

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-022


CAPT (O-6)

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 March 1, 2022, and assigned the case to an attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 12, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, an active duty Captain (CAPT/O-6), asked the Board to correct his 2019 annual Officer Evaluation Report (OER) for the rating period beginning October 1, 2018, and ending March 31, 2019. Specifically, he asked the Board to raise the mark he received on the Comparison Scale by one position from a mark in the fifth spot (of seven), denoting “One of the many high performing officers who form the majority of this grade,” to a mark in the sixth spot, denoting “One of the few distinguished officers.” The applicant stated that he believes that the Comparison Scale in this OER was incorrectly marked lower than on his previous OER in an attempt by the Coast Guard to “normalize the marks and re-balance OERs across various commands within the [] Area.” For comparison, the applicant provided his annual OERs for three prior years (2018, 2017, 2016).

The applicant stated that he was requesting the correction because “the single most significant document to effectively manage an officer’s [sic] career, the OER, is the official record of performance used to determine an officer’s potential for promotion, retention, advanced education, command screening, and all other professional decisions.” He also stated that the Comparison Scale mark in his 2019 OER is unjust because it was not assigned based on Coast Guard policy and procedures and may hinder his advancement potential.

In support of his application, the applicant provided a personal statement in which he explained why the Comparison Scale mark on his 2019 OER is erroneous and unjust because it was inappropriately adjusted downward due to a leveling of marks across all O-5 commands, and is not a true and accurate reflection of his performance in comparison to all the other O-5s known by his then Reporting Officer (RO).

I believe my mark in the potential block of my last OER dated May 2019 was inappropriately adjusted downward and was not an accurate reflection of my performance or in relation to peers at my then rank of CDR/O5. This is clearly articulated in an email between myself and my supervisor at the time [Captain S] (National Strike Force Commander) and his references to verbal discussions he had with my RO [Captain L] regarding my concern over the lowering of the mark from the previous OER (2018) and how that would look to various boards/panels. In it he remarks that my performance had not changed from the last marking period, - but that the lowering of the mark was due to a leveling of marks across all O5 commands. I would argue that if my performance was the same as it was during the previous period the mark should remain the same and not be lowered. Although I understand they want to ensure marks are not over inflated, movement downward mid-tour without an explanation is highly likely to raise concerns with any boards or panels. Although my RO notes that this was not intended to send a message, I believe it sent a clear message given the potential block in my last 3 OERs would have went from a 7 to 6 to 5. . . . The reduction from 7 to 6 is understandable given the transfer to a new unit and position, and maintaining the potential block at a 6 would make sense and could be seen as a continuation, [but] a reduction in potential block mid-tour does send a negative message. As noted in this email, the change was not related to performance (as it should have been) and was more related to ‘normalizing marks’.

...

The previous year I was selected for promotion to O6, to attend a Senior Service School (Fellowship) and successfully screened for both Sectors and Intel commands – all separate panels/boards. [The RO] notes in the email that ‘with promotion imminent and [the applicant] going off to school, I don’t see this as a negative’. This and the entire email seems to be an attempt to normalize the lowering of the potential block mark, while justifying the lowering by saying that I, having been recently selected [for] promotion and to go to a Senior Service School won’t be [affected] by it. This run[s] counter to everything in regulation regarding Officer Evaluation Reports – which should be completely based on my performance for the marking period. On that note this email sums it up completely – ‘The movement of the mark is less related to performance and more related to normalizing the marks within the latest form.’

The applicant explained that he appealed to the Coast Guard PRRB and the Board found that the mark should be redacted from his OER. The applicant claimed that the remedy provided by the PRRB would likely cause many more questions for any future boards or panels that would have looked at it. He asked the Board to correct this injustice by raising his mark on the Comparison Scale on his 2019 OER by one place to the same mark that he received on his 2018 OER.

In support of his application, the applicant provided his OERs and a summary of his OER marks to show for comparison where he has been consistently marked on the Comparison Scale for his previous service. He also provided emails and other supporting documentation in an effort to show that for the rating period of his 2019 OER that through several measures he had achieved as good, if not better performance than in the previous marking periods. That information deemed relevant will be included in the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard Reserve on June 19, 1990, and entered regular active duty on October 8, 1996. After attending Officer Candidate School, the applicant was commissioned as an Ensign in the Reserve on September 12, 1997, and began serving on extended active duty in 1998. He was integrated as a regular officer upon his promotion to Lieutenant in 2002, and was promoted to CDR/O-5 in 2013.

From July 31, 2014, to May 8, 2017, the applicant served as the Head of a Sector Response Department. On his 2016 and 2017 OERs for this service, the applicant received primarily top marks of 7 in the various performance categories, the top mark (7) on the Comparison Scale (denoting “Best officer of this grade”), and a very high mark of “In-zone reorder”¹ on the Promotion Scale.

On June 5, 2017, the applicant executed Permanent Change of Station orders to serve as the Commanding Officer of a new unit. On his first OER in this position, dated March 31, 2018, the applicant received top marks of 7 in fifteen of the eighteen performance categories, marks of 6 in the remaining three performance categories (“Evaluations,” “Responsibility,” “Health and Well-Being”), a mark in the sixth place of seven on the Comparison Scale (denoting “One of few distinguished officers”), and a mark of “Promote with top 20% of peers” on the Promotion Scale.

Disputed 2019 OER

The applicant’s second and final OER as the Commanding Officer is the disputed OER in this case. This 2019 OER was completed by the same rating officials who completed the applicant’s 2018 OER. The marks on this 2019 OER are nearly identical to the marks on his 2018 OER with only the following differences:

- The mark for the performance dimension “Writing” was lowered from a 7 (top) to a 6.
- The mark on the Comparison Scale was lowered from the sixth place (“One of few distinguished officers”) to the fifth place. (On the Comparison Scale, the third, fourth, and fifth place marks are all described as “One of the many high performing officers who form the majority of this grade.”)
- The Promotion Scale mark changed to “Already selected [for promotion] to next pay grade,” because the applicant had been selected in July 2018 for promotion to Captain/O-6.

On May 9, 2019, the applicant emailed his Supervisor to ask for counseling and stated:

My only question is given that this OER has good marks overall and reads well, yet there was an overall drop of 1 within one measurement and a drop of 1 in the comparison scale from the previous OER to this one (and

¹ A mark of “In-zone reorder” means that the Reporting Officer not only recommends the officer’s promotion very strongly but also recommends reordering the officer on the Active Duty Promotion List to the top of all those selected for promotion so that the officer will be eligible for the next promotion as soon as possible.

that one was down one in the comparison scale from the one before it), and this was the first time I've gotten the comparison scale at that level since 2010 – does that hinder my career/assignments going forward?

The applicant's Supervisor, Capt S, who was responsible for assignment the marks in the eighteen performance dimensions, including "Writing," responded as follows:

We can talk next week. In the meantime below is [Capt L's] perspective: "I have him at the top of the high-performing block for comparison vice 'One of few distinguished' and this is a change from last year. I'm not trying to send a message, it's where I felt the mark should be as we have ongoing discussions of where people are on the scale between communities. With promotion imminent and [the applicant] going off to school, I don't see this as a negative."

I agree that this OER still sets you up very well for screening coming out of your Senior Service School tab.

The movement of the mark is less related to performance and more related to normalizing the marks with the latest form.^[2] This has been a multi-year process. Your selection for promotion to O6 and Senior Service School is indicative of your continued high performance. You are still in very good shape to screen competitively for all of the commands listed in your OER and your marks are very high. As [Captain L] says, he is not trying to send some message to you or the board.

Likewise, any changes from 7 to 6 should not be perceived as reduction in my perception of your performance. OERs that are all 7's receive negative attention in the form of enhanced scrutiny during boards. A better balance between 5, 6, 7 is ideal.

The applicant's Supervisor (Captain S) signed the OER on May 8, 2019, while the Reporting Officer (Captain L) and the Reviewer (Captain R) signed it on May 9, 2019, as did the applicant. The applicant did not file an OER Reply for inclusion in his record with the OER.

Personnel Records Review Board (PRRB)

The applicant submitted a timely appeal to the PRRB. The evidence before the PRRB included sworn declarations provided by his Supervisor (Captain S) and the Reviewer (Captain R) for the contested OER and the transcript of an unsworn conversation between the PRRB and the Reporting Officer (Captain L) who was responsible for assigning the Comparison Scale mark.

² Between 2016 and 2017, the appearance of the Comparison Scale on the OER form changed. While both allowed 7 possible marks, the descriptors of the marks changed as follows: In 2016, Comparison Scale marks in the first and second spot were denoted as "Below the majority of Commanders" with a 1 meaning "Unsatisfactory performance/conduct, no potential for increased responsibility," and a 2 meaning a "Steady performer, limited potential for increased responsibility." Comparison Scale marks in the third, fourth, or fifth spots were for the "Majority of high performing Commanders" with a 3 meaning a "Strong performer, very competent and respected individual"; a 4 meaning an "Excellent performer, highly recommended for positions of increased responsibility"; and a 5 meaning an "Exceptional performer, give toughest, most visible leadership assignments." The sixth and seventh spots were denoted as being for the "Top 10% of all Commanders," with a 6 meaning "One of the few distinguished performers" and a 7 meaning "Best officer of this grade." In 2017 and thereafter, the Comparison Scale was simplified so now a 1 means "Unsatisfactory"; a 2 means "Marginally performing officer"; a 3, 4, or 5 means "One of the many high performing officers who form the majority of this grade"; a 6 means "One of the few distinguished performers"; and a 7 means "Best officer of this grade."

- Declaration of Captain S:

3. As Supervisor, I did not observe a drop in [the applicant's] performance from the 2018 to 2019 OER. The marks that I gave [the applicant] demonstrate sustained high performance as Commanding Officer at a highly demanding unit. I strongly believe that [the applicant] would make a fantastic Sector Commander, and was shocked by the fact that he did not successfully screen for Sector Command. I acknowledge that [the applicant's] Comparison Scale mark dropped by one mark from 2018 to 2019. I was told by Captain L, [the applicant's] Reporting Officer, that [the applicant] should not infer from the drop in the comparison scale that there was a problem with his performance, or that he was trying to send a message. Rather, the lowering of the mark was an attempt to normalize the OER across communities, and was in keeping with messaging from an email outlining the message from [Captain L]. That email is part of [the applicant's] PRRB package, and it is a true and accurate reflection of a conversation that I had with [Captain L] about counseling [the applicant] on his OER.

- Declaration of Captain R:

2. In the PRRB application, this officer challenges the “potential” mark on the challenged OER, noting that it is lower than in his previous OER. He cites to comments by his Supervisor and Reporting Officer suggesting that while his performance level was relatively constant, his “potential” mark was lowered because of a need to “normalize marks” across various commands. He then concludes that the mark is, therefore, not accurate. This reflects some conflation of issues and some confusion about OER standards and policies, as discussed below.

3. As reflected in the comments of the Supervisor and Reporting Officer, I emphasized the importance of OER accuracy across and among all operational communities – afloat, deployable forces, and so on. I also noted the particular concern about marks inflation, consistent with PSCINST M1611.1D, art. E.2.f (“Inflationary markings dilute the actual value of each evaluation, rendering the OER and the OER itself ineffective,”) This did not, however, result in an automatic “across-the-board” lowering of marks across the division. Rather, it tended to more precisely distinguish between different levels of performance among similarly situated officers. (In other words, some marks remained high across marking periods, while others were lowered to more appropriately reflect actual performance.) This was in keeping with the leadership responsibilities outlined in PSCINST M1611.1D (noting the need to “ensure the integrity of the [OER] system by giving close attention to accurate marking”).

4. As the Reviewer on this particular OER, I ensured it accurately reflected the performance of the officer during the period, and was otherwise consistent with OER policies and procedures. I found no inconsistencies between the evaluation and this officer's performance. Nor did I direct any changes to the marks or comments.

5. Having now reviewed the PRRB application and enclosures, and having reflected again on this officer's performance relative to the OER comparison scale, I remain convinced that the evaluation mark in question is accurate – and I recommend the Board not changing it.

Captain L, the applicant's Reporting Officer, provided an unsworn verbal declaration via a telephone call with the PRRB on October 30, 2019, resulting in the PRRB noting that conversation in its decision:

- i. Applicant's performance in 2019 was not markedly different from his performance in 2018.
- ii. In Block 5.b (Reporting Officer Authorization: Comparison Scale) of the OER for period ending 31 March 2019, Applicant was not compared with others of the same grade which his Reporting Officer had known in his career.

iii. In Applicant's OER for period ending 31 March 2019, he was compared to officers of the same grade across various commands within [] Area whom his Reporting Officer had not personally known nor worked with.

In further support of his application, the applicant also provided to the PRRB a favorable DEOCS/DEOMI survey; his Spring 2019 Officer Support Form, Form 225 (Incident Personnel Performance Rating) for hurricanes Florence, Lane and Michael; ALCGPSC 110/18 with the Captain Selection Board Results from July 2018; and ALCGPSC 116/18 with the AY19 Senior Education and Fellowship Panel Phase II Results.

On November 22, 2019, the PRRB concluded that the applicant had not provided clear and convincing evidence to establish that his Comparison Scale mark was lowered due to "normalizing marks to ensure they are not over-inflated." The PRRB did find, however, that the applicant's 2019 OER was not completed in accordance with the instructions in section 5.b. of the OER, COMPARISON SCALE: "Compare this officer with others of the same grade whom you have known in your career." The PRRB did not grant the applicant his requested relief but instead recommended granting alternative relief, including that the Comparison Scale mark be redacted from the applicant's 2019 OER and that the Personnel Service Center (PSC) evaluate the feasibility of reconvening the command screening panel in order to reevaluate the applicant for command. On November 22, 2019, the Acting Director of Military Personnel approved the PRRB's recommendation.

The applicant was informed of the PRRB's decision on November 25, 2019. On January 16, 2020, however, the applicant declined the remedy of the PRRB stating:

The Board recommended that the Block 5.b 'Comparison Scale' be redacted from my OER for period ending 31 March 2019. After discussing with several senior CG officers, I believe that such a remedy may negatively impact my record or create ambiguity going forward more than provide any benefit. I will there submit a BCMR . . . to seek relief.

VIEWS OF THE COAST GUARD

On September 27, 2022, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board not grant relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC recommended not granting relief, stating that PSC agrees that the RO violated the Coast Guard policy when preparing the OER by not adhering to the policy. The RO stated he compared the applicant with other officers of the same grade across various communities instead of comparing the applicant with other officers of the same grade that the RO had known throughout his career. PSC noted that the PRRB also found that this was not in accordance with the Coast Guard Personnel Manual (Commandant Instruction M1000.6A) that was in effect. Although PSC agreed that the RO violated Coast Guard policy, PSC went on to contend that even though the RO used the incorrect comparison when assigning the mark, the RO was still justified in assigning this mark based on his description of the members observed performance and that this was further confirmed by the Reviewer's statement that the mark was appropriate.

The JAG adopted the facts and analysis provided by PSC and recommended that the Board deny relief because the applicant failed to establish that the Coast Guard committed an error or injustice and also failed to establish that his OER warrants amendment. The JAG cited to the Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3A (January 2018) and argued that to be entitled to correction of an OER, which is signed by a rating chain of three superior officers, an applicant must prove by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.”³ Finally, the JAG argued that the decision to amend an OER must not be based on retrospective reconsideration of the officer’s conduct.⁴ The JAG also noted that pursuant to Article 5.K., an officer may file a reply to any OER and the applicant did not. In support of the Coast Guard’s position, the JAG also referenced the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1D (January 2018).

In sum, the JAG argued that the applicant has not provided sufficient evidence to meet the standard for correction of an OER because he had not demonstrated, by competent evidence, (1) a misstatement of a significant hard fact, (2) prejudicial 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, citing *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981). The JAG further argued that the applicant did not allege any misstatements of fact, or factors adversely affecting the ratings which had no business being in the rating process, but that he “appears to invoke the second prong of the *Hary* test in which he alleges a violation of the Officer Evaluation System (OES) Procedures Manual.”

The JAG also made the following points with regard to the applicant’s claims:

- The applicant’s claim emphasizes the supervisor’s use of the word “normalizing” in this email to argue that section 5.b was erroneously completed. The applicant’s reliance on the supervisor’s explanation of normalizing is not evidence that the RO acted contrary to policy. The RO, who provided the contested mark, stated “it’s where I felt the mark should be as we have ongoing discussions of where people are on the scale between communities.” The RO’s quote does not include language about normalizing marks but does state that the RO believes that the mark accurately reflects where the applicant should be rated. The RO’s quote reveals that the RO kept apprised of where officers in other communities are marked, but this is not evidence that the applicant’s contested mark was lowered due to normalizing. The PRRB similarly was not persuaded that the applicant’s block 5.b was lowered due to normalizing.
- The applicant argues that because the email states that his performance has not changed, the mark should not have been lowered from his previous evaluation. The applicant alleges that “[t]his runs counter to everything in regulation regarding Officer Evaluation Reports – which should be completely based on my performance for the marking period.” This is incorrect regarding policy. The contested mark is a relative rating and is not exclusively based on objective performance, but reflects the judgment of the RO. Policy in PSCINST M1611.1D, section 4.F.2.a. specifically notes that even if the applicant’s performance remained the same, or potentially increased from previous evaluation, his relative rating

³ Final Decision in CG BCMR Docket No. 2018-188 (quoting *Hary v. United States*, 618 F. 2d 704, 708 (Ct. Cl. 1980), citing *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁴ See *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that “[a]fter the fact [non-selection] statements by raters contending that they scored the applicants too low on their OER’s are not to be given great weight”); see also, Final Decision in CG BCMR Docket No. 2018-188.

could decrease. For example, if the applicant's performance increased in this evaluation, it's possible that the applicant could still be compared lower if his peers' performance increased by a greater amount. Additionally, just because performance may not have changed, the RO's assessment of how that performance should be rated could change, and that is not contrary to policy.

- The applicant supports his claim that the CG violated policy by alleging that [] he was not assessed relative to his peers, however, he then contradicts this argument a short time later by stating "lowering the mark was due to a leveling of marks across all O5 commands." The applicant fails to provide evidence to show that he not assessed and marked relative to other O-5 Officers and as such this claim is unsupported.

Regarding the applicant's claim that the Coast Guard violated policy by alleging that the RO compared the applicant against other officers that the RO had not known or worked with contrary to policy the JAG argued:

[E]ven assuming, arguendo, the RO compared the applicant to a larger pool of O-5 officers than the RO had actually known or worked with, this deviation from policy does not prove that the mark was inaccurate or erroneous. If the RO compared the applicant to officers of the same grade within a larger geographic area, this does not prove that the pool did not also include a sufficient number of officers that the RO had observed and know. Further, if the board determines that the RO deviated from policy, the deviation should be deemed de minimis, because it fails to prove the mark was erroneous. There is no evidence that had the RO used different officers in his comparison, that there would have been a more positive result for the applicant. The contested mark was reviewed by the Reviewer prior to the evaluation being finalized. The Reviewer's job is to ensure that the Supervisor and RO make an accurate assessment of the ROO- in this case the applicant. The Reviewer did not change the mark or comment on the mark at the time the OER was completed. When the mark was appealed at the PRRB, the Reviewer had a second chance to observe the contested mark and comment on it. Even reading the applicant's claim and re-reviewing the mark, the Reviewer still believed that this mark was accurate and should not be changed. Granting the relief, the applicant request, raising his mark, risks making the comparison assessment inaccurate according to those in the rating chain that observed the applicant. Thus, the applicant has not proven a material error or injustice in violation of policy with regards to the mark in section 5.b.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 11, 2022, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Chapter 5 of the OFFICER ACCESSIONS, EVALUATIONS, AND PROMOTIONS, COMDTINST M1000.3A (June 2017), states:

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.

...

B. Roles and Responsibilities.

...

- 5. For this Chapter, commanding officers include area and district commanders, commanders of logistics/service centers, commanding officers of Headquarters units and subordinate units or organizations, and cutters. Commanding officers must:
 - a. Ensure accurate, fair, and objective evaluations are provided to all officers under their command. In using the OER, strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.
 - b. Ensure members of the rating chain carry out their OES responsibilities.
 - c. Implement the OES for all Coast Guard officers within their commands.
 - d. Designate and publish the command’s rating chains.
 - e. Establish procedures that ensure timely submission of OERs. Ensure OERs for officers eligible for promotion or panel action are not delayed.
 - f. Provide local oversight and accountability for the proper preparation of OERs. Commanding officers are encouraged to monitor OERs submitted by the designated rating chain within their commands as a means of ensuring consistency.

Chapter 4 of the ENLISTED EVALUATION SYSTEM (EES), COMDTINST M1000.2B (February 2018) states:

- A. Overview. This Chapter states policies and standards for conducting performance evaluations for Coast Guard enlisted personnel. All enlisted members will be afforded accurate, fair, objective, and timely evaluations. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs and tasks enlisted members perform. In using the Enlisted Evaluation System, strict and conscientious adherence to the specific wording of the performance standards is essential to realizing the purpose of the enlisted evaluation system process.

The Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 7, 2016) (hereinafter, “OES Procedures Manual” provides at Chapter 4. PREPARATION AND PROCESSING OF OERS:

A. General

- 1. This section describes the procedures for preparing and processing OERs. Members of the rating chain should prepare reports with care. They should review the Commandant’s Guidance on the OER form and have a responsibility to ensure that comments are clear, concise, accurate, and timely.

...

F. Reporting Officer Preparation

- 1. Section 5, Reporting Officer Authentication. The Reporting Officer must select ‘Concur’ or ‘Do Not Concur’ with the Supervisor’s evaluation. If the Reporting Officer is also the Supervisor, they must select ‘RO is Supervisor’.
- 2. Section 5, Comparison, Promotion, and Rating Scales.

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

b. Promotion Scale on Officer Evaluation Report (OER), Form CG-5310A.

[1]. In addition to the comparison scale, the Reporting Officer is required to fill in one Promotion Scale mark.

[2]. For the Promotion Scale, the Reporting Officer must select 'Recently promoted' if the Reported-on Officer has less than 12 months in grade for annual OERs and less than 6 months in grade for semi-annual OERs.

[3]. The Reporting Officer may select 'Already selected to next paygrade', if applicable. The Reporting Officer may still make a promotion recommendation for any officer whose promotion is still pending and is not obligated to mark 'Already selected to next paygrade'.

c. Rating Scale on Officer Evaluation Report (OER), Form CG-5310C. The Reporting Officer fills in the circle that most closely reflects the Reported-on Officer's performance in consideration of information contained in the OER.

Article 17.A. of the OER manual provides the following regarding Reported-on Officer replies to OERs:

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 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. The Board concurs in that recommendation.⁵

4. The applicant alleged that the Comparison Scale mark on his 2019 OER was erroneously and unjustly assigned in violation of policy. 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 And to be entitled to correction of an OER, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁸

5. No OER Reply. The Coast Guard argued that the applicant did not exhaust all administrative remedies by submitting 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 Reporting Officer. An applicant's failure to file a reply to an OER may be considered evidence that the officer accepted the OER as valid when he received it even if he did not like it. In this case, however, because the applicant timely applied to the PRRB to correct the OER, the Board will not draw that conclusion.

6. The applicant alleged that the Comparison Scale mark he received on his 2019 OER was not completed in accordance with Coast Guard policy. Article 4.F.2.a. of the OES Procedures Manual states that to complete the Comparison Scale, "The Reporting Officer fills in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known." He argued that the evidence shows that his Reporting Officer did not follow this direction in completing the Comparison Scale on his OER, and the PRRB agreed with him on this point. This Board likewise agrees. When contacted by the PRRB, the applicant's RO, Captain L, stated that he did not assign the Comparison Scale mark on the applicant's 2019 OER by comparing the applicant to other officers of the same grade whom the RO had known throughout his career. Instead, the RO stated, he compared the applicant to officers of the same grade across various commands whom he had not personally known or worked with. The RO's statement is supported by the sworn declarations of the Supervisor and Reviewer and by the email of the Supervisor dated May 9, 2019, which indicate that the RO was instructed to consider a different factor in assigning marks on the Comparison Scale than the one required by policy. Therefore, the Board finds that the applicant has proven by

⁵ *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).

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).

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).

a preponderance of the evidence that the Comparison Scale mark on his 2019 OER was assigned in violation of Coast Guard policy.

Pursuant to *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), however, a violation of OER policy must be prejudicial to the applicant to warrant correction of the OER. Therefore, the Board must consider whether the applicant has proven by a preponderance of the evidence that the violation of policy in the assignment of the Comparison Scale mark was prejudicial and, if so, what relief is warranted.

7. The applicant argued that the OER policy violation was prejudicial because it resulted in a lower Comparison Scale mark than the one he had received from the same rating chain on his 2018 OER. He asked the Board to increase the mark from a 5 (the highest of “One of the many high performing officers who form the majority of this grade”) to a 6 (“One of the few distinguished officers”),⁹ arguing that his performance had not markedly changed since his 2018 OER, which evaluated his performance in the same position with the same rating chain. Although none of the rating chain members stated that the applicant should have received a Comparison Scale mark of 6 on his 2019 OER, all three of them admitted that his performance had not markedly changed since the reporting period for the applicant’s 2018 OER, although the applicant’s mark for the performance dimension “Writing” was lowered from a 7 to a 6 from 2018 to 2019.

8. The PRRB found that the applicant’s 2019 Comparison Scale mark had been erroneously assigned but declined to raise the mark from a 5 to a 6 and instead redacted it. The PRRB apparently declined to raise the mark because the applicant did not provide clear and convincing evidence to establish that his Comparison Scale mark was lowered due to “normalizing marks to ensure they are not over-inflated.” The BCMR, however, does not use the “clear and convincing” standard of proof, but the “preponderance of the evidence.” Moreover, it is not necessary to prove the exact reason the Comparison Scale mark was lowered—e.g., an attempt to “normalize” marks across Coast Guard communities—to prove that it was, in fact, lowered as a result of the Reporting Officer violation of OER policy in selecting the mark. In this case, when asked why the applicant’s 2019 Comparison Scale mark was lower than his 2018 Comparison Scale mark, all three rating chain members stated that the applicant’s performance had not declined and cited, instead, as the reason for the drop, the Reviewer’s erroneous instruction to apply a different factor or standard in the comparison, which caused the applicant’s Reporting Officer to compare the applicant’s performance to the performance of other officers whom the Reporting Officer had never met or worked with. Therefore, given that all three members of the rating chain, when asked about the lower mark on the Comparison Scale, cited the need to apply a different factor or standard in the comparison, the Board finds that the applicant has proven by a preponderance of the evidence that his 2019 Comparison Scale mark was lowered from a 6 to a 5 because of the impermissible comparison made by his Reporting Officer to officers whom the Reporting Officer had never met or worked with.

⁹ Although the Comparison Scale is not actually numbered, for brevity and simplicity, the Board will refer to the mark in the fifth spot as a mark of 5 and a mark in the sixth spot as a mark of 6.

9. The Coast Guard argued that the contested mark should not be changed for a number of reasons, including that the mark was reviewed by the Reviewer prior to the evaluation being finalized, that the Reviewer’s job is to ensure that the Supervisor and RO make an accurate assessment of the applicant, and that the Reviewer did not change the mark or the supporting comment at the time the OER was completed as evidence that it should not be changed. The Coast Guard further argued that during the PRRB process, the Reviewer had a second chance to observe the contested mark and comment on it and that even after reading the applicant’s claim and re-reviewing the mark, the Reviewer still believed that this mark was accurate and should not be changed. The Board does not find this argument persuasive, however, because the applicant’s RO, who had authority to assign the Comparison Scale mark, was Captain L. The Reviewer, Captain R, was the officer who apparently directed the impermissible comparison applied by Captain L, and Captain R had no authority to change OER policy, to assign the Comparison Scale mark, or to order Captain L to change the mark. The Board finds Captain R’s insistence that the applicant’s 2019 Comparison Scale mark is accurate—in the face of the Supervisor’s and Reporting Officer’s strange silence on the accuracy of the mark at a time when an endorsement would be expected if warranted—is unpersuasive.

10. Accordingly, the Board finds that the applicant has proven by a preponderance of the evidence that his 2019 Comparison Scale mark was erroneously and unjustly lowered from a 6 to a 5 because his Reporting Officer applied an improper standard by comparing the applicant’s performance to the performance of officers whom the Reporting Officer had never met or worked with. This was a prejudicial violation of Article 4.F.2.a. of the OES Procedures Manual warranting full relief. The Comparison Scale mark on the applicant’s 2019 OER should be raised from the fifth place to the sixth place (“One of the few distinguished officers”).

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of Captain [REDACTED] [REDACTED] (USCG), for correction of his military record is granted as follows. The Board directs the Coast Guard to correct the Comparison Scale mark in block 5.b. of his March 31, 2019, OER from a mark in the fifth spot, denoting “One of the many high performing officers who form the majority of this grade,” to a mark in the sixth spot, denoting “One of the few distinguished officers.”

April 12, 2024

[REDACTED]
[REDACTED]
Digitally signed by [REDACTED]
Date: 2024.06.12 10:08:01 -04'00'

[REDACTED]
[REDACTED]
Digitally signed by [REDACTED]
Date: 2024.06.12 14:50:36 -04'00'

[REDACTED]
[REDACTED]
Digitally signed by [REDACTED]
Date: 2024.06.12 15:08:42 -04'00'