

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-137

██████████ ██████████ ██████████
LCDR

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 July 7, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated June 8, 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) on active duty, asked the Board to correct his record by removing a Special Officer Evaluation Report (OER) documenting his Removal from Primary Duties (RPD) as the Executive Officer (XO) of a cutter on June 22, 2017; by retroactively promoting him to Commander (O-5); and by changing Coast Guard policy to prohibit Commanding Officers (CO) from removing subordinates due to Command Climate Investigations since the COs are “interested parties.” The applicant asked the Board to implement policies that require full disclosure to a unit’s command cadre of a pending Command Climate Investigation and to allow subordinates/aggrieved service members full and unimpeded access to all communications and documentation.

The applicant alleged that on June 22, 2017, the Coast Guard validated an unjust and capricious SOER for his record as a result of his commanding officer’s (CO’s) retaliation against him following a command climate investigation. According to the applicant, before the Command Climate Investigation, he had been requesting support from his superiors for about a year because of a negative command climate, but he was denied assistance. The applicant claimed that since the completion of the Command Climate Investigation, he has sought evidence and corrective action, but the Coast Guard has refused him the required whistleblower protection. The applicant further claimed that the Coast Guard has erroneously concealed his CO’s statements and the investigation

log and has wrongfully removed his name from a promotion list based on his CO's recommendation.

The applicant stated that as the XO of the cutter, he followed his CO's instructions and performed the required duties of an XO. According to the applicant, he never violated any laws or policies and he was never charged or investigated. But he became unpopular with the crew because the CO directed him to hold subordinates accountable for poor performance. However, the applicant alleged that once his CO became aware that a Command Climate Investigation would be conducted, the CO wrongfully influenced the crew and later claimed ignorance. The applicant claimed that his CO manipulated the process when he deceived the applicant by telling him that a convening order was not issued and counseled the applicant that he should take responsibility for the unit's negative command climate. The applicant alleged that his CO manipulated the cutter's climate during the time that he had exclusive knowledge of the pending investigation. Therefore, the applicant concluded, the Coast Guard acted upon a false narrative when it removed him from his position.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned an Ensign in the Coast Guard on May 23, 2001.

On June 24, 2015, the applicant was assigned as a cutter's Executive Officer (XO).

On September 1, 2016, ALCGPSC 096/16 was issued wherein the applicant was notified that he had been selected for promotion to Commander (O-5).

On January 18, 2017, the applicant's Sector Commander, CAPT R, issued a Convening Order wherein he appointed a single Investigating Officer (IO) to conduct a standard investigation in accordance with Article 1.D.1.a. of the Coast Guard Administrative Investigations Manual, COMDTINST M5830.1A,¹ into the command climate aboard the applicant's cutter.

On February 15, 2017, the IO released his report of his findings and recommendations into the allegations of a poor command climate aboard the cutter. The portions of the IO's report pertinent to the applicant and his claims are summarized below:²

¹ Article 1.D.1.a. of the Administrative Investigations Manual, COMDTINST M5830.1A, states, "Standard Investigations. Formerly referred to as "Informal Investigations," Standard Investigations are convened to investigate the vast majority of minor and major incidents requiring an Administrative Investigation. These investigations are normally conducted by a single individual known as the Investigating Officer (I.O.). A Standard Investigation uses informal evidence-gathering procedures, and usually does not conduct hearings. It does not have authority to designate Parties or to subpoena witnesses. (See Chapter 4).

² The IO's report was 23 pages. For efficiency, only those facts that are relevant to the applicant's treatment of his crew and the effect his treatment had on command climate will be recorded here.

FINDINGS OF FACT

1. CDR [D] assumed command in the summer of 2015. LCDR [applicant] assumed the duties as Executive Officer that same summer. (Encl 1, 2).

...

7. CDR [D] stated that he has not seen any public berating, but has observed corrections on the spot at all levels. He noted that LCDR [applicant] has had discussion in public areas and [CDR D] has seen LCDR [applicant] correcting JOs in public. (Encl 1).

8. LCDR [applicant] stated he does not berate in public but is not opposed to correcting on the spot if necessary. He believes he starts every encounter with giving the member the benefit of the doubt, but will never hesitate to engage and correct with respect, recognizing the potential for a learning experience. He believes that what some on the crew might see as berating were point-in-time incidents that were not indicative of his normal mentoring. (Encl 2).

9. LCDR [applicant] stated that he does praise in public, but often leaves that praising to the supervisor closest to the member. (Encl 2).

10. LCDR [applicant] has been observed berating members of the crew, of all ranks in public. (Encl 5, 7, 8, 9, 10, 11, 13, 14, 15, 16, 19, 21, 33, 34, 37).

11. [Cutter] practiced something called 'Ensign Hour' each week. The JOs [junior officers] would gather so LCDR [applicant] could collectively tell them where they had failed during the week. These meetings were usually in the wardroom, but would sometimes be held about the ship, in front of the crew such as during morale fish call. (Encl 1, 2, 5, 9, 47).

12. Many of the JOs felt this practice was humiliating since LCDR [applicant] would air their shortcomings to the entire group. (Encl 8, 9).

13. CDR [D] attended the first Ensign Hour, as did some of the CPO Mess. After several of these meetings, the CPO Mess would no longer attend. CDR [D] was aware that the format of Ensign Hour changed recently. (Encl 1, 9, 19).

14. Despite the adverse effects of Ensign Hour, the JOs aboard [cutter] did complement the Wardroom Professional Development sessions and ship handling training they received from LCDR [applicant]. (Encl 9).

15. LCDR [applicant] has been observed to be bullying, physically intimidating and threatening of crew member's careers. (Encl 12, 13, 33).

16. In particular, JOs were frequent targets of LCDR [applicant]. (Encl 9, 10, 13).

17. Multiple crew members have reported shipmates departing from encounters with LCDR [applicant] in tears. (Encl 13, 19, 33, 36).

18. HS1 [D] stated that when a [cutter] Petty Officer presented suicidal ideations, he was met by the command with skepticism and insensitivity. (Encl 13, 33).

19. In a separate case, BM3 [R] noted that when a shipmate was expressing suicidal ideations, rather than showing compassion for the person or ensuring she had the help she needed, LCDR [applicant] was upset that it was BM3 [R] assisting her. (Encl 18).

20. During [cutter's] last deployment, several rumors of a sexual and potentially aggressive nature (i.e., 'gang banging' the OS3) were circulating regarding OS3 [J], which if true, would rise to the level of workplace violence or sexual assault. HS1 [D] had initially uncovered the rumors and was attempting to deal with them at her level. (Encl 13, 17, 33).
21. The CPO Mess tried to gather additional information, counseled HS1 for not coming forward quickly and briefed LCDR [applicant]. (Encl 5, 10, 11, 13, 33, 38).
22. LCDR [applicant] briefed CDR [D] on the situation. CDR [D] states that he directed LCDR [applicant] to get the OS3 connected with support in the form of a Victim Advocate or Civil Rights. LCDR [applicant] stated that CDR [D] directed him to get more information. (Encl 1, 2).
23. HS1 [D] stated that LCDR [applicant] questioned her to get her to "name names," threatening UCMJ action and her career if she would not. (Encl 4, 13, 33).
24. CS3 [D] is one of OS3 [J's] friends and states that LCDR [applicant] then questioned her and similarly tried to intimidate her to name names using phrases like "you're not in trouble yet, so long as you do the right thing." Specifically, LCDR [applicant] mentioned CS3 [D's] upcoming trip to Europe, which had no bearing on the case and made CS3 feel she was being threatened. (Encl 5, 16, 33, 35, 38).
25. OS3 [J] stated that LCDR [applicant] questioned her about the situation and asked her to give him names so that he could start an investigation. OS3 [J] did not want to pursue this as she felt safe amongst her crew and said that if LCDR [applicant] continued, she would request transfer. (Encl 4, 17, 33, 36).
26. OS3 [J] remembers LCDR [applicant] stating that "it's going to come back and haunt you if you don't open an investigation." (Encl 17).
27. OS3 [J] and CS3 [D] both felt that LCDR [applicant] was manipulating the facts in an effort to pressure her into saying something. (Encl 16, 17, 35, 36, 38).
28. LCDR [applicant] stated that he did interview the HS1, CS3 and OS3, but was only making sure that OS3 [J] was safe as this was potentially a sexual assault or workplace violence case. (Encl 2).
29. When asked why this was not immediately referred to CGIS, per COMDT policy, LCDR [applicant] stated that there was not enough information to make a CGIS report and the situation was tracking towards a harassment case anyway. (Encl 2).
30. LCDR [applicant] stated that he briefed CDR [D] of OS3's situation again that evening. (Encl 2).
31. LT [H] was in the room when LCDR [applicant] questioned the HS1, OS3 and CS3. He stated that LCDR [applicant] determined that there was no actual threat and this case was more about who wanted to sleep with OS3 [J]. (Encl 4).
32. The following morning, LCDR [applicant] and CWO [B] met with OS3 [J] and connected her with Base [redacted] Civil Rights and Work-Life. (Encl 2, 5, 17).
33. CDR [D] stated that only then did LCDR [applicant] brief him. CDR [D] asked CWO [B] to keep an eye on OS3 [J], but he never met with her. (Encl 1).
34. The crew members suspected of uttering the remarks about OS3 [J] were counseled by the CPO Mess. (Encl 1, 2).
35. As a morale booster aboard [cutter], LCDR [applicant] would make Monkey Bread for the crew. (Encl 2, 15, 16).

36. Due to heavy seas, the making of the Monkey Bread would sometimes result in spilling of the batter and a mess in the ovens. (Encl 2, 5, 15, 38).
37. On 01 JAN 17, LCDR [applicant] had made Monkey Bread, which resulted in a mess in the ovens. Though he intended to clean it up, the duty cook cleaned it himself in order to have clean ovens to begin the morning meal. (Encl 15, 34).
38. CS1 [V] awoke that morning and was informed of the mess. When he saw LCDR [applicant], he made inappropriate comments regarding the mess in the oven. LCDR [applicant] directed him to get CSC [C] and report to the XO's stateroom. (Encl 2, 5, 15, 16, 34, 38).
39. In the ensuing meeting, and in lieu of other punishment or administrative action, LCDR [applicant] directed the following action: CS1 [V] would have to come see LCDR [applicant] every day and tell him one good thing LCDR [applicant] had done that day. (Encl 2, 5, 15, 27, 34, 38).
40. CS1 [V] stated he felt this was a demeaning punishment, but felt he had no choice but to comply. (Encl 5, 15).
41. Several other members of the crew stated they also felt this was a demeaning punishment. (Encl 5).
42. LCDR [applicant] briefed CDR [D] on his plan to provide this professional development to the CS1. CDR [D's] impression at the time of the brief was that the praising was about the XO position and not the XO himself and did not think it would be demeaning. He later got feedback from [Sector] about how the process was proceeding and believes it was being misconstrued. He tasked CWO [B] and CSC [C] to change it and make it more positive. (Encl 1).
43. LCDR [applicant] tracked each encounter with CS1 [V], though the CS1 had no knowledge that LCDR [applicant] was keeping this record. (Encl 2, 15, 27)
44. This process continued until the cutter moored in [redacted] on 23 JAN 17. (Encl 2, 27).
45. When asked if he believed the process with CS1 could be viewed by some in the crew as demeaning, LCDR [applicant] stated, "Yes, but that this was an opportunity for the CS1 to recognize the good the XO does for the crew, and more for the value, learn to communicate potentially combative concerns." (Encl 2).
46. Multiple crew members have heard LCDR [applicant] profess his expertise in many matters, often causing him to doubt the opinions of the petty officers and other technical experts aboard [cutter]. (Encl 23, 33).
47. On multiple occasions, LCDR [applicant] sat in on patient examinations conducted by HS1 [D] and even conducted his own examinations. This was perceived to [be] overstepping his bounds by the HS1. (Encl 46).
48. Multiple crew members noted that a perceived gender bias exists aboard [cutter]. Females feel they are overly scrutinized as compared to their male shipmates, that they were subjected to unwanted attention by LCDR [applicant] and are often accused of inappropriate relationships for being social to their male shipmates. (Encl 5, 6, 9, 12, 13, 15, 16, 17, 19, 21, 22, 36).
49. ENS [N] was selected as the First Lieutenant over her more senior peers despite being an unqualified Officer of the Deck. Many of the JOs believed this was because she is an attractive female, is liked by LCDR [applicant] and therefore does not face the same treatment and berating as the other JOs. (Encl 6, 8, 9, 19).
50. ENS [N] feels that her situation is not that bad and does not face the same harshness as the other JOs from LCDR [applicant]. (Encl 8).

124. [Cutter] visited [redacted] Island for a hunting trip/port call. Multiple members of the crew witnessed LCDR [applicant] tell the crew at Quarters that he had listened to them and the ship was going to [redacted] because that is what they wanted (the crew). (Encl 10, 21, 23).

125. None of the E-6 and below crew members interviewed stated that they did actually ask to go to [redacted] Island. (Encl 22).

126. When CDR [D] and LCDR [applicant] wanted to conduct a hunting trip/port call in [redacted], CSC [C] and CWO [B] advised against it as [redacted] is a poor logistics stop and the cutter needed provisions. (Encl 5, 10, 36).

127. Afterward at Quarters, LCDR [applicant] announced to the crew that “we asked the crew and the crew wants to go to [redacted], so we’re going to [redacted].” (Encl 10).

128. EMCS [M] states that he approached LCDR [applicant] and told him that [redacted] was not the CPOs desire and was dismissed by LCDR [applicant]. (Encl 10).

129. During UCMJ proceedings, LCDR [applicant] would conduct independent investigations and interview witnesses and the accused while the Preliminary Inquiry Officer (PIO) was conducting his/her investigation, which many of the crew found undermined the process. (Encl 9, 19).

130. Many of the JOs reported that LCDR [applicant] would always compel the PIO to change their recommendations so that the member would go to mast. (Encl 9).

131. On one occasion, LCDR [applicant] attempted to convince a witness in a UCMJ proceeding to testify harshly against the accused to “make sure we nail this guy.” (Encl 21).

132. CS3 [D] observed LCDR [applicant] state that a member did not care about his family at one NJP proceeding when it had no bearing on the case. (Encl 16).

133. LCDR [applicant] would brag to the crew that he was a “master manipulator” and even offered members of the crew books and resources on the subject. (Encl 9, 13, 23, 33).

134. LCDR [applicant] told members of the crew that he intentionally ‘laid low’ during MCPO [redacted] visit. (Encl 9, 23).

135. Multiple members of the crew noted that LCDR [applicant’s] demeanor would change if visitors were aboard of when the DEOCS survey was out for comment. (Encl 9, 10, 13).

...

140. Following the JAN 2016 DEOCS, LCDR [applicant] scheduled focus groups for the crew to come up with ideas on how to improve the climate. (Encl 19).

141. Many of the crew believe LCDR [applicant’s] presence at those meetings stifled input. (Encl 12, 19).

142. LCDR [applicant] states that he did not attend those focus groups. (Encl 2).

143. CDR [D] recalls counseling LCDR [applicant] to stay away from Town Hall meetings at the behest of the crew. (Encl 1).

...

152. The JOs describe approaching CDR [D] as akin to penetrating the ‘iron wall’ of LCDR [applicant] in that it is very difficult to get issues through him to reach the Captain. (Encl 9).

153. LCDR [applicant] believes the JOs are simply frustrated with him because he challenges them and they lack confidence. (Encl 2).

154. The crew of [cutter] also commented that there was much difficulty in getting items through LCDR [applicant]. There were three cases of crew members expecting babies aboard the ship. In each of those situations, the crew reports working for months to plan leave for these members, but being unable to get through LCDR [applicant]. (Encl 9, 22).

155. CDR [D] stated that he was frustrated that LCDR [applicant] had not briefed him sooner on the childbirth issues. (Encl 1).

...

OPINIONS

2. I believe LCDR [applicant] created an atmosphere of belittling and humiliation throughout the ship and in particular, in the wardroom and did not treat his shipmates with dignity and respect. (Findings 7-19).

3. Though I believe CDR [D] did treat his crew with respect, I believe he was aware of the atmosphere of belittling and humiliation throughout the ship, and in particular, in the wardroom and allowed this to continue unabated. (Findings 7, 13).

4. I believe LCDR [applicant] acted inappropriately, using intimidation and threats to acquire information. (Findings 15, 23, 24, 26).

5. I believe CDR [D] was aware of LCDR [applicant's] tendencies and allowed this practice to continue unabated. (Findings 15).

6. I believe the situation regarding OS3 [J] was handled inappropriately by LCDR [applicant] in conducting what can be equated to as interrogations of potential witnesses. (Findings 23-28)

7. I believe CDR [D] was unaware of the extent of the measures LCDR [applicant] was taking, and should have gotten more involved in the matter. (Findings 22, 30, 33).

8. I believe CS1 [V] behaved inappropriately when addressing LCDR [applicant] following the Monkey Bread incident on 01 JAN. This conduct could have been addressed by many professional means. (Finding 38).

9. I believe LCDR [applicant's] treatment of CS1 [V] following the events of 01 JAN, to wit, requiring CS1 to visit and praise him every day was inappropriate and demeaning. I also believe LCDR [applicant] is not remorseful for his actions. (Findings 39-45).

10. I believe CDR [D] was not completely briefed on the specifics of LCDR [applicant's] plan for CS1 [V] following the events of 01 JAN 17. Though he directed LCDR [applicant] to alter the plan after 06 JAN, he should have stopped it altogether. (Finding 42).

11. Though his intentions may have been good and protective in nature, I believe LCDR [applicant] gave undue attention to the females aboard [cutter]. (Findings 48-51).

12. I believe CDR [D] was aware of many of the issues surrounding LCDR [applicant], and after being counseled by PAC-37, failed to align him to the Core Values. (Findings 42, 54, 55).

...

26. I believe LCDR [applicant] often breached protocol, conducting independent investigations that already formally assigned to preliminary inquiry officers, and attempted to influence UCMJ processes. (Findings 129-132).

27. I do not believe CDR [D] was aware of LCDR [applicant's] actions in paragraph 26. (Findings 129-132).

28. I do believe that LCDR [applicant] created a climate of lacking information and sometimes misinformation to suit his needs. (Findings 121-135).

29. I believe that CDR [D] failed to heed the advice of his CPO Mess, the [Sector] CMC and [Sector] to increase his transparency, visibility and presence amongst the crew. (Findings 138-146).

30. I believe CDR [D] failed to align LCDR [applicant] to his expectations of transparency even when certain indicators of issues were present. (Findings 143, 155).

31. I believe CDR [D] and LCDR [applicant] created a poor command climate aboard [cutter], namely failing to keep the crew adequately informed and they did not adhere to the Coast Guard Core Values. (Findings 105-155).

...

RECOMMENDATIONS

2. I recommend the command of [cutter] apologize to CS1 [V] and OS3 [J] for the situations described above. (Opinions 2,3).

...

7. I recommend LCDR [applicant] be immediately removed as Executive Officer, CGC [cutter]. I further recommend his OER reflect that he is not recommended for any command cadre positions again in the Coast Guard. (Opinions 1, 2, 4, 6, 9, 11, 13, 14, 16-20, 23, 24, 26, 28, 31, 32, 35, 36, 38).

8. I recommend the orders for LCDR [applicant's] next assignment (Base [redacted] HSWL Chief) be changed so that he will not be in a position to exert influence over [cutter's] crew. (Opinions x).

On February 26, 2017, in response to the IO's report and recommendations, the applicant was removed from his primary duties and issued a derogatory OER pursuant to Article 5.E.7. of the Officer Accessions, Evaluations and Promotions Manual, COMDTINST M1000.3A., for substandard performance and/or conduct.

For the "Performance of Duties" section of the derogatory OER, the applicant received two marks of 6, two 5s, two 4s, and one 3. The applicant's supervisor provided the following comments:

Anticipated cutter & mission needs; coordinated 2016 Arctic deployment including multinational SAR exercise & numerous community relations (COMREL) visits; improved cutter response abilities & CG relations w/[redacted] native communities. Optimally utilized \$850K & identified \$350K backlog for vital OCONUS resources to maintain mission readiness. Highly adaptable to cutter/crew needs; revised maintenance plans after critical casualty during inport; infused senior enlisted advice into daily routine to increase transparency & devoted resources to missions; resulted in successful [redacted] patrols w/36 boardings, 4 COMREL events, 84 sorties/148 flight hrs, completed 240+ drills, 80% of semi-annuals in 3-wks, doubled watch station quals. Primary coach for most challenging evolutions; safely executed [redacted] missions. Despite counseling on confrontational attitude in resolving issues, continued to interact w/crew at various levels of chain of the command in combative or argumentative manner; directly contributed to stifled

communications across & up/down the chain of command. Wrote 2 DEPSUMs, 5 individual CG level award nominations, 2 discharge packages & internal memos; increased recognition & performance documentation for crew.

For the “Leadership Skills” section of the derogatory OER, the applicant received three 5s, one 4, and two 3s. The applicant’s supervisor provided the following comments:

Actively aware of crew need; supported E3 after family death & provided access to resources for support; produced 20+ personal awards. Developed collateral duty plan for JOs, mentored Training Officer for optimal service to crew; dedicated to EPLME & DC training, resulting in 100% basic DC quals & routing 14 “A” school requests; improved recognition & professional skills. Championed LDAC initiative for “speed mentoring”; enhanced junior personnel exposure to senior enlisted/command. Directed training plan during 74-day patrol; increased crew readiness. Partnered w/CPO Mess to organize morale event to improve own relations w/senior enlisted; worked w/Base [redacted] housing workgroup to improve AY17 housing assignment process. Created uncomfortable & hostile workplace environment w/overly intrusive leadership & overstepping authorities; insensitive to crew situations & not attentive to their perspectives, demonstrated by intimidating/threatening behavior; lost credibility & crew's trust.

For the “Personal and Professional Qualities” section of the derogatory OER, the applicant received one 6, two 4s, and two 3s. The applicant’s supervisor provided the following comments:

Exceptional initiative; arranged delivery of 1200lbs in donated clothes to remote [redacted] villages & made lasting positive impacts; developed financial management course for junior mbrs & motivated them for future stability. Encouraged crew inclusion while on liberty; promoted camaraderie & self-accountability, mitigating misconduct/alcohol incidents. Excellent unit/CG rep engaging w/community & tribal leaders during COMREL events; solidified CG's positive reputation in [redacted]. Failed to uphold CG's core value of respect & displayed poor judgment; during a sensitive work-life situation involving junior crewmbr, did not respect mbr's desire to resolve situation; often talked down to, berated or humiliated crewmbrs in public settings; negative interactions created environment lacking dignity & low morale; severely degraded trust & own leadership authority w/in command structure.

On the Comparison Scale, the applicant received a mark in the third spot (of seven), which is the lowest of three spots described as “One of the Many High Performing Officers Who Form the Majority of the Grade.” And on the “Promotion Scale” the applicant received the second lowest mark of “Promotion Potential.” The Reporting Officer provided the following comments regarding the applicant:

Highly capable mid-grade officer w/exceptional professional knowledge and competence to achieve tangible results; admirably balanced operations, routine admin & training; performance technology & training background greatly benefited development, qualifications and proficiency of crew in completing all missions during high optempo period. Lacks appropriate interpersonal, communication & leadership skills to effectively manage personnel in shipboard or higher stress environments, as evidenced by feedback from crew in climate survey & equal opportunity focus groups not recommended for promotion at this time. Competencies, experience & qualities well suited for positions w/in training system. With further mentoring to improve communications skills, has potential to assume leadership positions w/greater responsibility.

The following statements were submitted in conjunction with the derogatory OER:

- A May 4, 2017, OER reply submitted by the applicant for inclusion with the OER in his record stated the following:

I desire to make the following comments in response to this evaluation. I will not deny the crew's perceptions; however, they are not based on all the facts and circumstances. In fact, I received regular encouragement

from the CO during our 301 days together and 1700 text messages exchanged in port. I had no opportunity to rectify [redacted] concerns as they were not identified to me. Until 22Feb17 when [redacted] counseled the CO on the command climate, all indications I had received were that the CO and I were aligned and that he supported, if not encouraged, my actions as XO.

Overall, I believe this OER is not an accurate reflection of my performance, but instead attributes most, if not all, of the negative aspects of the crew's perceptions onto me personally. Blocks 3.a, 3.b, and 3.c contain remarks related to communication and interactions with crewmembers that are not viewed in the entirety of the circumstances. Amidst a year with 255 days away from homeport, I recognized the fragility of our climate but still used blunt, decisive, and direct coaching to achieve what the CO communicated to me as his desired performance. The OER block 5.d comment "as evidenced by feedback from..." falsely implies the climate survey and focus groups exclusively validate my shortcomings. This contradicts the CO's verbal interpretation regarding the sustained tempo of the survey period, subordinate performance, and crew anxiety. The survey occurred during a 74-day [redacted] deployment between November and January coupled with survey and focus group responses emphasizing trust and requesting the CO show greater transparency and leadership.

Block 3.a: The comment that "[d]espite counseling on confrontational attitude in resolving issues..." is misleading. During the 20Jan17 performance counseling session documented on this OER, the CO was very positive in his assessment of the tempo, environment, and my communication, even praising my ability to adapt to meet crew's needs. Stating now that I was combative or argumentative omits that vocal crewmembers disparaged the efforts to be transparent and undermined command decisions, fabricating an "us versus them" environment. With regard to the comment that I "directly contributed to stifled communications..." I offer explanation that when poised with opportunity to educate junior members to help align with the CO's expectations, there was an inherent lack of respect in the CO's discretion. When faced with Townhall complaints regarding missions occurring after 1600 for example, the CO publicly represented that leadership would "look into" such matters but supported the tempo and my actions in private, allowing the perception that I would address the festering grievances. He often praised the improved efficiency in training despite the shipboard adversity.

Block 3.b: The assertion that I "[c]reated uncomfortable & hostile workplace environment w/overly intrusive leadership & overstepping authorities" is incorrect. There existed an entrenched disconnect between the CO and senior members. Still, I did my best to maintain a positive workplace and advocated for compromise between these parties. OER comments omit the private counseling sessions where the CO vented about adversarial tensions when he visited the Mess. Similarly, passive tension between the CO and Engineer Officer negatively impacted the command climate. In the midst of these dynamics, it seems unfair to ascribe the shortfalls of this cutter's dysfunctional climate primarily and seemingly almost exclusively on my performance. Another specific comment that I was "[i]nsensitive to crew situations & not attentive to their perspectives..." disregards my exhaustive efforts and work with the Ombudsman to care for members' personal priorities against the relentless focus on mission results and impact.

Block 3.c: Claiming that I "[f]ailed to uphold the CG's core value of respect and displayed poor judgment" is false and ignores my role as the XO - executing the orders of the CO when my recommendation(s) are overruled. An example concerns the incident when the CPO Mess alerted me a crewmember was being threatened with sexual assault. I promptly relayed their concerns to the CO and recommended to immediately notify [redacted] and CGIS. Instead, the CO directed that a CPO and I attempt to identify the aggressors and follow up with him personally before he would inform [redacted]. I realize now that I was naive and should have taken this off the ship.

I strove to communicate factually and make insightful recommendations to best care for the crew as referenced in numerous conduct and work-life issues. Each time I applied proactive leadership, the circumstances demanded an XO's presence due to external agency direction or outreach for unit engagement. At no time did I act in either a physically or verbally intimidating manner nor did I display threatening behavior. Though publicly the CO projected an image of compassion, privately in our dialogues, he displayed an indifference to growing animosity, notably when he criticized in port OODs and junior officer quality of work, and encouraged me to be his enforcer.

Block 5.d: The concluding assertion that I “lack[] appropriate interpersonal, communication & leadership skills” likewise paints an erroneous description of my value. Not referenced was my innovative good that required these skills; I recognized the crew's despondent attitude and coordinated morale baking/decorating efforts, delivered a financial management course, and resolved multiple conduct issues. I sought the CO's affirmation with all decision points impacting the crew and cutter and had the CO's full trust to coordinate numerous high stress evolutions and resolve tense crewmember situations. I take responsibility for my shortcomings and humbly regret the climate that was fostered. However, I am concerned the CO leveraged my willingness to support and defend him internally against his supervisors' misperception of my performance.

I do not believe this OER reflects the transparency of my overall performance. In the unfortunate circumstances that transpired, I sought to act with integrity and serious professionalism to uphold the CO's direction in the manner in which he desired his ship to be run. In the ensuing fallout from those decisions, that CO now documents previously praised performance and crew interactions as unsatisfactory. While the assignment process often attempts to balance traits and abilities of different officers in the command structure, I believe that most officers put into the same situation would have failed, and that outcomes as they were in the ship could have turned out substantially worse. I understand I will bear the cost of this exchange, in terms of career viability and opportunity to return to the high calling of command at sea. However, I must protest at the likelihood that, from the leadership and coaching provided to me by the CO in our short time together in CGC [cutter], my own promotion is now in jeopardy.

- A May 14, 2017, response from the CO to the applicant's OER reply, which states the following:

LCDR [applicant] grossly misrepresents the facts by stating “all indications I had received were that the CO and I were aligned and that he supported, if not encouraged, my actions as XO.” The crew's negative perceptions of LCDR [applicant] were strictly based on his actions alone and in no way did I encourage him to treat the crew in the manner that he did, by belittling or humiliating them. Additionally, his statement “I had no opportunity to rectify [redacted] concerns as they were not identified to me” inaccurately implies that he did not receive any feedback concerning his substandard performance. Although I was not personally aware of his demeaning behavior toward the crew until 27JAN2017 when I reviewed the results of the Defense Equal Opportunity Climate Survey (DEOCS), I counseled him on numerous occasions based on my observations of his interactions, feedback from some crewmembers, and advice from PAC staff members.

After a female crewmember informed me she felt uncomfortable and intimidated during an encounter with LCDR [applicant] in his stateroom, I counseled him and discussed ways to change his behavior to mitigate these types of perceptions; however, he evidently did not make the necessary adjustments. As I discovered later, he continued to intimidate, threaten and bully crewmembers, and in several instances, to the point of tears. Additionally, I counseled LCDR [applicant] regarding his confrontational attitude with the crew, which often created a tense working environment if people did not agree with him. I also counseled LCDR [applicant] to listen more and talk less when interacting with the crew. Instead of resolving issues through active listening and positive engagement with the crew, his typical approach was to confront the issue or person, often addressing them in an argumentative manner to get his way or prove his point. As he professed to several crewmembers that he was a “master manipulator,” he was obviously proud of his ability to manipulate people or situations to achieve his own desired outcome.

When lack of transparency was identified as a crew concern, I counseled LCDR [applicant] on ways to improve communications with the crew and suggested several methods for better transparency; however, little effort was made and my suggestions were not utilized. Due to his poor interactions with the crew, his abuse of powers, perceived shading of the truth, and hidden agendas, LCDR [applicant] lost the crew's trust, which consequently stifled communications. I regrettably placed too much trust in LCDR [applicant] and his recommendations, which were sometimes misrepresented to me as I also discovered later.

There were several work-life situations in which LCDR [applicant] became deeply involved and was insensitive to personal needs for the particular situations. As a result, I counseled him on better utilizing his

chain of command and resources to appropriately handle situation. When I asked LCDR [applicant] to validate rumors of a potential sexual assault toward a junior female crewmember, he created an intimidating environment where he threatened several crewmembers during questioning and attempted to verbally coerce the crewmember into initiating an investigation against her will. I strongly believe LCDR [applicant] was fully aware of his inappropriate actions since he asked me after reviewing the DEOCS report “Am I fired?” knowing that most of the comments resulted from his behavior. Additionally, he conveyed to a crewmember that he “laid low” during the [redacted] Command Master Chiefs ten-day visit onboard during a patrol.

- A May 30, 2017, response to the OER reply by the applicant’s Reporting Officer, who stated the following:

LCDR [applicant] addendum further evidenced the poor leadership qualities, leading to this officer’s removal from primary duties. Commenting on the “fragility” of the command climate, LCDR [applicant] continued to use “blunt” communication techniques that were not effective or well received by the crew of [cutter]. By the admission of this officer, the crew was stressed and the command climate was “dysfunctional.” These quoted adjectives are the words of LCDR [applicant]. This indicates to me that LCDR [applicant] understood problems existed in the command climate and there were opportunities to lead the crew of [cutter] out of dysfunction. Instead, LCDR [applicant] continued to contribute to a poor command climate through intimidating and threatening behaviors. Sailors in the Coast Guard deserve far better from their leaders.

By Coast Guard regulation, LCDR [applicant], as executive officer, was charged with fixing problems, maintaining discipline, and endeavoring to create high morale. I cannot find evidence where any of these were attempted, much less achieved. Instead, LCDR [applicant] now seeks to diminish the role he played in creating problems, breeding mistrust, and instilling fear.

Based on my observations, I cannot stress strongly enough that LCDR [applicant] should not return to a seagoing assignment in any capacity, nor should this officer be allowed to lead sailors in the future. While LCDR [applicant] was selected for CDR, the behavior of this officer is not indicative of the qualities expected of a senior officer. I strongly recommend for the removal of this officer from the CDR promotion list.

The evaluation of the reported-on officer is consistent with the observed performance and the derogatory information is substantiated.

On February 6, 2018, a CDR with Coast Guard Personnel Service Center (PSC) issued a memorandum, “Results of a Coast Guard Special Board – Removal from Selection List,” where in the applicant was notified that a Special Selection Board had convened on December 11, 2017, and recommended to the Secretary that the applicant’s name should be removed from the 2017 CDR Promotion list. The memorandum stated that on February 2, 2018, the Secretary approved the Special Selection Board’s recommendation. As a result, the applicant was removed from the list of selectees for promotion to CDR under Section 271(f) and 272 of Title 14 of the United States Code as in effect at the time. Finally, the applicant was informed that he would be considered for CDR at the next selection board, which would convene in July 2018.

On June 8, 2018, the applicant applied to the Coast Guard Personnel Records Review Board (PRRB) and asked to be retroactively promoted to CDR (O-5) beginning July 1, 2017, following the February 6, 2018, notification from the Special Selection Board that he had been removed from the CDR promotion list. The applicant also requested that the derogatory OER for the May 1, 2016, through February 26, 2017, rating period be removed from his military record. Regarding the applicant’s request for a retroactive promotion to CDR, the PRRB stated that the applicant had not demonstrated his basis for relief. Regarding the applicant’s claim that his derogatory OER was not prepared in accordance with policy, the PRRB, after considering all of

the evidence, including two sworn statements from the applicant's CO and RO, found no clear and compelling evidence to support removal of the derogatory OER. The PRRB further found that the applicant's allegations that statements contained in the derogatory OER lacked a factual basis and that his Supervisor/Reporting Officer lacked objectiveness due to his involvement in the on-going command climate investigation were not supported by the evidence. The PRRB stated that at the time the Supervisor/Reporting Officer signed the applicant's OER, the command climate investigation had concluded and an independent and senior officer fully supported the Supervisor's assessment of the applicant. Finally, the PRRB stated that the applicant's poor performance highlighted in his OER did not appear to be based off a one-time occurrence, but was grounded in multiple displays of poor leadership and communication. The PRRB noted that the statements submitted by the applicant to support his PRRB application reinforced and corroborated many of the issues highlighted in the applicant's OER. Accordingly, the PRRB denied the applicant's requests for relief.

VIEWS OF THE COAST GUARD

On January 29, 2021, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he 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.

The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for correction of an OER. The JAG stated that as explained in *Hary v. United States*,³ the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The JAG argued that the applicant must demonstrate, by competent evidence 1) a misstatement of a significant, 2) a clear violation of a specific objective requirement of a statute or regulation, or 3) factors adversely affecting the rating which had no business being in the rating process. The JAG stated that here, the applicant failed to do so.

The JAG stated that the applicant did not point to or establish any misstatements of a significant hard fact or a clear violation of a specific policy in either his RPD or the associated OER. The JAG claimed that using the information contained in the command climate investigation report, in addition to the utilizing the discretion afforded to him in policy⁴, the applicant's CO properly removed the applicant from his primary duties as XO. The JAG explained that to make the RPD permanent, the same policy required that the applicant receive a special OER, which was ultimately accepted by CG PSC-OPM on or about July 28, 2017. The JAG argued that as to the evaluation itself, policy permitted the applicant's CO to draw on "observations" and "other information." Furthermore, the Reporting Officer (RO) was permitted to provide "judgment." The JAG further argued that the judicial system has recognized that the evaluation system is not a clinically objective one.⁵ According to the JAG, the applicant supplied only an allegation that his rating chain had selected him as a scapegoat and marked him unjustly. The JAG stated that ultimately, the applicant's special OER was validated by CG PSC-OPM on June 22, 2017, as being in accordance with the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST

³ *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

⁴ Article 1.F.2.d. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A.

⁵ "Perfect objectivity in the rating process cannot be expected or even hoped for." *Muse v. United States*, 21 Cl. Ct. 592, 605 (1990)(quoting *Guy v. United States*, 221 Ct. Cl. 427, 433 (1979)).

M1000.3A. Therefore, the JAG argued that the first and second prongs of the *Hary* test are not implicated.

The JAG stated that the applicant put the greatest emphasis on third *Hary* factor, but again failed to satisfy his required burden of evidence. The JAG stated that the applicant's allegations of manipulation, obfuscation, and self-preservation by his chain of command are not supported by the evidence. The JAG explained that according to the climate investigation report, the applicant's CO felt alignment with the applicant and held the applicant in a position of trust, but the CO's opinion changed when he was better informed by the resulting investigation. After this enlightenment, the JAG claimed that the request to permanently remove the applicant from his primary duties, was evaluated and accepted by neutral parties, namely the RO and CG PSC-OPM itself. The JAG argued that this review process received further insight and information by the applicant's submission of a reply to the OER.

Accordingly, the JAG argued that because no *Hary* factor was offended, the applicant cannot overcome the presumption that Coast Guard administrators discharged their duties other than correctly, lawfully, and in good faith.

APPLICANT'S RESPONSE TO VIEWS OF THE COAST GUARD

On February 12, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. The Chair received the applicant's response on March 16, 2021.

The applicant stated that he did not concur with the Coast Guard's opinion and that his request to have his OER removed from his record and his promotion to Commander reinstated with backpay from July 1, 2107, must be considered by non-Coast Guard parties. The applicant stated that it is astounding how a single order given by a CO can set in motion the events that have destroyed his career.

The applicant explained that following reports of sexual assault threats upon a crewmember, he immediately relayed the report to his Supervisor, the CO, on or about December 18, 2016. According to the applicant, the Chief's Mess speculated that this issue would immediately return the ship to port pursuant to Coast Guard policy. The applicant claimed that his CO acknowledged that he directed the applicant to inquire into the sexual assault threats, after which the applicant explained to the CO that Coast Guard policy required that the threats be reported to the chain of command and Coast Guard Investigative Services (CGIS). The applicant alleged that his CO denied his request to report the threats to their chain of command and CGIS.

The applicant explained that his cutter was afloat in the middle of the sea, which meant they could not isolate, separate, or return to port. The applicant stated that his crew was working nearly twenty hour days and their next port call was roughly a week away, which prevented him from going to base commanders to seek their counsel, leaving him at the mercy of his CO. During the time, the applicant stated that they were in winter weather conditions, but he made a judgment call to notify his Sector's Civil Rights Officer (CRO) via a Satellite phone and connected the CRO with the victim, despite the CO's order not to notify anyone. The applicant claimed that within a day of making this call and connecting the CRO with the victim, his CO privately berated him in

the CO's cabin for failing to follow his orders. The applicant stated that he contacted the CRO not knowing that his CO was facilitating other avenues with the CO's immediate supervisor. The applicant alleged that after reading his CO's response to his personal statement, he became fully aware of how his CO manipulated the situation to justify his poor decisions. The applicant further alleged that he made Coast Guard aware of previous insensitive and inappropriate comments the CO made to female junior officers, but the Coast Guard simply ignored the report and failed to acknowledge the CO's poor leadership during critical gender specific incidents.

The applicant claimed that the Coast Guard failed to follow the following policies: 1.) Military Whistleblower Protection Act, Title 10 U.S.C. § 1034; 2.) Coast Guard Whistleblower Protection, 33 C.F.R. Part 53; 3.) Article 5.D.5⁶ and 5.O.8.⁷ of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A; 4.) Sexual Assault Prevention and Response (SAPR) Program, COMDTINST M1754.10E; and 5.) Coast Guard Regulations (1992), COMDTINST M5000.3B. The applicant argued that had the Coast Guard followed these policies, the injustices committed against him could have been prevented.

The applicant stated that he pursued a congressional inquiry as to why the Coast Guard denied him whistleblower protection, but in the Coast Guard's response to his inquiry, they ignored his whistleblower allegations and only justified their actions taken against the applicant by referencing his previous CO's judgment of him. The applicant alleged that the Coast Guard should have provided him with protection pursuant to law for notifying his chain of command of his CO's failure to follow policy and abuse of authority. The applicant stated that he was astounded that his CO's immediate supervisor would contact his CO directly, and not contact him in any capacity. The applicant claimed that although his CO became aware of the command climate investigation on or about January 18, 2017, but withheld that information until three days before the investigators arrived on February 1, 2017. During the time, the applicant alleged that there was a remarkable change in the interaction between himself and his CO, which he could not explain. The applicant claimed that once his CO disclosed the upcoming command climate investigation, he requested a copy of the Convening Order—the central document used to outline the scope of the investigation—but his CO denied his request. According to the applicant, he requested the Convening Authority a second time on the advice of counsel, but his CO denied that a Convening Order existed. The applicant stated that at that point, he learned that both he and his CO were

⁶ Article 5.D.5. of the Officer Accessions, Evaluations, and Promotions Manual, states, "In instances where a rating chain member is unavailable or disqualified to carry out their responsibilities and if not already determined by the commanding officer, it is incumbent on the reported-on officer to identify the next senior officer in the chain of command that an exception to the rating chain may exist and an appropriate substitute for evaluating the reported-on officer must be designated. This issue should be raised by the reported-on officer during the reporting period or within 60 days after the end of the reporting period.

⁷ Article 5.O. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, states, "Definitions. The following definitions apply on to this chapter.

...

8. Disqualified. Includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the supervisor, reporting officer, or reviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation.

interested parties to the investigation. The applicant alleged that given the negative consequences both he and his CO faced as a result of the investigation, his CO should have been disqualified from being his supervisor. Regarding his CO's claim there was no Convening Order, the applicant stated that a Convening Order was proven to exist when it was disclosed in his FOIA request. The applicant argued that not only was he not provided the required whistleblower protection, but the very officer he reported, his CO, crafted an evaluation that removed his promotion and cancelled his follow on orders.

The applicant alleged that the Coast Guard failed to protect his status as a whistleblower, when his chain of command provided the CO with advance knowledge of the command climate investigation and hindered his efforts to gain access to this CO's personal statement submitted in response to the investigation. The applicant claimed that ultimately, his CO deflected the negative command climate that he created through capricious behavior, threatening remarks, and a failure to respect the safety and professional duties of enlisted members under his command. The applicant stated that at the end of the day, the Coast Guard found that he was at fault for "perpetrating a negative command climate," despite not being in command. The applicant further stated that up to this point, his OERs had been practically flawless and that he received full support in executing his orders.

The applicant alleged that the timing and narrative of the CO further supports an argument that the CO abused his power. The applicant explained that within a few weeks of an issue that nearly ripped the cutter apart due to the CO's refusal to notify proper personnel, he attempted to moderate the situation, but in doing so he solidified his position as an unpopular XO. The applicant claimed that each of the events referenced by his CO reinforce the natural duties of an XO to hold subordinates accountable. The applicant stated that the entire cutter lacked a CO capable of communicating his vision to the crew and withdrew from engaging with the crew. The applicant claimed that the CO absolutely succeeded in crafting a narrative that isolated and dismissed the countless leadership and operational successes he contributed to while aboard the cutter.

The applicant stated that while these claims and allegations could be construed as his opinions, they are not, but are the facts that led to injustices committed against him by the Coast Guard. Injustices the applicant argued the Coast Guard has refused to acknowledge. The applicant alleged that had the Coast Guard been transparent and followed required steps when conducting its investigation—namely maintained an Administrative Investigation Log and withheld knowledge of investigations into interested parties—and had it provided him with whistleblower protection, this situation could have been handled through an independent authority. Instead, the applicant claimed that he was continually denied support or relief due to biased policies used to protect an officer closer to themselves in rank and relationship.

The applicant alleged that the Coast Guard relied exclusively on statements made by a CO that ordered him to withhold mandatory reporting information to his command, admitted to his status as an "interested party," knowingly withheld information about the pending command climate investigation, willfully berated the applicant for disobeying an order that conflicted with Coast Guard policy, and successfully deflected responsibility and abused policy to terminate the applicant's career prematurely.

The applicant argued that this Board's decision is about more than just protecting his career, but will have ramifications to ensure senior officers are prohibited from protecting each other as seen through recent issues such as racial insensitivities. The applicant stated that this Board's decision will right a wrong and ensure Court-Martial authorities protect whistleblowers, but noting that the applicant had steadfastly made a whistleblower protection claim, for which the Coast Guard has failed to acknowledge in any capacity.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 271(f)(1) states, "The promotion of an officer may be delayed without prejudice if any of the following applies:

...

(C) The Secretary determines that credible information of an adverse nature, including a substantiated adverse finding or conclusion described in section 2115(a)(3), with respect to the officer will result in the convening of a special selection review board under section 2120a of this title to review the officer and recommend whether the recommendation for promotion of the officer should be sustained.

Coast Guard Policies & Instructions

Article 1.F.2.b. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, discusses the circumstances that warrant removal of a commissioned officer from his primary duties as follows:

An officer may be considered for permanent removal from primary duties under the following circumstances:

- 1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or
- 2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, or
- 3) The officer's actions significantly undermine their leadership authority.

Article 1.F.2.d. of Military Assignments and Authorized Absences Manual discusses the process of removing an officer from their primary duties as follows:

- 1) At the time's discretion, an officer may be temporarily removed from primary duties at any time. Upon determining that an officer meets the requirements of Article 1.F.2.b. of this Manual for permanent removal from primary duties, the command will submit an OER in accordance with Article 5.A.3.c. and 5.a.4.h. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series). That command should inform the officer of the RPD process and way forward.
- 2) After the OER is routed to Commander (CG PSC-OPM-3) or (CG PSC-RPM) per Article 5.A.2.i. of reference (q), Officer Accession, Evaluations, and Promotions, COMDTINST M1000.3 (series), Commander (CG PSC-OPM) or (CG PSC-RPM) will review and make the final decision on removal from primary duties.

Article 5 of the Officer Accessions, Evaluations, and Promotions Manual in force at the time, COMDTINST M1000.3A, provides the following guidance on an officer being removed from his primary duties and the subsequent derogatory OER that must follow:

Article 5.E.7. Removal from Primary Duty (RPD).

- a. This OER must be submitted when permanently removing an officer from their primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority's final action on a permanent relief for cause request in accordance with Reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series).
- b. The OER will be defined as derogatory and must follow the policies and standards for derogatory OER stated in Article 5.H. of this Manual.
- c. Reassignment not constituting RPD as provided in Reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series), is not derogatory and therefore does not require a RPD OER.

...

Article 5.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.
2. The rating chain must provide an authenticated copy to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum.
3. The reported-on officer has the option to prepare an addendum limited to two pages with no enclosures.
4. The supervisor and the reporting officer must be afforded the opportunity to address the reported-on officer's addendum via individual one page signed endorsements to the reported-on officer's addendum.

...

10. The reviewer must ensure that the evaluation of the reported-on officer is consistent and that the derogatory information is substantiated. If the reviewer finds otherwise, they must return the report to the reporting officer 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.

The Coast Guard Administrative Investigations Manual, COMDTINST M5830.1A, provides the following guidance on Standard Investigations:

Article 1.D. Definitions. For purposes of this manual, the following terminology applies:

1.a. Standard Investigations. Formerly referred to as “Informal Investigations,” Standard Investigations are convened to investigate the vast majority of minor and major incidents requiring an Administrative Investigation. These investigations are normally conducted by a single individual known as the Investigating Officer (I.O.). A Standard Investigation uses informal evidence-gathering procedures, and usually does not conduct hearings. It does not have authority to designate Parties or to subpoena witnesses. (See Chapter 4).

...

8. Party. A person who is required to be accorded specific rights in connection with a Formal Investigation or Court of Inquiry. A Party is usually designated because their conduct is subject to investigation. A Party must be accorded the opportunity to participate in the investigation as described in Chapter 10 of this manual.

...

Article 4.C.6. Comparison to Other Administrative Investigations.

a. Standard Investigations usually have a single Investigating Officer who conducts interviews and collects evidence. There is no authority to designate Parties in a Standard Investigation. In contrast, Formal Investigations normally involve a hearing and a designated Party. Formal Investigation procedures are mandated whenever a Party is designated.

b. Since no Parties are designated in the Standard Investigation, no one is entitled to the rights of a Party, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The Investigating Officer in a Standard Investigation may, however, make relevant findings of fact, opinions and/or recommendations concerning individuals, even where those findings of fact, opinions and/or recommendations are adverse to the individual or individuals concerned.

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 and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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.⁸

3. The application was 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).

⁸ *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. The applicant alleged that his removal from his primary duties (RPD), the SOER documenting his RPD, and his removal from the CDR promotion list are erroneous and unjust because (1) the Coast Guard failed to provide him with protections afforded to service members who make protected communications; (2) his CO was an “interested party” in the command climate investigation and so should have been disqualified from serving on the applicant’s rating chain; and (3) the Coast Guard relied exclusively on statements made by his CO who was biased and could not remain objective. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation 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.⁹ 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.¹⁰ In addition, to be entitled to removal of an OER, the 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.¹¹

5. Whistleblower Protections. The applicant argued that the Coast Guard should have provided him protection under the federal and Coast Guard Whistleblower Protection Acts. The applicant alleged that after he became aware of inappropriate sexual comments made toward on OS3, he reported the comments to his CO and told his CO that policy required that their chain of command be notified. According to the applicant, his CO told him not to inform their chain of command, but to investigate the matter further. The applicant claimed that he disregarded his CO’s orders and instead called his chain of command and informed them of the possible sexual harassment that had taken place and put the OS3 in touch with a victim advocate. According to the applicant, the statements he made to his chain of command regarding the sexual harassment and his CO’s order to disobey policy were protected communications, which guaranteed him protection from retaliation and adverse personnel action. However, the applicant has not met his burden of proof as to these allegations as he did not submit any independent evidence in support of his claims. The Board notes that the Office of the Inspector General (OIG) has exclusive jurisdiction for the Department of Homeland Security’s whistleblower complaints and investigations and the applicant did not provide any evidence of a communication being made to OIG.. However, even if he had presented evidence supporting his allegations, the evidence of record still provided an independent basis for his CO/Command to take the actions in question and does not support a claim of retaliation. Contrary to the applicant’s claims, the evidence demonstrates that the actions complained about were taken in response to the results of the command climate investigation. Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that he made protected communications about a sexual assault contrary to the direction of his CO or that, if he did, the CO retaliated against him because of his protected communications.

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹¹ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

6. Command Climate Investigation. The record shows that the applicant's chain of command became aware of a poor command climate aboard the applicant's cutter and that the applicant was at the center of the reported poor command climate. As a result, the Sector command issued a Convening Order wherein he appointed an investigating officer, CAPT P, to conduct a command climate investigation aboard the applicant's cutter. The results of this investigation revealed that the applicant had consistently engaged in conduct that was not in keeping with the Coast Guard's Core Values. For example, the applicant was described by shipmates as a bully who was frequently physically threatening and intimidating toward crew member's careers. It was noted that junior officers were frequent targets of the applicant's unacceptable conduct.

Members of the crew interviewed during the course of the investigation reported seeing shipmates leaving in tears after an encounter with the applicant. It was also reported that the applicant was skeptical and insensitive when members of his crew expressed thoughts of suicide. Regarding the allegations of sexual harassment/assault, the applicant reportedly bullied and threatened individuals involved in the investigation, most notably, the OS3 who was the target of the sexually inappropriate comments. When the OS3 informed the applicant that she did not want to pursue the matter further and that she felt safe amongst her crew, the applicant reportedly told her, "It's going to come back and haunt you if you don't open an investigation." The OS3 and others felt the applicant manipulated the facts of the situation in an effort to pressure the OS3 into filing a report. The applicant was also accused of ordering a CS1 to report to him daily to tell the applicant "one good thing" the applicant had done that day. The CS1 found the applicant's punishment to be demeaning. These are only a few of the complaints lodged against the applicant during the course of the command climate investigation. The IO's opinion was that the applicant had repeatedly belittled and humiliated his subordinates and did not treat his shipmates with dignity and respect. The IO recommended that the applicant be immediately removed as the cutter's XO and that an OER be issued to reflect that the applicant was not recommended to serve in a Command Cadre position for the Coast Guard again.

7. Removal from Primary Duties. As a result of the command climate investigation, the applicant was removed from his primary duties as the cutter's XO. The applicant alleged that his RPD was erroneous and unjust because his CO was an "interested party" of the investigation. He argued that because there were potential negative consequences to his CO's career as a result of the investigation, his CO should have been disqualified from serving as his supervisor. The applicant further alleged that his RPD was erroneous and unjust because his chain of command based their decision exclusively on statements made by his CO. For the following reasons, the Board disagrees:

- a. The record shows that on January 18, 2017, the Sector Command issued a Convening Order wherein CAPT P was directed to conduct a standard investigation in accordance with the Coast Guard Administrative Investigations Manual, COMDTINST M5830.1A. Article 4.C.6.a. COMDTINST M5830.1A, states, "There is no authority to designate Parties in a Standard Investigation." Article 4.C.6.b. goes on to state, "Since no parties are designated in the Standard Investigation, no one is entitled to the rights of a Party, such as notice of the proceedings, an opportunity to participate..." Therefore, Coast Guard policy makes it clear that for standard investigations, no Parties are designated and because no parties are designated, no one is entitled to the rights of a Party, which includes notice of proceedings

and the right to participate. Accordingly, because neither the applicant nor his CO were Parties to the investigation, the Command Climate Investigation did not require the CO to be disqualified from serving on the applicant's rating chain.

- b. The record further shows that the applicant's chain of command received the IO's report of investigation on February 15, 2107. This report revealed that the applicant's behavior had created an untenable and intolerable situation for his crewmembers and as a result, the IO not only recommended that the applicant be immediately removed from his role as XO, but that he never again be allowed to serve in a Command Cadre position in the Coast Guard. Although the applicant claims that the decision to remove him was based solely on statements made by his CO, a preponderance of the evidence shows that the applicant's chain of command based their decision on the numerous reports by members of the applicant's crew that the applicant favored an abusive and abrasive leadership style. The preponderance of the evidence further shows that multiple sources reported that the applicant treated his shipmates in an unacceptable manner, abused his authority as the XO, and tried to intimidate enlisted members into filing reports they did not want to file. Again, this is only a few of the complaints lodged against the applicant during the course of the investigation. An objective review of the record shows that the applicant not only failed to uphold the Coast Guard's Core Values as the cutter's XO, but refused to take any accountability for his actions. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his chain of command, erroneously and unjustly based their decision to remove the applicant from his primary duties solely on statements made by the CO, and not on information contained in IO's report.

8. Derogatory OER. Article 5.E.7.a. of COMDTINST M1000.3A states that an OER must be submitted when permanently removing an officer from their primary duties as a result of conduct or performance which is substandard. Article 5.E.7.b. of the same manual states that this OER will be defined as derogatory and must follow the policies and standards for derogatory OERs stated in Article 5.H. of the same manual. Article 5.H. states, "A derogatory OER is any regular or non-regular OER that indicates the Reported-on officer has failed in the accomplishment of his assigned duties." Article 5.H.1.c. further states that derogatory reports are only those OERs that "documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position." Here, the record shows that the applicant's conduct was adverse to his cutter and crewmembers and fell below the standards expected of Coast Guard officers. As a result, he was removed from his primary duties. Coast Guard policy required that once the applicant was permanently removed from his primary duties, that a derogatory OER be issued and entered in the applicant's record. The applicant has failed to show that the derogatory OER was adversely affected by a misstatement of significant hard fact, a clear violation of a specific objective requirement of a statute or regulation, or a factor that had no business being in the rating process, as required by *Hary v. United States*.¹² Therefore, the applicant has failed to prove, by a preponderance of the evidence, that his derogatory OER was erroneous and unjust.

9. Removal from CDR Promotion List. The applicant alleged that his name was erroneously and unjustly removed from the Commander's 2017 Promotion List. However, the record shows that the command climate investigation revealed that the applicant's conduct as a

¹² *Supra*, Footnote 12.

member of a cutter's Command Cadre and as a LCDR of the United States Coast Guard fell far below the expectations of both an XO and LCDR. As a result of these revelations, the applicant was not recommended for promotion in his derogatory OER for the . Title 14 U.S.C. § 271(f)(1)(C) states that the promotion of an officer may be delayed without prejudice if "The Secretary determines that credible information of an adverse nature, including a substantiated adverse finding or conclusion described in section 2115(a)(3),^[13] with respect to the officer will result in the convening of a special selection review board under section 2120a of this title to review the officer and recommend whether the recommendation for promotion of the officer should be sustained." A Special Selection Board was convened on December 11, 2017, to consider the applicant's continued promotion to CDR, and after reviewing the applicant's record, the board recommended that the applicant's name be removed from the 2017 Promotion List. This recommendation was approved by the Secretary on February 2, 2018. Therefore, the record shows that the applicant's promotion to CDR was considered by the appropriate authorities, and after careful consideration, and in consultation with the applicant's record and command climate investigation, in accordance with 14 U.S.C. § 271(f)(1)(C), decided that it was in the Coast Guard's best interest that the applicant not be promoted to CDR at that time. Accordingly, the applicant has failed to prove, by a preponderance of the evidence, that the CDR Special Selection Board was convened against policy, or that any Coast Guard policy was violated in the process of removing his name from the 2017 CDR Promotion List. His request for relief should be denied.

10. The applicant asked the Board to change Coast Guard policies, but the Board has no authority to do so. The Board's jurisdiction over military records is limited to records concerning individual applicants.¹⁴ The applicant made many allegations regarding the actions and attitudes of his CO, and chain of command. Those allegations and arguments not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.¹⁵

11. The applicant has not proven, by a preponderance of the evidence, that his RPD was erroneous or unjust, that the derogatory OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation,¹⁶ or that his removal from the 2017 CDR Promotion List was erroneous or unjust. Therefore, his requests for relief should be denied.

¹³ 14 U.S.C. § 2115 states, "(a) In general.--The Secretary shall furnish the appropriate selection board convened under [section 2106](#) of this title with - ...

(3) in the case of an eligible officer considered for promotion to a rank above lieutenant, any credible information of an adverse nature, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry and any information placed in the personnel service record of the officer under section 1745(a) of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66; 10 U.S.C. 1561 note), shall be furnished to the selection board in accordance with standards and procedures set out in the regulations prescribed by the Secretary.

¹⁴ 10 U.S.C. § 1552(k).

¹⁵ 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

¹⁶ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

ORDER

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

June 8, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
[REDACTED] [REDACTED] Date: 2023.06.20 13:50:58 -04'00'

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