reporting period.

- f. Notify the Supervisor not later than 21 days before the end of the reporting period if the Reported-on Officer desires an end-of-period meeting.
- g. If the Reported-on Officer declines to draft an addendum they shall so indicate by attaching the following statement: "I am aware of the contents of the performance report and decline comment." An addendum by the Reported-on-Officer must be made within 14 calendar days of receipt of the OER unless an extension is specifically requested and received from CG-PSC-OPM-3 or CG-PSC-RMP-1. If the Reported-on-Officer fails to provide either an addendum or the above statement within 14 days, the Reporting Officer shall forward the OER to the Reviewer noting that an addendum was solicited and not received. In such cases, the Reviewer shall complete Reviewer Comments on the OER in Block 6, specifically stating that a Reported-on Officer addendum was solicited but not received. If this space is already filled, then the Reviewer must address this on an addendum.
- h. The Reviewer ensures that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reviewer finds otherwise, they return the report to the Reporting Office for additional information and/or clarifying comments. Substantive changes to the OER require its return to the Reported-on Officer to provide another 14-day opportunity for the Reported-on Officer to revise the addendum.
- i. If no substantive changes are required and after the addendum process has been completed the Reviewer signs and dates the OER.
- j. The Reported-on Officer must review and sign (handwritten or electronic signature) the OER after the Reviewer has signed prior to submitted the OER to CG PSC-OPM-3 or CG-PSC-RPM-1.
- k. Since the above procedure does not constitute a request for correction of the record, the Reported-on Officer limits the addendum to a maximum of two single-spaced pages (8 1/2" x 11", 1" margins) typed on one side with no enclosures (font Times New Roman, minimum, 12 point font size). Rating chain members, addressing the Reported-on Officer's addendum, must each limit their comments to a maximum of one single-spaced page (8 1/2" x 11", 1" margins) typed on one side with no enclosures (font Times New Roman, minimum 12 point font size).
- l. Addendum comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. All prohibited comments outlined in Article 5.I. of reference (a) and Article 4.B. of this Manual apply. Comments pertaining strictly to interpersonal relations or personal opinion of the abilities or qualities of a rating chain member are not permitted.
- m. The Reported-on Officer's addendum does not constitute an official request for correction of a record but provides the Reported-on Officer an opportunity to explain the failure or provide their view of the performance

in question. Commenting or declining comment does not preclude the Reported-on Officer from filing an official request for correction of the record as per Reference (b) or submitting a Reported-on Officer OER Reply per Article 5.K. of Reference (a) and Chapter 17 of this Manual. Refer to Appendix D for an outline of the OER addendum process.

- n. After completing the addendum, the Reported-on Officer forwards the OER along with the addendum to the Supervisor. The Supervisor must be afforded the opportunity to address the Reported-on Officer's addendum. In all cases, the rating officials each endorse the addendum by signature at a minimum. The Supervisor will then forward the OER and attachments to the Reporting Officer.
- o. If the Reported-on Officer declines to draft an addendum they shall so indicate by attaching the following statement: "I am aware of the contents of the performance report and decline comment." An addendum by the Reported-on Officer must be made within 14 calendar days of receipt of the OER unless an extension is specifically requested and received from CG PSC-OPM-3 or CG-PSC-RPM-1. If the Reported-on Officer fails to provide either an addendum or the above-statement within 14 days, the Supervisor shall forward the OER to the Reporting Officer noting that an addendum was solicited and not received. In such cases, the Reporting Officer shall prepare the Comments Form, CG-5315, specifically stating that an addendum was solicited and not received.
- p. The Reporting Officer ensures that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reporting Officer finds otherwise, they return the report to the Supervisor for additional information and/or clarifying comments. Substantive changes to the OER require its return to the Reported-on Officer to provide another 14-day opportunity for the Reported-on Officer to revise the addendum.
- q. If no substantive changes are required and after the addendum has been completed the Reporting Officer signs and dates the OER.
- r. Since the above procedure does not constitute a request for correction of the record, the Reported-on Officer limits the addendum to a maximum of two single-spaced pages (8 1/2" x 11", 1" margins) typed on one side with no enclosures (font Times New Roman, minimum 12 point font size). Rating chain members, addressing the Reported-on officer's addendum, must each limit their comments to a maximum of one single-spaced page (8 1/2" x 11", 1" margins) typed on one side with no enclosures (font Times New Roman, minimum 12 point font size).
- s. Addendum comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. All prohibited comments outlined in Article .I of Reference (a) and Article 4.B. of this Manual apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.

## C. The Comments Form, CG-5315

This form is only authorized to be used in two situations.

## 1. Form CG-5310B.

- a. The Supervisor uses the Comments Form, CG-5315, to substantiate substandard marks if there is not adequate space in Section 3 on CG-5310B. The use of the Comments Form, CG-5315, indicates the presence of substandard marks.
- b. The Reporting Officer uses the Comments Form, CG-5315, to document when the Reported-on Officer is unavailable or refuses to sign the OER.
- c. The Reporting Officer uses the Comments Form, CG-5315, to document when the Reported-on Officer is unavailable or did not complete the required mid-term counseling.

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission, applicable law and regulations, and Coast Guard policy:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).
3. As the JAG noted, the applicant did not submit a reply to the disputed OER within 45 days of receiving it, and he failed to apply to the PRRB to request correction of the OER. Nor did he file an official EO complaint with the Civil Rights Office upon receiving the OER. However, filing a reply to an OER is not a means of correction; the PRRB's jurisdiction ends one year after the disputed document is entered in the record; and an EO complaint must be filed within 90 days of the alleged retaliation. Therefore, the once-available administrative remedies are no longer available to the applicant. Failure to exhaust an administrative remedy that is no longer available does not remove the BCMR's jurisdiction,<sup>4</sup> but it is substantial evidence that the applicant considered the OER valid when he received it.
4. The applicant asked the Board to correct his record by removing his 2018 OER, alleging it is erroneous and unjust, and replacing it with either of his Supervisor's drafts of the OER. In 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,

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<sup>4</sup> 33 C.F.R. § 52.13.

and that applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>5</sup> Absent specific 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>6</sup> In addition, to be entitled to correction of an OER, which is signed by a rating chain of three superior officers, an applicant must prove by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factor “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>7</sup>

5. At the outset, the applicant claimed that the actions of certain Coast Guard officials in his rating chain were in violation of the Health Insurance Portability and Accountability Act (HIPAA) and that the negative marks and comments in the disputed OER were reprisal for his report of the violation on April 20, 2018. HIPAA governs the confidentiality of medical records and regulates how and under what circumstances “covered entities” may use or disclose protected health information about an individual, *see* Social Security Act § 1177, 42 U.S.C.A. § 1320d-6. HIPAA applies only to the disclosure of protected medical information by a covered entity, defined by statute as a health plan, health clearing house, or healthcare provider. Social Security Act § 1177, 42 U.S.C.A. § 1320d-6. Accordingly, any claims by the applicant of a HIPAA violation by a member of his rating chain lack merit since they do not fit within the statutory definition. Nothing in HIPAA prevented the SRO from requesting more information about a member’s child’s disability before deciding whether to grant the member permission to be absent from a drill weekend.

6. The fact that the SRO’s request for more information about the child’s disability was not a violation of HIPAA does not end the question of retaliation, however, because even an erroneous allegation of a statutory violation could theoretically incur retaliation that is prohibited under the Military Whistleblower Protection Act. However, in this case, the preponderance of the evidence indicates that the applicant’s communications issues with the SRO and the chain of command had an adequately documented basis in the records presented in this case.

7. Under Chapter 2.B.1. of the Reserve Policy Manual, reservists’ drills are scheduled throughout the year by the Command. Chapter 2.E. the Reserve Policy Manual provides guidance on reservists’ absences from drills. It states that “Commands may grant an excused absence based on a reservist’s prompt notification and submission of adequate justification.” Therefore, reservists must justify their need to be excused from a drill to the satisfaction of their commands. The record shows that the SRO had the authority and discretion to excuse Base reservists’ absences from drills or not, and the applicant has not proven by a preponderance of the evidence that it was unreasonable, much less illegal, for the SRO to require more information about the level of disability of the ET2’s child before concluding that the ET2’s absence from a scheduled drill weekend should be excused. But the applicant appears to have assumed a statutory violation by

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<sup>5</sup> 33 C.F.R. § 52.24(b).

<sup>6</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).

<sup>7</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).



the SRO where there was none and, instead of working to enhance understanding and dissipate resentment, by his own admissions, he apparently helped build resentment against the SRO.

8. The applicant submitted two statements from other members supporting his claim that the SRO and other leaders created a “hostile work environment” among the Reserve force at the Base. But he apparently never filed a complaint with the Civil Rights Office so that these claims could be investigated. Without a report of investigation or more evidence, particularly evidence of how the SRO treated the applicant himself, the Board finds the evidence of a “hostile work environment” insufficient to overcome the presumption of regularity accorded the SRO and the rest of the Command Cadre at the Base.

9. The applicant argued that his Supervisor’s recommendations for the SRO’s section of the OER should prevail, but consistent with the OES Procedures Manual, a rating chain provides an assessment of the officer’s performance and value to the Coast Guard through a system of multiple evaluators and reviewers who present *independent views* of the officer’s performance. The applicant’s rating chain on his 2018 OER, consistent with Coast Guard guidance, appropriately consisted of his Supervisor, Reporting Officer, and the Reviewer. The fact that the applicant’s Supervisor had a much better impression of his performance than his Reporting Officer/SRO and his OER Reviewer, and the fact that he received better OERs before and after the reporting period for the disputed OER, is not evidence that the disputed evaluation does not accurately reflect the applicant’s performance during the reporting period.<sup>8</sup>

10. To get an OER corrected or removed, an applicant must prove by a preponderance of the evidence that the OER is adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>9</sup> But the applicant has not shown that the disputed OER was adversely affected by a misstatement of significant hard fact; a factor that should not have affected the rating process; or a prejudicial violation of a statute or regulation. There is no evidence of bias or a prejudicial violation of law or policy, and the applicant has not shown that the SRO’s comments in the OER are false or that his assessment of the applicant was retaliatory. Accordingly, the applicant has not proven by a preponderance of the evidence that his 2018 OER is erroneous or unjust or that it should be removed and replaced with a prior, draft version of the OER.

11. The applicant also requested that the Form CG-5315 dated June 18, 2019, with Reviewer Comments be removed from his record. Pursuant to Chapter 5.B. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1D (January 2018), an OER Reviewer may add comments to an OER to “explain or reconcile discrepancies or conflicts reflected in the completed report, if these inconsistencies cannot be resolved by returning the report to the concerned rating chain members or through personal discussions.” To add those comments, the Reviewer is supposed to check a box that opens up a block for comments on the pdf fillable OER form before signing it. In this case, PSC determined that the comments needed to be added to reconcile the discrepancies between the Supervisor’s and Reporting Officer’s evaluations after

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<sup>8</sup> *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) (“[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.”).

<sup>9</sup> *Hary*, 618 F.2d at 708, cited in *Packert*, 20 CL. Ct. at 71 and *Lindsay*, 295 F.3d at 1259.

the OER Reviewer had already signed it and so the CG-5315 Reviewer's Comment form was used. Under Chapter 5.C. of the manual, the use of a CG-5315 is supposed to be limited the following circumstances, which were not applicable in this case:

- (a) The Supervisor uses the Comments Form, CG-5315, to substantiate substandard marks if there is not adequate space in Section 3 on CG-5310B. The use of the Comments Form, CG-5315, indicates the presence of substandard marks.
- (b) The Reporting Officer uses the Comments Form, CG-5315, to document when the Reported-on Officer is unavailable or refuses to sign the OER.
- (c) The Reporting Officer uses the Comments Form, CG-5315, to document when the Reported-on Officer is unavailable or did not complete the required mid-term counseling.

Therefore, the Reviewer entered his comments on the wrong form, the CG-5315, because he entered them after he signed the disputed OER. The applicant has not shown that the use of the blank form *per se* prejudiced him, however, and the Reviewer's comments on the CG-5315 somewhat ameliorate the impact of the Reporting Officer's assessment because the Reviewer stated that he would have assigned the applicant a higher comparison scale mark, which is arguable the most important mark on an OER. As the Board is not removing the disputed OER from the applicant's record, the Board believes it would be a disservice to the applicant to remove the Reviewer's comment page from the OER just because of the different format. Therefore, this request for relief should also be denied.

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

