

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-083


LTJG (O-2)

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 May 26, 2021, 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 September 22, 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 Junior Grade (LTJG/O-2) on active duty, challenged his 2018 and 2020 regular Officer Evaluation Reports (OERs) and subsequent non-selections for promotion. Specifically, he asked the Board to correct his military record by:

- 1) Changing the following numerical marks¹ on his OER for the period April 1, 2018, through July 9, 2018:
 - a) his "Results & Effectiveness" mark from 4 to 6;
 - b) his "Adaptability" mark from 4 to 6;
 - c) his "Professional Competence" mark from 5 to 6;
 - d) his "Judgment" mark from 4 to 6; and
 - e) his "Responsibility" mark from 4 to 6.

- 2) Changing the following marks on his February 1, 2020, through June 9, 2020, OER:
 - a) his "Planning & Preparedness" mark from 5 to 6;
 - b) his "Result & Effectiveness" mark from 5 to 6;
 - c) his "Adaptability" mark from 5 to 6;

¹ On an OER form, an officer is evaluated by his or her Supervisor in 18 performance dimensions on a scale from 1 (worst) to 7 (best). In addition, the Reporting Officers (normally the Supervisor's Supervisor) assigns the officer a mark on an officer Comparison Scale and a mark on a Promotion Scale.

- d) his “Professional Competence” mark from 4 to 6;
 - e) his “Developing Others” mark from 5 to 6;
 - f) his “Workplace Climate” mark from 5 to 6;
 - g) his “Judgment” mark from 5 to 6; and
 - h) his “Professional Presence” mark from 5 to 6.
- 3) Removing all restricted comments as outlined in the Officer Accessions, Evaluations and Promotions Manual, COMDTINST M1000.3A.
 - 4) Removing the following comment from his 2020 OER: “Overcame personal challenges in tactical operations training pipeline to become a productive team member prior to early rotation back to intel billet where member will undoubtedly excel.”
 - 5) Removing his Promotion Year (PY) 2021 non-selection for promotion to Lieutenant (LT) in 2020 from his record;
 - 6) Providing him with a Special Selection Board (SSB) to reconsider his non-selection in 2020 following the corrections made by this Board; and
 - 7) If selected for promotion by the SSB, backdating his date of rank as a LT to January 11, 2021, and providing him with all backpay and allowances that he would be owed as a result of his backdated promotion.

The applicant argued that the two disputed OERs were not completed in accordance with Coast Guard policy and standards as outlined in Article 5 of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, and the Officer Evaluation Systems Manual, COMDTINST M1611.1C. The applicant alleged that the summation of the errors committed by his command on the two OERs—the significantly reduced numerical marks and the negative comments—directly contributed to his non-selection to O-3. The applicant explained that he is a Direct Commission Intelligence Officer with 12 years of intelligence experience in multiple areas of focus. He stated that he has completed multiple Department of Defense (DoD) courses aimed at increasing analytical and ethical standards within the intelligence community, in addition to the Intelligence Community Advanced Analyst Program and Intelligence Fundamentals Professional Certification. The applicant further stated that he holds competencies and Office Specialty Codes in intelligence and cyber security.

According to the applicant, his marks on his 2018 OER were lowered, in comparison to his 2017 and 2019 OERs, as a result of a professional dispute with his supervisor over the scope of work to be completed for an intelligence product. The applicant stated that although professional courtesies were always maintained between himself and his supervisor, he was still verbally counseled and his OER marks were lowered significantly as a result of this dispute. The applicant alleged that his marks were lowered because he vocalized his professional opinion and concerns to his supervisor and that work completed toward the aforementioned competencies and certifications was incorrectly credited on his OER for the period ending on March 31, 2018, and that this OER was not signed or completed by his supervisor until May 15, 2018.

The applicant explained that he felt that his supervisor created an environment that was not conducive to junior officer productivity and was denied professional development for several months. The applicant alleged that he attempted to address his concerns with the next highest commander in his chain of command, but his concerns were ignored. In fact, the applicant claimed that after he shared his concerns with his supervisor's supervisor, his concerns were shared with his direct supervisor, which resulted in a hostile work environment. The applicant explained that he documented his concerns in a Command Climate Survey and eventually spoke to a Chaplain to try and engage in conflict resolution. After his previous attempts to address his concerns up the chain of command were shared with his direct supervisor, the applicant claimed that he decided not to pursue a formal complaint because of fear of retribution.

The applicant explained that in January 2018, he was assigned as a Cyber Analyst. The applicant alleged that during this time he was tasked with an assignment by his supervisor that has never before been completed by the Coast Guard or any other agency. The applicant stated that the scope of the project was extremely large, and the project had been previously attempted but was ultimately "shelved" due to a shortage of personnel. The applicant claimed that the timeline for completing this task was aggressive and not likely to have been completed within the estimated timeline of 90 days. According to the applicant, he worked late nights and weekends in an effort to complete the project, but despite his efforts he was told by his supervisor that he would ultimately receive marks of 3 in "Results & Effectiveness," "Adaptability," "Judgment," and "Responsibility" for failing to complete the project within the required timeframe. The applicant alleged that the project was delayed due to reasons outside of his control, including delays in peer editing, as well as a significant change in the scope of the project post-completion. The applicant claimed that the initial due date for his project was April 30, 2018, but after submitting the project to his supervisor and peers for review, the final product was returned to him on May 3, 2018, with substantial changes to the scope and product of the project. The applicant stated that on May 6, 2018, he emailed his supervisor to express his concerns about the edits and the implementation of analysis outside the agreed upon scope and original product provided to him in a January 25, 2018, email.

The applicant alleged that after his May 6, 2018, email wherein he raised his concerns about the substantial changes being made to the project, he was verbally "dressed down" for questioning the additional analytical input on the project, threatened with a Page 7, and given an OER wherein he received four marks of 3 in the performance categories identified above. The applicant claimed that he felt pressured to implement analytical content that was biased, unsubstantiated, and outside the original scope of the project provided to him on January 25, 2018. The applicant stated that he was told to incorporate the new information into the project within 30 days.

The applicant contended that his marks were significantly reduced from previous OERs and contained prohibited and negative language within block 5, "Reporting Officer Comments," that was inaccurate, ambiguous, and detrimental to a fair and impartial evaluation of his potential. The applicant again alleged that the language contained within his OER, coupled with significantly reduced marks from the previous marking period, directly contributed to his non-selection to O-3. Specifically, the applicant alleged that the use of the wording "personal challenges" and "early rotation back to intel billet" were overly ambiguous and suggestive. The applicant argued that the

use of this language did not accurately assess his potential to assume greater leadership or responsibilities. The applicant alleged that the use of the term “challenges” qualified by the word “personal” invites speculations about his character and overall suitability for promotion. According to the applicant, his marks were lowered as a direct result of his appeal to remain in training and his claims of discrimination. The applicant claimed that his marks were not fairly assessed with regard to professional duties or the work he completed during that marking period.

The applicant further explained that from January 2020 through March 2020, he was enrolled in a pilot course, which was created to combine two previous eight-week tactical courses—basic tactical operations and advanced tactical operations—into one 14-week course. The applicant alleged that these courses have historically maintained high attrition rates and it is not uncommon for members to return more than once to complete the course. The applicant stated that the overall graduation rate for his course was approximately 65 percent. The applicant stated that he felt singled out and targeted for several weeks while in this training course and spoke to the course chief about possible discrimination, for which he claimed he was counseled on accountability after his claims of discrimination were raised. The applicant explained that he was subsequently sent before a Performance Review Board (PRB) where he was given a “no fault” disenrollment one week prior to graduation. The applicant claimed that he appealed his disenrollment, but received no response. The applicant stated that upon returning to his unit he was quarantined for two weeks due to COVID-19 and was then removed from the training pipeline and placed in a non-training status. The applicant explained that on March 27, 2020, he received transfer orders from the Personnel Service Center (PSC) and was told that an early transfer was the best way to maintain career progression and to remain competitive with his peers due to his COVID-19 stand down time. The applicant alleged that on April 3, 2020, he went before a PRB, where the recommendation was made that he should rotate early back to intelligence. The applicant claimed, however, that the results of the PRB were already decided, as evidenced by the PSC orders that he received on March 27, 2020.

The applicant alleged that his OER marks related to “Performance of Duties” and “Professional Competence” are not consistent with the actions he displayed during the marking period. The applicant claimed that between January and March of 2020, he demonstrated professional competence that matched or exceeded previous marking periods, but he was rated significantly lower during this period as a direct result of his “no-fault” disenrollment. The applicant further claimed that although actions were captured in the OER that demonstrated superior expertise, great breadth and depth of knowledge, and improved workplace productivity, these actions were not reflective in his marks, as shown by his mark of 4 in “Professional Competence.”

The applicant stated that from March 27, 2020, through at least July 1, 2020, his workplace was closed, and all members were required to phone muster and telework due to COVID-19, which effectively limited his opportunity to perform. The applicant stated that pursuant to Article 5.C. of the Officer Evaluation System Manual, COMDTINST M1611.1.C, his rating chain was required to ensure that individuals do not receive substandard evaluations strictly as a consequence of these circumstances. Specifically, the applicant claimed that Article 5.C. of COMDTINST M1611.1C states,

Periodically, officer may experience circumstances due to a temporary condition which results in a limited opportunity to perform. These circumstances may involve specific performance restrictions (e.g., those imposed by a medical authority), which require restructuring or reassignment of duties. While preferential treatment must not be given, the rating chain must ensure these individuals do not receive substandard evaluations strictly as a consequence of these circumstances.

The applicant explained that his January 31, 2020, OER was submitted on time with his peers but was not returned to him along with his peers' OERs. The applicant alleged that while his peers received their signed OERs in March of 2020, he did not receive his until May 29, 2020. The applicant claimed that this delay was the direct result of his "no fault" disenrollment in March of 2020.

To support his application, the applicant submitted the following documents:

- Emails between the applicant and his direct supervisor. The following emails are relevant to the applicant's claims:
 - An April 17, 2018, email from the applicant's supervisor wherein the supervisor provided feedback from the applicant on the final draft of the project submitted by the applicant. Specifically, the supervisor stated:

Hi [Applicant],

Ok, thank you for your work on this project so far. I like your ideas & this product has a ton of potential!

However ... we've got a lot of work to do.

1. Use active voice whenever possible.

<https://owl.english.purdue.edu/owl/resource/539/02/>

2. You need to work on the logical structuring of paragraphs & sentences. Clearly state your thesis for each paragraph; think of supporting sentences as evidence in a court case. Are there a ton of gaps in your argumentation? Is your argumentation logically sound?

<https://owl.english.purdue.edu/owl/resource/606/1/>

3. You need to improve on writing in a clear & concise manor. PROOFREAD!

<https://owl.english.purdue.edu/owl/resource/572/1/>

Please take a look at my comments and rework as necessary. Let's make time to discuss any questions you have.

I'm glad we're working on this project together - it's my opportunity to make sure you're prepared to serve in future positions as an O.

V/R & thanks,

[Supervisor]

- An April 25, 2018, email from the applicant to his supervisor wherein he requested time off to navigate personal family issues. The applicant told his supervisor that his request for time off would not affect the project he was working on.
- A May 3, 2018, email from an individual involved in the applicant's project.² Specifically, the email stated the following:

I caught up with [redacted] briefly this morning and we discussed the product. She agreed that we need to provide some more analysis in order for it to be ready for publication. I've attached my thoughts/edits (and some of hers as well) based on our discussion. Some of the changes should be quick/easy...others will likely be more substantial. To ensure you see all my comments, please enable "All Markup" under the Review tab in Word.

I'm out on RDO [regular day off] tomorrow and attending a conference Mon-Weds of next week. Please work through what you can while I'm gone, and we can discuss any questions/concerns you have when I get back.

If there's anything urgent that I could answer quickly via email, [redacted] mentioned she will have her work cell, so you could reach me via an email to her.

Thanks for your work on this so far ... I know we can finish it up with just a little more effort!

- A May 6, 2018, email from the applicant to his supervisor. The email stated the following:

Good Morning Sir

I came in this weekend hoping to knock out [redacted] edits, but I have some concerns. Can you please take a look and provide your feedback to me. I'd like to sit down and discuss a way forward on Wednesday. I don't agree with the removal of Key Finding 3 in favor of the addition of proposed Key Findings 3 and 4. The guidance that I sought and was given before beginning my research was FIR data only for this report. I've seen nothing in the FIRs or data to support the proposed Key Finding 3 or 4. I have some additional concerns as well I'd like [to] discuss further.

- A May 18, 2018, email from the applicant's supervisor wherein he requested that the applicant come and see him. The supervisor told the applicant that after their conversation concerning the project, in conjunction with the applicant's OER, he wanted to seek some feedback and second opinions regarding the things he and the applicant discussed.
- A June 6, 2018, email from the applicant's supervisor regarding the applicant's upcoming OER. The email stated the following:

Hi [Applicant],

GOOD EFFORT - Thank you! I went through about 1/2 of your bullets and provided some comments for timely feedback.

² The applicant did not identify this individual, so the Board is unclear of who this individual is or how they were involved in the applicant's project.

If I could impart one piece of advice, you can strengthen your bullets with greater levels of specificity on action/impact. Adjectives & adverbs have a small role in OER writing - the value is in the specifics. More on Friday.

This has me looking forward to your work on the CER - happy to have an informal look at your work so far and exchange ideas (especially if you find yourself not making much progress).

Very respectfully,

LCDR [Supervisor]

- A June 8, 2018, email from the applicant to his supervisor requesting permission to participate in a golf outing hosted by the Coast Guard. The email stated the following:

Good Afternoon Sir

We're having our first Golf Outing next Wednesday the 13th, and while I don't golf, I'd like to participate, or at the minimum attend the kickoff to ensure the event gets off on the right foot. Additionally, the Leadership Development Center will be at ICC from the June 18th-22nd and they will be hosting the Team Leader Facilitator Course. It's the only local offering this year so I'd like to take advantage if possible. I'm willing to work weekends or alternatively work until [redacted] returns before departing for Baby Leave. I understand what's expected moving forward in regards to our conversation and production requirements and I'm willing to do whatever's necessary to meet and exceed those expectations.

Here is the link for the course for additional information.

<https://cg.portal.uscg.mil/communities/leadership-development/TLF/SitePages/Home.aspx>

Please let me know your thoughts.

- A June 11, 2018, email from the applicant's supervisor, wherein he responded to the applicant's request. The email stated the following:

Good Morning [Applicant],

Great job - I sincerely appreciate the summary. A few thoughts on my end...

1. 13th Golf Outing. OK, if you need to be there in person to coordinate, so be it. I'd argue that you could provide more value by making all preps ahead of time & delegate kick-off to an actual golfer, but I may not have vis on all logistics. Remember, if you're not there, you can still take all credit for event execution & perhaps pick up some points for leadership/mgmt. with delegation.

2. Team Leader Facilitator Course - Big concerns. This doesn't seem to meet the needs of ICC, or your professional/personal needs. ICC's needs - You are ICC's only cyber analyst; we do not have a firm direction on CTA. Also, MTSA is still very much in progress per [redacted] email. You need to be here to attend to those things & coordinate with peers/mgmt.

Your professional needs - per mid-period counseling, you need to do all you can to demonstrate action/impact with your core work responsibilities & judgement/leadership. As directly as I can put it, you have not proven to me that you can execute your core responsibilities...why would you not address that first?

Your personal needs - Speaking very broadly, we've spoken frequently about your difficulties managing stress at home & you've admitted it's had impact on work. Why put yourself in a more strained situation working nights/weekends?

I believe we can find success for you by attending to your core personal/professional needs first. Once we have a solid foundation, we can seek broadening experience. Happy to sit down & discuss.

Very respectfully,

LCDR [Supervisor]

- An August 6, 2018, email from the applicant to his supervisor's supervisor, Commander (CDR) L. The applicant requested a meeting with CDR L. The applicant stated that he had been with his current unit for 18 months, but felt that he would benefit professionally and personally from a reassignment. The applicant further stated that he had concerns about speaking with his immediate supervisor regarding his desire for a reassignment.
- A September 27, 2018, email wherein the applicant thanked his chaplain and told him he took the chaplain's advice and spoke with his supervisor. The applicant claimed that his supervisor gave him some honest feedback and that he was encouraged moving forward.

SUMMARY OF THE RECORD

The applicant received a direct commission on January 11, 2017, and was placed in an intelligence billet.

On January 22, 2018, the applicant was assigned a large scale project from his supervisor, LCDR C. Between January 22, 2018, and May 6, 2018, the applicant communicated with LCDR C and other civilians involved in the project multiple times regarding the status of the project.

On August 3, 2018, the applicant signed his OER for the April 1, 2018, through July 9, 2018, rating period. On a scale of 1 to 7, for this OER, the applicant received four 4s, ten 5s, and four 6s. The applicant received a mark of 4 out of 7 on the Comparison Scale, which was the middle mark in the "One of the many high performing officers who form the majority of this grade" comparison scale. The applicant received the following comments on his OER:

Pending publication, authored 1st-ever report on physical security threats to facilities regulated under Maritime Transportation Systems Act; described hi-risk threat data from 3 years of field reporting; leveraged National Geospatial Intel Agency to provide graphical depiction of most impacted areas; added context by cross-referencing findings with extremist propaganda; laid a solid foundation for a repeatable process for future assessments. Leading contributor to [redacted] FY19 production working group; carefully reviewed [redacted] major acquisition intelligence req's & proposed amended portfolio to align with need; quickly drafted prototype & gained approval for revised analytic scope; improved decision-maker advantage via greater analytic fidelity. [Redacted] leadership regarding CO's command climate initiatives including family day/open house; prep'd, sanitized all classified spaces and coordinated facility access for 80 family members; enriched visitor's experience by partnering w/STA [redacted] for 29' RBS static display and recruiting volunteer team to present [redacted] pictorial expo; orchestrated all-hands award ceremony followed by

catered reception; greatly enhanced morale by improving families understanding of members' normally restricted workplace.

REPORTING OFFICER COMMENTS: ENS [applicant] earned selection to O2 & is preparing to serve at the O3 level Continues to seek & succeed in more demanding leadership, intelligence, & collateral responsibilities. Previous expeditionary/joint-service experience, consistent performance and enthusiasm for USCG mission-sets merits recommendation for future dual ops/intel career track including ops ashore response, District/Sector Intel, or cryptologic unit assignments. Pursuit of professional development & obvious academic aptitude evidence that mbr is a promising post-grad candidate incl National Intel University or Command & Staff War College.

On June 28, 2019, the applicant executed Permanent Change of Station orders as a Precision Marksman Division Officer.

On January 20, 2020, the applicant began the Tactical Operations Course (TOC).

On April 3, 2020, the applicant appealed the PAB's decision to disenroll him from TOC. The applicant stated the following:

Greetings,

I would like to formally appeal the decision of the Performance Review Board held on 18 March 2020.

The Board arrived at the decision to disenroll the student from training to return at a later date.

I respect and understand how the board arrived at their decision based on the totality of deficiencies listed in my student performance log. I feel the board was very professional and I have no issues with the performance review board.

I would like to appeal this decision based on several factors not previously stated. I have successfully completed and received a GO/pass on all objective evaluations given throughout the course. I have zero safety related issues in my student performance log and it is also my strong belief that I am performing at the same level of my peers.

My central complaint is I feel the majority of the deficiencies listed in my student performance log are subjective and utilize language that in the event of a review or board strongly handicaps the student for a fair or impartial decision. Currently, there is no section or space on the paper for the student to document or make a statement with regards to the performance related deficiency listed that could be of value to the performance review board in arriving at an impartial decision. Although stated throughout my performance logged that "Student was counseled on the spot" This is inaccurate. I was rarely verbally counseled on the spot. Furthermore, students are told that signing the daily counseling log is not an admission of guilt but there is currently no available recourse for students who disagree with the statement or feel that they're not being graded or evaluated fairly.

The overwhelming majority of my deficiencies listed in my performance log were given to me at the end of the day, where I was counseled by instructors or individuals who rarely entered the deficiency listed. I believe feedback is best given direct and on the spot.

On April 10, 2020, the applicant was disenrolled from the TOC due to a "no-fault" finding.

On July 23, 2020, the applicant signed his OER for the February 1, 2020, through June 9, 2020, rating period. The applicant's supervisor at this time was LCDR L and his Reporting Officer was CDR F. For this OER, the applicant received three 6s, fourteen 5s, and one 4, and a 4 out of

7 on the Comparison Scale, which is the middle mark on the “One of the many high performing officers who form the majority of this grade” comparison scale. The applicant received the following comments on his OER:

Quickly adapted to changing env't/circumstances; used COVID restriction period to max prof dvlp't & seek out career enhancing opportunities incl drafting 11 awards, completing CG accident invx, & organizing 7 remote advancement/promotion ceremonies. Outstanding leadership during first TOC at SMTC; guided 28 students fm 4 DSF units through challenging course helping achieve impressive 82% grad rate, maintained accountability of 7 vehicles, 50+ weapons, \$9K of Meals Ready to Eat (MRE), 40K rounds of ammo, & high-end breaching/LE equipment and fostered “+” team atmosphere. Took initiative to act as Diversity & Inclusion Change Agent dvlp'ing a network of training & support for local LDACs to address diversity & inclusion challenges; supported/promoted critical COMDT guiding principles & goals. Sought out add'l duties/responsibilities to hep CG; helped coordinate & participated on 6 OCS interview panels utilizing teleconferencing tools for first time; helped ensure cont'd recruiting efforts despite challenges & depicted professional image for potential CG Officers. Well regarded prof interactions w/U.S. Marine Corps during 4-month training course at [redacted] brought positive credit/view of service/[redacted].

REPORTING OFFICER COMMENTS: LTJG [Applicant] is highly recommended for promotion to LT with the best of peers. A solid Junior Officer with outstanding potential to serve in both Intel & Response Ops Ashore career paths. Overcame personal challenges in TOC training pipeline to become a productive team member prior to early rotation back to Intel billet where member will undoubtedly excel. Strongly recommended for future Sector Enforcement/Incident Management/Emergency Management leadership positions and/or follow-on high-op tempo & high visibility Intel tours. Also an ideal candidate for Intel related advanced education program of choice.

IEWS OF THE COAST GUARD

On December 16, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The JAG recommended the Board deny relief in this case. The JAG provided the following analysis:

The JAG argued that the applicant has not provided sufficient evidence to meet the standard for correction of his OER for the April 1, 2018, through July 9, 2018, rating period. According to the JAG, under *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. An applicant challenging an OER must demonstrate, by competent evidence that there was: 1. A misstatement of a significant hard fact; 2. A clear violation of a specific objective requirement of statute or regulation; or 3. Factors adversely affecting the rating which had no business being in the rating process.⁴ The JAG stated that regarding the applicant's April 1, 2018, through July 9, 2018, OER, the applicant did not allege a misstatement of significant hard fact, but even if he had, the applicant failed to take certain key steps afforded by policy to challenge the comments and marks contained within this OER. Specifically, the JAG claimed that the applicant failed to submit a Reported-on Officer (ROO) Reply as authorized by policy. The JAG stated that pursuant to Article 5.A.7.e. of the Officer Accessions, Evaluations and Promotions Manual, COMDTINST M1000.3A, the RO provides an opportunity for the officer to express a view of his or her performance which may differ from that of the rating official. The JAG further stated that the applicant failed to submit a

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

⁴ *Id.*

timely application to the Personnel Records Review Board (PRRB) upon completion of the contested OER as authorized by Coast Guard policy.

The JAG argued that the applicant did not contest the content or the facts in his April 1, 2018, through July 9, 2018, OER in any of the previously cited methods for challenging and/or contesting his OER. Furthermore, the JAG argued that the applicant did not complain about the OER until almost 3 years after he signed his OER. The JAG claimed that this failure to timely complain about the content of the evaluation or to avail himself of the available administrative remedies is evidence that when he received his OER in August 2018, he accepted its marks and comments as valid even if he did not like them.⁵

The JAG asserted that while the applicant originally stated he believed that both OERs were not completed in accordance with policy, the applicant failed to cite a specific policy that his chain of command failed to adhere to when completing his OERs. According to the JAG, the applicant implied that his April 1, 2018, through July 9, 2018, OER violated policy because information from this marking period was included in his previous OER. However, the JAG noted that the applicant did not contest the previous OER, and the applicant's claim is unsupported and contradicted by his rating chain. The JAG further explained that while the applicant may have completed particular certifications during the April 1, 2018, through July 9, 2018, rating period, the bulk of the applicant's ICAAP coursework and achievements were completed during the previous rating period. The JAG argued that the applicant failed to demonstrate that his supervisor violated policy by choosing to credit the ICAAP accomplishments on the previous OER since the bulk of the applicant's achievements were completed during that rating period.

The JAG further argued that the third *Hary* prong requires that the applicant present evidence of factors that adversely affected the rating which had no business being in the rating process. The JAG claimed that case law is relatively sparse on enumerating what particular factors count for purposes of this prong, however, there has been at least one case that stated bias and personal animosity are such factors.⁶ The JAG stated that the evidence presented by the applicant—numerous emails—does not prove bias or personal animosity on the part of the applicant's direct supervisor. The JAG argued that even if the applicant and his supervisor may have had a disagreement as to the scope of a project, which he has not adequately proven, there is still no evidence in the record that the applicant's supervisor or his rating chain took any retaliatory action against him as a result of the alleged disagreement. The JAG further argued that the fact that the applicant received lower marks during this rating period than during previous rating periods is not *per se* evidence of retaliation and is not persuasive in this instance. Regarding the applicant's claim that he decided not to pursue a formal complaint against his supervisor and rating chain because of fear of retribution, the JAG argued that the applicant failed to provide any evidence to support his claims. The JAG further argued that the same is true regarding the applicant's claims that he was "verbally dressed down" after he questioned the changes he was told to make to the project and that he felt "pressured" to implement information outside of the

⁵ BCMR Docket No. 2018-188, Final Decision, Page 14, Paragraph 4.

⁶ *Guy v. United States*, 221 Ct.Cl. 427, 422 (1979), "The process of evaluating officers by other officers is an inherently subjective process which neither the military boards nor this court will interfere with unless there is clear and convincing evidence of factors adversely affecting the ratings which had no business being in the rating process. Though the bias and personal animosity of rating officers are such factors..."

scope of the project. According to the JAG, the applicant failed to submit any evidence to support his allegations.

Like the applicant's April 1, 2018, through July 9, 2018, OER, the JAG argued that the applicant failed to satisfy the first prong of the *Hary* test for his February 1, 2020, through June 9, 2020, OER, because he did not allege that the OER contained a misstatement of significant hard fact. On the contrary, the JAG explained that the applicant challenges the numerical marks of the OER, not the comments or statements contained within the OER. However, the JAG stated that even if the applicant were to challenge a specific statement or comment contained in his February 1, 2020, through June 9, 2020, OER, like the applicant's other contested OER, the applicant failed to avail himself of his right to submit a ROO Reply for this OER, nor did he submit a timely application to the PRRB. As with his other OER, the JAG argued that the applicant's failure to timely avail himself of the processes afforded to officers who wish to contest their OERs is evidence that when the applicant received the OER in July 2020, he accepted the OER as valid even if he did not agree with the contents of the OER.

The JAG stated that the applicant appeared to have invoked the second prong of the *Hary* test, which required the applicant to prove that his OER contained a clear violation of a specific objective requirement of a statute or regulation. Here, the JAG explained that the applicant alleged that his OER contained two separate violations. First, the JAG stated that the applicant alleged that his OER contained "restricted" remarks in violation of the Officer Evaluation Systems Manual, COMDTINST M1611.1C. Specifically, the JAG stated that the applicant alleged that the comments that he faced "personal challenges" and an "early rotation back to intel billet" were overly ambiguous and suggestive. However, the JAG argued that the applicant's own interpretation as to these comments is not evidence of an error or violation of policy. The JAG stated that while the applicant may subjectively believe that those comments "invite speculations," pursuant to Coast Guard policy, those comments were not restricted or prohibited. Regarding the applicant's claim that the use of his name in block 5 of his OER was a restricted remark, the JAG explained that Coast Guard policy only prohibits the use of the officer's first name, which was not present in the applicant's contested OER.

The JAG addressed the applicant's claim that his OER violated policy because he received substandard evaluations as a consequence of his workplace being closed due to COVID from March 27, 2020, through at least July 1, 2020, by arguing that applicant provided no evidence that his workplace's closure was the reason he received the alleged substandard evaluations. On the contrary, the JAG explained that declarations from the applicant's chain of command provide performance based reasons for the applicant's lowered marks.

The JAG further argued that the applicant failed to submit evidence to show that his OER contained factors that adversely affected his ratings that had no business being in the rating process. Although the applicant alleged that his marks were significantly reduced from previous rating periods because he requested to remain in training and that he faced discrimination while attending the TOC, the JAG argued that the applicant failed to provide sufficient evidence to support his claims. The JAG stated that the fact that the applicant received lower marks during this rating period than he had in previous rating periods is not *per se* evidence of retaliation. The JAG claimed that the applicant's lower marks were the result of the challenges the applicant faced while at the

TOC, and his failure to complete the training. The JAG explained that the TOC covered a significant portion of the reporting period and was a requirement for the applicant's assigned position, so it is reasonable that the challenges the applicant faced during his time at the TOC, coupled with his disenrollment, would be reflected in his OER for that rating period. Moreover, the JAG argued that even if the applicant claimed retaliation against the TOC instructors, he failed to address or prove why these instructors would cause his rating chain to take retaliatory action against him when the TOC is a completely different unit. In conclusion, the JAG argued that the applicant failed to establish a violation of any of the *Hary* prongs, or that his OER contained an error, and therefore failed to overcome the presumption that his rating chain discharged their duties correctly, lawfully, and in good faith.

To support its application the Coast Guard submitted the following documents:

- A June 16, 2021, sworn statement from CDR F, who served as the applicant's Reporting Officer for the February 1, 2020, through June 9, 2020, rating period. CDR F stated the following:

I, CDR [F], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code § 1746:

1. I am currently serving as Commanding Officer of [redacted]. I was previously assigned as Operations Officer of [redacted] from 2017-2020.

2. While serving as Operations Officer of [redacted], I was LTJG [Applicant's] Supervisor and was the Reporting Officer for the OER (Period of Report 01Feb20 to 09Jun20) in which he is requesting a change in marks.

3. I believe the marks assigned to LTJG [Applicant] are fair, accurate, and reflect LTJG [Applicant's] performance during the Period of Report in question. The below comments provide amplifying information:

a. Change mark for Planning and Preparedness from 5 to 6: Upon reporting to [redacted], LTJG [Applicant] participated in Whetstone, a mandatory, unit-wide indoctrination program designed to prepare members for SMTCs Tactical Operator Course (TOC). LTJG [Applicant] lacked the physical fitness, motivation, and leadership expected of a Junior Officer in the Deployable Specialized Forces.

b. Change mark for Results/Effectiveness from 5 to 6: LTJG [Applicant] was disenrolled from TOC in March 2020 due to poor performance. Successful completion of this course is a requirement for all members of the [redacted] and is a Junior Officer Core Competency.

c. Change mark for Adaptability from 5 to 6: During TOC, LTJG [Applicant] received counseling from multiple instructors (E7s and E8s), as well as the Deployable Specialized Forces Branch Chief. In all instances, he was not able to receive feedback and/or was not receptive to such feedback. He was provided multiple pathways/opportunities to succeed and failed to take appropriate action.

d. Change mark for Professional Competence from 4 to 6: Given his struggle during Whetstone, his inability to pass TOC, and failure to qualify as a Tactical Operator, LTJG [Applicant] did not demonstrate breadth and depth of knowledge expected, and as a result, failed to acquire operational and specialty expertise expected of him and his peers.

e. Change mark for Developing Others from 5 to 6: Without the Core Competencies expected of a Junior Officer in the Deployable Specialized Forces, LTJG [Applicant] was not able to provide mentorship, counseling, and/or training to enhance the professional development of others.

Furthermore, his lack luster performance during Whetstone and TOC was often a distraction to fellow students, peers, and teammates.

f. Change mark for Workplace Climate from 5 to 6: LTJG [Applicant] was supportive of human resource initiatives and worked to promote a healthy workplace climate/environment but often failed to take ownership and responsibility for his own actions and how they impacted his fellow students, peers, and teammates.

g. Change mark for Judgement from 5 to 6: Upon being disenrolled from TOC, LTJG [Applicant] left his barracks room in a general state of disrepair. His Course Chief stated that in his 6.5 years instructing at SMTC, “this is the first time I have witnessed a room being left in this manner by any student.”

h. Change mark for Professional Presence from 5 to 6: L T J G [Applicant’s] performance during TOC, his inability to accept feedback, and unsatisfactory barracks room (Marine Corps owned) upon departing SMTC brought discredit to himself, [redacted], and the Coast Guard.

4. This member failed to demonstrate the professionalism, proficiency in craft, nor leadership expected of a member of the Deployable Specialized Forces or a Coast Guard Officer.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 16th day of June 2021.

- A June 17, 2021, sworn statement from LCDR [L] who served as the applicant’s supervisor during the February 1, 2020, through June 9, 2020, rating period. LCDR [L] stated the following:

I, LCDR [L], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code § 1746:

1. Currently, I am assigned as the Assistant Operations Officer at [redacted]. I was LTJG [Applicant’s] direct supervisor for the entirety of LTJG [Applicant’s] tour at [redacted].

2. I was LTJG [Applicant’s] supervisor and signed LTJG [Applicant’s] Officer Evaluation Report dated 09JUN2020 as the supervisor.

3. During the marking period in question (01FEB2020 to 09JUN2020), LTJG [Applicant] received orders to attend the Tactical Operations Course (TOC) at [redacted]. LTJG [Applicant] began the course in late January; LTJG [Applicant] was disenrolled OOA [on or about] 20MAR2020 due to poor performance. Graduating TOC is a requirement for [redacted] Junior Officers as Advanced Tactical Operator (ATO) is a required competency for their assignment. Because on career timing and progression (member reported in 2019 with three year orders), [redacted] recommended the member be short toured to ensure they were provided the opportunity to perform as a Junior Officer vice remaining in a training status for a third marking period and ultimately significantly delaying their assignment progression at [redacted]. Because LTJG [Applicant] was a direct commission Intelligence Officer, [redacted] recommended the member be assigned to an intelligence position. This was articulated in the Reporting Officer comments where “overcame personal challenges in Tactical Operations training pipeline” referred to the member’s disenrollment from the required Tactical Course and “early rotation back to intel billet” addressed the potential for LTJG [Applicant] to excel as an Intelligence Officer. This comment was inserted to depict that even though LTJG [Applicant] was unable to complete the required training of a [redacted] Officer, the officer had the potential to add value to the Coast Guard in the intelligence community. Additionally, the marks assigned to LTJG [Applicant] are fair and accurately reflect LTJG [Applicant’s] performance.

4. Regarding claim that the 31Jan2020 OER was delayed: LTJG [Applicant's] OER was delayed due to an ongoing conversation between [redacted] and OPM socializing in a Duty Under Instruction (DUINS) status while they attended TOC due to the length of the course. [Redacted] delayed finalizing the OER until a decision was made by OPM.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 17th day of June 2021.

- A June 18, 2021, sworn statement from CDR [G] who was the applicant's Reporting Officer (RO) during the applicant's April 1, 2018, through July 9, 2018, reporting period. CDR [G] stated the following:

1. I am currently assigned to Coast Guard [redacted], Intelligence Department Head. I was the Strategic Intelligence Operations Officer at [redacted] and the Reporting Officer (RO) of the Applicant during the time of observation.

2. I supervised ENS [Applicant's] direct supervisor, LCDR [C]. LCDR [C] was responsible for all source intelligence analysis and production (A&P) in the [redacted] within the [redacted]. I was responsible for all of [redacted] analysis, production and dissemination of strategic intelligence, and CG Intelligence (CGI) reporting against Commandant's intelligence requirements. I was ENS [Applicant's] RO from 11 January 2017 to 09 July 2018.

3. The evidence presented and my personal recollection of ENS [Applicant's] performance of duties do not justify changing my "concur" judgment with regards to the marks assigned on the 09 Jul 2018 OER.

- Per Reference #1, ENS [Applicant] stated that he felt "pressured to implement analytic content that was biased, unsubstantiated information and outside the scope of the agreed upon parameters." However, according to his email from 25 Mar and POAM, the scope of analysis never strayed from the initial scope of only using Field Intelligence Reports (FIRs). The additional evidence he offers in later email only confirms the usual peer and supervisory edits and analytical clarifications related to definitions within the scope or how well (or not) he addressed the Key Intelligence Questions (KIQs), and not a complete re-scoping of the product. These KIQs were present in his initial POAM and he presented no evidence to show that they changed. Of note, and per his email evidence, LCDR [C] and Ms. [S] (Senior Intelligence Analyst) had to provide extensive edits and analytic critique on his ability to provide clear and logical argumentation and support a key finding (KF).

- According to the POAM dated 25 Jan he met with GEOINT to use as a "source for heat maps, etc." However, according to the email evidence he only notified GEOINT of his heat map requirements on 30 May, which was noted by LCDR [C] as a reason for not meeting the 5 June deadline for product completion. The timeline and evidence do not support ENS [Applicant's] claim that the delay was "due to reasons outside of the member's control."

- According to the evidence presented and my personal recollection LCDR [C] made a sincere effort to accommodate ENS [Applicant's] leave requests and personal needs while upholding mission requirements (see 25 Apr and 11 Jun emails), but ENS [Applicant] failed to uphold work attendance requirements. Per the LCDR [C's] 18 May email to ENS [Applicant]: "You did not come to see me about this yesterday so I wanted to make sure you saw this note." This implies ENS [Applicant] was expected and failed to meet with LCDR [C] on 17 May.

- According to the Summary of Error, ENS [Applicant] claimed his 31 Mar 2018 OER was signed by his supervisor on 15 May, yet the actual OER submitted as evidence shows LCDR [C] signed on 18 April. ENS [Applicant] attempted to use this alleged discrepancy to justify his claim that LCDR [C] incorrectly credited his ICAAP certification completion (10 May email) and Intelligence

Professional Competency Code (2 May Memo) to his 31 Mar 2018 OER. However, LCDR [C] could not have added these achievements to his 31 Mar 2018 because he signed the OER at least 2 weeks prior to evidence of professional development completion. Additionally, ENS [Applicant] only made passing reference to ICAAP in his OER support form (“...as a recent graduate of the ICAAP ...”), which in and of itself is not enough to justify moving his professional competency mark above a 5 for his 9 Jul 2018 OER, especially when much of his ICAAP coursework achievements were captured in his 31 Mar 2018 OER.

4. In summary, the facts presented in his evidence and highlighted above do not justify changing my “concur” with supervisor judgment on his 09 July 2018 OER and increasing his marks as requested.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 8, 2022, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. The Chair received the applicant’s response on May 10, 2022.

The applicant recited his claim that he received multiple OERs that were not completed in accordance with Coast Guard policy. Specifically, the applicant alleged that his chain of command failed to follow Article 5.I.6, 10, and 12 of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3 (July 2020).⁷ The applicant further alleged that the cumulative effect of these errors resulted in his non-selection to LT. Furthermore, the applicant claimed that the policy relied upon by the Coast Guard in its Advisory Opinion used outdated policy.

The applicant again alleged that his marks within his contested OERs were affected by performance and/or conduct that took place outside of the rating period, which he stated is supported by the unusually lengthy delay in the submission of his OERs. The applicant claimed that the rating period for his OER ended on January 31, 2020, but he did not receive his signed OER until May 29, 2020, approximately 70 days past its required submission to OPM. The applicant contested his RO’s reasons for the delay by stating that he suffered a lower back injury early on in the whetstone process and as a result of the condensed schedule, he did not have time to recover. However, the applicant alleged that he continued to participate in beach runs, runs over 3 miles, and intensive physical training/weightlifting sessions. The applicant explained that he operated at a pace that he felt was sustainable and would allow him to manage his medical injuries enough to participate. The applicant stated that he skipped bear crawls because of the debilitating pain and stiffness he felt afterward and that he suffered from extensive blistering from running long distances in boots. In addition, the applicant claimed that he was diagnosed with an upper respiratory infection during whetstone and because of the condensed schedule, he did not have time to recover, but still participated in the training evolutions. The applicant alleged that because of his ailments, he was viewed as not having “physical fitness and motivation.”

The applicant stated that whether right or wrong, politics in the wardroom exists, and that he did not submit an OER Reply because by the time he received his OER, he had already departed

⁷ The last day of the reporting period for the applicant’s contested OER was June 9, 2020, which was prior to the July 2020 edition of COMDTINST M1000.3.

from that unit and command. The applicant explained with the OER coming in such proximity to the selection board and his previous experiences attempting to challenge marks, he felt it best to wait and see if the Office of Personnel Management (OPM) would redact the marks as prohibited comments or reject the OER all together. The applicant stated that he was trying to be tactful and choose his battles. The applicant alleged that the one time he mentioned feeling discriminated against at TOC, it led to a field counseling on accountability, a review board and dismissal in just over one week. The applicant claimed that his argument was not that he was not making mistakes, but that everyone was making mistakes in the learning process, but he was the only one whose mistakes were being documented, while others received informal coaching. The applicant argued that he should have received his OER in March with his peers, but alleged his OER was purposely delayed and changed as a result of actions that took place outside of the rating period.

The applicant stated that whether malicious or not, he earned significant professional milestones in April and May 2018 that were not reflected in his OER. The applicant claimed that these milestones were completed in May and incorrectly included in his OER with a rating period ending on March 31, 2018. The applicant explained that his wife was placed on mandatory bedrest on June 1, 2018, 30 weeks into a high-risk pregnancy, and delivered the baby on July 10, 2018, via C-Section. According to the applicant, he returned from parental leave on August 2, 2018, and his OER was emailed to him on August 3, 2018. The applicant stated that although he did not submit an OER Reply, he immediately scheduled a meeting with his new RO and department head to express his concerns and to formally request an internal transfer. The applicant explained that he did not believe that he was rated fairly for the contested rating periods, but acknowledged that this was merely his opinion. The applicant stated that since his initial application for relief, he was selected for promotion to LT on a subsequent promotion board.

APPLICABLE LAW AND POLICY

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (June 2017), provides the following guidance on the Officer Evaluation System (OES):

Article 5.A. Overview. This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers.

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

...

Article 5.E.8. Duty Under Instruction (DUINS). A DUINS OER is not an occasion for report, and may only be submitted for a reason in Articles 5.E.2 to 5.E.7. of this Manual.

a. Commander (CG PSC) must:

- (1) determine which officers, based on their assignment, will follow this schedule in lieu of Article 5.E.2. of this Manual.

(2) promulgate when DUINS OERs must be submitted, making allowances for differences in pay-grade, promotion lists, active duty orders, and any other concerns.

b. OER submission will be submitted once a year at a minimum. The period of report must not exceed 18 months; this includes ensign and lieutenant (junior grade) submissions. Officers in and above zone for promotion must follow the regular DUINS submission schedule.

c. When a reported-on officer is assigned PCS duty under instruction to industry training, DUINS OERs must be submitted upon detachment of the officer or completion of the program.

...

Article 5.I. Prohibited Comments. The rating chain must not:

1. Mention a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), Coast Guard Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as required by a non-regular OER. Referring to the fact conduct was the subject of a proceeding of a type described above is permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.K. of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

...

9. Refer to the reported-on officer by first name in the comment blocks.

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 application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. 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. All Board members concurred in that recommendation.⁸

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 argued that his two OERs were not completed in accordance with Coast Guard policy and standards as outlined in Article 5 of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, and the Officer Evaluation Systems Manual, COMDTINST M1611.1C. 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 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 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. The fact that the applicant received better OERs before and after the reporting period for the disputed OER is not evidence that the disputed evaluation does not accurately reflect his performance during the reporting period.¹²

6. April 1, 2018, through July 9, 2018, OER. The applicant alleged that his OER was erroneous and unjust because his marks were lowered over a disagreement he had with his supervisor over the extent of information that should be included in a project he was working on and because events that took place outside of the rating period were included in the OER. For the following reasons, the Board disagrees:

- a. The applicant claimed that when he pushed back and disagreed with his supervisor about including certain material in a project he was working on, he was verbally counseled and his OER marks were significantly lowered as a result of the dispute. The applicant further alleged that when he attempted to address his concerns with individuals higher up in his chain of command, not only were his concerns ignored, but they were later disclosed to his supervisor. However, not only has the applicant failed to provide any evidence to substantiate his claims, but his complaints do not satisfy any of the prongs provided in *Hary*. Specifically, the applicant has failed to point to one comment contained in the OER that was a misstatement of significant hard fact. The record shows that the applicant's OER for this rating period contained positive comments regarding the applicant's work and contribution to the Coast Guard, and although the applicant claimed his marks were lowered due to the fact that he pushed back on a project, there were no negative comments or references to the applicant's work relating to that project in the applicant's OER. On the contrary, the applicant received positive comments for his work on this project. Furthermore, there is no evidence that the scope of the project was significantly changed,

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).

¹² *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) ("[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.").

as alleged by the applicant, and there is no evidence whatsoever that applicant's alleged disputes resulted in the applicant receiving significantly reduced marks on his OER. In addition to failing to show that there was a misstatement of significant hard fact, the applicant also failed to show that his supervisors used factors to rate him that had no business being in the rating process, or that the Coast Guard violated a statute or regulation when completing his OER.

- b. Regarding the applicant's claim that certain awards and competencies he earned during this rating period were reflected on his previous OER, the Board finds the sworn statement by the applicant's supervisor persuasive. The supervisor explained that the reason for the awards being documented in the applicant's previous OER is because the bulk of the applicant's course work and achievements were accomplished during the previous rating period. As argued by the JAG, the applicant has failed to prove that his supervisor violated policy by documenting his coursework and achievements in the rating period during which the bulk of the coursework was completed. The applicant has also failed to cite any policy, and the Board could find none, that required his supervisor to document these achievements in a different rating period. The Board accepts that many officers will have contributed a great deal towards the Coast Guard during each rating period and an OER does not contain the space to record every achievement. The applicant's OER shows that his supervisors took great care to document what they found to be the applicant's strongest contributions and characteristics during the rating period and the OER was overwhelmingly positive. Accordingly, the applicant has failed to prove, by a preponderance of the evidence, that his April 1, 2018, through July 9, 2018, OER was not completed in accordance with Coast Guard policy, or that any of the *Hary* prongs were violated.
- c. Finally, the Board notes that the applicant did not contest the contents of this OER until nearly three years after it was validated and only after he failed to be selected for promotion to LT. This kind of retrospective consideration of one's OER gives the Board reason to believe that the applicant did in fact accept the comments and marks of this OER as valid upon its issuance and later contested its contents as a means to dispute his non-selection for LT.

7. February 1, 2020, through June 9, 2020, OER. The applicant alleged that his 2020 OER was erroneous and unjust because his rating chain used prohibited comments and failed to take the COVID-19 closures into account when rating him. For the following reasons the Board disagrees:

- a. The applicant alleged that the comment that he "Overcame personal challenges in Tactical Operations training pipeline to become a productive team member prior to early rotation back to Intel billet where member will undoubtedly excel" should be redacted from his OER. According to the applicant, this comment was a prohibited comment under Article 5.I. of the Officer Accessions, Evaluations and Promotions Manual, COMDTINST M1000.3A., but the applicant has failed to show how this comment violated Article 5.I. of COMDTINST M1000.3A in any way. The applicant alleged that the words "personal challenges" and "early rotation back to intel billet" are overly ambiguous and suggestive. The applicant further alleged that the words "challenges" coupled with "personal" invited

speculations about his character and overall suitability for promotion. However, this is nothing more than mere speculation on the applicant's part. Although the applicant's own subjective belief is that these words were prejudicial and invited speculation about his character and overall suitability for promotion, he has failed to show that these statements were not only false, but that the LT promotion board was actually prejudiced by this statement and that his non-selection was the result of this prejudicial error. The applicant himself admitted in his response to the AO that he struggled with personal difficulties while he was at the TOC, namely a back injury, upper respiratory infection, and severe blistering. In his response to the AO, the applicant claimed that he was counseled by his local OPM that this statement was a "career killer," because the promotion board has no idea how to interpret the phrase personal challenges. However, the applicant has failed to prove not only that OPM made such a statement, but that the comment being contested was the actual cause of his non-selection to LT.

- b. The applicant further alleged that the Coast Guard relied on outdated policy and used his last name in his OER which violated Article 5.I.10. of COMDTINST M1000.3A. However, the applicant's claims are not only unsupported by the record, but the Board finds that even if the newer COMDTINST M1000.3A was applicable to the applicant's OER, using the applicant's last name in the comments section of the OER was not a prejudicial error that would have resulted in the applicant being non-selected for LT. In addition, the last day of the applicant's rating period was June 9, 2020, several weeks before the July 2020 edition of COMDTINST M1000.3A was in effect.
- c. The applicant further alleged that his OER violated Article 5.I.6. of the same manual. Article 5.I.6. of the July 2020 manual prohibits rating officials from mentioning "[a]ny medical or psychological conditions, whether factual or speculative. Restriction applies to reported on officer and family members. The mention of not fit for full duty is prohibited." Again, this edition of the manual was not in effect at the end of the applicant's rating period, but even it was in effect, the applicant has failed to show where in his OER his rating officials mentioned any medical or psychological condition the applicant was diagnosed with. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his February 1, 2020, through June 9, 2020, OER was not completed in accordance with Coast Guard policy, or that any of the *Hary* prongs were violated. The applicant has also failed to prove, by a preponderance of the evidence, that the marks he received in his OER were erroneous and/or unjust and that he is entitled to have them increased.
- d. The applicant alleged that his rating chain failed to abide by Article 5.C.6. of COMDTINST M1000.3A,¹³ because they failed take the COVID closures into account when rating him because COVID resulted in a limited opportunity for him to perform. However, the

¹³ Article 5.C.6. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, states, "Periodically, officers may experience circumstances due to a temporary condition which result in a limited opportunity to perform. These circumstances may involve specific performance restrictions (e.g., those imposed by a medical authority), which require restructuring or reassignment of duties. While preferential treatment must not be given, the rating chain must ensure these individuals do not receive substandard evaluations strictly as a consequence of these circumstances."

applicant has failed to prove, by a preponderance of the evidence, that the marks he received were lowered or the result of the applicant's inability to perform throughout the rating period. On the contrary, the record shows that the applicant's OER recorded numerous accomplishments and achievements made by the applicant for the rating period. There is no evidence that the applicant's marks were impacted in anyway by COVID and again, the applicant has failed to prove that his ability to perform was limited and/or reduced by COVID.

8. The applicant made multiple allegations regarding delayed OERs and discrimination. Those allegations 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.¹⁴

9. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.¹⁵ He has not proven, by a preponderance of the evidence, that his OERs were not completed in accordance with Coast Guard policy, or that his OERs contained 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. Because he has not shown that either of the disputed OERs were erroneous or unjust, there are no grounds for directing the Coast Guard to convene a Special Selection Board to reconsider his non-selection for promotion. Accordingly, the applicant's requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁴ 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").

¹⁵ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

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

September 22, 2023

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.10.02 15:28:01 -04'00'

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.10.02 15:37:17 -04'00'

[REDACTED] Digitally signed by [REDACTED]
Date: 2023.10.02 16:36:02 -04'00'