

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-090


LCDR (O-4)

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on October 11, 2022, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated July 31, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant commander on active duty, asked the Board to correct an Officer Evaluation Report (OER) dated November 4, 2020.

The applicant firmly believes that the evaluation report that was approved by the rating chain at the Incident Management Assist Team (IMAT) during the period of report of June 1, 2018 to April 30, 2019 was not adequate and does not reflect the totality of performance during the period. The applicant alleged that the assigned marks under each performance dimension do not match with the level of performance during the period of report nor with the supporting bullets provided by the applicant.

The applicant noted that in November 2018, he was the victim of robbery while on a Temporary Duty Assignment and the Coast Guard Investigative Service conducted an investigation in which the applicant was found to not be at fault. The applicant alleged that the rating chain used this incident as the baseline to evaluate his performance as slightly below average. The applicant stated that he expected his rating chain to provide feedback if his performance was not up to par of a high performer, which they did not. The applicant alleged he had no reason to believe his performance was not meeting the standards for marks of 6 and 7 because of awards and excellent evaluations for incidents responses during the rating period.

The applicant alleged that his supervisor never conducted mid-period counseling to inform him of “alleged” concerns with observed performance. According to the applicant, the first time he was notified that his performance did not warrant higher marks was a day prior to the change of command of the reviewer when the reporting officer and the reviewer met with the applicant for an informal counseling session. The applicant noted that this was 60 days after the OER was submitted to the supervisor for review and approval. The applicant believed that the documentation provided was sufficient to argue higher marks and that his multiple incident deployment evaluations exceeding expectations and the two commendation medals in the period of report were proof of the caliber of his performance.

According to the applicant, the signed OER from his supervisor, sent on June 12, 2019, indicated that mid-period counseling occurred on January 17, 2019, but that this is incorrect as no mid-period counseling occurred. The applicant stated that this was corrected on November 4, 2020.

The applicant stated that he signed the OER on October 21, 2019, however on November 4, 2020, he received notification from CG-OPM-3 that his OER was not yet received or validated. According to the applicant, he validated the OER on November 5, 2020, but shortly after identified additional errors that swapped the marks for “Initiative” and “Judgment.” The applicant alleged these marks were changed from the first signed version without notification to him or additional justification.

Further, the applicant noted that he graduated from the Naval War College on June 10, 2022 and he immediately requested an official credits transcript be forwarded to the Coast Guard’s Training and Quota Management Center so his degree could be added to his record prior to the convening date of the Promotion Year 2023 O-5 Selection Board. According to the applicant, the degree was not added to his record until after the promotion board adjourned, which he believes impacted his non-selection for O-5 for promotion year 2023.

The applicant alleged that he received this OER with low marks and does not accurately reflect the performance of the rating period. Below are the requested corrections and the applicant’s support for the changes:

1. Changing the following marks on his OER, covering his work on the IMAT from June 1, 2018 to April 30, 2019:
 - a. Changing the mark for “Planning and Preparedness” from a 5 to a 6
 - i. Bullet in OER: “Deployed on multiple Hurricane responses; skillfully designed & executed efficient Emergency Support Function (ESF)-10 (oil spill) Florida surge staffing protocol w/D8's concurrence, deftly facilitated sourcing of 149 personnel requests.”
 - b. Changing the mark for “Results/Effectiveness” from a 5 to a 7
 - i. Bullet in OER: “Flawless execution during HURR resp; disseminated info related to 15 Punt teams, 12 port assessment teams, & 35+ local/surge stations/cutters, facilitated post-storm resp reporting; 2100+ lives saved/assisted. Integrated into CG-IMAT; immediately deployed to

emergent ops w/in 1st month of arrival, sustained 48 days of high readiness duty, 58 days deployed ISO 2 Sectors & 16 days deployed ISO IMT workshops for 4 Sectors.”

- c. Changing the mark for “Professional Competence” from a 5 to a 7
 - i. “Attached ICS-225s and subsequent Commendation Medal awarded as a result of efforts during Hurricane [redacted] Response in [redacted], and Emergency Support Function (ESF) 10 at [redacted] support my claim.”
- d. Changing the mark for “Writing” from a 5 to a 6
 - i. Bullet in OER: "Constructed detailed ESF-10 ICP close-out docs, enabled Incident Commander's to finalize \$18.6M mission assignment & accurately capture recovery of 539 vsls & 24K + gal of oily mixture. Drafted/edited 22 ICS- 225's."
 - ii. “The close out process of an ESF-10 mission is complex and controversial because of the level of scrutiny and review process prior to completing a state/federal led mission assignment. I had to develop the required documents with no guidance, and successfully enabled the timely closure of the ESF-10 in [redacted]. Attached award supports my claim.”
- e. Changing the mark for “Looking Out for Others” from a 5 to a 6
 - i. Bullet in OER: "Relentless advocate for welfare of subord's. Tactfully managed pers during hurricane resp; established effective work/rest ratio procedures, reduced fatigue & boosted morale."
- f. Changing the mark for “Developing Others” from a 5 to a 7
 - i. Bullet in OER: “Consummate ldr; an advocate for prof dev/career progression, presided 10 qual boards & completed 15+ PQS's; resulted in 10 ICS cert's nationally."
 - ii. “As an ICS Coach, I delivered training to units Coast Guard-wide that enhanced their Incident Management Capability and Capacity to respond to all-hazards events. Developed subordinate 03; assisted with ICS qualifications' completion that enhanced professional competence in the Response Ashore career path. Also, ensured same individual short toured from the IMAT to compete for Sector Response positions that enabled her to pursue Response qualifications, and subsequent selection to Post-Graduate program of choice.”
- g. Changing the mark for “Workplace Climate” from a 5 to a 6
 - i. Bullet in OER: "Swiftly addressed neg remark w/ pers; explained policy & supported open discussion, defined clear/concise expectations."
 - ii. “Mark was assigned based on limited interaction of Supervisor and Reporting Officer with ROO. Spent over 100 days deployed in emergent operations or training, and evaluations reports from such events were above average as shown on attached ICS-225's.”
- h. Changing the mark for “Initiative” from a 4 to a 7

- i. Bullet in OER: "Superior initiative; exploited untapped resource tracking database w/ CGOne, constructed virtual COP, accurately tracking 449+ vsl's thru 5 HURR affected counties."
 - ii. "Supporting bullet reads as a 7 but yet I was marked a 4, example is the use of Superior initiative which does not apply to a mark of 4 but to a higher mark. The results of my actions was [sic] instrumental in the assessment and validation of over 449 vessels that posed a threat to the maritime environment. Additionally, numerical mark was changed from 5 to a 4 from first version of OER to validated version, both versions are attached. This shows inconsistencies and the lack of proper measurement of performance by the rating chain."
 - i. Changing the mark for "Judgment" from a 5 to 6
 - i. Bullet in OER: "Id'd critical support gap during HURR [redacted] resp; build 2-pers IMAT team & provided logistical support for deployment to high impact areas, provided urgent staffing relief to 5 local EOC's."
 - ii. "Identified key areas following Hurricane [redacted] that needed Coast Guard representation to ensure smooth communications and assignment of resources during high tempo operations."
 - j. Changing the mark for "Professional Presence" from a 5 to a 6
 - i. Bullet in OER: "Embodied pristine prof presence during 4 IMT workshops & multi VIP visits from LANT/DCMS/D8. Represented the Coast Guard on multiple multi-agency exercises and training events. Provided detailed briefs to CG/State/Local senior leadership during high stress situation during Hurricanes [redacted] and [redacted], and Integrated Advance 19, a DoD mass migration exercise."
 - k. Changing the comparison scale to align with the above updated marks and the bubble to be moved at minimum one above the current selection.
- 2. Updating the following comments:
 - a. Updating the Reporting Officer Comments from "recommendation for continued promotion with peers" to "strongest recommendation for promotion to Commander (O5)" or a similar comment to be a more forceful recommendation
 - i. "In my opinion the RO comments solidify my case that I was not assigned the appropriate marks that I earned on each performance dimension. As an example, RO wrote the following: 'Strong response ashore background & superior performance of duty has earned my recommendation for assignment to a variety of Command Cadre positions to include Sector IMD/ENF Chief, CO of MSST, Station or any National Strike Force or Deployable Specialized Force unit.' Although the RO provided a positive recommendation for command opportunities, the numerical assignment of mark might send a mixed message to a panel of officers reviewing my record. Another example is that the RO provided a recommendation for selection to a post-graduate program of choice which I was selected for in the fall of 2020, and successfully graduated from the Naval War College

with a Master of Arts in Defense and Strategic Studies, and earned the JPME-1 competency.”

- a. Updating Reviewer Comments to reflect that informal counseling with the applicant’s supervisor did not occur.
 - a. “I never met with my supervisor at any point during the period of report to conduct formal or informal counseling.”

The applicant respectfully requested the consideration of this request by the board, and to recommend that his OER is corrected prior to the next O-5 panel for promotion year 2024. The applicant believed he has demonstrated a level of performance at the highest level in many high tempo events, and that his personal record reflects this.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on August 8, 2000. He advanced to E-5 on June 1, 2006. He commissioned as an Ensign on September 27, 2006, after which he was assigned to various shore units. On June 17, 2008, the applicant became a response department head. Then, in 2014 he became a preparedness specialist until 2016, when he was a section command chief. In 2018, the applicant was promoted to Lieutenant Commander (O-4) and began working with the Incident Management Assist Team (IMAT).

OER

The OER at issue in this case covers the period of June 1, 2018 to April 30, 2019. The applicant received marks of 5s and 6s for the categories in “Performance of Duties.” To support the marks, the supervisor stated:

Deployed on multiple Hurricane responses; skillfully designed & executed efficient Emergency Support Function (ESF)-10 (oil spill) [redacted] surge staffing protocol w/D8's concurrence, deftly facilitated sourcing of 149 personnel requests. Directed logistical support & developed transition plan ensured 2 IMAT mbr's transferred safely to high impact areas ISO HURR [redacted] & provided urgent staffing relief to 5 local EOC's. Flawless execution during HURR resp; disseminated info related to 15 Punt teams, 12 port assessment teams, & 35+ local/surge stations/cutters, facilitated post-storm resp reporting; 2 100+ lives saved/assisted. Integrated into CG-IMAT; immediately deployed to emergent ops w/in 1st month of arrival, sustained 48 days of high readiness duty, 58 days deployed ISO 2 Sectors & 16 days deployed ISO IMT workshops for-4 Sectors. Polished communicator; exceptional performance during high-temp resp ops, masterfully balanced multiple daily planning meetings & high-viz VIP visits from LANT/DCMS/D8. Constructed detailed ESF-10 ICP close-out docs, enabled Incident Commander's to finalize \$ 18.6M mission assignment & accurately capture recovery of 539 vsls & 24K + gal of oily mixture. Drafted/edited 22 ICS-225's.

The applicant received marks of 5s and 6s for the categories in “Leadership Skills.” To support the marks, the supervisor stated:

Relentless advocate for welfare of subord's. Tactfully managed pers during hurricane resp; established effective work/rest ratio procedures, reduced fatigue & boosted morale. Consummate ldr; an advocate for prof dev/career progression, presided 10 qua! boards & completed 15+ PQS's; resulted in IO ICS cert's nationally. Skillfully led the maritime branch during high-viz IA-19; creatively assigned duties & established battle rhythm, expertly directed 30+ CG/USN vsls for D7/SOUTHCOM mass mig EX. Commanded robust planning sec; managed several op planning cycles & produced detailed IAP's. Superior team wk in dvlpmnt

of environment management practices & resp priorities; garnered trust w/ agency specialist bolstering key partnerships. Swiftly addressed neg remark w/ pers; explained policy & supported open discussion, defined clear/concise expectations. Consistent use of performance supp forms; led to timely, well documented submission of own OER, 1 03 QER & 1 GS 12 eval, & 22 ICS-225's.

The applicant mostly received marks of 5s and 6s for the categories of “Personal and Professional Qualities.” The exception was a 4 in “Initiative,” which was swapped after validation with “Judgment.” To support these marks, the supervisor stated:

Superior initiative; exploited untapped resource tracking database w/ CGOne, constructed virtual COP, accurately tracking 449+ vsl's thru 5 HURR affected counties. Id'd critical support gap during HURR [redacted] resp; build 2-pers IMAT team & provided logistical support for deployment to high impact areas, provided urgent staffing relief to 5 local EOC's. Reviewed/provided edits prior to implementation of complex demob Plan, ensured a smooth release of 45+ overhead personnel & tactical equipment. Clarified conflicting info IRT reserve demob physical procedures; drove clear guidance for all reserves prior to demob, reduced demob delays. Embodied pristine prof presence during 4 [MT workshops & multi VIP visits from LANT/DCMS/D8. Unrivaled commitment to fit/healthy lifestyle; maintained 6x/wk PT regimen, improved esprit de corps during high op-tempo deployments.

The Reporting Officer comments recommended continued promotion. To supplement this evaluation, the Reporting Officer stated:

[The applicant] is recommended for continued promotion w/ peers. Adaptive ofcr w/demonstrated commitment to excellence, superb performance of duty since reporting to CG-IMA T; deployed w/in first few months during major hurricane responses to support ops in NC (historical flooding) & FL (Cat V) as SITL and ESF-10 [redacted] as PSC. Consummate team player who builds & maintains strong inter-agency relationships; praised by NOAA & FWCC for noteworthy accomplishments in ESF-10 [redacted] mission. Strong response ashore background & superior performance of duty has earned my recommendation for assignment to a variety of Command Cadre positions to include Sector IMD/ENF Chief, CO of MSST, Station or any National Strike Force or Deployable Specialized Force unit. Recommended for acceptance into service school/post grad degree prgm when time is right.

In his comments, the Reviewing Officer stated, in part, “ROO did not formally request or ensure mid-term counseling was conducted. Informal counseling was conducted with supervisor.”

Email Chains

To support his application, the applicant included an email chain beginning on June 18, 2019, which concerned the issuance of the OER. The applicant expressed concerns with the perceived differences between the marks and the comments and the lack of mid-point counseling. The supervisor permitted the applicant to draft new bullets to aid in reevaluation of the OER. The applicant provided new bullets, which the supervisor reviewed and did not believe warranted an increase in marks. The applicant concluded the chain by agreeing to sign the OER even though he felt it did not accurately reflect his work during the period. He did refuse to sign the portion for the midterm counseling because it did not occur.

The applicant included another email chain beginning on March 4, 2020 regarding his lack of signature on the midterm counseling box and his request to OPM-3 for an OER review. The OPM-3 team member let the applicant know that OPM-3 does not review OERs by comparing them with previous OERs but it is “a standard quality review.”

ICS 225-CGs

The applicant included ICS 225-CGs (Incident Personnel Performance Rating) for his performance during hurricanes within the reporting period of the disputed OER. For two of the ICS 225-CGs, he received marks of 4s and 5s, with 5 being the highest. On the remaining ICS 225-CG, he received all 5s. The comments on all of his ICS 225-CGs were positive.

Commendation Medals

The applicant included commendation medals he received during the reporting period of the disputed OER. He received one for his assignment as Emergency Support Function during a hurricane. The other he received for his time at IMAT.

Supervisor Affidavit

The applicant's supervisor submitted an affidavit. The relevant portions are below:

2. In July of 2019 I sent [the applicant] his OER via email. [The applicant] did not agree with the marks he received. I provided [the applicant] the opportunity to send me three additional bullets for each performance mark he wanted increased, stating the result/impact. [The applicant] sent me additional bullets on July 19th. The majority of the additional bullets provided were the same bullets provided April. In my opinion, the bullets provided in April and the additional bullets provided in July did not justify an increase in marks.
3. Formal counseling was not conducted during the period due to scheduling conflicts. Informal counseling was conducted throughout the period, during conversations in the office or while TDY as evidenced by ICS-225 for Hurricane [redacted]. Formal counseling would not have included a conversation about numbers, example five vs six, which was [the applicant's] concern. In my 20-year career, I have never gone over numbers during a mid-period counseling.
4. In my opinion, [the applicant's] performance throughout the period was five/six. [The applicant] was not proactive in the office and did not take on any substantial new projects or initiatives. He prioritized his schoolwork over the unit when in the office. When I observed him in the field, he was content with the status quo and made very few recommendations for improvement or helped make those around him better. During our response to Hurricane [redacted] supporting [redacted], I had to pull the team outside the ICP, which included him, to discuss their motivation and how we needed to help the Sector personnel improve.
5. Initiative should be a five, while Judgement a four per the OER I signed on 12 May 2019. During the transfer to the OER form that included the reviewer comments, I believe the numbers were accidentally swapped. They were not intentionally changed. I recommend changing them back to a five for Initiative and a four for Judgement. Judgement was a four due in part to the actions surrounding the events while he was TDY in [redacted]. I discussed a mark of four with the Reporting Officer and Reviewer, who read the CGIS investigation and they both, agreed on a mark of four for judgement was appropriate.

Reporting Officer Affidavit

The applicant's reporting officer submitted an affidavit. The relevant portions are below:

In block 5.d with regards to the verbiage used, the applicant by his own account was selected for Post Grad at the Naval War College, of which, I gave him a recommendation. I gave him a recommendation for promotion, but not being privy to the deliberations of the last Commander Selection Board, it is unfair to say that was the reason for nonselection. Furthermore, for the period in question, I saw him as an O4 with potential, which he has since displayed. The evidence provided regarding his self evaluation for that period

were lofty and although he did receive personal awards, some of those awards marked as evidence encapsulate activity well beyond the period in question.

Reviewer Officer Affidavit

The reviewing officer submitted an affidavit. The relevant portions are below:

3. In the BCMR application, this officer challenges ten of the marks and associated wording within blocks 3a, 3b and 3c as well as the Comparison Scale marks in block 5b and Reporting Officer Comments in block 5d and Reviewer Comments in block 6. He cites his deployments, his own OSF, awards and some ICS-225s as proof of this challenge. When originally reviewing this OER and in keeping with my leadership responsibilities as outlined in PSCINST MI611.1D, I ensured the OER needed to "ensure the integrity of the [OER] system by giving close attention to accurate marking." Since receiving this BCMR request I have reviewed all of the evidence I had at the time as well as that presented in this request and continue to come to the same conclusion now as I did then. It is my opinion that [the applicant] was marked appropriately for the complete period in question and his performance is accurately reflected in the marks and words describing his performance.
4. This was [the applicant's] first OER as an O4 and his performance during the period in question was good, but not great, as compared to other O4s I had known over the course of my career. I have come to this conclusion having supervised many O4s over the course of my career as well as seeing his supporting documentation and observing much of his performance personally during this period. The marks and wording [the applicant] is asking for would put him at the very top of O4s with whom I have served. [The applicant] did not meet those levels of performance of duties, leadership skills, personal and professional qualities or in comparison to other officers of his paygrade during this period of report. I applaud [the applicant] for what seems to be his improvement in performance over the following periods or his performance previous to this period, but that does not change or affect his performance during the period in question. I see no issues or concerns with his marks or comments for the OER in question. They are commensurate with his performance during the period.

VIEWS OF THE COAST GUARD

On April 3, 2023, a judge advocate (JAG) submitted an advisory opinion in which he adopted the findings and analysis provided in a memorandum on the case submitted by the Personnel Service Center (PSC) and recommended that the Board deny relief.

In his memorandum, the JAG argued that the applicant has not provided sufficient evidence to meet the standard for correction or removal of the contested OER. The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for the correction of an OER. The JAG argued that under *Hary v. United States*,¹ the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.²

¹ *Hary v. United States*, 618 F.2d. 704, 708 (Cl. Ct. 1980).

² *Id.*

The JAG noted that the applicant alleged a misstatement of fact in regards to whether the informal counseling was conducted, but the applicant's supervisor disputed this and declared the applicant was informally counselled numerous times throughout the period. The JAG stated that the applicant failed to prove that any of the comments are erroneous, which is the standard. The JAG concedes that the rating chain made an administrative error in switching two of the numbers, but this did not materially alter the evaluation because the marks were not raised or lowered only transposed. The JAG noted that the applicant was aware of this change and did not challenge it. Additionally, the JAG argued that the applicant did not pursue pathways to challenge the OER such as submitting an OER reply or an application to the PRRB. The JAG discussed the applicant's allegations that the rating chain was biased against him because of the robbery incident, but notes the applicant does not provide any evidence of the bias. Thus, the JAG concluded that the applicant has not provided sufficient evidence of error in his OER.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 1, 2023, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The Chair received the applicant's response on June 12, 2023.

In response to the JAG's argument that he failed to prove informal counseling was not conducted, the applicant disputed the supervisor's recollection of events. Specifically, the applicant responded to the supervisor's statement that "[d]uring our response to Hurricane [redacted] supporting [redacted], I had to pull the team outside the ICP, which included [the applicant], to discuss their motivation and how we needed to help the Sector personnel improve." According to the applicant, the supervisor addressed the "Team" and not specifically address him as an individual, and at no moment did he pull the applicant aside separately or mention that he was conducting informal counseling to address his "subpar" performance. The applicant also notes that the supervisor signed the ICS-225 for the same hurricane with marks of exceeding expectations, and he does not mention the "Team" discussion. Further, the applicant contrasts the first OER signed by the supervisor with the date of January 17, 2019 for the mid-period counseling and the affidavit where he admits formal counseling did not occur.

In response to the supervisor's assertion that the applicant "prioritized schoolwork over the unit when in the office," the applicant enclosed a copy of his college transcript, which shows he only took one class during the Winter of 2018-2019. The applicant noted that during this time he was deployed to Hurricane [redacted] and other workshops for over 30 days, which required him to complete most of the work required for the course on his own personal time in a condensed timeframe. In addition, the applicant argues that he seldomly used the IMAT workspace to complete his grad school assignments because it was an open cubicle environment and not conducive to focused schoolwork. The applicant asserted that he always prioritized his IMAT duties in the office and made himself available for discussion and collaboration with colleagues. According to the applicant, the IMAT unit instruction states that members are authorized to pursue advance education for professional development including higher education. The applicant argued that if he had completed any grad school coursework during office hours, he would have been

within policy. The applicant pointed to the IMAT unit instruction, which states that the units and supervisors should encourage their members to use this benefit to achieve advanced degrees, which the applicant did in June 2020. According to the applicant, the fact that the supervisor would include something like this as a negative against his character is not only confusing but also contradicts Coast Guard values and CG-IMAT policy. The applicant argued that this practice is allowed within the organization and should not be used as a negative remark when measuring performance.

In response to the supervisor's statement that the "mark of four in Judgement was assigned in part to the actions surrounding the events while TDY in [redacted]," the applicant argued that the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 2016), Article 4.B.2 states:

Members of the rating chain shall not...[m]ention a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), CG Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as provided in Article 5.F.3. of Reference (a) and Chapter 15 of this Manual.

The applicant argued that using an investigation to assign performance marks is not allowed unless the investigation itself mandates that a special OER is to be completed which was not the case here. Further, the applicant stated that if his performance warranted a mark of 4 on Judgment, it does not match with the ICS-225 where the supervisor marked his performance as exceeding expectations in multiple categories, including Judgment. According to the applicant, the supervisor was only deployed with him at one location, so the supervisor did not witness the applicant's performance in Hurricane [redacted] and during the IMT Workshops and Exercises he supported during the period of July 1-April 30. Further, the applicant stated that the unfortunate and traumatic events he experienced while representing the CG-IMAT at [redacted] had a profound impact on his life and the life of his family. The applicant stated that he was the victim of a crime, and he reported the incident to the proper authorities as soon as he could. The applicant argued, if anything, his honesty and forthcoming with authorities and his chain of command demonstrated the type of judgment the Coast Guard encourages from its members. The applicant felt that the lack of support he received from his chain of command was very discouraging. The applicant argued that receiving a subpar mark in Judgment on his OER for being the victim of a crime is extremely concerning, and poor leadership on the part of his chain of command.

In response to the JAG opinion that stated he failed to prove at least one *Hary* factor was offended and the reporting officer's statement that the applicant's self-evaluation was "lofty," the applicant pointed to the comments in the OER, such as "strong response ashore background and superior performance of duty has earned recommendation for assignment to a variety of Command Cadre positions." The applicant noted that his performance was average based on the assigned marks, but the reporting officer writes comments including "flawless execution," "superior teamwork," "superior initiative" and "embodied pristine prof presence" that exude performance exceeding the average officer and that it should be marked as a "6" or "7." In the applicant's opinion, the rating chain failed to assign the proper numerical marks based on the comments.

The applicant noted that he requested an OER Review to OPM-3, but that they would not entertain his request. The applicant pointed to PSCINST M1611.1D, which states the following:

“CG PSC-OPM-3 or CG PSC-RPM-1 review OERs for administrative and substantive errors. Particular attention is given to administrative data, Review Comments, and inconsistencies between the numerical evaluations and written comments (where applicable). The review is not intended to question a rating official’s judgment about a subordinate’s performance, but to ensure OERs are prepared per OES guidelines.

The applicant is firmly confident that he has proved inconsistencies with the numerical values and comments of the OER that suggest a correction to this OER should be made. The applicant stated that he did not pursue the PRBB process because he was outside the 1-year time submission requirement, and he understood that submitting to the BCMR, as allowed by Commandant Instruction, was the best route to plead his case.

The applicant has dedicated over 20 years of service to the Coast Guard and this amazing nation. The applicant wants to continue to serve in this capacity because he is passionate about the Coast Guard’s eleven statutory missions and the service it provides to the citizens of the United States and other nations. The applicant noted that, unfortunately, if his request is denied, he will most likely be passed over for the rank of Commander and be forced to retire from the service on June 30, 2024. The applicant wanted to thank the board for their dedication and the swift review and processing of his request.

APPLICABLE LAW AND POLICY

Article 3 of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 2016), provides the following guidance on mid-term counseling:

Article 3.A.2. If the Reported-on Officer is unavailable or did not request and/or complete the required mid-term counseling, this must be documented on the OER. For CG-5310A and CG-5310C, the Reviewer shall address this in Section 6, Reviewer Comments. For CG-5310B, the Reporting Officer shall address on the Comments Form, CG-5315.

Article 3.C Roles. The Reported-on Officer is responsible to ensure this mid-term counseling session takes place and is documented. Rating chain members should be available to support these requests. The counseling can be conducted by any member of the rating chain.

Article 4 of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 2016), provides the following guidance on the preparation and processing of OERs:

Article 4.B.1 Prohibited Comments. Members of the rating chain shall not...[m]ention a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), CG Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as provided in Article 5.F.3. of Reference (a) and Chapter 15 of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.K. of Reference (a) and Chapter 17 of this Manual.

Article 4.E.1 Evaluation.

- 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. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form. Refer to Table 4-2 below and Chapter 19 in determining the appropriate mark to assign to each performance dimension. Inflationary markings dilute the actual value of each evaluation, rendering the OES and the OER itself ineffective.

...

- h. Comments required for CG-5310A and CG-5310C.
- [1]. In the "comments" block following each evaluation area, the Supervisor includes comments citing specific aspects of the Reported-on Officer's performance and behavior. Well crafted comments may apply to more than one dimension. Decreased comment space will require concise yet readable supporting verbiage and allow more flexibility to comment on significant performance. The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period.
- [2]. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of 1, 2, 3, and 7. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six "above standard" block.

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 was timely 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 alleged that his OER dated November 4, 2020, is erroneous and unjust because the marks are not as high as the comments warrant, his rating chain took into account an incident in which the applicant was the victim of a crime, and mid-period counseling did not occur. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the

evidence, that the disputed information is erroneous or unjust.³ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁴ To be entitled to relief, the applicant cannot “merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense,” but must prove that the disputed evaluation was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁵

4. The applicant alleged that the marks of 4s and 5s that he received in “Planning and Preparedness,” “Results/Effectiveness,” “Professional Competence,” “Writing,” “Looking Out for Others,” “Developing Others,” “Workplace Climate,” “Initiative,” “Judgment,” “Professional Presence,” were erroneous and unjust. According to the applicant, these marks do not accurately reflect his performance during the applicable rating period and each performance dimension should be raised to a 6s and 7s. For the following reasons, the Board finds that the applicant has not proven that these marks of 4s and 5s are erroneous or unjust:

- a. First Hary Prong. Here, the applicant alleged a misstatement of a significant hard fact with regards to whether informal counseling occurred. The applicant claims informal counseling never occurred, whereas the supervisor claims it did occur numerous times. The supervisor pointed to an instance during a hurricane in which he provided informal counseling to the team and the applicant concedes that this instance occurred, but refused to concede it was informal counseling. As the name suggests, informal counseling can take many forms and there is no standard for what it should look like.

The applicant also alleged several marks in the OER were erroneous for not lining up to his performance. The applicant contests the numerical marks, by stating the comments are more complimentary than the numbers suggest. However, the comments are where misstatements of hard fact occur. The applicant only request for an updated comment is the reporting officer comments, in which the applicant wants a “more forceful” recommendation, but a recommendation is not a hard fact.

The OER does contain an error in which the marks for “judgment” and “initiative” were swapped, but this did not materially alter the OER as the numbers were merely swapped. Thus, the applicant has failed to prove a misstatement of a significant hard fact.

- b. Second Hary Prong. The applicant alleged that mid-period counseling did not occur, which would have allowed him to correct deficiencies in his performance. The Article 3 of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 2016) provides: “The Reported-on Officer is responsible to ensure this mid-term counseling session takes place and is documented.” Therefore, it fell to the applicant to ensure mid-period counseling occurred at a point that would have been valuable to him.

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *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).

Thus, the applicant has failed to prove a clear violation of a specific objective requirement of statute or regulation.

- c. Third Hary Prong. The applicant alleged that the supervisor improperly used the fact that the applicant was a victim of a crime. The applicant argued that the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 2016), Article 4.B.2 states

Members of the rating chain shall not...[m]ention a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), CG Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as provided in Article 5.F.3. of Reference (a) and Chapter 15 of this Manual.

However, this prohibition is on *comments*, not on an influence. The disputed OER does not contain a comment regarding the fact that the applicant was the victim of a crime. Further, the applicant omitted the remaining relevant portion of this prohibition, which states: “[t]hese restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself...” The OER could reference the fact that the applicant was the victim of a crime without invoking the prohibition.

The applicant also argued that he should not be marked down for prioritizing schoolwork over the unit in the office because the IMAT manual encourages members to pursue advanced education and supervisors should be supportive of this endeavor. The applicant included a copy of this manual, but it is dated after the period of the OER.⁶ Thus, the manual provided is not applicable to this OER and the applicant has not demonstrated by a preponderance of evidence that this had no business being in the rating process.

Therefore, the applicant failed to prove that there were factors adversely affecting the ratings which had no business being in the rating process.

5. For the reasons outlined above, the applicant has failed to show that his November 4th, 2020 OER, for the period June 1, 2018 through April 30, 2019, contained a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a prejudicial “violation of a statute or regulation.”⁷ Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the OER should be removed from his record or that his marks should be adjusted.

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⁶ The Board finds that even if the manual in effect at the time contained similar verbiage regarding encouraging the pursuit of advanced education, it is not reasonable to assume that said schoolwork may or should be prioritized to the detriment of operations.

⁷ *Hary*, 618 F.2d at 708.

ORDER

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

July 31, 2024

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