

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-031

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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 January 14, 2021, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 16, 2024, 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 revising his concurrent Officer Evaluation Report (OER)¹ for his performance during a Temporary Duty (TDY) assignment as the Executive Officer (XO) of a cutter for the two months from May 3, 2019 to July 5, 2019. Specifically, he asked the Board to raise the marks he received on the Comparison Scale and Promotion Scale on the concurrent OER. The applicant explained that the CO of the cutter, CDR P, originally prepared and signed the OER as both Supervisor and Reporting Officer (RO). As the RO, the CO assigned him a high mark of “One of few distinguished officers” on the Comparison Scale² and a mark of “Promote w/top 20% of peers”

¹ A concurrent OER is an OER submitted outside of the regular submission schedule in addition to a regular OER and thus does not count for continuity. Article 5.F.1. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A. On a concurrent OER form, CG-5310F, the Supervisor is tasked with providing a detailed description of a Coast Guard officer’s accomplishments and performance on a TDY assignment. The officer’s Reporting Officer (usually the Supervisor’s Supervisor) then assigns the marks on a Comparison Scale and a Promotion Scale. Unlike a traditional OER, there is no section for a Reviewer to complete to either concur with the OER as submitted or add comments to provide a significantly different perspective.

² Article 4.F.2.a. of PSCINST 1611.1 provides the following instructions to Reporting Officers for completing the Comparison Scale on an OER form:

on the Promotion Scale.³ However, those marks were subsequently lowered by the Chief of the Area Cutter Forces, CDR D. Therefore, he asked the Board to revert the marks to those that the CO had originally assigned to him. The applicant also requested a Special Selection Board (SSB) for each promotion year beginning in 2019. He also asked that his Record of Professional Development be updated to be accurate for each promotion year and that, if selected for promotion by one of the SSBs, he receive a backdated date of rank and backpay.

The applicant explained that after the CO signed the original OER on July 1, 2019, as both Supervisor and Reporting Officer (RO) and the applicant himself signed it on July 5, 2019, the OER was submitted to the Officer Personnel Management (OPM) division of the Personnel Service Center for entry in his record. However, on July 9, 2019, OPM returned the OER for correction because Coast Guard policy requires at least two different officer's signatures on all OERs. Therefore, the CO could not serve as both Supervisor and RO for the OER. Instead, the CO could sign only as the Supervisor, and the Chief of Area Cutter Forces, CDR D, had to sign the OER as the RO. In preparing the revised version of the OER, CDR D did not assign the applicant the same high marks on the Comparison Scale and Promotion Scale that the CO had made. Instead, CDR D lowered those marks to "One of the many high performing officers who form the majority of this grade" and "Promote," respectively.

The applicant argued that CDR D violated Coast Guard policy by marking him without having any direct observation or interaction during the rating period of the OER. The applicant alleged that he never interacted with CDR D during his TDY assignment and that CDR D's marks were based solely on the short duration of the TDY assignment, rather than the applicant's actual performance. He claimed that there is an "arbitrary and unwritten rule" that equates a limited time aboard with quality of performance and that reliance on this "rule" violated Coast Guard policy because not only were the marks not based on direct observation, but they also did not take into account the limited period of performance that concurrent OERs cover. The applicant argued this made the majority of the OER form superfluous and nullified the entire purpose of the concurrent OER.

The applicant also argued that CDR D's marks on the Comparison Scale and Promotion Scale were inconsistent with his actual performance, which he believes was accurately described by the CO in the laudatory comments in block 3. He noted that the CO's description of his performance stated that he demonstrated "operational prowess & crew management of a seasoned O5" and that the CO had given the applicant his "absolute highest/ unequivocal recommendation for command of WMEC/OPC."⁴ The applicant stated that CDR D did not dispute the CO's

a. Comparison Scale, Form CG-5310A and CG-5310B. The Reporting Officer fills in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. [NOTE: This section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category.] The visual graphic shows expected (not required) distribution.

³ On the OER form, CG-5310F, the Promotion Scale includes the following possible marks: Recently promoted (within 12 months of promotion); Already selected to next pay grade; Do not promote; Promotion potential; Promote; Promote w/top 20% of peers; In-zone reorder; Below-zone select.

⁴ The commanding officer of a medium endurance cutter (WMEC) and an offshore patrol cutter (OPC) is an O-5 position.

description of his performance and that it is difficult to reconcile the CO's written description of his performance with CDR D's marks on the Comparison and Promotion Scales.

The applicant also argued that CDR D did not consider "other reliable reports and records" when marking the applicant as required by Coast Guard policy. He asserted that he met with CDR D on October 3, 2019, for an OER counseling session, and CDR D told him that the OER marks had been affected by "unit reputation." The applicant argued that "unit reputation" meant that CDR D had used the cutter's past performance as a metric to gauge the applicant's performance and so CDR D's marks were not based on his performance during the rating period. He also asserted that CDR D had not considered additional performance feedback from the applicant's permanent chain of command, office chief, or CDR H, his commanding officer during a previous TDY assignment as an XO. The applicant stated that he had supplied CDR D with supplemental performance support, and CDR D had agreed to seek additional feedback from CDR H. However, CDR D chose not to engage with any other sources.

Finally, the applicant argued that CDR D unjustifiably influenced the OER process, harming the applicant's promotion and assignment potential. He claimed that CDR D told him on October 3, 2019, that CDR D expects COs to accept requested changes to marks and that he placed undue pressure on those who refused. The applicant also argued that there appears to be an "unconscious bias" against TDY personnel that unjustifiably influenced the OER process.

To support his claims, the applicant included a statement from his permanent unit supervisor, CDR J, which was prepared in support of the applicant's petition to the Personnel Records Review Board and is discussed in detail in the Summary of the Record below. The applicant also included statements from the CO of the cutter, CDR P, and a Chief Boatswain's Mate (BMC) that appear to have been prepared for the PY 2019 CDR Selection Board.

- In a letter dated December 5, 2019, the CO described the applicant's performance as XO on the cutter from May 3, 2019, to July 5, 2019. He said that the applicant oversaw significant training, managed three extensive personnel challenges, and was instrumental in boosting crew morale. He described the applicant as creative and hardworking and a "model shipmate, leader, and teacher."
- In a letter dated December 20, 2019, the BMC described the applicant as "vital to the ship's mission by providing operational and technical support" during a drug interdiction operation. The BMC also credited the applicant's prowess for training with the crew's earning 73 shipboard qualifications. The BMC also complimented the applicant's focus on high crew morale. He described the applicant as "one of the best XO's" he had ever worked under and attested that the applicant went above and beyond the expectations of a TDY XO.

Finally, the applicant also attached two Letters of Commendation awarded during his two TDY assignments as the XO of a cutter, as well as his two most recent Regular OERs.

SUMMARY OF THE RECORD

The applicant graduated from the U.S. Coast Guard Academy and was commissioned as an Ensign (O-1) on May 21, 2003. He was promoted to Lieutenant Junior Grade (O-2) in 2004; to Lieutenant (O-3) in 2007; and to LCDR in 2013. His assignments included being the XO of a patrol boat from 2005 to 2007 and being the CO of a patrol boat from 2011 to 2013. He received an Achievement Medal and a Commendation Medal for these tours of duty, respectively. Subsequently, the applicant attended graduate school and was assigned to Headquarters billets.

The applicant received a Letter of Commendation on July 6, 2017, for his service as the TDY XO of a medium endurance cutter from May to July 2017. The applicant was noted to have selflessly rearranged his obligations to fill the vacancy and to have made the cutter a better ship through his efforts and hard work.

On June 6, 2018, the applicant received the Coast Guard Commendation Medal for outstanding achievement during his tour of duty in a Headquarters billet from September 2014 to June 2018. He was then transferred to another Headquarters billet as a program manager.

Previous OER

On his annual OER evaluating his performance as a program manager from May 1, 2018, to April 30, 2019, the applicant received three excellent marks of 6 and fifteen superior marks of 7 in the various performance categories (on a scale from 1 (worst) to 7 (best)) for his service in the program manager billet. On the Comparison Scale, his RO assigned him a mark of “One of few distinguished officers” (the 6th highest of 7 possible marks). On the Promotion Scale, the RO entered a high mark of “In-zone reorder.”

Temporary Assignment as XO

On February 25, 2019, the applicant was solicited to fill another critical TDY assignment as the XO of a cutter underway in the seas around Latin America. The applicant accepted the assignment and served as XO aboard the cutter for two months from May 3, 2019, to July 5, 2019. The CO of the cutter, CDR P, was the applicant’s direct Supervisor. CDR D was the Chief of Cutter Forces for the Area.

On June 29, 2019, the CO of the cutter signed a Letter of Commendation for the applicant’s performance of duty aboard the cutter. The applicant was recognized for his quick response to the TDY solicitation, his energetic attitude in organizing three morale events for the crew, his oversight of “15 training evolutions resulting in a 100% completion rate,” his oversight of 17 personnel transfers in foreign ports, and other work he undertook to help ensure that the cutter met all its goals and successfully completed its assigned missions. The CO commended the applicant for his “outstanding performance of duty.”

Disputed OER

On July 1, 2019, near the end of the applicant's TDY assignment, the CO of the cutter, CDR P, prepared a concurrent OER for the applicant and signed it as both the Supervisor and the RO. As the Supervisor, the CO provided a paragraph of highly laudatory comments about the applicant's performance:

Superior ability to immediately assume command position, should be selected for one of the initial OPC's due to ability to initiate positive op procedures. Demo'd operational prowess & crew management of seasoned 05: flawlessly executed 60 day CD patrol, coord'd mtg w/NSC & WMEC to share tactics & push intel for improved interoperability; interdicted low profile vsl & 2 go-fasts, seized 4209kg contraband valued at +\$55M, & 13 suspects. Expertly managed crew w/ 48% turnover in foreign ports; oversaw preps for CO CoC/retirement w/3-Star Presiding. Coach & Safety for 11 special sea details & 11 hr Panama Canal transit, led crew thru emergency drills, boat/flight ops, non-compliant vsl use of force, live gunnery exercise; contributed to 100% trng completion rate and 70 quals. Caring & inclusive leader: coached EO struggling w/cmd climate; coord'd 2 emergency leave and 2 medevac w/out passports and GTCC; briefed changes to Post-9/11 GI Bill and assisted 2 w/ transfer of benefits; promoted prodev & welfare of crew. Resp for good order & discipline of ship: initiated CGIS investigation for alleged felony; E6 Alcohol Incident/NJP; E3 separation for misconduct; assured just treatment & upheld highest CG standards. Top Service rep: steered international engagement w/Panama. Signature ready 3 OERs, 12 evals, & 12 awards. Superlative performance in all regards as XO of WMEC amid dynamic & operationally rigorous JIATF-S EASTPAC patrol demonstrates innate ability to command and serve in hi-profile afloat positions. Passion & propensity for afloat ops motivated crew to perform beyond expectations and served as a catalyst for a highly successful patrol. Absolute highest/unequivocal recommendation for command of WMEC/OPC. Tremendously talented & inspiring leader w/drive rarely seen at paygrade-unlimited Service potential.

In addition, acting as the RO, the CO assigned the applicant a mark of "One of few distinguished officers" on the Comparison Scale (the 6th highest mark of 7) and a mark of "Promote w/top 20% of peers" on the Comparison Scale. The applicant signed the OER on July 5, 2019, and it was submitted to OPM for processing.

OPM returned the OER on July 9, 2019, for administrative correction because, according to Coast Guard policy, CDR P could not serve as both the Supervisor and RO on a concurrent OER. Two different officers had to serve as the Supervisor and the RO. Therefore, CDR P removed his signature as the RO and routed the concurrent OER to CDR D, the Chief of Area Cutter Forces, to assign the Comparison Scale and Promotion Scale marks as the RO.

On July 16, 2019, CDR D signed the concurrent OER as the RO after assigning the applicant a Comparison Scale mark of "One of the many high performing officers who form the majority of this grade" (the 5th highest mark of 7) and a mark of "Promote" on the Promotion Scale.

On July 17, 2019, CDR P emailed a copy of the revised concurrent OER to the applicant and thanked him for his "outstanding dedication." In the email, CDR P told the applicant that CDR D had "moved the one mark in the final block down based on limited time aboard, but confirmed with OPM it is not a[n] issue that would affect you in any way."

The applicant signed the concurrent OER on July 19, 2019.

In August 2019, the PY 2020 CDR Selection Board convened and did not select the applicant for promotion to CDR.

On August 28, 2019, the applicant emailed CDR D to request counseling on the disputed OER. CDR D responded to the applicant on the same day. He stated that he had been swamped due to a hurricane and asked the applicant to reach back out to him the following week.

On September 5, 2019, the applicant emailed CDR D to follow up on his request for OER counseling. CDR D again responded the same day and told the applicant they would need to push the discussion out for two weeks because he would be TDY the following week.

According to the applicant, he spoke with CDR D by phone on October 3, 2019. The applicant's permanent duty station supervisor, CDR J, also participated in the call. The applicant claimed that CDR D offered insight into how he manages the OER process and told the applicant that the change in marks was based on his limited time on board the cutter as well as unit performance and reputation.

In an email following up on the call, also dated October 3, 2019, the applicant thanked CDR D for his time. He also acknowledged that he did not believe the disputed OER was the sole reason that he was passed over for promotion. The applicant thanked CDR D for his willingness to speak with OPM and his commanding officer during a previous TDY assignment.

On November 5, 2019, the applicant emailed CDR D to follow up on the October 3 phone conversation and stated the following:

Following up on our call last month. I know you have been in and out of the office a lot. Hopefully, you had an opportunity to discuss with OPM and [CDR H, the CO of the applicant's permanent unit]. I met with the board president a couple of weeks ago to review my record and the center punch was the basis for a much deeper/in-depth review of my record; no silver bullet.

Let me know if you need more time to consider changing the mark. I didn't want to send you the wrong message that it's not important [to] me.

I hope all is well and look forward to hearing from you.

CDR D responded on the same day and stated that he was out of the office but would be happy to discuss once he returned. He also stated that he had spoken with OPM and believed that "the mark is correct/appropriate."

The applicant responded to CDR D on November 8, 2019, and stated that he had hoped CDR D would speak with the commanding officer of his permanent unit, as discussed. He also said, "From what I understand, there is nothing that I could have done in 60-90 days to earn a higher mark." He noted that was unfortunate because both of his commanding officers recognized that his performance had improved the culture and readiness of the ship. He also claimed that OPM and the selection board president had told him that the mark had raised a lot of questions.

Annual OER

On his annual OER for the year from May 1, 2019 to April 30, 2020, the applicant received one excellent mark of 6 and seventeen superior marks of 7 (on a scale from 1 (worst) to 7 (best)) in the various performance categories from his rating officials at his permanent unit. On the Comparison Scale, he received a mark of “One of few distinguished officers,” and on the Promotion Scale, he received a mark of “In-zone reorder.”

Personnel Records Review Board

The applicant timely filed an application for relief from the Personnel Records Review Board (PRRB), asking the PRRB to correct the disputed OER by changing the Comparison Scale mark on the concurrent OER to “One of few distinguished officers” and the Promotion Scale mark to “Promote w/top 20% of peers.” The applicant also asked the PRRB to convene an SSB to reconsider him for selection to CDR (O-5).

The applicant’s arguments before the PRRB were very similar to those now before the BCMR. The applicant argued that CDR D had marked him lower than he otherwise would have based solely on the duration of the assignment. The applicant also argued that CDR D did not consider “other reliable reports and records” in marking the applicant, as required by policy. Finally, the applicant argued that CDR D did not consider additional performance feedback from the applicant’s non-TDY chain of command, Office Chief, or his Commanding Officer for an earlier TDY assignment.

As noted above, the applicant submitted a letter from his Supervisor at his permanent duty station, CDR J, dated January 24, 2020, in support of his application to the PRRB. In the letter, dated January 24, 2020, CDR J asserted that the concurrent OER had adversely affected the applicant’s chance of selection by the PY 2020 CDR Selection Board, which convened in 2019. Having participated in the counseling session between the applicant and CDR D, CDR J claimed that he “witnessed a complete loss of confidence and breakdown in the OER process.” He stated that he found it concerning that CDR D had not previously counseled the applicant or discussed the OER marks with him before the OER was submitted. He recommended that the OER marks be raised to those proposed by the CO of the cutter, CDR P, and that the applicant be reconsidered for promotion by an SSB. CDR J attested that in his more than 25 years in the Coast Guard, he had never seen a more dedicated individual than the applicant and that he firmly believes the applicant’s integrity and caliber are needed in the Service. In addition, in an email to the PRRB dated May 4, 2020, which apparently followed a phone call from the PRRB attorney, CDR J wrote, “as requested quote from CDR [D] on a phone call with [the applicant] and myself he stated “the marks were based on time on board and not on performance” and “based on previous performance of unit in comparison to other units” prior to [the applicant’s] arrival.”

The PRRB also obtained a declaration from CDR D, the Chief of Cutter Forces for the Area, to allow him to respond to the applicant’s claims and request for relief. In a declaration dated March 9, 2020, CDR D attested under the penalty of perjury that the Comparison Scale and Promotion Scale marks he had assigned to the applicant were appropriate. He stated that when the CO forwarded the OER to him, the CO included draft marks for the two scales for his

consideration. Because it was a concurrent OER, he sought additional guidance from OPM-3 (the Officer Evaluation Branch of OPM) and the Chief of Operational Forces for the Area. After discussing the marks with them, he assigned the marks, signed the OER, and sent it back to the CO of the cutter, CDR P, on July 17, 2020. CDR P replied the same day, saying, "Thanks, [CDR D]. That is where I originally was also." CDR D stated that after the applicant received the OER, the applicant's permanent chain of command engaged the Area chain of command, including the Area Chief of Operations and the Area Chief of Staff. "Multiple conversations were had, ultimately resulting in support for the marks which I assigned."

The PRRB issued a split recommendation on June 1, 2020 with two members voting to grant relief and two members voting to deny relief. The two in favor of granting relief concluded that there was clear and convincing evidence that CDR D had considered the applicant's limited time on board in assigning the Comparison Scale and Promotion Scale marks and that such a consideration was not permitted by the OER instructions and was counter to the logistical purpose of a concurrent OER. They also concluded that the applicant's marks had been lowered as a result of CDR D's consideration of the shortness of the reporting period.

The two PRRB members who recommended denial of relief found that the applicant had not provided clear and convincing evidence to overcome the presumption of regularity with respect to the disputed OER marks. First, they noted that the CO, CDR P, did not have the authority to assign the disputed marks, and so no error occurred when CDR D assigned the marks as the RO. With regard to the allegation that CDR D erred in taking into consideration the shortness of the rating period when assigning the marks, they noted that the OER Manual, PSCINST M1611.1D, provides the following instruction, which does not prohibit taking the shortness of the rating period into account:

The Reporting Officer fills in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. NOTE: This section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category.

They also concluded that "[i]t is the sole discretion of the Reporting Officer to compare and mark based on all officers of the same grade he has observed during his career. The Applicant provided no evidence to show that this was not the case; thus, there is no reason to change the mark."

On June 11, 2020, Captain W, Acting Director of Military Personnel, approved the recommendation to deny relief and signed a memorandum explaining the decision:

1. In accordance with Correcting Military Records, COMDTINST 1070. 1, Section 7.c.(5)(a) and (b), "[p]ersonnel records are presumed to be administratively correct and prepared in an objective manner in accordance with applicable laws and regulations The burden of proof is upon the applicant. Accordingly, to justify correction of a record, the applicant must produce clear and convincing evidence that overcomes the presumption of regularity with respect to the contested record and establishes that action is warranted to correct a material error."

2. Per PSCINST M1611.1D, Ch. 1.A.3.b.1., it is the Reporting Officer's (RO) responsibility to fill in the circle that most closely reflects the RO's ranking of the Reported-on Officer (ROO) relative to all other officers of the same grade the RO has known; further, "[t]his section represents a relative ranking of the [ROO], not

necessarily a trend of performance.” The RO is also required to fill out the Promotion Scale. The Applicant has failed to overcome the presumption of regularity by clear and convincing evidence. The RO attested that he reviewed the OER and, given that it was a concurrent OER, he discussed his role as RO and the marks with OPM-3. He further attested that the marks were appropriate based on the merits of the officer’s performance and review of the OER. Further, the RO stated that the Supervisor emailed him after receiving the applicant’s OER and stated that he, the Supervisor, had also considered marking the Applicant as the RO eventually did mark him, indicating that the marks given by the RO were not a “material error” based on both the RO’s and the Supervisor’s observation. Even if one assumes that the RO stated that the performance was based on limited time onboard, the Applicant has not demonstrated how that statement is evidence of improper administrative action. The Applicant has produced no evidence to support his claim that the marks were based solely on the duration of the assignment, as he alleges. Without context, the statement regarding limited time onboard is ambiguous at best. Again, assuming the applicant has demonstrated by clear and convincing evidence that the RO made the statement, he could have meant that, based on the limited time onboard, what he observed of the Applicant was accurately reflected in Block 5 but the Applicant could have performed better had he had time to learn and adapt. The RO also could have meant that, based on the limited time on board, the Applicant did not perform as well as other officers of the grade that [the] RO knew who also had the same limited time to demonstrate their leadership and proficiency. Because the Applicant bears the burden of proof to present clear and convincing evidence that the marks were based only on his limited time onboard and no other factor (including performance during that limited time), he has failed to meet that high burden.

VIEWS OF THE COAST GUARD

On July 12, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which they recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared on behalf of the Commander, Coast Guard Personnel Service Center (PSC).

PSC argued that CDR D was not obligated to keep the marks that were suggested by CDR P and that CDR D was free to change them at his discretion. PSC also argued that the fact that CDR D had no direct contact with the applicant during the rating period of the concurrent OER is immaterial because he acted as directed by policy to serve as the RO.

PSC also asserted that the applicant did not offer compelling evidence to overcome the presumption of regularity accorded OERs. PSC disagreed with the applicant’s argument that “because a number of other officers would have marked him differently on a relative assessment infer that CDR [D’s] own assessment is in error or unjust.” PSC noted that Coast Guard policy does not prohibit the RO from considering the length of the rating period when filling in the Comparison and Promotion Scales. PSC also concluded that the applicant did not offer compelling evidence that CDR D’s marks are inconsistent with the actual performance as described by the CO in the disputed OER; nor did he offer compelling evidence that CDR D did not consider “other reliable reports and records.”

Finally, PSC asserted that the applicant “speculates that [the disputed OER] led to a non-selection to O-5 during PY21.” However, PSC argued that the applicant could not prove that argument because selection board proceedings and deliberations cannot be disclosed under 14 U.S.C. § 261. PSC also noted that procedurally, board members consider numerous factors in making selections. PSC stated that because concurrent OERs are of a limited period of observation, they are balanced against regular OERs encompassing the same period of report. As a result, PSC argued that a myriad of other factors were likely considered by each Selection Board.

The JAG added that, as outlined in *Hary v. United States*, the applicant must do more than merely allege or prove that an OER appears inaccurate, incomplete or subjective. The applicant must demonstrate, by competent evidence, (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.⁵ The JAG argued that the applicant failed to meet any of the *Hary* prongs, and for that reason cannot establish an error or injustice.

First, the JAG argued that the applicant did not establish a misstatement of a significant hard fact in his OER. Instead, the JAG asserted that the applicant agreed with all of the facts as he believed the description of his performance provided by CDR P was accurate. Therefore, the JAG argued that the applicant's position indicates that the hard facts in the OER narratives are accurate and not misstated.

Second, the JAG argued that the applicant did not establish a clear violation of a specific objective requirement of statute or regulation. The JAG noted that the applicant claimed CDR D violated policy because he chose not to inquire or receive feedback from "other reliable reports and records" and did not respond to his permanent duty station chain-of-command or Commanding Officer from a previous TDY XO assignment that sought to provide additional feedback. The JAG argued that the most reliable reports and records applicable to the disputed OER and the review period were the narratives in the draft concurrent OER submitted by the applicant's supervisor, CDR P. The Comparison and Promotion Scales completed in error by CDR P also qualified as "other information provided by the supervisor" that CDR D could use to evaluate the applicant. CDR D attested that he reviewed the OER and discussed it with OPM. The JAG stated that CDR D considered the information available within the OER, including the CDR P's draft Comparison and Promotion Scale marks. The JAG further argued that nothing in Coast Guard policy required CDR D to seek information or consider information from other commands that did not supervise the applicant during the reporting period since any information they would be able to provide would be immaterial as it would relate to performance outside of the reporting period.

Third, the JAG argued that the applicant failed to meet his burden to prove that the shortness of his time onboard the cutter adversely affected the marks that CDR D assigned. The JAG disagreed with one of the PRRB arguments that "[N]o instruction or form lists 'limited time on board' as a proper factor for the Reporting Officer to consider." Instead, the JAG asserted that the proper statement is that "no instruction or form prohibits time on board as a factor the Reporting Officer may consider." The JAG pointed to *Guy v. United States*,⁶ as illustrative as to the types of factors that are considered to have no business in the rating process. In *Guy*, the court noted that the rating process is inherently subjective and will be left alone by military boards and judicial review in the absence of clear and convincing evidence of factors adversely affecting the ratings which had no business being considered.⁷ The court went on to recognize "bias and personal animosity" as examples of such factors.⁸ The JAG argued that other than the applicant's assertion that CDR D must have a bias against TDY assignments because he used time as a factor in the

⁵ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980).

⁶ 221 Ct. Cl. 427 (1979).

⁷ *Id.* at 433.

⁸ *Id.*

ratings, the applicant provided no evidence of such a bias or other evidence that would indicate animosity, friction, or ill treatment of the applicant.

The JAG also argued that even if the Board were to find that the consideration of time had no business in the rating process, the applicant has failed to show that CDR D relied on that factor as material to the marks. The JAG asserted that the existence of time as a factor when CDR D made relative assessments in those blocks does not prove, materially, that his marks on the comparison and promotion scales were errant or erroneous. Similarly, the JAG asserted, the removal of time as a factor does not prove that the applicant should have been marked as “One of few distinguished officers” and “Promote w/top 20% of peers.” The JAG argued that those assessments are relative to the experience of the Reporting Officer completing the OER.

The JAG also asserted that even if the Board found that the duration of the rating period should not affect the rating process and that it was a material factor to CDR D’s marks, the applicant has still failed to provide evidence to prove that the disputed OER resulted in his non-selection at the PY 2021 CDR Selection Board. The JAG argued that the applicant relies on speculation to assume that the disputed OER led to his non-selection since board proceedings and deliberations are undisclosed pursuant to 14 U.S.C. § 261. However, the JAG argued that presumably the selection board would have considered numerous factors and that due to the limited duration of concurrent OERs, they are balanced against regular OERs that cover the same reporting period. Therefore, the JAG argued that there were likely a myriad of other factors attributable to the applicant’s non-selection, such as the applicant’s assignment history, how well the applicant’s record aligned with the Commandant’s Guidance to PY 2021 Boards and Panels, and how well the applicant’s overall performance, professionalism, leadership, and education were assessed relative to his peers. The JAG concluded that the applicant failed to demonstrate that any of the *Hary* factors had been offended and therefore was unable to overcome the presumption that Coast Guard administrators discharged their duties correctly, lawfully, and in good faith.

Finally, the JAG also disputed the applicant’s requested relief. The JAG argued that the applicant was asking the Board to replace CDR D’s impression of his performance with that of his Supervisor, CDR P. The JAG asserted that Coast Guard policy supports an independent assessment of the applicant by his rating chain and that CDR D attested to speaking with OPM and maintained that the marks were correct and appropriate. The JAG believed that CDR D’s email correspondence with the applicant made clear that he felt differently than CDR P in terms of the comparison and promotion scales. Therefore, the JAG argued that replacing CDR D’s judgment and opinion with CDR P’s would be an inappropriate remedy.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 15, 2021, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. In his response dated August 27, 2021, the applicant opposed several allegations set forth by the JAG.

First, the applicant disagreed with the JAG’s conclusion that the PRRB denied relief. Instead, he asserted that the PRRB, including the “Board President and Lawyer,” determined that CDR D did not follow Coast Guard policy and recommended relief. The applicant argued that

OPM submitted a dissenting opinion that caused the PRRB to deny relief. He accused the PSC/OPM from having an “inherent conflict of interest” in this process since those same offices are responsible for the evaluation process and implementing any corrective actions. The applicant claimed he “performed several record reviews with OPM staff” and was told that the disputed OER was problematic for his career. He questioned the purpose of the PRRB if the PSC had the authority to accept or reject the board’s recommendation.

The applicant disputed the JAG’s assertion that his performance outside of the review period was “immaterial” because CDR D attested to consulting outside sources, including regional command and OPM, and that neither of those sources had any direct observation or communication with him during the period of performance. While he agreed that previous and subsequent evaluations should have no bearing on the reporting period in question, he argued that they do offer insights and observable trends in his record of performance which is considered by selection boards. The applicant stated that the “promote” mark is an outlier as he was marked “promote with top 20%” in 2017 and 2018, and “in-zone reorder” in 2019, 2020, and 2021. He argued that the “drop in performance” stands out as an irregularity and goes against the Commandant’s guidance to selection boards and panels to promote officers of sustained excellence.

The applicant also disagreed with the JAG’s argument that he had not demonstrated a violation of Coast Guard policy. He first argued that the evaluation process is flawed because concurrent OERs do not require authentication by a Reviewer. The applicant argued that such a requirement would have prevented CDR D from providing his “abstract opinion” of his performance. He also asserted that Coast Guard policy requires the Supervisor and Reporting Officer to provide timely performance feedback during and at the end of the reporting period, and that neither CDR P nor CDR D notified the applicant of any shortcomings or areas of improvement. The applicant also argued that CDR D did not make himself available to discuss the disputed OER until 79 days after the marking period ended. He asserted that CDR D did not change the marks on the Comparison and Promotion Scales based on anything material and noted that CDR D did not provide any alternate explanation for why he changed the marks other than the applicant’s limited time on board.

In response to the JAG’s argument that the applicant did not demonstrate that CDR D lowered the marks due to bias or personal animosity, the applicant reiterated that CDR D did not observe or communicate with him during the reporting period and that it would be impossible for CDR D to properly evaluate his performance without input from CDR P. “Blindly changing the marks suggests it was an abstract opinion based solely on being temporarily assigned.” The applicant also emphasized that CDR D’s staff repeatedly requested his assistance in filling critical vacancies aboard ships and argued that it demonstrated a level of responsibility that would not be given to an officer considered a below average or average performer.

The applicant also disputed the JAG’s statement that CDR P did not submit a declaration. He pointed to the letter CDR P wrote on his behalf that was submitted to the PRRB, and also stated that CDR P informed the applicant that he never received any communication from the Coast Guard requesting a declaration. CDR P wrote another letter that the applicant submitted along with his response to the advisory opinion and stated that CDR P was prepared to speak before the Board on his behalf.

Finally, the applicant argued that it was “misleading” for the JAG to assert that the disputed OER did not contribute to his non-selection for promotion to O-5. He claimed that the mark of “promote” is widely acknowledged to be a below-average mark and claimed that the PSC/OPM should have data to support his assertion. He also claimed that the mark of “promote” is referred to as a “center punch” or “death punch” that will negatively affect an officer’s career. The applicant claimed he met with promotion board members and OPM to discuss his record and one board president told him that “[a] center punch in your primary specialty was likely enough for the [b]oard to pass you over.” He also claimed that he is no longer able to compete for afloat assignments or positions of greater responsibility due to the disputed OER.

In a letter dated August 17, 2021, CDR P echoed the applicant’s achievements while serving on board the cutter and reiterated his recommendation of the application for “Executive Officer or Commanding Officer afloat or any other challenging leadership position.”

APPLICABLE LAW AND POLICY

Article 5.F.1. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST 1000.3A, states the following regarding the use of concurrent OERs in relevant part:

Concurrent. A concurrent OER is an OER submitted outside of the regular submission schedule in addition to a regular OER and thus does not count for continuity.

- a. The unit to which the reported-on officer is permanently attached is always responsible for ensuring that OER continuity is maintained with regular OERs. The permanent unit’s OER is never considered a concurrent report.
- b. Concurrent reports may be submitted only when the officer is:
 - (1) On active duty and performing temporary duty (TDY) away from a permanent station while being observed by a senior officer other than the regular reporting officer...In this case, the concurrent report normally will be written upon the detachment of the TDY officer and cover only the period of temporary duty. This is an optional OER And will be submitted at the discretion of the TDY command. A TDY concurrent OER must be for a period of at least 60 days.

Article 1.A.1. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1D (January 2018) (hereinafter, “OER manual”), states the following regarding a Reported-on Officer in relevant part:

b. Be responsible for managing their performance and requesting mid-term counseling from their rating chain. This responsibility entails determining job expectations, obtaining sufficient performance feedback from the Supervisor during the period, and using that information to meet or exceed standards. Request an appointment with the Supervisor at the beginning and during each reporting period, if clarification of duties and areas of emphasis is needed.

...

k. Assume ultimate responsibility for managing their own performance, notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough, and that OERs and associated documentation are timely and accurate.

Article 1.A.3.b.1. of the manual provides the following regarding the responsibilities of the Reporting Officer when preparing an OER in relevant part:

[1] Evaluate the Reported-on Officer based on direct observation, the Officer Support Form (OSF), Form CG-5308, other information provided by the Supervisor, and other reliable reports and records.

Article 4.B.11. of the manual states that OER comments may not “[d]iscuss 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.” (The exceptions concern special OERs documenting past performance that was unknown when the regular OER was prepared and rating officers’ endorsements of a Reported-on Officer’s OER Reply when the Reply references performance outside the rating period.)

Article 13.B. of the manual states the following regarding the function of a Concurrent OER (emphasis in original):

Concurrent OERs serve as a vehicle for documenting performance away from the permanent unit. A Concurrent OER covers performance observed by a rating chain other than the permanent unit...The Concurrent OER will be written upon the detachment of the officer and cover only the period of temporary duty. The Concurrent OER provides a record of significant performance that was not directly observed by the rating chain from the permanent unit. The Concurrent OER rating chain has the option to complete the Concurrent OER on either the one page Concurrent OER form or the standard OER form. *Since the Concurrent OER form only has a two-person rating chain, it is recommended, but not required, that the Reporting Officer be a Coast Guard military officer or member of the Coast Guard Senior Executive Service.* The rating chain must be two different members, regardless of rank. Requirements in Article 5.F.1. of Reference (a) [Officer Accessions, Evaluations and Promotions, COMDTINST M1000.3] still apply. (Emphasis in original.)

Article 13.D.4.c. of the manual provides the following regarding the Supervisor’s responsibilities in completing a Concurrent OER in relevant part:

c. Section 2, Description of Duties.

[1] Summarize goals and objectives for period of report. The Supervisor writes a summary of the most important aspects of Reported-on Officer’s job. Use common sense approach to describe the most important duties in a manner that will be understandable to a reader unfamiliar with the officer’s job.

[2] Describe duties and responsibilities to provide an overall understanding of the job. Also note conditions particular to the assignment. Include number of people supervised, funds controlled, and unit operation or organizational relationship as appropriate. Define highly technical terms and uncommon acronyms. Comments must be clear and concise and confined solely to the space allotted on the form.

d. Section 3, Detailed Description of Accomplishments/Performance.

[1]. This section is designed to measure an officer’s demonstrated performance and qualities exhibited with performing duties away from their permanent unit.

[2]. The Supervisor includes comments that best characterize the officer’s performance and conduct. Well-written comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities. Omit superlative objectives, needless statistics, and imprecise phrasing. Describe the officer’s accomplishments and performance that have been observed during the period. The Supervisor should recount specific details or achievements and describe results or impact.

Article 13.D.5.b. of the manual provides the following regarding the Reporting Officer's responsibilities in completing a concurrent OER (emphasis added):

b. Section 5, Comparison, Promotion and Rating Scale.

[1] Comparison Scale (CG-5310F and GC-5310G). The Reporting Officer fills in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. NOTE: This section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category.

[2] Promotion Scale (CG-5310F). In addition to the comparison scale, the Reporting Officer is required to fill in one Promotion Scale mark

Article 17.A. of the manual states the following regarding Reported-on Officer replies to OERs in relevant part:

1. The Reported-on Officer may reply to any OER. Replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. A Reported-on Officer OER reply does not constitute a request to correct their record.
2. 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 Reference (a) and Article 4.B. of this Manual apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.

Title 14, United States Code (U.S.C.), section 2120, in relevant part provides:

(b) Officers considered but not selected; material error.—

(B) In general.—In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 2106, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that—

(B) an action of the selection board that considered the officer or former officer—

- (B) was contrary to law in a matter material to the decision of the board; or
- (ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

...

(d) Appointment of officers recommended for promotion. —

(1) In general.--An officer or former officer whose name is placed on a promotion list as a result of the recommendation of a special selection board convened under this section shall be appointed, as soon as practicable, to the next higher grade in accordance with the law and policies that would have been applicable to the officer or former officer had the officer or former officer been recommended for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(2) Effect.--An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(3) Record correction.--If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer not eligible for promotion or a former officer whose name was referred to the board for consideration, the Secretary may act under section 1552 of title 10 to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from the officer or former officer not being selected for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

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 concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discovery of the alleged error in accordance with 33 C.F.R. § 52.22.

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.⁹

3. The applicant alleged that the Comparison Scale and Promotion Scale marks on his concurrent OER are erroneous and unjust and should be revised to reflect the marks originally assigned by the CO of the cutter. The applicant requests the Board correct the concurrent OER, for the period May 3, 2019 to July 5, 2019, by changing the Comparison Scale to "One of few distinguished officers" and the Promotion Scale "Promote w/top 20% of peers" and sending his records to a Special Selection Board (SSB) to reconsider him for promotion to CDR/O-5. 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.¹⁰ 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.¹¹ To be entitled to relief, 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

⁹ *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).

¹⁰ 33 C.F.R. § 52.24(b).

¹¹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.¹²

4. PSC’s Return of the Original OER. Initially, the Board finds no error in PSC’s return of the original OER for correction. Article 13.B. of the OER manual, PSCINST M1611.1D, in effect at the time, expressly states that the rating chain for concurrent OERs “must be two different members, regardless of rank.” It was contrary to Coast Guard policy for the applicant’s CO, CDR P, to serve as both Supervisor and Reporting Officer and it was properly returned for a different officer to serve as the Reporting Officer, CDR D. The Board further finds that CDR D was not bound by the Comparison and Promotion Scale marks initially made by CDR P. Under the provisions of PSCINST M1611.1D, Article 1.A.3.b., the Reporting Officer is the one responsible for completing the reporting officer authentication, which includes the Comparison Scale and Promotion Scale marks. However, as discussed below, the Board is persuaded that, in this case, the applicant has demonstrated by a preponderance of the evidence the existence of an injustice warranting relief.¹³ Specifically, the Board finds that consideration of the short duration of the TDY assignment by the Reporting Officer, which resulted in a downgrade in the Comparison Scale and Promotion Scale marks on the concurrent OER, was a factor that adversely affected the rating and had no business being in the rating process.

5. Lack of Direct Observation. The record reflects that the applicant served aboard the cutter on TDY for 64 days from May 3, 2019 to July 5, 2019, and for 60 of those 64 days, the cutter was underway on patrol around Latin America. As a last-minute arrival, the applicant’s ability to impact the cutter’s initial preparation for the voyage would have been minimal. CDR D, the Chief of Cutter Forces for the Area who signed the concurrent OER as the RO, did not visit the cutter while the applicant was aboard. Article 1.A.3.b.1 of the OER manual states that the RO’s evaluation should be based on direct observation, the officer’s own input, information from the Supervisor, and “other reliable reports and records.” Therefore, CDR D’s sources of information about the applicant’s performance were limited to the CO of the cutter and other reliable reports and records. Per Coast Guard policy, CDR D was required to consider the CDR P’s input, as the Supervisor, in making his own evaluation.

6. Marks Inconsistent with Performance. The applicant argued that CDR D’s marks are inconsistent with his actual performance during the rating period. The Board agrees that the mark of “Promote” is inconsistent with the OER comments prepared by the Supervisor, CDR P.

¹² *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).

¹³ Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.” *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); but see 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907 (finding that “[t]he words ‘error’ and ‘injustice’ as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ need not have been caused by the service involved.”). The Board has authority to determine whether an injustice exists on a “case-by-case basis.” Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002). Indeed, “when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,” *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)), and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.” *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

CDR P's comments are a laudatory account of the applicant's superior performance while aboard the cutter. CDR P noted that the applicant performed beyond expectations and "served as a catalyst for a highly successful patrol." CDR P provided his "highest/unequivocal recommendation for command . . ." describing the applicant as a "[t]remendously talented [and] inspiring leader w[ith] drive rarely seen at paygrade-unlimited Service potential." The Reporting Officer's marks represent a relative ranking of the Reported-on Officer compared to all other officers of the same grade whom the Reporting Officer has known throughout his or her career.¹⁴ The OER policy neither states nor implies that those marks should be based entirely on the description of performance provided by the Supervisor. A Reporting Officer could have a different assessment of an officer's performance based on his or her own knowledge and experience or based on information from sources other than the Supervisor. Therefore, the laudatory comments in block 3 of the concurrent OER do not *per se* make the Reporting Officer's marks on the Comparison and Promotion Scales erroneous or unjust. However, these marks do show that without any direct observation of the applicant's performance as XO, the Reporting Officer opted to assign lower marks than those recommended by the Supervisor based on some other information or consideration, which, in this case, the Board finds was the short duration of the TDY assignment.

7. Consideration of Short TDY Duration. The applicant argued that the block 5 (Comparison Scale and Promotion Scale) marks in the concurrent OER are erroneous and unjust because in assigning them, CDR D took into consideration the short amount of time that the applicant served aboard the cutter. The record reflects that CDR D admitted to considering time on board as a factor when completing Block 5 of the concurrent OER. CDR P, CDR J, and the applicant have all confirmed CDR D stated on more than one occasion that time on board was a factor in the marking decision. In a July 17, 2019 email to the applicant, CDR P noted CDR D "moved the one mark in the final block down based on limited time aboard." In a May 2, 2020 email to one of the board member assigned to the applicant's PRRB case, CDR J stated that on a call with the applicant and himself, CDR D stated "the marks were based on time on board and not performance." Further, in his declaration to the PRRB, CDR D makes no mention of the applicant's performance during the period of report or what information he relied upon in making the Comparison and Promotion Scales marks. CDR D does not contradict or refute the statements from CDR P and CDR J that he used time on board, and not performance, as the basis for the marks. Based on a preponderance of the evidence, the Board finds the Reporting Officer clearly used the applicant's limited time on board as a or the material factor in determining the applicant's Comparison Scale and Promotion Scale marks.

8. The Board considered and concurred with the findings of the two members of the PRRB that previously voted to grant relief that CDR D's consideration of the applicant's limited time on board in completing block 5 of the concurrent OER was not permitted by the OER manuals, counter to the logistical purpose of a concurrent OER, and the applicant's marks had been lowered as a result of said consideration. The Board could not locate a Coast Guard policy or form that lists "limited time on board" as a proper factor for Reporting Officers to consider when completing the Comparison and Promotion Scales on a Concurrent OER. By their very nature, concurrent OERs are meant to capture periods of temporary duty exceeding 60 days. Periods of "limited time on board," like the period at issue here, is exactly the sort of period that concurrent OERs are designed to measure. Penalizing or imposing an artificial cap on the

¹⁴ PSCINST M1611.1D, Art. 13.D.5.c.

Comparison and Promotion Scales for an officer because he or she had a short period of report on a concurrent OER eliminates the purpose of these reports – *i.e.*, to document generally short periods of performance away from the permanent unit. Further, the Reporting Officer admitted in statements to CDR P and CDR J that he lowered the marks because of the short duration of the TDY. As such, the Board finds that the applicant has demonstrated by a preponderance of the evidence, that the Reporting Officer considered a factor, specifically limited time on board, that had no business being in the rating process that materially and adversely affected the Comparison Scale and Promotion Scale marks on the concurrent OER. Given this finding, the Board need not address the merits of the applicant’s other allegations of error and injustice in the concurrent OER.

9. Revising or Removing the Concurrent OER. The applicant requested the Board correct the concurrent OER to reinstate the Comparison Scale and Promotion Scale marks originally assigned by CDR P. However, the Board finds such a remedy would, in practical effect, result in CDR P serving as Supervisor and Reporting Officer because it would substitute his impression of the applicant’s performance for that of the new Reporting Officer, which is prohibited in concurrent OERs by Coast Guard policy.¹⁵ Instead the Board finds the more appropriate remedy is to remove the flawed concurrent OER from the applicant’s record in its entirety. As such, the Coast Guard should remove the concurrent OER, for the period May 3, 2019 to July 5, 2019, from the applicant’s record.

10. Special Selection Board. The applicant also requested the Board send his records to an SSB for reconsideration of promotion to CDR/O-5. The Coast Guard argued that the applicant has failed to provide evidence that it was the concurrent OER, and not some other factor that resulted in his non-selection for promotion. Because promotion board proceedings and deliberations are not disclosed in accordance with 14 U.S.C. § 2118, it is impossible to know with certainty why the applicant was not selected for promotion. However, the Board finds that the lower mark on the concurrent OER would stand out as an anomaly and cause a reasonable officer reviewing the applicant’s record to question his promotion potential. As such, in light of its removal from the applicant’s record, consideration of the 2019 concurrent OER by the PY2020 CDR selection board constitutes material error warranting an SSB.¹⁶ As such, the Coast Guard should convene an SSB to determine whether the applicant would have been promoted by the PY2020 CDR selection board with the corrected record.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁵ PSCINST M1611.1D, Art. 13.B.

¹⁶ 14 U.S.C. § 2120(b).

ORDER

The application of LCDR [REDACTED] [REDACTED] USCG, for correction of his military record is partially granted. The Coast Guard shall—

- Remove the Concurrent Officer Evaluation Report, for the period from May 3, 2019 to July 5, 2019, from the applicant’s record.
- After the record is corrected, convene a Special Selection Board to evaluate the applicant’s records for promotion by the Promotion Year (PY) 2020 Commander/O-5 selection board. If the Special Selection Board selects him for promotion, the Coast Guard shall place his name on the next CDR promotion list for appointment to CDR. Once promoted, the Coast Guard shall backdate his date of rank to what it would have been had he been selected by the original PY2020 CDR selection board, and pay him all backpay and allowances due as a result of these corrections. If the Special Selection Board does not select the applicant for promotion, no further correction of his record shall be made.

February 16, 2024

[REDACTED] Digitally signed by [REDACTED]
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