

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-110


CDR (O-5)

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 April 29, 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 18, 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 Commander (CDR/O-5) on active duty, asked the Board to correct his record by removing his annual Officer Evaluation Report (OER2), which was acknowledged by him on July 7, 2019, and replacing it with a previous version of the OER, which he had acknowledged on May 16, 2019 (OER1). (Both OER1 and OER2 covered the evaluation period April 1, 2018, to March 31, 2019, but the Coast Guard Personnel Service Center (PSC) allowed the rating chain to withdraw OER1 and replace it with OER2.) The applicant also asked that, if this relief is granted, the PSC be directed to convene a special selection board to reconsider his non-selection for promotion to Captain (O-6) in July 2019.

During the evaluation period for the disputed OER, the applicant was the commanding officer (CO) of a cutter. He had assumed command in April 2017 and received a strong annual OER in the spring of 2018. For his second year as the CO, from April 1, 2018, to March 31, 2019, the applicant first received OER1, which he acknowledged and signed on May 16, 2019. However, after OER1 was completed and validated by PSC for entry in his record, it was withdrawn and replaced with a revised OER with some lower marks (OER2), which was acknowledged and signed by the applicant on July 7, 2019.

The applicant contended that his record should be corrected because “[t]he Coast Guard did not follow proper procedures or policies to complete my 2019 annual OER, when they removed a signed and approved May 16, 2019, OER from my record and replaced it on July 7, 2019.” The

applicant further contended that the changes made to the May 16, 2019, OER by his command were substantive, not administrative, and so were made without proper authority. The applicant stated that he did submit an appeal to the Coast Guard Personnel Records Review Board (PRRB), and he alleged that in denying his request, the PRRB did not follow proper procedures and incorrectly interpreted Coast Guard policies. In a memorandum to the BCMR dated April 8, 2020, the applicant rebutted the PRRB's decision and explained why he believes OER2 should be removed and replaced with OER1. Because the BCMR is not an appellate board and reviews all matters *de novo*, the applicant's allegations about the PRRB and its decision will not be included here, but his remaining allegations are summarized below.

Allegation that Surveys Show Improved Climate Aboard Cutter

First, the applicant stated that, contrary to the PRRB's conclusion, he is not claiming that the DEOCS Command Climate Survey was incorrect. In fact, he clearly stated the opposite. The applicant stated that those surveys show that when he received command of the cutter,

[t]he workplace climate was extremely poor (red). Over the course of 2 years, [he] transformed the working environment into a healthy and productive climate (green/blue). The assessment tools referenced in [his] PRRB package are the Coast Guard-recommended assessment tools to evaluate a command's workplace climate. [He is] perplexed by the PRRB's conclusion that [his] appeal package was attempting to discount the surveys during [his] time onboard. By including the DEOCS surveys, [his] intent was to demonstrate to the PRRB that [he] was using the best Coast Guard tools available to assess onboard climate, and that by [his] crew's account the [cutter] was a healthy shipboard environment.

Allegation of Procedural Error: Improper Withdrawal of Validated OER

Second, the applicant stated that, contrary to the PRRB's analysis, his principal argument is that PSC violated Coast Guard policies when they authorized OER1 to be pulled from his record and replaced with OER2. While the PRRB concluded that COMDTINST M1000.3A, Chapter 5.B.3.b.1., authorized PSC to review and return an OER requiring correction before validating it, the applicant argued that it does not apply to already validated OERs. He pointed out that Chapter 5.B.3.b states that PSC's OER role is to "review and validate OERs for administrative and substantive errors with attention given to inconsistencies between the numerical evaluations and written comments." Then, under Chapter 5.B.3.b.1, if the review shows that the marks and written content do not match, PSC "may return any OER requiring significant correction or redaction to the appropriate member of the rating chain." The applicant argued that these policies clearly apply to PSC's pre-validation review, not to already validated OERs. He noted that Chapter 18 of the OER manual, PSCINST M1611.1D, "also describes CG PSC's role regarding OER reviews and occasions for returning an OER with known administrative errors." He stated that OER1 was not removed by PSC because of administrative or substantive errors it discovered during its review and then returned to my chain of command for correction before validating it, as allowed by the Chapter 5.B.3.b.1. Instead, PSC's review resulted in OER1 begin validated. But then, his rating chain wanted to change it after it had been validated, and PSC let them withdraw and replace it.

He provided the following timeline:

- a. 16 May 2019 – OER1 is completed, signed, and submitted to OPM3.
- b. 24 May 2019 – Letter from OER Reviewer about pulling OER1.
- c. 3 June 2019 – Area Chief of Operations visited the applicant’s cutter.
- d. 12 June 2019 – Area Command initiated a command climate investigation.
- e. 21 June 2019 – Area Chief of Operations initiated revision of OER1 to OER2.
- f. 2 July 2019 – Applicant was shown draft OER2.
- g. 3-5 July 2019 – Applicant appealed to his chain of command regarding disproportionate marks and content that had occurred outside the rating period or was not supported.
- h. 6 July 2019 – Applicant received final version of OER2 and acknowledged it.
- i. 7 July 2019 – With no time to submit an OER Reply before the selection board met, the applicant opted to address the OER in a letter to the Captain Selection Board.
- i. 8 July 2019 – Captain Selection Board convened and did not select the applicant.
- j. 19 July 2019 – The applicant’s tour of duty as the CO ended.
- k. August/September 2019 – The Area Command finalized the investigation.

Moreover, the applicant alleged, his rating chain withdrew OER1 “based on a speculative hunch and held [it] in abeyance pending further inquiry,” which PSC improperly allowed. He argued that there is no Coast Guard policy that authorizes a rating chain to remove a signed and approved OER from an officer’s record, much less based on a suspicion that they might change their assessment of the officer’s performance if they investigate further. In essence, the applicant argued, PSC improperly removed a validated OER and permitted an extended 2.5-month observation period, which ended on June 21, 2019, contrary to policy.

The applicant stated that the Coast Guard has procedures that allow a rating chain to document past performance that was not known when the original OER was prepared, and those processes afford due process to the officer being evaluated, but his rating chain and PSC ignored those procedures.

Allegation of Procedural Error: Insufficient Time to Reply

Third, the applicant stated that when an officer has an upcoming selection board, as he did, the manual requires timely submission of OERs so that they will be in the record and the reported-on officer has a chance to submit an OER Reply. However, he had no chance to submit an OER Reply, and the PRRB failed to address why the deviation from policy was allowed in his case. He stated that by permitting his OER to be removed and altered one day before the Captain Selection Board convened, PSC circumvented and denied him the safeguards and due process that the manual affords officers at critical career milestones. He also claimed that it was the approach of the Captain selection board that motivated his chain of command’s decision to pursue a “soft kill” amended OER (OER2), which denied him due process and still destroyed his promotion potential. He alleged that their actions drew the attention of Commander, PSC who called the Area Chief of

Staff on July 8, 2019, to discuss the irregular circumstances surrounding OER2. And the following year, the “roadshow representatives of CG PSC highlighted the importance of administrative due process and timely OERs during senior leader engagements, and the need to follow CG PSC published guidance regarding the OER review process. These actions highlight that CG PSC established and reaffirmed OES regulations that were previously violated during the processing of [the applicant’s] 2019 Annual OER.”

OER Reviewer’s Action

Fourth, the applicant alleged that his OER Reviewer, CAPT C, who was the Chief of Area Operations, “was the primary driver of all decisions in this matter and directed the ‘soft kill OER’ course of action in violation of Coast Guard policy.” He stated that the information that the Reviewer found so “disconcerting”—according to her declaration to the PRRB—was already available to his entire rating chain when OER1 was prepared in May 2019. And yet not until June 21, 2019, almost two months after the reporting period for the OER ended, did the Reviewer decide to change the applicant’s OER. The applicant stated that he was not even given the opportunity to discuss the allegations against him with his Supervisor, CAPT M, who was the Chief of Cutter Forces, and his Reporting Officer, CAPT L, who was the Chief of Maritime Forces until they had been transferred away and had already prepared OER2. He also noted that his OER Reviewer was responsible for preparing the OERs of both of those officers. The investigator for the Area also reported directly to the OER Reviewer.

To support his application, the applicant submitted the PRRB’s decision; the memo he submitted to the PRRB on October 10, 2019, in support of his request to remove OER2; copies of OER1 and OER2; the Area Chief of Operations letter advising the applicant that OER1 was being pulled from OPM; the cutter’s DEOCS survey from just before the applicant assumed command; the cutter’s DEOCS survey from 6 months into his command; the cutter’s DEOCS survey from 1.5 years into his command; and the cutter’s Equal Opportunity Review from June 2019.

SUMMARY OF THE RECORD

The applicant is a graduate of the Coast Guard Academy and has served continuously with this Coast Guard since his commissioning. During his career, the applicant has received consistently strong OERs. He served as the CO of a 110-foot patrol boat for two years as an LT/O-3; was promoted to LCDR/O-4 in 2008; and then worked at Headquarters as a liaison before serving as the CO of a 225-foot buoy tender for three years. He attended the Naval War College and was promoted to CDR/O-5 in 2014.

From April 2017 to August 2019, the applicant served as the CO of a large cutter with a crew of more than a hundred officers and enlisted members. Three months before the applicant took command, in January 2017, the cutter underwent a DEOMI Organizational Climate Survey of the cutter’s workplace climate regarding organizational effectiveness, equal opportunity, and sexual assault prevention and response. The results were extremely poor as the survey showed that the crew’s perceptions were “markedly less favorable than those held across [the] Service” in almost every category, including, for example, trust in leadership, job satisfaction, and exhaustion;

racist, sexist, and demeaning behavior; and the reporting climate for sexual assault, barriers to reporting, and support for victims from the chain of command.

In November 2017, six months after the applicant took command of the cutter, another DEOMI Organizational Climate Survey was conducted with very different results. The crew's perceptions were average, above average, or excellent for every category.

The applicant received three regular, annual OERs for his tour of duty as the CO. The first, dated March 31, 2018, contains very high marks and laudatory comments and is not disputed.

In October 2018, a third DEOMI Organizational Climate Survey was conducted, and the results were even better, with about half above-average responses and half excellent responses.

The applicant's second OER as the CO, dated March 31, 2019, is the disputed OER in this case, and the circumstances of its entry in his record were unusual, as explained below.'

OER1, Acknowledged by Applicant on May 16, 2019

On May 16, 2019, the applicant acknowledged receipt of his annual OER for the year ending March 31, 2019 (OER1). OER1 was electronically signed by his Supervisor, CAPT M, who was the Chief of Cutter Forces, on May 13, 2019; by his Reporting Officer, CAPT L, who was the Chief of Maritime Forces, on May 14, 2019; and by his Reviewer, CAPT C, the Area Chief of Operations, on May 15, 2019. The applicant acknowledged OER1 with his signature on May 16, 2019.

According to an email from one personnel specialist at PSC to another, dated May 20, 2019, PSC-OPM-3 had reviewed and validated OER1 on May 17, 2019, and then forwarded it to PSC's business office (BOPS) for scanning and entry in his electronic record. PSC also entered the numerical marks from OER1 in the Employee Record section of the Coast Guard's database, where the applicant was able to see and take a screen-shot of them, which he submitted to the BCMR as evidence." The applicant received very high marks and praise in OER1. 'For the section evaluating his Performance of Duties, on a scale from 1 (worst) to 7 (best), he received six marks of 7 (for Planning and Preparedness, Using Resources, Results/Effectiveness, Adaptability, Professional Competence, Speaking and Listening) and one mark of 6 (for Writing) with consistently laudatory supporting comments."

For the section evaluating his Leadership Skills, the applicant received five marks of 7 and one mark of 6. The comments for this section were as follows:

Responded to highly charged berthing area incident perfectly, held crew meetings, re-structured berthing area personnel to provide wider range of ages/maturity, changed leadership within depts; effort kept unit cohesion/effectiveness high. Consistently submitted for CG wide recognition for high performers; nominations were of highest quality. Created forums to improve mentoring/ldership for CPOs/JOs. Built partnership w/remote [redacted] villages thru COMREL events. Hosted USN SEALS, [redacted] nat'l guard aviation, & MSRT-W for cold wx [water] hook & climb/fast rope trng, built strong team that was able to adjust as wx forced a change to opareas; resulted in safe, valuable trng op. Dedicated to continuous improvement of onboard climate thru LDAC & people plan revision/adjustments/adherence, efforts resulted

in continued positive trend in DEOCS survey & onboard morale. Completed 18 OERS, approved 197 EERs all on time & high quality.

For the section evaluating his Personal and Professional Qualities, the applicant received all 7s (Initiative, Judgment, Responsibility, Professional Presence, Health and Well-Being). The comments for this section were as follows:

Continually looked for new paths to improvement; found projs w/most return on investment & succeeded. Sought out depot level support to challenging IT network hardware issues created by years of patchwork, resulted in improved perf & security; created model for future updates. Safely conducted CG's highest risk ops in world most hazardous environments. Took warranted risk to facilitate mission objectives. Upon failure of davit made best decision to safely xsit cutter boat >200 nm in heavy wx to nearest port. Exceptional diligence/deliberation before conducting short-notice drug screening for 100% of crew. Distinguished CG rep during mult int'l engagements w/[redacted]. Presided over 3 retirements & burial at sea. Dedicated to improving unit health.

When compared to other officers in the same grade, the applicant received a mark for "One of the few distinguished officers" (a mark in the sixth spot of seven on the comparison scale), and his promotion scale mark was "In-zone reorder," (a mark in the fifth spot of six on the promotion scale), meaning that his Reporting Officer recommended that he be promoted and then ranked above the others selected for promotion to Captain on the Active Duty Promotion List. The Reporting Officer's comments were as follows:

Exceptional performance in second year as CO. Unavoidable casualties forced frequent high consequence decisions; all flawless. Results on par w/any WHEC/WMSL in same AOR. Garnered absolute trust of [Area Command] and D[X] leadership thru savvy displayed in high viz operations, engagements, public affairs events, & personnel challenges. Unlimited potential for assignment to CG's most demanding & high visibility assignments. Proven ability to work across inter-agency, state, local, tribal stakeholders while advancing national and service strategic interests. Assign to CGs most demanding positions such as Congressional Affairs, White House, Personnel Services Command, COMDT staff, DOD/other Liaison. Has my highest possible recommendation for WMSL and Sector Command at earliest opportunity. Highly recommend for promotion to O6 with top 5% of peers.

The applicant provided a screen shot of his Employee Record in the Coast Guard's database which shows that the numerical marks from OER1 were entered in his database after OER1 was validated by PSC-OPM.

May 24, 2019, Memorandum from CAPT to the Applicant

On May 24, 2019, the applicant received a letter from his OER Reviewer, CAPT C, regarding the command climate on board his cutter. CAPT C stated that recent EEO complaints from the applicant's crew had indicated a workplace climate that was rife with harassment and maltreatment. CAPT C stated that a Coast Guard Investigative Services investigation had documented that much of the ongoing harassment was known to members of the Chiefs' Mess and Wardroom. CAPT C also stated that the culture described by the CGIS investigation did not honor the applicant's philosophy of "Honor/Respect: Shipmates Taking Care of Shipmates." CAPT C directed the applicant to take immediate action to remedy the climate aboard his ship. The applicant was further directed to send a written report of his actions to CAPT C by June 15, 2019. CAPT C stated that the written report should include all actions the applicant had taken from October 2018

to the present, specifically addressing the actions he took upon notification of the following events: 1) in October 2018, an FN had reported a culture of harassment onboard the ship in which she named perpetrators and officers who were aware of the harassment; 2) in March 2019, an ET3 had named specific perpetrators of harassments; 3) in March 2019, CGIS had informed the applicant of a continued culture of harassment; and 4) an SA had indicated that she had experienced a hostile workplace aboard the cutter. Finally, the applicant was instructed to conduct a holistic review of the overall climate aboard the ship and his actions to address such negative influence on his cutter's climate. CAPT C concluded by notifying the applicant that he had temporarily removed the applicant's 2019 OER from his record with OPM concurrence.

EO Review

From June 19 to June 20, 2019, the Coast Guard's Civil Rights Directorate conducted an on-site Equal Opportunity (EO) Review for the cutter through focus groups where the respondents were encouraged to provide their candid impressions about the command's overall equal opportunity climate and to openly and honestly express workplace climate concerns. Seventy percent of the unit participated in the EO Review, followed by an in brief and out brief where the applicant was present. To protect the anonymity of the focus group participants, the EO Review Team provided results based on themes articulated, identified, and explored. The groups shared generally positive comments about the cutter's leadership, morale, organizational effectiveness, professional development, recognition, and the local community, and they expressed concerns regarding communication, berthing, investigation fatigue, equal opportunity, and inappropriate conduct. The EO Review Team was to contact the command within a week after the report was issued to provide technical assistance and guidance to support measures to address the areas of concern. Regarding EO and inappropriate behavior, the responses of the majority of focus group respondents were summarized as follows:

[T]he unit does not have a problem with these issues, however, multiple respondents also state improvements could be made, especially in regards to inappropriate comment/jokes and gender equity. Multiple Focus group respondents also stated that they have witnessed junior enlisted personnel at the unit making comments or jokes that went beyond, or could be perceived as going beyond, what is appropriate for a professional workspace. Regarding concerns specific to gender, it was expressed that female personnel at the unit were not always invited to meetings that they should be a part of given their rank/position, and that their ideas were sometimes dismissed in ways that some focus group respondents interpreted as being connected to their gender.

In regards to identified positive practices, all focus groups stated that Civil Rights Directorate posters and related Commandant Policy Statements are posted at the unit. All focus groups reported the command has made concrete efforts to address identified concerns through actions like reorganizing the 52-Man Berthing, investigating issues, and rearticulating/discussing related Commandant Policy Statements with personnel at the unit. Several focus groups also indicated issues that would be swept under the rug at other units were addressed at this unit.

OER2, Acknowledged by Applicant on July 7, 2019

The applicant signed OER2, a revised version of OER1, on July 7, 2019, after his rating chain signed it on July 5 and 6, 2019; this is the disputed OER in this case. Several of the applicant's evaluation marks were significantly lowered from OER1 to OER2. Overall, instead of the sixteen marks of 7 and two marks of 6 that he had received in the performance categories on

OER1, the applicant received ten marks of 7, five marks of 6, and three marks of 5 on OER2. In addition, his comparison scale mark was lowered from the sixth spot (“One of few distinguished officers”) to the fourth spot (“One of the many high performing officers who form the majority of this grade”). And on the promotion scale, he received a mediocre mark of “Promote,” in the third of six spots.

Specifically, although the marks and comments for the Performance of Duties section did not change, in the Leadership Skills section, the applicant’s Supervisor assigned him two marks of 5 (Looking Out for Others, Workplace Climate), two marks of 6 (Developing Others, Evaluations), and two marks of 7 (Directing Others, Teamwork) from his Supervisor, CAPT M. The comments for this section are as follows:

Responded to highly charged berthing area incident, held crew meetings, re-structured berthing area personnel to provide wider range of ages/maturity, changed leadership within depts; effort kept unit cohesion/effectiveness high. Consistently submitted for CG wide recognition for high performers; nominations were of highest quality. Created forums to improve mentoring/ldership for CPOs/JOs. Built partnership w/remote [redacted] villages thru COMREL events. Hosted USN SEALS, [redacted] nat’l guard aviation, & MSRT-W for cold wx hook & climb/fast rope trng, built strong team that was able to adjust as wx forced a change to opareas; resulted in safe, valuable trng op. Dedicated to continuous improvement of onboard climate thru LDAC & people plan revision/adjustments/adherence. Did not take adequate action or inform chain of command of multiple negative cmd climate situations &/or indicators which led to inhospitable climate for some crew. Completed 18 OERs, approved 197 timely, accurate EER. [Emphasis added.]

For the section evaluating his Personal and Professional Qualities, the applicant received one mark of five (Responsibility); two marks of 6 (Judgment, Health and Well-Being), and two marks of 7 (Initiative, Professional Presence) from his Supervisor. The comments for this section are as follows:

Continually looked for new paths to improvement; found projs w/most return on investment & succeeded. Sought out depot level support to challenging IT network hardware issues created by years of patchwork, resulted in improved perf & security; created model for future updates. Safely conducted CG’s highest risk ops in worlds most hazardous environments. Took warranted risk to facilitate mission objectives. Upon failure of davit made best decision to safely xsit cutter boat > 200nm in heavy wx to nearest port. Exceptional diligence/deliberation before conducting short-notice drug screening for 100% of crew. Distinguished CG rep during multiple int’l engagements with [redacted], incl several at sea exchanges. Presided over 3 retirements & 1 burial at sea. Dedicated to improving unit health. Self initiated rehab of [port] wifi bldg. increasing habitability/liberty options.

In addition, after lowering the applicant’s marks on the comparison and promotion scales, the Reporting Officer substantially revised his comments as follows:

Operational performance on par w/any WHEC/WMSL in same AOR. Balanced high risk operations in very challenging and remote environment. Unavoidable casualties forced frequent high consequence operational decisions; all flawless. ROO missed key indicators, climate concerns, & behaviors contrary to CG core values in this period of performance. Absence of intrusive actions led to an inhospitable workplace environment & unhealthy culture. Officer is a charismatic leader and high performer; able to learn and recover from an uncharacteristically challenging leadership environment. Officer will undoubtedly grow from this experience and continue to contribute at a high level. Recommended for continued demanding assignments such as Sector Deputy, Congressional staff/fellow, White House, HQ/Area/District ops, response, or force management. Promote with peers.

As the Captain selection board was convening on July 8, 2019, after signing OER2 on July 7, 2019, the applicant provided his views in a personal communication to the President, PY20 Captain Selection Panel. The relevant portions are below:

Workplace Climate: During this period of report, [cutter] has a documented October 2018 DEOCS survey and a recent Civil Rights Directorate Equal Opportunity (EO) Review stating the workplace climate onboard [cutter] is superb, scoring in the Green/Blue (8 out of 10 scale for the EO review). Those are extremely high grades for a [redacted] based cutter, and the crew was overwhelmingly gracious in their comments regarding the command's leadership and positive impact on all shipboard aspects. Despite this favorable shipboard environment, the [cutter] crew has some bad actors who commit misconduct. Commanding Officers cannot control individual behaviors. My job is to ensure the crew understands and applies the COMDT policies, and if they fall short I take action in accordance with COMDT policy and maintain good order and discipline. I have fulfilled my job without question during this period as documented in the draft OER. The above assessments substantiated the crew understood the policies, enjoyed a healthy and positive work environment, and I held those accountable who fell short. Actionable and supportable items that can be directly tied in a positive manner to the workplace climate initiatives throughout the OER.

Misconduct Reports: On March 2019, I received 2 misconduct reports and I immediately informed my chain of command. Given the timing of the March misconduct reports, I was not afforded an opportunity to communicate my handling and deliberations of the personnel situations in my 2019 OSF. In June 2019, [the Area Command] began looking into additional climate concerns about [the cutter]. I was not advised by my Supervisor or Reporting Officer until [July 1, 2019] that my OER was going to be revised. After receiving the revised OER on [July 2, 2019], I was finally afforded an opportunity during counseling to educate my Supervisor of my handling of the personnel situations. While I was afforded minor redress of some marks, the cuts in the revised OER follow a common pitfall outlined in the PSCINST M1611.1 (series) called negative halo error; whereby multiple marks are negatively impacted based on a low rating in one factor (namely workplace climate). To highlight this point, the comments in my OER for Personal and Professional Qualities (3c) are the same as my draft 3c OER comments; yet the marks were downgraded in three categories. The counseling session on [July 6, 2019] only included the Reporting Officer and only covered Leadership Skills (3b) and the Reporting Officer section. I was not properly counseled as to why my marks were lowered in section 3c.

July 7, 2019 OER: The OER contains comments that I disagree with or taken from information gathered outside of the period of report. When counseled by the Reporting Officer, I was informed the comment regarding 'did not inform the chain of command' was in reference to a specific personnel matter. My supervisor and I engaged in a lengthy conversation about that personnel matter in March 2019, a date well before my draft OER was submitted documenting a 7 in all categories of Leadership Skills and evaluations. I was also engaged with [Area] legal from the onset of the matter. I do not concur with the statement the chain of command was not informed. Additionally, if my reporting of this incident was in question it should have been captured in my draft OER. Moreover, my Reporting Officer stated that content from the ongoing [Area Command] assessment was used to substantiate comments throughout the OER and the lowering of the marks in the Reporting Officer section. I am not privy to any of the information that [Area Command] has uncovered during their ongoing engagements with my crew; hence I am unable to substantiate their extrapolations. Notably, during that counseling session, I was presented with my own words, taken out of context and relayed for academic purposes, which had no impact on my performance or conduct during the period. Those words most influenced the Reporting Officer marks. I have been informed that I will not see any information related to these deliberations until [July 19, 2019].

The revised OER marks are the first time I have been out of sync with my rating chain. I am perplexed by the comments in the OER stating I should have done more, responded in a different manner or missed indicators/climate concerns/behaviors. During the counseling sessions, it became clear my rating chain was drawing conclusions from ongoing [Area] discussions with [cutter] crew members concerning our command climate, stating I could have done more to identify the bad actors and alter their behaviors. My attempt to counter their statements during multiple rating chain conversations in recent days was unsuccessful; whereby it was consistently iterated that the CO bears ultimately responsible. I elaborated on my efforts with

documented events implemented this entire period to bolster workplace initiatives in response to ALL indicators; supportable facts of actual events that have known positive outcomes reinforced by crew comments and scores in the DEOCS and the EO Review. These marks and comments from the OER are not substantiated by my record of performance with content that I have been made privy to.

The applicant did not file an OER Reply for inclusion in his record with OER2. He was not selected for promotion to Captain by the selection board that convened on July 8, 2019, or by subsequent selection boards. He continues to serve on active duty in the rank of CDR.

Report of Investigation

On September 5, 2019, CAPT H of the Area Command sent a memorandum regarding the final action on the administrative investigation into the command climate aboard the applicant's cutter. In summation, CAPT H determined that under the applicant's command, the cutter met all mission and operational requirements. However, the Command Climate/Work Environment under the applicant's leadership allowed for and/or encouraged unacceptable conduct, to include excessive alcohol consumption, general harassment, sexual harassment, bullying and hazing.

CAPT H found that the applicant actively, knowingly, and purposely exercised selective adherence to and enforcement of the Coast Guard's Core Values. In rationalizing what should be categorized as "misconduct," the applicant stated that "conduct must be viewed in context." The applicant stated that what would not be acceptable in other locations is simply "entertainment" at his station. CAPT H determined that this philosophy allowed for misconduct, excessive alcohol consumption, hazing, harassment, sexual harassment, and a loss of respect. CAPT H based his finding on multiple facts, including the activities that took place at a bar on November 23, 2018. On that date, the applicant and many members of his crew, including members of the Chiefs' Mess, were at a bar where a command-sponsored morale, welfare, and recreation trivia event was taking place. A bachelorette party was also taking place in the bar. The following are excerpts from CAPT H's report:

As the evening progressed, BM3 [redacted] was approached by the bar tender and solicited to perform a "lap-dance" for the bachelorette party. BMJ [redacted] agreed and proceeded to remove his shirt and "grind up on" a local female. A short time later, EMCS [redacted], the senior most enlisted member onboard [the cutter], proceeded to remove his clothes and conduct a lap-dance on a male ensign assigned to the [cutter]. The Commanding Officer [the applicant] was present and encouraged this activity through laughing and clapping until such time that EMCS [redacted] removed his pants and was dancing in front of the ensign in his underwear (boxer shorts). In addressing the lap dances, the Commanding Officer viewed it as [redacted location] entertainment, while not acceptable elsewhere, in the "blue-collar" town of [redacted], it was considered acceptable behavior by the Commanding Officer at this [redacted] establishment. It was reported that the Commanding Officer appeared to be drunk and was heard saying "if there are no photos or videos it didn't happen."



Under [the cutter's] unwritten tap-out program, members could drink to excess knowing they would be taken back to the cutter without consequence. The policy charged and allowed the cutter's Shore Patrol to identify members who, due to alcohol intoxication were drunk or otherwise unable to take care of themselves, to order them back to the cutter. The shore patrol would then transport each member that was tapped-out back to the cutter without consequence. Many of the members tapped-out by the shore patrol should have been evaluated and/or screened for alcohol dependency/abuse or considered for a documented Alcohol Incident. However, the method in which the tap-out program was administered, members who should have been considered for a documented alcohol incident, or other administrative or disciplinary actions, were simply returned to the cutter with no follow-up. As reported by multiple members, the tap-out program was very active, with

multiple members being routinely tapped-out for public intoxication. One crew member stated [redacted] port calls would "destroy" people, crewmembers looked "inhuman" based on the amount of alcohol they drank. Multiple non-rates were well known for drinking. Several members of the Chiefs Mess to include [three names redacted] were witnessed "stumbling" around after drinking. [Two names redacted] were described as "sloppy drunks." EMCS [redacted] was known by the Commanding Officer to be a heavy partier. Only one member of the Chief's Mess has been referred to alcohol screening or otherwise held accountable for the excessive public drinking. The excessive drinking and resulting behavior has caused the Chiefs Mess to lose the credibility and respect of some members of the crew.



I fully agree with the Commanding Officer when he stated "[t]here is an element of our command climate that is not inclusive or healthy. This negative element takes the form of harassment, bullying, and sexual assault. This element is not rank specific and does not affect entire crew segments, but has primarily negatively impacted junior personnel onboard representing minority, underperforming or not-qualified, overperforming, or unique shipmates." The Commanding Officer, did once he was made aware of specific hazing, bullying, or sexual harassment incidents, take the proper steps to initiate investigations. However, as the Commanding Officer, he was responsible to prevent such an atmosphere, and while he was attempting to address it after the fact; he failed to set a positive climate. The Commanding Officer's selective enforcement of the CG Core Values based on geography was a significant factor in actively creating and allowing a negative command climate where the hazing, bullying and sexual harassment could take place.

I find multiple crewmembers, especially unqualified non-rates within the Deck Department, were hazed, harassed, bullied by other qualified non-rates. I also find that BMC [redacted] and BM1 [redacted] allowed it to continue. Several female non-rates were sexually harassed and bullied by several enlisted members onboard [the cutter], through name-calling, sexual innuendos, and sexual comments/rumors. This negative culture may have paved the way for alleged sexual assaults to occur, including the unwanted touching and grabbing of female buttocks.

Applicant's PRRB Application

On October 10, 2019, the applicant applied to the Personnel Records Review Board (PRRB) to remove OER2 and replace it with OER1. He also requested that an SSB be convened to reconsider his selection to O-6. To support his request, the applicant argued that the DEOCS Command Climate Surveys prove that he had significantly improved the climate and that the Command Investigation was incomplete. He also argued that the entry of OER2 in his record violated five Coast Guard policies. First, the applicant argued that he should have received an OER upon his Reporting Officer's departure. Second, he argued that his OER should not have been delayed until July 7, 2019, the day before the Captain selection board convened. Third, the applicant argued that there is no Coast Guard policy that allowed for PSC to return OER1 to his rating chain and replace it with OER2. Fourth, he argued that OER1 should have been kept in his record and supplemented by a non-regular OER. Finally, the applicant argued that he was not given enough time to submit an OER Reply to refute the accuracy of OER2 before it was presented to the selection board.

The PRRB gathered sworn declarations from the Supervisor, Reporting Officer, and Reviewer who prepared and signed the disputed OER:

- On December 6, 2019, CAPT M, who served as the applicant's Supervisor from April 2017, until May 13, 2019, provided a declaration under penalty of perjury. He first addressed the applicant's assertion that his OER had violated several Coast Guard policies. Regarding the applicant argument that he should have received an OER upon his Reporting Officer's departure, CAPT M stated that CAPT L's transfer was timed so as not to require

a change of Reporting Officer evaluation. Next, he addressed the applicant's argument that his OER should not have been delayed until July 7, 2019, because he was an "in-zone reorder." CAPT M stated that the applicant's regular evaluation was not delayed. However, in the days immediately following their signature and submission of OER1, three events came to light from the CGIS investigation report which warranted changes. The first event was a Civil Rights complaint by an MK3. CAPT M stated that while MK3 had filed the complaint in October 2018, the applicant did not inform him about it until March 28, 2019. He claimed that the applicant's response to the MK3's initial complaint was dismissive. The second event was the CGIS Sexual Assault investigation. The final event was the strip dancing that had occurred during liberty on November 23, 2018. CAPT M stated that he did not learn about the strip dancing until after he had submitted OER1. According to CAPT M, the applicant and a significant number of the cutter's crew had been present at a bar following a morale sponsored trivia event where a male BM3 stripped off his shirt and danced for a group of local civilian females. Then, a male EMCS had removed his shirt and danced on a male ENS. CAPT M stated that the applicant had stopped the event before the EMCS could remove his pants. CAPT M stated that while the applicant did check in on the well-being of the ENS following the event, he did not address the EMCS on the topic at any point during the marking period. CAPT M stated that had the applicant informed him about the event, he could have provided the applicant with guidance that it was not within the bounds of the professional conduct expected from Coast Guard members. He stated that the applicant's OER Reviewer, CAPT C, had worked with the staff at PSC and decided that a revision to the previously signed, but unvalidated OER1 was the best solution. CAPT M stated that at that time, he and the applicant's Reporting Officer were deployed in Out of Hemisphere deployments and communications were challenged by limited underway connectivity, time zones, and operations. Despite the challenges, he was able to revise the applicant's OER. CAPT M stated that on several occasions between July 1 and July 3, he spoke with the applicant on the phone to discuss what performance issues would be captured in the revised OER. He stated that on July 1, 2019, the applicant received the first draft of the revised OER. After receiving the revised version, OER2, the applicant had separate counseling sessions with CAPT M and his Reporting Officer, CAPT L. Following the counseling sessions, the applicant requested several adjustments to OER2. CAPT M stated that he granted some of the requests. He provided a list of the applicant's requested adjustments and indicated which requests were granted or denied:

Requested the following comment in section 3.b. be removed: "Did not take adequate action or inform chain of command of multiple negative cmd climate situations &/or indicators which led to inhospitable climate for some crew." Request was denied.

Requested comments in section 3.c. be returned to the original content. Request granted.

Requested the following numerical marks be changed:

Looking out for Others: 5 to a 7	Request denied.
Workplace Climate: 4 to a 6	Mark changed to a 5.
Judgment: 5 to a 6	Request granted.
Responsibility: 4 to a 5	Request granted.
Health and Well-being: 5 to a 7	Mark changed to a 6.

CAPT M stated that the final OER, OER2, was an accurate reflection of the applicant's performance based on all of the information. He stated that the applicant had had an exceptionally challenging tour as CO of the cutter and, as reflected by OER2, had met the vast majority of the challenges with success.

- On December 12, 2019, CAPT L, who served as the applicant's Reporting Officer from July 2017 until April 31, 2019, provided a declaration under penalty of perjury. He stated that, as the Chief of Maritime Forces, he was the Reporting Officer for the region's O-5 afloat Commanding Officers. In February 2019, CAPT R relieved him of his duties with the exception of supervisory responsibility for afloat COs. He stated that for OER and performance continuity, he remained attached to the Area Command through April 31, 2019, and completed all OER responsibilities associated with his previous position. CAPT L stated that the day after OER1 had been signed and sent to OPM for review, he received an email from the Reviewer, CAPT C. The email detailed a CGIS investigation into alleged sexual assault aboard the applicant's cutter. The investigation described deplorable sexual behaviors, acts of omission by leadership, and a culture contrary to the Coast Guard's core values. Further, CAPT L stated that there was growing evidence that the applicant had knowledge of unacceptable behavior during the OER reporting period. Based on this information, CAPT L had serious concerns and questions as to whether OER1 accurately reflected the applicant's performance. He stated that the rating chain began careful deliberations on the best, most appropriate, and fair course of action to accurately investigate the circumstances, and if appropriate, properly account for the applicant's actions. CAPT L stated that with advice from Area legal, Area Human Resources, and CGPC-OPM, the decision was made to withdraw the applicant's originally submitted (but not reviewed and filed) OER to allow the rating chain time to investigate the circumstances and climate aboard the cutter. Accordingly, OPM returned OER1 to the rating chain. At that point, a climate investigation was conducted aboard the cutter. Further, Area Chief of Operations and the Area Command Master Chief (CMC) conducted an in-person visit to the cutter. CAPT L stated that these sources of information informed his decision to amend his section of the applicant's OER. He stated that based on the CGIS investigation, his own afloat experience, experience in command, and expectations of his subordinate commanding officers, he made the following conclusions:
 - [The applicant] had knowledge of, and opportunities to correct, behaviors contrary to the Core Values of the U.S. Coast Guard. With this knowledge, he failed to take early corrective actions which could have prevented furtherance of an inhospitable climate;
 - [The applicant] showed a lack of curiosity, introspection, and attention when he failed to further report a member's fear of sexual assault or investigate alleged sexual harassment and toxic leadership, which was reported to him as early as October of 2018. His dismissive attitude and response to an EEO complaint illuminated barriers to reporting, even to the CO.
 - [The applicant] inappropriately believed there was a different standard, different core values, and different rules that applied to [a certain region's] cutters and sailors. This selective adherence to the core values and regulations contributed to an inhospitable climate and an unhealthy culture.

CAPT L concluded by stating that his final input in Block 5 of OER2 was measured and deliberate. He stated that the applicant had many successes and did many things right in a challenging command. CAPT L stated that these successes are acknowledged in his comments. However, he stated that the applicant failed in the most important area: looking out for his crew. CAPT L stated that while he does not believe the applicant's conduct should preclude him from promotion, he was unwilling to recommend him for command afloat or ashore. According to CAPT L, the applicant did not compare as well to other distinguished officers who had not compromised their moral high ground and had more adeptly addressed similar challenges.

- On November 18, 2019, CAPT C, the Reviewer for the disputed OER, provided a declaration under penalty of perjury. She first addressed the applicant's assertions that the disputed OER was submitted in violation of Coast Guard policies. CAPT C stated that contrary to the applicant's assertion, CAPT L departed from his position on April 30, 2019. Accordingly, CAPT L properly remained the applicant's Reporting Officer for the disputed OER. She also argued that contrary to the applicant's assertion, the disputed OER was not delayed. CAPT C stated that the end date of the reporting period remained March 31, 2019, in accordance with all governing directives. She also contested the applicant's assertion that there is no policy that authorizes an OER to be removed from an officer's record. CAPT C stated that on May 17, 2019, one day after signing the applicant's original OER (OER1), she discovered there was an open CGIS investigation that contained very serious allegations of workplace harassment and assault. CAPT C stated that after seeking and receiving the advice and consent of both legal counsel and PSC, she requested that PSC return the OER1 to allow the rating chain to fully consider the content of the CGIS investigation. She stated that PSC obliged her request and returned OER1. In revising the applicant's OER, she stated, the rating chain considered witness statements contained in both the CGIS investigation and the administrative investigation. The revised draft OER2 was delivered to the applicant for his review on July 2, 2019. CAPT C stated that the applicant advocated for several adjustments. After further revision, the final OER2 was signed and submitted to PSC on July 6, 2019. She stated that the OER2 addressed only conduct that had occurred during the reporting period ending on March 31, 2019. CAPT C concluded by stating that OER2 is an accurate record of the applicant's performance from April 1, 2018, to March 31, 2019.

On February 28, 2020, the PRRB denied the applicant's request for relief. The PRRB stated that the applicant had not submitted a cognizable claim for relief, as per Command.

VIEWS OF THE COAST GUARD

On November 30, 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 proving the existence of an error or injustice by the preponderance of the evidence.

The JAG made three arguments in support of denying the applicant's request:

- Where an [a]pplicant challenges the accuracy of one or more [OERs], a higher standard is applied. “To demonstrate that the records do in fact contain material legal errors and injustices and, as a consequence, where not ‘fair and equitable,’ a claimant must present ‘cogent and clearly convincing evidence.’^[1] The level of required evidence is high because the petitioner ‘must overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers discharge their duties correctly, lawfully, and in good faith.’ This presumption ‘includes those officers who are charged with rating the performance of other officers.’ ‘[T]he burden is upon the plaintiff to prove otherwise.’”
- “In the face of this presumption, plaintiffs must do more, to invoke court intervention, than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The showing is not enough where an allegation, even if proved, fails to establish the presence of ‘factors adversely affecting the ratings which had no business being in the rating process,’ or where there is no misstatement of a significant hard fact.”
- The final analysis requires an applicant to “show both that (a) there was a material legal error or an injustice [committed by] the military department, which led to the adverse action against him, and also (b) that there is an adequate nexus or link between the error or injustice and the adverse action (e.g., passover and nonselection for promotion).”^[2] Finally, the Coast Guard's recommendation to amend an OER must not be based on retrospective reconsideration of the officer's conduct.

The JAG referenced the following Coast Guard policies² as applicable here:

- Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3A (July 2020), states: 5.B.2. Roles and Responsibilities. Commandeer (CG-PSC) has overall responsibilities for the OES. Administrative servicing of OERs is accomplished by Commander (CG-PSC-OPM-3) or Commander (CG PSC-BOPS-C-MR).
- Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1D ([December 2021]) Chapter 4.B. Prohibited Comments. Members of the rating chain shall not:
 1. Mention a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), CG Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as provided in Articles 5.E.7 and 5.F.3 of Reference (a) and Chapter 10 and Chapter 15 of this Manual. **These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.** Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.K. of Reference (a) and Chapter 17 of this Manual. (Emphasis added.)
 11. Discuss Reported-on Officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.E.7 and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of this Manual.

¹ In accordance with 33 C.F.R. § 52.24(b), the burden of proof remains the preponderance of the evidence in all cases.

² The Board notes that the Coast Guard cited to versions of the manual which were issued after the disputed OER was issued.

Chapter 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 JAG admitted that PSC had validated OER1 before its entry in his record was “suspended.” The JAG argued, however, that “[w]hile there is no policy directly addressing the scenario described by the instant case, it fell within the authority and discretion of CG PSC as to how best to respond to the rating chain’s request for retraction and correction. In that regard, when presented with the possibility of an inaccurate evaluation due to possible misconduct occurring during the marking period, it was reasonable for CG PSC to delay or withdraw the OER pending confirmation.”

The JAG also argued that the applicant’s due process rights were not violated because he failed to request an SSB after he was not selected for promotion. Instead, he applied to the PRRB seeking correction of his OER.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 16, 2020, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. The applicant provided a response to the Coast Guard’s views by memorandum dated January 14, 2021. In this memo, the applicant argued that he was denied due process. He also submitted evidence in support of his position that OER1 had been validated, and should not have been removed, including:

- An email chain from PERS2 to PERS3 copying Captains and a Commander and stating that “Our files show that the OER was validated on [May 17, 2019]”
- An email from PERS2 to a Commander referencing the May 17, 2019, email and stating, “I received the email below and a subsequent call from CAPT advising me that the correction needed is not an administrative nature.”
- In addition, the applicant provided an undated email that he sent to the Chief of PSC-OPM4, in which he states, “I elected to enclose my ‘draft’ OER [OER1]. In my purview, this OER was not a draft, but official as it was signed and submitted to OPM. Moreover, OPM3 acted on it making it official by transferring my marks to an established USCG program of record. My direct access snippet is attached.”

The applicant stated that he had been explained the procedural aspects by OPM3 of what OPM considers “official,” but to his knowledge that guidance is not posted.

The applicant stated:

Both PSC and CG-LGL failed to adequately address the timing of the July 2019 OER currently in my military record, which was my principal concern regarding due process violations. I was provided with an OER substantively altered 6 days prior to the O6 promotion board meeting, after my [redacted] fully completed 2019 Annual OER (May 2019 OER) had been validated and placed into my military record. Per OPM guidance, I engaged my supervisors and a third OER version (the July 2019 OER) was signed by my supervisors on [July 6, 2019]. I was counseled on [July 7, 2019]. I had less than 24 hours to produce

comments to the promotion board which commenced on [July 8, 2019]. Some of those comments to the promotion board, notably related to due process, were redacted by OPM4. My original comments to the promotion board are provided as enclosure (1). The timing of the July 2019 OER in relation to the promotion board did not afford adequate time for editing and interaction with OPM4. Upon learning of the redactions to my comments to the board I was not afforded an opportunity to correct my comments to prevent the redactions. Furthermore, I was informed by OPM3 that there was insufficient time to complete a Reply to the OER to provide to the promotion board. In my mind, I had exhausted all efforts with my supervisors to seek relief before the July 2019 OER was placed into my military record in violation of Coast Guard policy. There was no purpose to complete a Reply to the OER, as the promotion board had already met. PSCINST M1611.1D states the sequence and timing of OERs for officers in promotion zones, and that process was clearly not followed in my case.

Regarding the finality of the July 7, 2019, OER, the applicant claimed:

I was originally informed by OPM3 that the May 2019 OER was in fact not validated, and that was why the May 2019 OER could be removed from my military record by my supervisors. In my enclosed email communication to OPM4 . . . I highlighted that my May 2019 OER marks were already recorded into Direct Access prior to OPM3 removing the fully completed OER from my military record. There has to be a point in time when an OER is considered final. Webster states validation to mean ‘declare legally valid.’ CG-LGL arguments . . . support wide discretion by PSC for the point in time when an OER is final. If CG-LGL’s position is supported, DHS will encourage future decisions by PSC to violate Coast Guard policy and remove OERs from officer records at any point in time, instead of using established policies to document performance after an OER has been finalized that provide sufficient due process. The trust in our Officer Evaluation System is based on rules being followed, not unlimited PSC discretion in individual cases, and lack of adherence to Coast Guard policy. The validated May 2019 OER entered in my military record was legally valid, and PSC should not have unlimited discretion to remove validated documents from my record.

The applicant also included as an attachment a screen shot of his Coast Guard record showing the numerical marks from OER1 in his Employee Record.

The applicant contended that OER1 was not removed from his military record to correct errors to the document. He stated, “This action violates PSC’s role defined in COMDTINST M1000.3A Chapter 5.B.3.b, which states that PSC’s role is to ‘review and validate OERs for administrative and substantive errors with attention given to inconsistencies between the numerical evaluations and written comments.’”

In closing, the applicant states that “CG PSC did not follow Coast Guard policies, for the specific purpose of bypassing due process protections in a rush to hinder my opportunity for selection at the PY20 Captain Selection Board.”

In further support of his position, and to set out a full picture of his argument, the applicant included in his response to the AO the memorandum he provided to the President of his Captain Selection Board on July 7, 2019, where he explains:

I received a regular OER signed by the rating chain dated [March 31, 2019], the marks were straight 7s with two 6s in writing and evaluations, highest recommendation for CO Afloat and Sector Commands, in-zone reorder, and distinguished officer mark. The OER was signed by all rating chain members by [May 16, 2019], I was counseled, and I submitted the OER to OPM to be part of my record. The OER . . . was subsequently withheld. I was presented with a revised OER lowering 6 marks, my promotion and comparison scale marks, and added negative comments on [July 6, 2019]. In doing so, my OES due process has been severely hampered, particularly in light of the timing of this panel.

APPLICABLE LAW AND POLICY

The Coast Guard Military Personnel Data Records (PDR) System Manual, COMDTINST M1080.101, states the following:

Section 4.a. Commander (CG PSC-BOPS-C-MR) maintains the validated OER as a part of the Electronically Imaged Personnel Data Record (EI-PDR) in accordance with Military Personnel Data Records (PDR) System, COMDTINST M1080.10 (series).

The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, June 2017, Chapter 5, Officer Evaluation System (OES), states the following:

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.

a. All active duty 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 (CGPSC-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).

b. 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.

(2) Correct OERs containing minor administrative errors or as directed by judicial or administrative adjudications without return to the rating chain.

(3) 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.

(4) 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.

4. Commander (CG PSC-BOPS-C-MR) must:

a. Maintain the validated OER as a part of the Electronically Imaged Personnel Data Record (EI-PDR) in accordance with Military Personnel Data Records (PDR) System, COMDTINST M1080.10 (series).

F. Occasions for Non-Regular OERs. The OERs listed in this Article do not count for continuity.

4. To Document Significant Historical Performance. This OER may be submitted to document significant historical performance or behavior of substance and consequence which were unknown when a previous OER was prepared and submitted.

...

c. The OER must address only the performance dimensions relevant to the OER since all other performance dimensions will have been addressed in the previously submitted OER.

d. This OER must be initiated by the original rating chain unless they are unavailable or disqualified.

e. The reviewer must be a flag officer.

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.

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.

The Officer Evaluation System Procedures Manual, PSCINST M1611.1C, December 2016, includes the following in Chapter 17, Reported-On Officer Reply:

C. Record Correction

Any rating chain member who, upon reviewing a Reported-on Officer's OER Reply, finds reason to concur that an error of fact may be present in the OER should comment in their endorsement and assist the officer in following the records correction procedures in Reference (b), Correcting Military Records, COMDTINST 1070.1 (series).

The Manual includes the following rules in Chapter 18, "Review of OERs at CG Personnel Service Center":

A. General. Completed OERs are forwarded to CG PSC-OPM-3 or CG PSC-RPM-1, Officer Evaluations Branch for processing, review and validation.

...

C. OER Review.

1. CG PSC-OPM-3 or CG PSC-RPM-1 review OERs for administrative and substantive errors. Particular attention is given to administrative data, Reviewer Comments, and inconsistencies between the numerical evaluations and written comments (where applicable). The review is not

intended to question a rating official's judgment about a subordinate's performance, but to ensure OERs are prepared per OES guidelines.

2. **Unacceptable Reports.** Reports found unacceptable are returned to the original rating chain member identifying areas for correction. The initial submission shall be deleted to avoid duplication and/or confusion. Corrected OERs must be returned to CG PSC-OPM-3 or CG PSC-RPM-1 via the rating chain within 30 days.

D. Correction of OERs.

1. Administrative Information. CG PSC-OPM-3 or CG PSC-RPM-1 may make changes to the administrative data of an OER; no notification is required to the Reported-on Officer and/or the original rating chain.

2. Description of Duties. CG PSC-OPM-3 or CG PSC-RPM-1 may make changes to the Billet Information; block 2.b to ensure it matches the PAL. No notification is required to the Reported-on Officer and/or the original rating chain.

3. 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 and justify those marks which deviate from a four (if applicable). On those marks indicated by CG PSC-OPM-3 or CG PSC-RPM-1 as not being supported, the rating chain should either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided.

4. Comments.

a. If an OER is returned to the rating chain due to comments, those marks and comments may be changed by the original Supervisor and Reporting Officer as appropriate. The signature dates should be adjusted to reflect the date that the necessary changes and reviews were actually made. The Reported-on Officer should be provided the opportunity to review and sign the updated OER.

b. CG PSC-OPM-3 or CG PSC-RPM-1 may make minor changes of a positive nature to marks and comments after receiving unanimous consent/direction from the rating chain. The Reported-on Officer must be informed of the change/s. Signature date adjustment is not required.

c. A new OER form should be used if the corrections are extensive.

5. All changes to the original OER must be initialed.

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 applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.³

3. 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).

4. The applicant alleged that the 2019 annual OER (OER2) in his record is erroneous and unjust and should be removed and replaced with his previously validated 2019 annual OER, which he signed on May 16, 2019 (OER1). The applicant also asked that if relief is granted, the Coast Guard PSC be directed to convene a special selection board to reconsider his non-selection for promotion to O-6 in July 2019. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁴ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.⁵ In addition, to be entitled to correction of a performance evaluation, an applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁶

5. Although someone at PSC apparently told the members of the applicant's rating chain that OER1 had not yet been validated and entered in his record when they allowed the rating chain to withdraw it, the JAG admitted and the applicant has proven by a preponderance of the evidence that OER1 had in fact been validated before PSC removed it. Moreover, the numerical marks, at least, had already been entered in his Employee Record. The applicant has submitted an email exchange between two PSC personnel specialists, dated May 20, 2019, stating that PSC-OPM-3 had reviewed and validated OER1 on May 17, 2019, and then forwarded it to PSC's business office (BOPS) for scanning and entry in his electronic record. In addition, the applicant has submitted a screen shot of his Employee Record showing the numerical marks in OER1, which proves that the evaluation marks in OER1 were in fact entered in his official Employee Record before OER1 was removed and replaced with OER2. The Board therefore finds that OER1—the first version of the OER which the applicant signed on May 16, 2019—was validated by PSC on May 17, 2019, and the marks were uploaded into his Employee Record.

6. The JAG did not cite any Coast Guard manual that authorizes PSC to remove a validated OER from an officer's record without a decision by the PRRB or BCMR to remove the OER. In fact, the JAG admitted that there is no such policy, and the Board knows of none. The OER Manual and Officer AEP Manual provide that PSC reviews each OER to ensure that it

³ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *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).

conforms to the rules for preparing OERs and, once PSC determines that the OER does conform, PSC validates the OER and forwards it to the PSC business office, BOPS, which according to Chapter 5.B.4.a. of the Officer AEP Manual, COMDTINST M1000.3 (series), “must” maintain a validated OER in the officer’s personnel record. The rules for correcting OERs pursuant to PSC’s review in Chapter 18.D. of the OER Manual are for unvalidated OERs and do not authorize removal of a validated OER. Specifically, Chapter 18.D. authorizes PSC to change administrative information and the description of the officer’s duties on the OER during its review without consulting the rating chain; to return the OER to the rating chain for correction if its review reveals inconsistencies between the marks and comments; and to “make minor changes of a positive nature to marks and comments after receiving unanimous consent/direction from the rating chain.” Nothing in the applicable manuals authorizes PSC to remove an already reviewed and validated OER whose marks have already been entered in the officer’s Employee Record in response to a rating chain’s request.

Moreover, the Coast Guard has previously admitted in advisory opinions for other cases, both expressly and implicitly, that it has no authority to remove or substantively change a validated OER and so recommended that the Board grant relief, instead of changing the OER *sua sponte* and recommending that the Board administratively close the case.⁷ For example, in the advisory opinion for BCMR Docket No. 2000-131, the Coast Guard stated the following:

In the process of generating a final document for signature, numerous errors were made that were not detected by the Reviewer or during subsequent CGPC validation. Upon receipt of his [sic] copy, Applicant detected the errors and alerted his [sic] rating chain. Since the OER had already been validated and entered into the official record, Applicant was required to [apply to the BCMR for the correction].

While that advisory opinion was issued more than 20 years ago, the applicable authorities for processing OERs have not been amended in the interim to allow PSC to remove an already validated OER from the officer’s Employee Record upon the request of the rating chain. In addition, the manuals’ instructions for officers seeking a correction of an OER do not provide any post-validation avenue of relief except the PRRB or the BCMR. There is no instruction that authorizes a rating chain to withdraw an OER that has already been validated and entered in the officer’s record. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that his annual OER dated March 31, 2019, was adversely affected by a prejudicial violation of a regulation when PSC removed the OER it had already validated in May 2019 from his record and allowed the applicant’s rating chain to revise it.

7. The Board makes no finding regarding the quality of the applicant’s performance, the accuracy of the marks and comments in either OER1 or OER2, or the applicant’s other allegations of error and injustice. The error identified in this case was purely procedural, but it is significant and prejudicial, as it did result in a significant negative change to the applicant’s annual 2019 OER and deny him the chance to submit an OER reply before the selection board convened. Therefore, relief is warranted.

⁷ See, e.g., the Coast Guard’s advisory opinions in BCMR Docket Nos. 2000-065, 2000-131, 2008-106, 2014-007, 2014-015, 2018-188.

8. As the applicant alleged, consistent with COMDTINST M1000.3A.5.F.4, the Coast Guard could have documented the new information about the applicant's performance contained in the July 7, 2019 OER in a special "historical" OER, but it did not, and this Board does not have the authority to make negative changes to an applicant's record.⁸ The Board expresses no opinion and makes no recommendation about whether a historical OER should be entered in the applicant's record.

9. The Board finds that the applicant's failure to submit a reply to OER2 does not alter the Board's findings because the Coast Guard erred in replacing OER1 with OER2 just one day before the CAPT selection board convened, and PSC personnel rightly told the applicant that there was insufficient time to process an OER reply through his rating chain—two of whom were overseas—for entry in his record before the selection board convened, and so he could only submit a personal letter to the selection board, instead of an OER reply.

10. Nor does the fact that the applicant did not request an SSB following the CAPT selection board show that he received due process, as the JAG argued. First, the applicant had already complained about PSC's irregular procedures in his communications to PSC and the selection board to no avail. Second, requesting an SSB would be futile without a correction of the disputed OER, and an SSB is not a correction board empowered to remove erroneous OERs. Instead, the applicant's foremost remedy was an application to the PRRB, and he did promptly apply to the PRRB, also to no avail.

11. The Board further finds that the decisions of the CAPT selection board(s) may well have been prejudiced by the erroneous entry in his record of OER2 instead of OER1 because the marks and comments in OER1 are much more favorable. Therefore, pursuant to 14 U.S.C. § 2120, the applicant is entitled to at least one Special Selection Board with a record corrected by replacing his 2019 annual OER with the OER that he signed on May 16, 2019 (OER1), and if he is not selected for promotion by the first Special Selection Board, he is entitled to additional Special Selection Boards for the subsequent CAPT selection boards that have not selected him for promotion. In addition, because his letter to the 2019 CAPT selection board expressly addressed OER2, which is to be removed from the applicant's record, his letter to the 2019 CAPT selection board should also be removed from the record to be reviewed by the Special Selection Board(s).

12. Accordingly, because the applicant has proven by a preponderance of the evidence that PSC exceeded its authority in removing the applicant's already validated 2019 OER from his Employee Record and replacing it with a new OER with significantly lower marks and comments, relief should be granted by removing the revised 2019 OER from his record and replacing it with the original OER that he signed on May 16, 2019, and that PSC validated on May 17, 2019. In addition, any letters to the President of the CAPT selection boards that he has submitted to address his 2019 OER should be removed from his record, and his record should be reviewed by a Special Selection Board pursuant to 14 U.S.C. § 2120 to reconsider his non-selection for promotion in July 2019. If not selected for promotion by the first Special Selection Board, his record should be

⁸ See *Friedman v. United States*, 141 Ct. Cl. 239, 252-53 (1958) (holding that "[t]he Correction Boards were established for the purpose only of reviewing, on application of a member of the military personnel, a military record to correct errors or injustices *against* such personnel and not to review and reverse decisions of other established boards *favorable* to such personnel).

reviewed by additional Special Selection Boards to reconsider his non-selections by subsequent CAPT selection boards. If selected for promotion by a Special Selection Board, his name should be placed on the next promotion list for appointment by the President with the advice and consent of the Senate and, once promoted, his date of rank should be backdated to what it would have been had he been selected for promotion by the original CAPT selection board.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of Commander [REDACTED] [REDACTED] [REDACTED] USCG, for the correction of his military record is granted as follows:

The Coast Guard shall remove the revised 2019 OER that PSC validated in July 2019 from his record and replace it with the original OER that was signed and validated by PSC in May 2019. Any letters to the President of the Captain selection boards that he has submitted to address his 2019 OER shall also be removed from his record, and his record shall be reviewed by a Special Selection Board pursuant to 14 U.S.C. § 2120 to reconsider his non-selection for promotion in July 2019. If not selected for promotion by the first Special Selection Board, his record shall be reviewed by additional Special Selection Boards to reconsider his non-selections by subsequent Captain selection boards that have reviewed his record for promotion. If selected for promotion to Captain by a Special Selection Board pursuant to this order, his name shall be placed on the next promotion list forwarded for appointment by the President with the advice and consent of the Senate and, once promoted, his date of rank shall be backdated to what it would have been had he been selected for promotion by the original Captain selection board whose decision was overturned by the Special Selection Board in accordance with 14 U.S.C. § 2120(d).

August 18, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
[REDACTED] [REDACTED] Date: 2023.08.21 15:55:07 -04'00'

[REDACTED] [REDACTED] signed by [REDACTED] [REDACTED]
[REDACTED] [REDACTED] 23.08.21 17:03:53 -04'00'

[REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
[REDACTED] [REDACTED] Date: 2023.08.22 07:13:35 -04'00'