

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-100

██████████
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 September 10, 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 December 2, 2022, 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-5) on active duty, asked the Board to correct his record by upgrading his May 1, 2018, to June 28, 2019, Officer Evaluation Report (OER), when he was the commanding officer (CO) of a cutter. Specifically, he asked the Board to raise a mark of 5 to a mark of 6 in the performance dimension of “Workplace Climate,”¹ to remove a comment in the leadership skills section, and to amend language in the Reporting Officer’s comment section.

The applicant argued that the mark of 5 in the performance dimension of “Workplace Climate” is erroneous because his Supervisor was unduly pressured by his Reporting Officer to change the mark. He argued that according to Coast Guard policy, performance marks should be solely within the Supervisor’s discretion. The applicant argued that other minority officers under the same command had similar experiences with their evaluations.

¹ On an OER form, CG-5310A, the Supervisor evaluates a Coast Guard officer in 18 performance categories on a scale from 1 (worst) to 7 (best). A mark of 4 denotes the “standard” level of performance expected of all officers. The Supervisor also adds comments citing examples of performance that support the numerical marks. The officer’s Reporting Officer (usually the Supervisor’s Supervisor) then indicates whether he or she concurs with the Supervisor’s marks and comments, adds his or her own comments, and assigns the officer marks on a Comparison Scale and a Promotion Scale. The OER Reviewer has the option of concurring with the OER as submitted or adding comments to provide a significantly different perspective.

The applicant also argued that a comment in the leadership skills section of the disputed OER was erroneous and unjust. The comment states that the applicant encouraged galley menu options that included Puerto Rican cuisine. The applicant claimed that he felt personally attacked because the OER inaccurately categorized him as Puerto Rican. He also argued that he never asked his Culinary Specialist to prepare such food.

Additionally, the applicant argued that the negative comments in the Reporting Officer's comment section of the OER are erroneous. In this section, the Reporting Officer is supposed to describe the demonstrated leadership ability and overall potential of the Reported-on Officer. The applicant first argued that the comments are false and are not based on direct observation, the Officer Support Form, or other reliable reports and records. Instead, he argued, the comments provide an inaccurate view of his performance and are based on unwarranted discussions with his crew.

The applicant also argued that the negative comments by his Reporting Officer are erroneous because his Reporting Officer, Captain (CAPT) K, was biased against him. He argued that CAPT K was biased against him because he is a minority officer. The applicant also argued that CAPT K was biased against him because he had tried to hold his Engineering Petty Officer (EPO) accountable for trying to quit his job. The applicant detailed the incident with the EPO. He stated that in November 2017, the EPO of the cutter asked to be relieved from duty. In doing so, the applicant alleged, the EPO jumped the chain of command. Eventually, the EPO changed his mind and decided to remain on the cutter. Then, in May 2018, the applicant completed the EPO's OER. The EPO requested to appeal marks of 4 in three performance dimensions. The applicant stated that he reviewed the EPO's request and determined that his evaluation of the EPO was fair and accurate. However, the applicant claimed that CAPT K asked the applicant to change the evaluation because the EPO's appeal was an issue that the District Admiral did not need to deal with. The applicant claimed that CAPT K refused to entertain any further discussion of the matter or hear why the EPO earned the assigned marks. He stated that he subsequently changed the evaluation per CAPT K's request.

The applicant claimed that after the EPO's appeal, the Command Master Chief (CMC), CMC G, began to treat him unfairly. He asserted that he felt targeted by CMC G. For instance, the applicant stated that CMC G interrogated him regarding the granting of rewards to his crewmembers and questioned how he held his crewmembers accountable. The applicant also claimed that CMC G spoke with his crew outside of his presence and refused to tell him what they had discussed. Instead, the applicant alleged, CMC G referred him to CAPT K and the Deputy Sector Commander, CAPT M. The applicant spoke with CAPT K and CAPT M, who suggested that he allow the crew to select their own morale events and to be careful of creating the perception that he had favorites. The applicant also alleged that CAPT K discouraged him from pursuing any action against CMC G for his actions.

The applicant argued that CAPT K's bias was reflected in specific comments in the Reporting Officer comments section of the disputed OER. First, the applicant cited the following comment: "In OCONUS homeport w/dynamic sked & a myriad of challenges, SNO's gung-ho attitude & willingness to perform any mission achieved great operational results, but sometimes

led to negative follow-on effects to overall unit health/esprit de corps.” He asked for that comment to be revised to state the following: “In OCONUS homeport w/dynamic sked & a myriad of challenges, SNO’s gung-ho attitude & willingness to perform any mission achieved great operational results. Ideal choice for demanding high vis assignment which req continuous high performance.” The applicant also cited the following comment: “MEC XO/NSC OPS to continue path towards major O-5 afloat command. Rec for O-5 promotion w/peers.” He asked for that comment to be revised to state the following: “Strongly Recommended for continued afloat opportunities as MEC/NSC XO followed by major O-5 Command afloat. Strongest recommendation for O-5 with best of peers.”

To support his request, the applicant provided records that are included in the Summary of the Record, below, and statements from several members of the Coast Guard who either had experience with CAPT K or worked alongside the applicant during his tour on the cutter. He provided statements from two Lieutenant Commanders, LCDR C and D, who claimed that CAPT K had a practice of discriminating against minority members:

- In an unsworn statement dated November 22, 2019, LCDR C described three different instances in which CAPT K allegedly exhibited discriminatory behavior. First, he recalled being told by Chief Warrant Officer (CWO) R that he had a “very discriminatory conversation” with CAPT K in October 2017. LCDR C alleged that during a hurricane response operation, CAPT K had told CWO R that he did not like members of the Coast Guard married to other members because he was always the junior officer who had to do more work when they were absent. LCDR C stated that CAPT K then told CWO R that “all the women who evacuated and were married member-to-member to return to [redacted] despite there being no infrastructure (water, medical, etc.) in place.” LCDR C stated that the District Commander “had to tell [CAPT K] to stand down as nobody was returning until infrastructure was restored.” LCDR C claimed that CAPT K retaliated against his own wife, a minority female officer, for not returning after having been evacuated due to the hurricane. However, he did not specify how CAPT K allegedly retaliated against her.

Second, LCDR C also stated that CAPT K heavily influenced his April 30, 2018, OER. He stated that he noticed that the Reporting Officer comments section of his OER did not outline a recommendation for any operational jobs even though his prior OER had clear recommendations for such jobs. LCDR C stated that he routed his concerns through his chain of command and that after multiple conversations with his rating chain, the Reporting Officer comments section was revised to include a recommendation for command positions.

Finally, LCDR C claimed that CAPT K told another minority officer that he was not going to be chosen for the postgraduate law school program because he was “too old.” He stated that there was no age limit for the program and that CAPT K’s actions were “perceived by many as discriminatory based on his age and race.” LCDR C claimed that such discriminatory remarks happened on a constant and regular basis. While LCDR C stated that the comments were never reported because people were afraid of retaliation and

reprisal, he also stated that several junior officers filed discrimination claims against him. He stated that CAPT K did not make the same type of comments to non-minority members.

- In an undated, unsworn statement, LCDR D stated that his May 18, 2018, OER did not contain a recommendation for operational jobs in the Reporting Officer comments section. He noted that all of his prior OERs had included recommendations for positions of higher leadership in both operational and non-operational commands. LCDR D stated that he consulted with the Reviewer of the OER, CAPT K, and his Supervisor, CAPT R. CAPT R allegedly informed LCDR D that CAPT K had changed the language after he and the Reporting Officer had submitted the OER. LCDR D stated that he was reassured by CAPT K that his OER was “good.” LCDR D argued that as the Reviewer, CAPT K was limited to either concurring or non-concurring with the Reporting Officer’s comments and that the comments in that section were not his to edit. LCDR D stated that CAPT R changed the comments back to the original language and CAPT K eventually concurred after being shown his previous OER.

LCDR D also noted the same instances of alleged discrimination that LCDR C discussed in his statement. He stated that LCDR C had experienced the same issue with his OER, which was concerning because he was on the short list to become a Military Aide to the Commandant. LCDR D also stated that he later learned that three other minority officers either had issues with their OERs or were discouraged from applying to graduate school because of their age. LCDR D stated that after learning about CAPT K’s negative interactions with minority officers, he began to feel that it was a pattern of behavior.

- On November 6, 2019, Lieutenant (LT) H, the Executive Officer during the applicant’s tour on the cutter, signed a declaration. He attested to the applicant’s work ethic and how he made the well-being of the crew his top priority. LT H primarily focused on the applicant’s efforts to safeguard the crew’s physical and mental health following a major natural disaster in September 2017. He also described the applicant as “an exceptional leader and a true asset to the Coast Guard and his fellow service members.” LT H stated that he could “fully attest to the level of dedication, responsibility and leadership demonstrated by [the applicant] each and every day.” He strongly recommended that the applicant’s request be considered and stated that the applicant “can provide valuable service, as a cutterman and a leader, to the Coast Guard for many years to come.”
- On November 20, 2019, Boatswain’s Mate first class (BM1) B, signed a declaration under penalty of perjury. As First Lieutenant, BM1 B oversaw the cutter’s deck department and law enforcement activities which provided the opportunity to interact with the applicant daily. He stated that the applicant was “up for the challenge” of being the CO of the cutter. BM1 B noted that the applicant provided the crew with ample time to work out each day. The applicant always asked the crew how they were doing and what could be done to increase morale. BM1 B described one specific morale event suggested by the crew that the applicant supported and the impact that it had on them. According to BM1 B, the applicant also took the familial obligations of the crew into consideration and tried to put the crew before the mission. He strongly recommended that the applicant’s request be

considered and stated that the applicant “can provide valuable service, as a cutterman and a commanding officer to the Coast Guard for many years to come.”

- Finally, on October 20, 2020, the Command Chaplain, LT R, signed a declaration under penalty of perjury. He stated that the applicant valued his crew’s morale, health and wellbeing. LT R also stated that the applicant was the first CO in the Sector to invite him on board a cutter and that the applicant had also invited him to family morale events. According to LT R, the applicant would reach out to him to provide counseling and support to members of the crew who were going through difficult life events. LT R strongly recommended that the applicant’s request be considered and attested that the applicant “can provide valuable service as a cutterman and Commanding Officer to the United States Coast Guard for many years to come.”

The applicant alleged that he also requested statements from the Operations Officer, Chief Boatswain’s Mate, and Electronics Technician first class (ET1) on board the cutter. He alleged that while all three had originally agreed to provide positive statements, the Sector Command stopped them from doing so. The applicant submitted text messages between himself and the Operations Officer, Lieutenant junior grade (LTJG) L, who he had asked to write an endorsement. Between November 8 and 12, 2019, the applicant and LTJG L communicated several times about the endorsement. However, on November 15, 2019, LTJG L emailed the applicant and stated that after giving the endorsement exhaustive thought, he was “simply not comfortable writing an endorsement” like the one the applicant had shared that was written by the Executive Officer, LT H. LTJG L also added that he had been advised to request that the applicant no longer contact him about the matter any further. The applicant also attached a vague email from ET1 L in which he apologized for failing to respond sooner and stated that he had started drafting the applicant’s letter. Finally, the applicant also attached a text message chain with another individual, K, presumably the Chief Boatswain’s Mate. The exact subject of the text message conversation is unclear, but K repeatedly apologized for not being able to “get to it yet.”

SUMMARY OF THE RECORD

The applicant joined the Coast Guard on April 1, 1997, and served as an enlisted member for just under ten years. On February 7, 2007, the applicant was commissioned as an ensign.

On June 26, 2017, the applicant reported aboard a cutter as the Commanding Officer. As such, his Supervisor was the head of the Sector Response Department, CDR D; his Reporting Officer was the Sector Commander, CAPT K; and the OER Reviewer was the District Chief of Enforcement, CAPT R. The applicant was promoted from Lieutenant to LCDR on September 1, 2017, two months after assuming command of the cutter.

On his first annual OER as the CO of the cutter, dated May 31, 2017, the applicant received nine excellent marks of 6 and nine superior marks of 7 in the various performance categories, including a mark of 6 for “Workplace Climate” from his Supervisor, CDR D. His Reporting Officer, CAPT K, assigned him a mark as “One of the many high performing officers who form the majority of this grade” in the fifth of seven possible marks ranging from “Unsatisfactory” to

“Best officer of this grade.” On the Promotion Scale, CAPT K entered a mark of “Recently promoted.”

On June 15, 2018, the applicant received a Coast Guard Commendation Medal for outstanding achievement from August 30, 2017, to October 3, 2017. According to the certificate, he had demonstrated commendable dedication, judgment and devotion to duty in the cutter’s response to Hurricanes Irma and Maria. The Operational Distinguishing Device was authorized.

On March 25, 2019, the Reviewer of the disputed OER and District Chief of Enforcement during the review period, CAPT R, sent an email to another Captain about the applicant’s leadership challenges. In that email, CAPT R discussed a conversation he had with CAPT K about the command climate aboard the cutter. CAPT R stated that CAPT K was considering convening a command climate investigation. CAPT R noted that CAPT K did not have a lot more than the crew’s general feelings of dislike of the applicant. He also noted that CAPT K felt that most of the issues could be fixed with “better leadership” from the applicant. CAPT R stated that he had recommended to CAPT K that he call the applicant in for a meeting and put the onus on the applicant to provide better leadership.

On May 9, 2019, CAPT R sent an email to the Sector Deputy Commander, CAPT M, to get an update on how things were going with the applicant. CAPT M replied on May 10, 2019, and stated that the situation appeared to be improving. CAPT M said that “[i]t could be that things are in fact improving or that everyone is keeping their head down until he leaves.” CAPT M noted that the applicant had been on leave/TDY for a few weeks and that gave the Executive Officer an opportunity to “take stock of things and put crew suggestions in motion.” CAPT M also noted that a Defense Equal Opportunity Management Institute (DEOMI) survey was in process.

On June 28, 2019, when his tour of duty as the CO ended, the applicant received a Coast Guard Commendation Medal for outstanding achievement while serving as CO of the cutter from June 2017 to June 2019. According to the citation for the medal, during that period, the applicant led his unit in 19 interdictions seizing over three tons of cocaine worth over \$60 million, apprehending 15 smugglers, and interdicting 245 illegal migrants at sea. The applicant was also recognized for enhancing key international partnerships through joint operations, executing steadfast command conducting a series of high-profile operational exchanges, conducting humanitarian assistance and disaster relief, and building relationships through cross-training and professional exchanges. The Operational Distinguishing Device was authorized.

On July 16, 2019, the applicant was presented with the Military Outstanding Volunteer Service Medal in recognition of the 600 hours of volunteer time he had dedicated to the U.S. Naval Sea Cadet Corps from June 2017 to June 2019. He was recognized for his outstanding professionalism, leadership, and mentorship to all he interacted with during training evolutions.

OER Preparation

On September 25, 2019, CAPT K, the applicant’s Reporting Officer, emailed the applicant’s Supervisor, CDR D, to discuss finalizing the disputed OER that CDR D had prepared. CAPT K noted that he had “bounced” the message that they were trying to convey off of several

people. He stated that they were trying to convey that the applicant was promotable but not the top of his peers. CAPT K also noted that the applicant was recommended for continued afloat assignments but should be MEC XO/NSC OPS (Executive Officer of a Medium Endurance Cutter or Operations Officer of a National Security Cutter) first mainly because of his total mission focus and “not maintaining a consistent healthy unit climate.” While CAPT K believed that the applicant needed to find a “more balanced and measured approach to success with less reliance on positional power,” he also praised the applicant’s “organizational maturity and acumen” which he observed as being greater than his peers.

CAPT K also discussed the dramatic differences between the applicant’s previous OER and the disputed OER. CAPT K noted that the applicant’s prior OER had been “extremely good,” which he believed was deserved given the applicant’s performance and challenges of two Category 5 hurricanes. CAPT K told CDR D that the disputed OER should show “some movement to the left” but that he thought the current version showed “too steep a drop” in the marks. CAPT K noted a total drop in the applicant’s total numerical score of 12, which he believed to be “overly dramatic,” and stated that it would make the applicant essentially non-competitive for promotion. He recommended that the OER reflect a total drop of about 3, instead of 12, and suggested that CDR D lower only the mark for “Workplace Climate” because that would be impactful enough.

For the performance of duties section on the applicant’s OER, CAPT K recommended that CDR D keep the marks the same as the marks the applicant received on his previous OER because he believed those marks were still accurate based on the applicant’s performance during the reporting period.

For the leadership skills section, CAPT K stated that he believed the 6-point drop was too dramatic of a change. He agreed with CDR D that the mark of 5 for “Workplace Climate” “makes sense” and the 6 for “Teamwork” “makes sense” but recommend that the other marks in this section mirror the higher marks in the previous OER to reduce the overall 6-point drop in marks in this section to a 3-point drop.

For the personal and professional qualities section, CAPT K suggested that the applicant receive the highest mark of 7 for “Initiative” given his performance showcasing the Coast Guard and the District. CAPT K recognized that the applicant understood how to represent the Coast Guard better than most but admitted that his execution had been faulty.

CDR D responded to CAPT K by asking for a copy of the applicant’s previous OER to see how the two compared. CAPT K followed up with a copy of the applicant’s prior OER. That same afternoon, CDR D submitted the applicant’s disputed OER to CAPT K.

Disputed OER

The applicant received a detachment OER for the period of May 1, 2018, to June 28, 2019, which is the disputed OER in this case. The OER indicates that the applicant had received required mid-period counseling on February 12, 2019. For the section evaluating his performance of duties, on a scale from 1 (worst) to 7 (best), he received three excellent marks of 6 and four outstanding marks of 7. The Supervisor’s comments for this section are as follows:

Superior planning & resourcefulness during 7 CD/AMIO patrols resulted in the seizure of 3,000 kgs of cocaine totaling \$60M in value, detention of 15 suspected smugglers & repatriation of 245 illegal migrants; ably protected Nation's southernmost border. Prepared/executed extensive 2 week U.S. Navy Sea Cadet training program o/b cutter; improved public relations by displaying FRC's capabilities & initiating a lasting relationship between SSJ cutters & local Sea Cadets. Oversaw preparations for cutter's ordnance [sic] & law enforcement inspections; achieved near perfect results on 300+ checklist items & received highest praise from inspectors. Immediately adapted to complex personnel issues w/unique & effective solutions including last minute employment of CG Auxiliary Chef due to unexpected discharge of cutter's CS3; creative problem solving afforded crew unique opportunity & forged bonds btwn active duty & AUX. Led bridge teams through 30 restricted water transits; ensured navigation discipline was understood by all members; zero safety mishaps. Oversaw FY18 spenddown; all target dates met. Persuasive memo to CG-7 secured 2 extra non-rates for FRCs; improved material condition for FRCs CG wide & created u/w opportunities for jr enlisted.

For the section evaluating the applicant's leadership skills, he received one above-standard mark of 5 and five marks of 6. The Supervisor's comments for this section, with the contested comment underlined, are as follows:

Managed worklife needs; kept crew/families informed of dynamic schedule changes. Ensured that crewmember was present for the birth of first child during a patrol. Mentored several 1st tour JO/Academy cadets through career counseling; all assigned highly desire afloat posns. Genuinely devoted to unit's success; comprehensive training program ensured members received best quality training for all watch stations; unit attained 100% compliance w/intensive training drill requirements, 2 shipmates quald as u/w OODs. Displayed leadership during a complex SAR case; maintained crew focus & managed fatigue that resulted in the rescue of a woman who had been lost at sea for over 14 hrs. Thorough knowledge in high paced [sector] AOR in Counter Drug & AMIO missions resulted in 19 non-compliant vessel pursuits/interdictions w/zero mishaps. Promoted positivity & bolstered morale by routinely encouraging galley menu options that included unique Puerto Rican cuisine & dessert options.

For the section evaluating the applicant's personal and professional qualities, he received three marks of 6 and two marks of 7. The Supervisor's comments for this section are as follows:

Arranged TDY D7 PAO to document impact-full cases & assisted w/interviews; efforts resulted in social media exposure used to "Tell the Coast Guard Story". Commanded multinational Surface Action Group during Exercise Tradewinds 2018; executed steadfast command & control conducting a series of high profile operational exchanges enhancing capabilities of partner nations to conduct humanitarian assistance, disaster relief & counter transnational organized crime. Rallied crew to complete repairs to unscheduled casualty to return to normal ops; achieved buy-in through dedication & perseverance. Prof interactions w/int'l/fed/local DHS & DOJ partners always positive & well represented Coast Guard during joint patrols/ops. Hosted several VIPs – [redact] Secretary of State/Lieutenant Gov, [redacted] Navy Chief of Ops 7 CO of [redacted]; represented pride in maritime Service.

Finally, when compared to other officers of the same grade, the Reporting Officer, CAPT K, assigned the applicant another mark for "One of the many high performing officers who form the majority of this grade" in the fifth of seven possible marks ranging from "Unsatisfactory" to "Best officer of this grade." On the Promotion Scale, CAPT K chose the mark of "Promote" (between the marks of "Promotion potential" and "Promote w/Top 20% of peers"). The Reporting Officer's comments, with the disputed comment underlined, are as follows:

A superior bilingual CG representative w/extensive ops/LE afloat background; succeeded in [sector]'s most demanding AOR despite multiple personnel/logistical hurdles. In OCONUS homeport w/dynamic sked & a myriad of challenges, SNO's gung-ho attitude & willingness to perform any mission achieved great operational results, but sometimes led to negative follow-on effects to overall unit health/esprit de corps. Deeply respected & well-liked by external & intl partners w/superior outward & vertical comms; significantly increased CG brand throughout region. Following Naval War College grad; strongly recommended for strategic opportunities to work across intl ops as CG Attache, CGLO or w/combatant commands. Recommended for continued afloat opportunities as MEC XO/NSC OPS to continue path towards major O-5 afloat command. Rec for O-5 promotion w/peers.

On October 7, 2019, CAPT K emailed the signed OER to the applicant. He told the applicant to contact him and CDR D for counseling.

On October 15, 2019, the applicant emailed CAPT R, the OER Reviewer, to request a call to discuss the disputed OER. CAPT R replied that he "[w]ould love to talk" and told him that he would be available that Friday afternoon. The applicant responded to CAPT R on October 17, 2019, to suggest that the two speak at 1530 the following day.

On October 21, 2019, CAPT R emailed CAPT K to inquire if he had had a second conversation with the applicant. CAPT K responded on October 24, 2019, and stated that he did have a second conversation with the applicant and that it "went as expected." He noted that he had another call scheduled with the applicant later that day. CAPT K indicated that he was trying to get the applicant to understand that there were "lots of lines of bearing from various sources all pointing to this climate weakness driven by his inability to listen to feedback or observe behaviors." CAPT K stated that he hoped the applicant understood that there were others who felt that the language used in the OER "could be much worse." CAPT K expressed that the applicant understood his message, but that he did not want CAPT K to comment on his weaknesses and felt that his lowered recommendation was sufficient. CAPT K also mentioned that the Deputy Commander, CAPT M, had met with the applicant about the disputed OER and believed that the applicant was taping the conversation. CAPT K said that CAPT M felt that the applicant asked very specific questions to possibly be used in a subsequent request to the BCMR. CAPT K said that for that reason, CAPT M would also be on the call scheduled with the applicant later that day.

On September 14, 2022, the applicant notified the Board that he had been selected for LCDR for Promotion Year 2023.

Discrimination Case

On November 18, 2019, the applicant filed a complaint of discrimination with his Coast Guard District. The applicant alleged that CAPT K had discriminated against him by making a false statement in the section for the Reporting Officer comments of the disputed OER. Specifically, the applicant asserted that there were no negative effects to overall unit health or esprit de corps and that he believed the statement was influenced by the CMC G. The applicant also alleged that CMC G had subjected him to harassment based on his national origin and race from June 2018 to October 2019. The allegation was based on the applicant's perception that CMC G had become hostile toward him following the EPO's OER appeal. The applicant asserted that

CMC G's visit aboard the cutter to speak with the applicant's crew outside of his presence was a form of harassment. He specifically alleged that CMC G had asked the crew whether the applicant was doing anything illegal or in violation of Coast Guard policy or core values.

CAPT K submitted a sworn affidavit in response to the applicant's complaint. In his affidavit, CAPT K disputed the applicant's allegation that the statements in the Reporting Officer comments section of the disputed OER were false. CAPT K stated that the applicant had had more personnel challenges during his first year as CO than any other cutter on the waterfront that CAPT K supervised. He noted that the 2017 DEOMI survey results for the applicant's cutter had largely centered on how the applicant negatively managed the personnel side of his unit. As a result, CAPT K had ordered the applicant to create an action plan to address the issues. That was the first time CAPT K had ever made such an order in his three years of supervising five cutters and six small boat stations. CAPT K also stated that the applicant did not conduct another DEOMI survey until forced to by leadership and that he tried to push it as far as possible into 2019. CAPT K explained that the survey is not a test or inspection that can be prepared for and that the applicant's resistance to conducting the survey demonstrated that he did not want to initiate it until he could confirm it would yield favorable results. CAPT K's affidavit also indicated that the applicant's cutter had failed the Naval Engineering Logistics Compliance Exam with a score of 32% while every other cutter had scored in the 80th percentile. CAPT K believed the failing score was attributable to the applicant being focused on operational results without checking the work of his crew which led to the cutter failing the inspection

CAPT K described informal conversations that he had had with the applicant's crewmates on a regular basis. From those conversations, CAPT K got the impression that the applicant had trouble listening to advice from others and that the crew felt like the applicant only cared about himself. According to CAPT K, following a visit to the cutter by CMC G, CAPT K and the Deputy Commander of the Sector discussed several areas of concern with the applicant, including (1) Perceptions that the applicant did not listen to junior female crew members; (2) Feelings of the crew that the applicant only cared about himself and played favorites with awards and leave (CAPT K noted that not being consistent with personnel matters could wreak havoc on morale and health of a small unit.); (3) Statements of the crew that the applicant controlled what morale events were offered instead of letting the crew choose; (4) How to cover blind spots and communicate effectively with crew members; (5) The need for another DEOMI survey. CAPT K noted that the crew was aware that one had not been conducted in a year and had the impression that the applicant was deferring a survey out of concern that it would reflect poorly on him; and (6) The applicant's reliance on positional and coercive power rather than his expert power as an officer with almost 20 years of service. Overall, CAPT K concluded that the applicant was never able to listen to the advice of others or cover his blind spots.

CAPT K also disputed the applicant's allegation that CMC G harassed him. He stated that Command Master Chiefs have free reign to act as the eyes and ears of the command related to the workforce. The Command Master Chief position allows for open-ended engagement at all levels of the command and subordinate units. Accordingly, CAPT K stated, CMC G spoke with crewmembers on other cutters and regularly visited the Sector units to meet with crew and look at overall readiness. CAPT K stated that during those visits, he had never heard CMC G ask about COs doing anything illegal or in violation of Coast Guard policy. Finally, CAPT K disagreed that

CMC G was hostile toward the applicant because he was in agreement with how the EPO's OER appeal was handled.

On February 14, 2020, the District Commander found that the applicant's allegations of harassment were unsubstantiated. Instead, the District Commander stated that the investigation had uncovered disappointing conduct on the part of the applicant. For instance, the applicant was found to have pushed subordinate personnel to author statements supporting his views, rather than allowing the investigation to proceed impartially. Further, the investigation had found that the applicant had demonstrated significant shortcomings as a CO. The District Commander noted that if warranted, additional inquiries might be convened into the applicant's conduct. Nevertheless, the District Commander stated that because there was a comment in the disputed OER that could be subject to misinterpretation, the Sector Command was directed to coordinate with the Officer Personnel Management branch of the Personnel Service Center about revising the report.²

It appears that the applicant filed a complaint with the Coast Guard Civil Rights Directorate (CRD), but his personnel record does not contain a copy of the complaint.

On August 27, 2020, the CRD issued a Final Agency Decision regarding the applicant's complaint. The CRD concluded that no discrimination was found. The CRD also notified the applicant of his right to appeal to the Department of Homeland Security Office for Civil Rights and Civil Liberties. It is unclear if the applicant ever did so.

Personnel Records Review Board Application

The applicant submitted an application to the Personnel Records Review Board (PRRB) to correct the disputed OER. He asked for similar relief as in his current application before the BCMR.

As part of the PRRB's review, the Personnel Service Center (PSC) gathered sworn declarations from the Supervisor, Reporting Officer, and Reviewer who prepared and signed the disputed OER:

- On November 10, 2020, CDR D, who served as the applicant's Supervisor during the reporting period, provided a declaration under penalty of perjury. CDR D "wholeheartedly disagree[d]" with the applicant's assertions. He stood by the mark of 5 for "Workplace Climate" and comments made in the OER. CDR D stated that he never once felt pressured to change any sections on the applicant's OER. Instead, he noted that he had had discussions with CAPT K about the applicant's OER as he did with the other six OERs he was responsible for completing.

CDR D addressed the applicant's request to increase his mark of 5 for "Workplace Climate." He stated that he had considered two substandard DEOMI surveys that were completed while the applicant was Commanding Officer. CDR D stated that based on the totality of what he observed during the reporting period and other metrics that demonstrated

² The District Commander did not identify the comment, but it may be the reference to "Puerto Rican cuisine." However, the comment was not amended for PSC-OPM.

the applicant's leadership abilities, he did not believe the applicant's performance warranted a mark greater than 5 for "Workplace Climate."

CDR D also stated that he was "deeply troubled" that the applicant viewed his comment concerning "Puerto Rican cuisine" as an attack on his national origin and ethnicity. He emphasized that he never had the intention of offending the applicant. The comment was intended to recognize the applicant's celebration of the local cuisine where he and his crew were stationed. CDR D noted that the applicant did not include any reference to offering unique culinary options in the galley on his Officer Support Form, but he felt it was worth mentioning given the "pride and exuberance" displayed by his crew when preparing the meals.

CDR D concluded his declaration by stating that the applicant did not raise concerns when he called to discuss his OER around August 2019. Instead, CDR D stated that the applicant thanked him for the OER and they reminisced about all of the great things they had accomplished together.

- On November 10, 2020, CAPT K, the Reporting Officer for the disputed OER, provided a declaration under penalty of perjury. CAPT K stated that he had worked with CDR D to raise the applicant's overall marks from the original draft by eight points. In fact, CAPT K asserted that CDR D's original draft of the OER had dropped the applicant's marks 12 points overall compared to the previous reporting period. CAPT K also stated that due to the applicant's challenges in maintaining a positive unit climate, the mark of 5 for "Workplace Climate" is accurate.

CAPT K also asserted that his comments in the applicant's OER are accurate and reflect a strong operator who struggled to maintain a positive unit climate. He stated his comments were based on the applicant's performance managing the "people side of his unit." CAPT K said he could not in good faith recommend the applicant to be a Commanding Officer of a Medium Endurance Cutter (WMEC) knowing that such an assignment would put him in command of a major unit with 75 to 100 people and no oversight due to the "totality of his challenges managing the unit's health and esprit de corps."

- On November 10, 2020, CAPT R, the Reviewer for the disputed OER, provided a declaration under penalty of perjury. He stated that based on his interactions with the applicant, he agreed with CAPT K's comments in the OER. CAPT R stated that the applicant had a strong operational acumen, but his leadership skills demonstrated that he was not ready for an MEC command.

CAPT R also stated that he had discussed the applicant's performance with CAPT K on several occasions during the reporting period in question. According to CAPT R, CAPT K was considering initiating a command climate investigation to determine the situation aboard the cutter. CAPT K had also asked CAPT R for advice on evaluating the applicant because he was concerned about balancing his strong operational results with the leadership and command climate challenges that the applicant had struggled to handle. CAPT R had recommended that CAPT K give the applicant a fair and accurate assessment

of his leadership potential, particularly if CAPT K did not believe the applicant was ready for a major command position.

CAPT R also stated that on October 18, 2019, he had discussed the OER with the applicant at his request. CAPT R found the applicant to be “upset, argumentative and combative.” CAPT R also found the applicant to be unreceptive to feedback and unwilling to take ownership of leadership issues on the cutter. He noted that the applicant was only focused on getting the OER comments changed.

In a decision dated March 22, 2021, the PRRB denied the applicant’s request. The PRRB opined that the mark of 5 for “Workplace Climate” should not be upgraded because the evidence suggested that the mark was appropriate and supported by the comments. The PRRB also determined that the language in the leadership section was valid. Finally, the PRRB determined that the Reporting Officer’s opinion of the applicant on his future potential was supported. The PRRB opined that CAPT K did not feel that applicant was deserving of a command recommendation and, therefore, the comments on the applicant for WMEC command should remain as recorded.

VIEWS OF THE COAST GUARD

On January 21, 2022, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice. Instead, PSC concluded that the disputed OER was completed in accordance with Coast Guard policy. First, PSC argued that the applicant provided no evidence indicating that CDR D felt pressured by CAPT K to lower the applicant’s OER marks. Further, PSC argued that the applicant failed to show that CAPT K’s comments were false and not based on direct observation.

The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for correction of an OER outlined in *Hary v. United States*.³ The *Hary* standard requires a showing by competent evidence of (1) a misstatement of a significant hard fact; (2) a 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.⁴ As to the first prong, the JAG noted that the applicant appeared to imply two misstatements of fact in the Reporting Officer’s comments section of the disputed OER. However, the JAG argued that neither of the challenged comments include significant hard facts and instead reflect the judgment of CAPT K, which is inherently subjective. First, the applicant challenged the accuracy of the following statement: “...but sometimes led to negative follow-on effects to overall unit health/esprit de corps.” The applicant alleged that the statement is false and not based on reliable information. However, the JAG argued that CAPT K’s declaration demonstrated that the challenged statement was based on various sources of information available to him, including his own observations. The JAG also argued that the multiple issues raised in CAPT K’s declaration demonstrate that he had sufficient information to

³ 223 Ct. Cl. 10, 18, 618 F.2d 704, 708 (1981).

⁴ *Id.*

comment on negative impacts to unit health. In terms of the statements that the applicant provided from his crew as evidence that the comment is false, the JAG argued that the evidence failed to demonstrate a misstatement of fact when contrasted with CAPT K's declaration. The applicant also challenged the accuracy of the following statement: "MEC XO/NSC OPS to continue path towards major O-5 afloat command. REC for O-5 promotion w/peers." The JAG again argued that CAPT K provided sufficient justification to support his assessment of the applicant's readiness to assume further responsibility.

As to the second prong of the *Hary* standard, the JAG argued that the applicant did not prove a clear violation of specific objective requirement of statute or regulation. In this case, the applicant argued that CAPT K pressured CDR D to change certain marks in the OER in violation of Coast Guard policy. The JAG noted that the applicant provided an email conversation between CAPT K and CDR D to support his allegation. However, the JAG argued that the email did not directly support the applicant's argument because it is merely his interpretation of a third-party conversation. Instead, CDR D's declaration provided under penalty of perjury directly contradicts the applicant's argument. CDR D stated that he never felt pressured to change any sections of the disputed OER. Additionally, the JAG argued that CAPT K's sworn statement that he worked with CDR D to raise the applicant's marks demonstrated collaboration, not coercion. The JAG argued that assuming, *arguendo*, that CAPT K did influence CDR D to change the marks, the applicant appears to have benefited from CAPT K's suggestion to CDR D that he raise some of the marks.

Finally, as to the third prong of the *Hary* standard, the JAG argued that the applicant failed to prove that the disputed OER was the result of bias, personal animosity, or other factors which had no business being in the rating process. The applicant claimed that CAPT K's comments were based on his bias towards under-represented minority officers. He also claimed that the comments were based on rumors aggressively sought out by CMC G who was biased against him for trying to hold the EPO accountable. The JAG argued that the applicant failed to adequately support either claim and that his claims are speculative. First, the JAG argued that CAPT K sufficiently supported the challenged comments in the OER by providing specific non-biased and non-influenced justifications in his declaration. The JAG asserted that the challenged comments are not prohibited comments and that they address the issues that the Reporting Officer is supposed to opine on under Coast Guard policy. Next, the JAG argued that the applicant failed to provide any evidence to demonstrate that CMC G was biased against him. The JAG stated that the applicant clearly took issue with CMC G's visits to the cutter and his interactions with the crew. However, the JAG argued that the applicant did not show that CMC G harbored any animosity or bias against him. Finally, in light of the presumption of regularity afforded to the applicant's rating chain, the JAG argued that the statements from other minority officers and the applicant's subordinates are insufficient to prove CMC G's or CAPT K's alleged bias against the applicant.

The JAG argued that the applicant failed to prove the implication of at least one *Hary* factor, and therefore the applicant has not sufficiently demonstrated error in his OER. Accordingly, the applicant failed to overcome the presumption that his rating chain discharged their duties correctly, lawfully, and in good faith.

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. In his response, the applicant opposed several allegations set forth by the JAG.

The applicant argued that CAPT K’s email to CDR D “plainly exerted pressure” to lower the marks in section 3 of the OER. The applicant asserted that whether or not CDR D would admit to having felt pressure, which would cause embarrassment for him and CAPT K, the record is clear that pressure was exerted by his superior. The applicant argued that contrary to the position of the advisory opinion, the fact that CAPT K “worked with” CDR D to raise some numerical marks does not excuse the lowering of others. The applicant also argued that CAPT K’s assertion that he did similar things for other officers supports his claim that he did not receive a truly independent assessment from his Supervisor. Finally, the applicant argued that on an OER, each mark must be correct, as evidenced by a separate evaluation of each trait, instead of having just the total “points” of all the numerical marks be “overall” correct. The applicant asserted that if the advisory opinion’s “arguendo” fallback is accepted, the entire OER is suspect and should be expunged with a continuity report substituted for it.

Accordingly, the applicant asked the Board to direct that the OER either be expunged or adjusted so that his personnel record accurately depicts his “commitment to Coast Guard values, work performance, merit, dedication to duty, professional character and most importantly, [his] potential as a career Coast Guard officer.”

APPLICABLE LAW AND POLICY

Article 1.A.1. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C, states the following regarding the responsibilities of the Reported-on Officer in relevant part (emphasis added):

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.

...

g. Inform Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) directly by written communication (e.g., e-mail) if the original validated OER has not been received *six months after the end of the reporting period*.

Article 1.A.2.b. of the manual states the following regarding the responsibilities of the Supervisor in relevant part (emphasis added):

[1]. Evaluate the performance of the Reported-on Officer in the execution of their duties.

...

[4]. Encourage the use of the Officer Support Form (OSF), Form CG-5308, ([sic] required for ensigns and lieutenants (junior grade) or other appropriate means, to note important aspects of the

Reported-on Officer’s performance during the reported period. Significant events, problems, achievements, shortcomings, or personal qualities should be noted.

Article 1.A.3.b. of the manual states the following regarding the responsibilities of the Reporting Officer in relevant part (emphasis added):

[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.

[2]. Prepare Reporting Officer section of the OER and describe the overall potential of the Reported-on Officer for promotion and special assignment such as command.

[3]. Ensure the Supervisor fully meets responsibilities for administration of the [Officer Evaluation System]. *Reporting Officers are expected to hold designated Supervisors accountable* for timely and *accurate evaluations*. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments (if applicable). The Reporting Officer shall not *direct* that an evaluation mark or comment be changed, unless the comment is prohibited under Article 5.I. of reference (a) and Article 4.B. of the Manual.

Article 4.B.11. of the manual states the following regarding comments that a member’s rating chain is prohibited from including in relevant part:

Discuss Reported-on Officer’s performance or conduct which occurred outside the reporting period except as provided in Article 5.E.7. and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of this Manual.

Article 4.E.2. of the manual states the following regarding Supervisor comments in relevant part:

f. For each evaluation area, the Supervisor reviews the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor must take care to compare the officer’s performance and qualities against the standards – not to other officers and not to the same officer in a previous reporting period.

...

j. Comments should amplify and be consistent with the numerical evaluations (if applicable). They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to accurately portray the officer’s performance and qualities which compares reasonably with the standards defined and marked on the performance dimensions in the evaluation area.

k. Citing weaknesses does not make the OER derogatory. Derogatory OERs are identified in Article 5.H.1. of Reference (a) and Article 6.A. of this Manual.

Article 4.F. of the manual states the following regarding Reporting Officer comments in relevant part:

3. Section 5, Reporting Officer Comments

a. This section provides an opportunity for the Reporting Officer to comment on the Supervisor's evaluation. Reporting Officers are encouraged to cite other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period. By doing so, the Reporting Officer gives a more complete picture of the Reported-on Officer's capabilities.

...

d. No specific comments are required to support the Reporting Officer's judgment for the Comparison, Promotion, and Rating Scales.

e. Comments in this section reflect the judgment of the Reporting Officer and may include, but are not limited to, the following:

[1]. Qualification to assume the duties of the next grade.

[2]. Specialties or types of assignment, such as command, or post-graduate education for which the Reported-on Officer is qualified or shows aptitude.

[3]. Special talents or skills (or lack of) such as military readiness and warfare skills, seamanship or airmanship, etc., as applicable.

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.

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.⁵

2. The applicant alleged that his June 28, 2019, OER should be amended because it is erroneous and unjust. 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.⁶ 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.⁷ To be entitled to relief, the applicant cannot "merely allege or prove

⁵ 33 C.F.R. § 52.22.

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.⁸

3. The applicant did not submit a reply to the contested OER as permitted by Article 17.A. of the Coast Guard Evaluation System Procedures Manual, PSCINST M1611.1C, to express a differing view of his performance from that of his rating chain. The applicant’s failure to reply to his OER is substantial evidence that when he received it in October of 2019, he accepted it as valid even if he did not like it.

4. The applicant argued that the mark of 5 for “Workplace Climate” in the leadership skills section is erroneous because his Supervisor was unduly pressured by the Reporting Officer to lower the mark in violation of Coast Guard policy. The Reporting Officer is responsible for ensuring that the Supervisor fully meets responsibilities for administration of the Officer Evaluation System.⁹ Reporting Officers are also expected to hold Supervisors accountable for accurate evaluations.¹⁰ However, Reporting Officers are prohibited from *directing* that an evaluation mark or comment be changed, unless the comment is prohibited by policy.¹¹ In support of his argument, the applicant provided an email exchange between his Supervisor, CDR D, and his Reporting Officer, CAPT K. The email exchange reflects that CAPT K suggested that CDR D revise some of the applicant’s marks. However, CAPT K did not use any language that could be construed as directing CDR D to change the marks. This is supported by CDR D’s declaration in which he stated that he never once felt pressured to change any sections on the applicant’s OER. Moreover, as noted by the JAG, CAPT K’s feedback only improved the applicant’s marks from CDR D’s initial marks. CAPT K expressed concern to CDR D that the applicant’s initial marks were too much lower than his previous OER. As CAPT K also stated in his declaration, he collaborated with CDR D to raise the applicant’s marks but that he did not coerce him to do so. CAPT K’s email discussion of CDR D’s marks in the leadership skills section of the disputed OER shows that CAPT K agreed with CDR D that a mark of 5 for “Workplace Climate” “makes sense” and a mark of 6 for “Teamwork” “makes sense” but recommended that the remaining marks in that section be as high as they were in the applicant’s previous OER. Accordingly, the applicant has failed to prove by a preponderance of the evidence that the applicant’s mark for “Workplace Climate” was directed by CAPT K or lowered by CDR D under pressure from CAPT K. He has not shown that the mark of 5 for “Workplace Climate” is erroneous or unjust.

5. The applicant also argued that the leadership skills section of the disputed OER is erroneous because it contains an offensive comment that was also inaccurate. In the comments for that section, CDR D praised the applicant for encouraging galley menu options that included unique “Puerto Rican cuisine.” The applicant argued that the comment was an attack on his ethnicity because it incorrectly categorized him as Puerto Rican. CDR D specifically addressed the applicant’s allegation in his sworn declaration. He stated that he did not intend to offend the

⁸ *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).

⁹ Article 1.A.3.b.3. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C.

¹⁰ *Id.*

¹¹ *Id.*

applicant and that the comment was not based on the applicant's national origin or ethnicity. Instead, the comment was based on the region in which the applicant was stationed. CDR D wanted to recognize the benefit that offering the local cuisine had on the applicant's crew. The applicant also argued that he had not asked the Culinary Specialist to prepare that Puerto Rican cuisine. However, the applicant did not provide any evidence to support his assertion. His argument appears to be based primarily on the fact that he is not Puerto Rican, notwithstanding that the comment does not directly or indirectly implicate the applicant's national origin or ethnicity. Accordingly, the applicant has not proven by a preponderance of the evidence that the leadership skills section of the disputed OER contained comments that that were erroneous or unjust.

6. The applicant also argued that the comments in the Reporting Officer comments section of the disputed OER were erroneous because they provided an inaccurate review of his performance. The applicant specifically pointed to the following comment as inaccurate: "In OCONUS homeport w/dynamic sked & a myriad of challenges, SNO's gung-ho attitude & willingness to perform any mission achieved great operational results, but sometimes led to negative follow-on effects to overall unit health/esprit de corps." (Emphasis added.) Similarly, the applicant argued that the following comment was inaccurate: "MEC XO/NSC OPS to continue path towards major O-5 afloat command. REC for O-5 promotion w/peers." However, the applicant did not provide any evidence that the comments, or the sources for them, violated Coast Guard policy. Reporting Officers are encouraged to "cite other information and observations they may have which would confirm or provide another perspective of the Reporting Officer's performance and qualities demonstrated during the reporting period."¹² The Reporting Officer is permitted to provide his or her judgment on the Reported-on Officer's skills or special talents, or lack thereof.¹³ The applicant also did not provide any evidence that the comments misstated a significant, hard fact.

Furthermore, CAPT K's sworn statements – which were consistent throughout the discrimination proceedings and PRRB review – provided sufficient support for the challenged comments in the applicant's OER. In his declaration, CAPT K was able to identify specific non-biased and non-influenced justifications from a variety of sources. Notably, CAPT K referenced the uniquely significant personnel challenges that the applicant faced during his first year as Commanding Officer and the cutter's very low score on the Naval Engineering Logistics Compliance Exam. CAPT K also stated that he routinely had informal conversations with the applicant's crew because he lived in the same housing and that those conversations contributed to the comments he made in the disputed OER. Reporting Officers are responsible for commenting on the Supervisor's evaluation and may cite to "other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period."¹⁴ The applicant has not provided any evidence that would indicate that CAPT K failed to follow that instruction.

7. The applicant argued that CMC G harbored bias against him for the way he handled the EPO's OER appeal. The applicant also believed that CMC G inappropriately interacted with his crew. For instance, he alleged that CMC G asked the crew if the applicant had violated any

¹² Article 4.F.3.a. of the Coast Guard Officer Evaluation System Procedures Manual, PCSINST M1611.1C.

¹³ Article 4.F.3.e.3. of the Coast Guard Officer Evaluation System Procedures Manual, PCSINST M1611.1C.

¹⁴ Article 4.F.3.a. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C.

laws or Coast Guard policy. However, CMC G's interactions with the applicant's crew do not demonstrate bias, or even malice, against the applicant. Instead, they show that CMC G was fulfilling the role of a Command Master Chief, which is to "represent[] the field to the commander and the commander to the field"; "frequently visit their units, meet informally with personnel, exchange ideas"; "recommend action to correct adverse conditions and improve quality of life for personnel"; "promote good order and discipline by assisting in all matters pertaining to health and wellness, job satisfaction, and morale of personnel within their [area]"; and "ensure a positive command climate and culture of respect."¹⁵ CMC G's actions demonstrate that he was concerned with and critical of the applicant's ability to foster a positive workplace climate. Disapproval based on negative performance and/or personality conflicts is not illegal bias. The applicant has submitted no evidence to show that CMC G's criticisms or conduct was unwarranted or abusive. Furthermore, CAPT K stated that CMC G had free reign to act as the eyes and ears of the Sector Command. The nature of his position allowed CMC G to participate in open-ended engagement with the applicant's crew. CAPT K also expressed doubt that CMC G asked the applicant's crew any inappropriate questions. CAPT K also noted that there was no basis for the applicant's accusation that CMC G harbored hostility or bias against the applicant because CMC G had agreed with the way that the applicant handled the EPO's OER appeal.

6. The applicant also appeared to argue that the disputed OER was affected by CAPT K's bias against minority officers. The applicant's argument seems to be based on CAPT K's disagreement with how the applicant intended to handle the EPO's evaluation appeal. However, the applicant did not provide any specific instances in which CAPT K made any statements or actions that were discriminatory toward the applicant. In fact, none of CAPT K's statements that the applicant challenged here demonstrate bias or malice towards the applicant. Instead, CAPT K's statements show that he was concerned and critical of the climate aboard the cutter under the applicant's leadership. Even assuming *arguendo* that the statement regarding Puerto Rican cuisine in section 3.b of the disputed OER was offensive or discriminatory, that comment was provided by the applicant's Supervisor CDR D, not CAPT K.

Additionally, the statements the applicant submitted from other minority officers who alleged that they had been discriminated against by CAPT K fail to provide evidence that CAPT K discriminated against the applicant. The applicant has submitted no evidence to show that CAPT K's criticisms were unwarranted or based on the applicant's race, ethnicity, or national origin.

7. The applicant has not proven by preponderance of the evidence that his June 28, 2019, OER should be expunged or corrected due to a misstatement of a significant hard fact, a clear violation of specific objective requirement of statute or regulation, or factors adversely affecting the ratings which had no business being in the rating process.¹⁶ Accordingly, the applicant's requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁵ COMDTINST 1306.1H.

¹⁶ *Hary, supra* n. 6 at 708.

ORDER

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

December 2, 2022

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