

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-002


LT (O-3)

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 October 26, 2022, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated April 17, 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

The applicant, a Lieutenant (LT/O-3) on active duty, asked the Board to correct his record by removing an Officer Evaluation Report (OER) for the June 1, 2018, through May 30, 2019, rating period and replacing it with a Continuity OER. The applicant further requested that his PY2023 and PY2024 non-selections for Lieutenant Commander (LCDR) be removed from his record and that he be provided a Special Selection Board (SSB) for his PY2023 non-selection in 2022 as authorized by 14 U.S.C. § 2120, and, if non-selected by the PY2023 SSB, he be provided with a subsequent SSB for his PY2024 non-selection in 2023. If selected by either board, the applicant requested that he be awarded all applicable backpay and allowances that would flow from this correction. The applicant also requested that the two Personnel Record Review Board (PRRB) decisions be removed from his record. Finally, the applicant requested that his May 31, 2019, Coast Guard Achievement Medal be replaced with his 2023 Coast Guard Commendation Medal because the Coast Guard does not allow for dual recognition for the same acts, achievements, and period of service. In addition, the applicant stated that his 2023 Commendation Medal states, “(GOLD STAR IN LIEU OF SECOND)” which is incorrect. The applicant stated that the 2023 Commendation Medal was his third. Accordingly, the applicant stated that his medal should be corrected to state, “(GOLD STAR IN LIEU OF THIRD).”

SUMMARY OF THE RECORD

The applicant enlisted in the Regular Coast Guard on June 7, 2011, and served on active duty for two years before attending Officer Candidate School. On December 4, 2013, he was commissioned an Ensign in the Coast Guard Reserve and began serving on Extended Active Duty (EAD) as an apprentice Marine Inspector and Port State Control Officer (PSCO). He was promoted to Lieutenant Junior Grade on June 4, 2015. On his final semiannual OER as an LTJG and apprentice Marine Inspector-PSCO, dated June 3, 2016, the applicant received all high marks of 5 and 6 (on a scale from 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark) in the various performance dimensions and a mark of 5 (“Excellent Performer: give toughest, most challenging leadership assignments”) out of 7 on the Comparison Scale.

On June 9, 2016, the applicant reported for duty to a new Sector as a journeyman Marine Inspector-PSCO. On his semiannual OER for the June 4, 2016, through January 31, 2017, rating period, the applicant received two marks of 5, eleven marks of 6, and five marks of 7 in the various performance categories. On the Comparison Scale, the applicant received a mark of 5 (“Excellent performer ...”) out of 7 and on the Promotion Scale the applicant received a mark of “Already selected to next paygrade” because he had been selected for promotion to Lieutenant.

On his semiannual OER for the February 1, 2017, through July 31, 2017, rating period, the applicant received ten marks of 6 and eight marks of 7. On the Comparison Scale, the applicant received a 5 out of 7, and on the Promotion Scale the applicant received a mark of “Already selected to the next paygrade.” On December 4, 2017, the applicant was promoted to Lieutenant.

On December 6, 2018, the applicant received an email from his Supervisor, LCDR P, who was Chief of the Sector’s Inspection Division, regarding his mid-period counseling. The email stated the following:

Following is a summary of your mid-period counseling session with me on November 19, 2018.

You mentioned your continued desire to pursue professional development as an IO. That is something you should discuss further with LT [C] during your final months here. It may be possible to go through the PQS.

However, you would also need to leverage this with your current PSC Branch Chief responsibilities. Primary focus needs to be on meeting basic divisional/branch requirements, such as timely qualification of self and staff, along with timely case review and closure (I think you do okay with that last part regarding casework). Once that is met, I think you need to explore ways to go “above and beyond” your day-to-day duties and look for ways to implement functional improvements to the Branch/Division/Department/Sector. You need to ask yourself what are/should you be doing extra, without being told, that warrants and justifies higher than average marks, and ensure you do it. If you already are, make sure it is impactful and document it. Remember, I’m not always privy to everything you do or I may not recall later. Hurricane [redacted] provided all of us with a lot of opportunity to demonstrate abilities in various OER performance dimensions. This year we all must seek additional opportunities to demonstrate and justify appropriate OER marks.

Your Tank/Chem qualification has taken too long, despite previous conversations between us during your last EOP. I realize your goal letter says May 2019, but it should be noted that is the minimum standard. This factors into the “Rapidly developed professional growth beyond expectations/insightful knowledge of own role, etc (6 mark)” or “Acquired and applied excellent operational or specialty expertise for assigned duties (4 mark)” aspect of your professional competence. Also [you] need to consider initiative and helping out others, along with other performance dimensions. The primary reason we moved you to be the Port State

Control Branch Chief was to make it easier to focus on obtaining your qualification. This affects your people, bullpen morale, and our ability to effectively use qualified personnel we have available to complete our Prevention mission. It also prevents other qualified individuals already qualified in Tank/Chem from focusing on their own professional development or office tasking if they need to continually go out and do Tank and Chemical vessel exams. I'm sure you can appreciate that from your view regarding others getting Cruise Ship and CCSSC qual'ed to help you. With this in mind, how can the minimum mark standard be justified? You mentioned you and [redacted] have not always seen eye-to-eye and that has made PQS signs-off take longer. I recommend you discuss further with him, but it sounds like you already are and it is getting better; your Tank/Chem board should happen shortly.

Your marine inspector knowledge of the regulations within your qualifications is excellent and commitment to ensure the safety of our vessel fleet continues to be noteworthy. Your outreach and engagement with the CCSSC fleet is commendable. However, you need to look for additional responsibility and project ownership outside the division/department. As a LT, you are expected to not only continue to develop and employ skills within your specialty as a Subject Matter Expert, but also look for opportunities to expand your professional experience beyond inspections and obtain a broader perspective of the Unit/CG. The CG looks to promote people who demonstrate understanding of the CG outside their specialty. Look to demonstrate you can manage projects and people at a level expected as a LCDR. Your work as Project Officer for the Vietnam Commemoration is a good start. Make sure you continually reach out to your staff to maintain situational awareness of their well-being and professional growth.

If I missed anything or you wish to discuss further, please let me know.

On the applicant's annual OER for the August 1, 2017, through May 31, 2018, rating period, he received four marks of 5, eleven marks of 6, and three marks of 7. On the Comparison Scale, the applicant received a mark of 5 out of 7.¹ On the Promotion Scale the applicant received a mark of "Recently Promoted (<12 months in rank; <6 months in rank semiannual)."

In September 2018, the Head of the Prevention Department (of which the Inspections Division is a part) changed, and CDR R became the new Head and the applicant's new Reporting Officer. Then in December 2018, the applicant's Supervisor changed, as LCDR P left and LT C fleeted up to become the new acting Chief of the Inspections Division.

On February 27, 2019, the applicant submitted a draft nomination for an end of tour Commendation Medal to his new Supervisor, LT C, by email, because the applicant's tour of duty at the Sector was to end in May 2019. The applicant explained that he had spoken to his previous Reporting Officer to certify the Summary of Action information. The applicant told LT C that if he had any questions or concerns about the draft to reach out to him. (The applicant alleged that he received no response from LT C.)

On April 14, 2019, the applicant learned through LT C that his proposed Commendation Medal had been downgraded to a Coast Guard Achievement Medal.²

¹ Up to this point, the applicant's Reporting Officer was CDR Y and the Reviewing Officer was CAPT M.

² In his application to the PRRB the applicant stated that the Achievement Medal he received lacked much of the information he had included in his Commendation Medal draft, and he did not know whether his award input reached the Awards Board for consideration or if CDR R refused to endorse and forward the Commendation Medal, just like he refused to endorse the applicant's Award for Excellence in Marine Inspections nomination.

Disputed OER

On May 29, 2019, the applicant received the contested OER for the June 1, 2018, through May 30, 2019, rating period. The OER was prepared by his new Supervisor, LT C, and Reporting Officer, CDR R. The OER Reviewer, who was the Deputy Sector Commander, had not changed. From his new Supervisor, the applicant received six “standard” marks of 4, ten marks of 5, and two marks of 6 in the various performance dimensions. The Supervisor supported these marks with the following comments:

PERFORMANCE OF DUTIES: Planned and executed Vietnam War Veterans lapel pinning ceremony, worked tirelessly with Vietnam War Commemoration Office, National Parks Service & multiple Vietnam Veterans groups to reduced [*sic*] costs & delegate assignments, established early contingencies, overcame government shutdown & venue/date changes; hosted event for over 250 people, honored 100+ Vietnam War Veterans. Found unauthorized bilge containment system setup for automatic discharge into sewage plant, expanded exam & uncovered safety management non-compliance; recommended major control action, informed owner/operator of non-compliance & mitigated future pollution of oily bilge water through sewage system. Earned required qualifications outlined in training plan; alleviated examiners 6 months before departing unit. Provided 90-minute training to department members on the [redacted] Cargo Ship Safety Code (CCSSC), gross tonnage & common issues that invalidate certificates; conveyed deep understanding of regulatory compliance with confidence. Authored concise email to industry rep wanting to use a foreign cruise ship as berthing for FEMA workers, outlined policies/regulations required for compliance; clearly articulated concerns & tactfully denied request.

LEADERSHIP SKILLS: Advocated for civilian MIs to receive funded occupational health exams in accordance with policy, researched & found CGHQ templates & informed Sec [redacted] medical clinic of procedures; overcame non-compliance, ensured funded annual health exams for 4 civilians, shared information with Sectors throughout the CG. Capitalized on unique training opportunity during testing & deployment of cruise ship Marine Evacuation Slide, maximized participation for a normally deferred item; aided 8 trainee PQS sign-offs on an item that has a 6 year frequency. Established relationship with local EPA representative for air emissions enforcement & procedures for sharing reported violations; encouraged cooperation between agencies effectively referred 3 cases with ease. Promoted open communication during exams, actively sought opinions from team members prior to deciding citations & control actions; empowered members to feel part of the team. Met own OSF responsibilities, narratives were insightful.

PERSONAL AND PROFESSIONAL QUALITIES: Willingly gave own time to redesign training program for local/D[redacted] CCSSC qualification, devoted over 100 hours to develop 67-pg job aid & PQS containing over 150 regulations; revamp program will support future qualification for units throughout D[redacted]. Made noteworthy recommendation, allowed NAVCEN to use appropriate [redacted] Emission Control Area during alleged air pollution investigation; actions supported evidence collection in 1st air emission criminal referral to the Department of Justice in U.S. history. Observed several vessels not complying with air emission regulations, notified vessel operator through official correspondence; improved awareness of emission regulations & gained compliance of CG/International policy. Provided guidance to subunit following acute exposure to benzene; ensured members underwent physical exam within required timeframe.

On the Comparison Scale, the new Reporting Officer assigned the applicant a mark of 4 (marks of 3, 4, or 5 denote “One of the many high performing officers who form the majority of this grade” category) out of 7. On the Promotion Scale, the applicant received a mark in the second spot of six (“Promotion Potential”). The Reporting Officer also added the following comments:

REPORTING OFFICER COMMENTS: *ROO made progress as a marine inspector, however, did not take complete advantage of second inspections tour & gained only 3 of 8 additional qualifications available*

while assigned to a Prevention feeder port.^[3] ROO has a great understanding of earned qualifications, however member's leading, mentoring, or developing subordinates skills need to be further develop. Highest recommendation for follow-on assignment at any District, Area or Headquarters unit; meticulous interpretation of regulations will be a great asset reviewing & enforcing program & CG policies. Member will greatly benefit from future assignments that will enhance and diversify member's prevention knowledge, such as Investigating Officer. Member's assignment to Waterways Management Chief position will afford the opportunity to further develop management skills. Recommended for promotion.

On May 30, 2019, the applicant completed his tour of duty as a Marine Inspector and PSCO Journeyman and Branch Chief and was transferred to become the Waterways Management Branch Chief at another Sector.

On December 6, 2019, the applicant emailed the Deputy Sector Command and OER Reviewer, CAPT M, and asked him if LT C or CDR R had informed him that he intended to appeal the contested OER. The applicant told CAPT M that he had told LT C the day he received his OER that he intended to appeal it. The applicant further stated that to his knowledge, LT C had informed CDR R of his intent to appeal.

On December 7, 2019, CAPT M responded to the applicant's email and told him that there was no appeal process for an OER and recommended that the applicant look up the process for completing an OER Reply.

On May 22, 2020, the applicant received his first annual OER at the new Sector for the May 31, 2019, through May 22, 2020, rating period. The applicant received thirteen marks of 6 and five marks of 7 in the various performance dimensions. On the Comparison Scale, the applicant received a mark of 5 out of 7, and on the Promotion Scale, he received a mark of in the fourth spot of six ("Promote w/top 20% of peers").

First PRRB Application

On October 5, 2020, the applicant applied to the PRRB to have the contested OER removed from his record and replaced with a continuity OER.

On April 5, 2021, the PRRB issued its decision in the applicant's case. One of the members of the PRRB was a Mr. N, a civilian employee from the Coast Guard Personnel Service Center who had previously reviewed and approved the contested OER for entry in the applicant's record, after finding that it substantially followed Coast Guard policy. The PRRB's decision included the following Opinions and Recommendations:

OPINIONS:

1. The Application to the PRRB was submitted within the one year time restriction.

³ Emphasis added. This sentence was later redacted from the applicant's OER as a result of a PRRB determination, and the applicant's mark on the Promotion Scale was also increased from a mark of 2 ("Promotion Potential") to a mark of 3 ("Promote"). In addition, the PRRB ordered that the mark of 4 in the "Looking out for others" performance dimension be raised to a 6; the mark of 4 in the "Directing others" performance dimension be raised to a 5; the mark of 4 in the "Teamwork" performance dimension be raised to a 5; the mark of 4 in the "Evaluations" performance dimension be raised to a 5; and the mark of 5 in the "Initiative" performance dimension be raised to a 6.

2. It is clear that the Applicant received mid-term counseling. According to the OER in question, the mid-term counseling was conducted by LCDR [P] on 19 Nov 2018, though LCDR [P] did retire in December of 2018. The mid-period counseling details factors and expectations for receiving a mark of 6 as well as those for receiving a mark of 4. The Applicant was counseled on qualification performance “*Tank/Chem qualification has taken too long despite previous conversations between us during the last EOP.*” LCDR [P] discussed initiative, helping others, and other dimensions as considerations.

3. The Board noted a 28 point deficit between the Applicant’s previous Lieutenant OER and the disputed OER. The Board observed that the new Supervisor and RO [Reporting Officer] conducted no formal individual counseling with the Applicant. Although additional counseling was not required to be conducted during this period, because of the previous counseling session with LCDR [P], some members of the Board believed there was a lack of feedback by the Applicant’s new Chain of Command. CG personnel should have a clear understanding of their leadership’s expectations and priorities. If the Applicant was performing significantly below the previous year’s performance then the Applicant’s Chain of Command should have been more transparent and spent time ensuring the Applicant was formally counseled. In addition, the Chain of Command sent a mixed message to unit personnel by awarding the Applicant an Achievement Medal for service during the disputed OER. To earn an Achievement Medal an individual must demonstrate professional achievement that clearly exceeds what is normally required or expected, considering the individual’s rank or rate, training and experience, and must be an important contribution that is beneficial to the United States and the United States Coast Guard.

4. The Board also considered the performance of the Applicant during the previous year. Two specific comments written in Block 5, section d of the previous year’s OER (2017 to 2018) were of note. First, “*the ROO’s performance and contributions were critical to [the Sector’s] operational success during 2017’s devastating hurricane season.*” The evaluation praises the Applicant’s grasp of complex international regulation schemes, responsiveness and leadership. Hurricane [redacted] and [redacted] devastated [redacted] in 2017 and required an ‘all hands on deck’ mentality from all involved. The Applicant supported these operations and was awarded a Commendation Medal for ensuring ports, vessels, and facilities were in compliance with Captain of the Port directives as well as for work completed at the Incident Command Post. This type of work was not in line with the proposed training plan and ‘most likely’ delayed the Applicant’s efforts to finish qualifications early.

Second, Block 5, section d of the previous year’s OER (2017 to 2018) states that the ROO is, “*Highly qualified and recommended for demanding assignments with increased responsibility in prevention field, such as CID/JO, MSD Support or Assistant Department Head.*” Certainly an officer receiving a Commendation Medal and an Achievement Medal for outstanding performance of duty in a 2 year span while meeting the training plan deadlines set forth by command would not anticipate the dramatic reduction in performance evaluations received. If performance had faltered so significantly as to justify a 28 point reduction from the previous OER, then the new Supervisor and RO should have formally counseled the Applicant.

5. LT [C] stated “*I disagree with LT [Applicant’s] statement...LCDR [P] was best positioned to evaluate my performance for the first half of the reporting period. LCDR [P] was removed from his primary duties and failed to manage his division.*”⁴ If the Applicant’s Supervisor failed to manage his division then why was their [sic] not formal midperiod counselling conducted by LT [C]? LT [C] is admitting that the previous Supervisor was inadequate and was essentially fired from his job. LT [C] references LCDR [P’s] counsel sheet which seems to be in direct contrast to LT [C’s] opinion of LCDR [P’s] leadership and judgement.

RECOMMENDATIONS:

1. The Board recommends granting relief for the following:

⁴ This claim is disputed by LCDR P who stated in a sworn declaration that he was not removed from his primary duties, but resigned his post for both personal and professional reasons.

a. The Board recommends Block 5, section c. [be] change[d] from Promotion Potential to Promote. The remarks by the RO in Block 5, section d. of the disputed OER recommends the Applicant for promotion. The RO's declaration states that the member has potential and should be considered for promotion. The RO's declaration also states that the Applicant is appropriately marked as one of many high performing officers who form the majority of this grade. Finally, the Applicant's departing award (for the period in question) states that the Applicant "*is cited for superior performance of duty as a Branch Chief while assigned to the Inspections Division at Sector [redacted]... .*" These statements coupled with the RO's comment in Block 5, section d (recommending the Applicant for promotion) support the Performance Scale adjustment.

b. The Board recommends that Block 5, section d's first sentence "*ROO made progress as a marine inspector, however, did not take advantage of second inspection tour & gained only 3 of 8 additional qualifications available while assigned to a Prevention feeder port*" be redacted from the disputed OER. PSCINST M161 1.1D Chapter 4, section B, paragraph 11 states that a prohibited comment includes "*Reported-on Officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.E. 7. and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of this Manual.*" The Board agrees that the statement paints a prejudicial picture of the applicant's first 6 years in the Prevention field. It does not indicate that the Applicant met all of the required qualifications set forth by the Chain of Command in the units training plan.

c. The Board recommends that Block 3b, section a (Looking out for others) [be] change[d] from a mark of 4 to a 6. PSCINST M 1611.1 D states, "*A mark of a 6 in this performance dimension. Always accessible. Enhanced overall quality of life. Actively contributed to achieving balance among unit requirements, professional and personal responsibilities. Strong advocate for subordinates; ensured appropriate and timely recognition, both formal and informal.*" Enclosure 20 of the Applicant's packet lists multiple informal and formal awards the Applicant was responsible for advancing. The Applicant's disputed OER lists achievements in overcoming unfunded occupational health examinations for civilians as well as information sharing with Sector [redacted] Medical Clinic. These achievements were not disputed by the supervisor in the declaration. In addition, it was documented by the Applicant's Chain of Command in the Applicant's departing award. The departing award also credits the applicant with mentoring 13 unit members through formal and informal training contributing to 27 earned qualifications. In the previous 3 OER's, the Applicant was given credit for mentoring just 3 unit members and 6 qualifications which leads the Board to determine the Applicant mentored 10 unit members with 21 earned qualifications. The Board believes this documented performance merits and meets the 6 performance dimension.

d. The Board recommends that Block 3b, section c (Directing others) change from a mark of 4 to a 5. PSCINST M 1611.1 D states, "*An inspirational leader who motivated others to achieve results not normally attainable. Won people over rather than imposing will. Clearly articulated vision, empowered subordinates to set goals and objectives to accomplish tasks. Modified leadership styles to best meet challenging situations.*" Enclosure 20 of the Applicant's packet details [redacted] high vessel detention rate which was affirmed by the Chain of Command on the Applicant's departing award, with 18 international detentions. Enclosure 20 and the departing award details a comprehensive compliance initiative led by the Applicant that focuses on correction of substandard issues involving international standards. The Board believes this documented performance meets some of the 6 performance dimension.

e. The Board recommends that Block 3b, section d (Teamwork) change from a mark of 4 to a 5. PSCINST M 1611.1 D states, "*Insightful use of teams raised unit productivity beyond expectations. Inspired high level of esprit de corps, even in difficult situations. Major contributor to team effort. Established relationships and networks across a broad range of people and groups, raising accomplishments of mutual goals to a remarkable level.*" Enclosure 20 of the Applicant's packet describes a collaborative effort by the Applicant to establish a Memorandum of Understanding with the Environmental Protection Agency to share air emissions vessel violation information. In addition, the Applicant led 82 percent of cruise ship examinations during the marking period with

considerable coordination between CG, vessels, and other federal agencies. The Board believes this documented performance meets some of the 6 performance dimension.

f. The Board recommends that Block 3b, section f (Evaluations) change from a mark of 4 to a 5. PSCINST M1611.1 D states, “*No reports submitted late. Narratives were insightful, of the highest quality, and always supported assigned marks. Subordinates’ material reflected same high standards. No reports returned for revision. Returned reports to subordinates when appropriate.*” Supervisor states in the declaration that the reason for the mark of 4 was the Applicant “*provided poor quality narratives for ENS eval, and subordinate CWO package; long winded comments did not match dimensions and required extensive revision. Own OSF required the same.*” Enclosure 20 of the Applicant’s package was, in the opinion of the Board, extensive and well-written. The OSF was written in accordance to PSCINST M 1611.1 D and the Applicant provided multiple detailed bullets of all required performance dimensions. With such a derogatory statement made about the Applicant’s OSF, the Board questions the assigned mark of 4. In addition, enclosure 20 details 4 LTJG OERs and 10 EERs that the applicant wrote for the period that were not mentioned in the Supervisor’s declaration or on the OER. The Board believes this documented performance meets some of the 6 performance dimension.

g. The Board recommends that Block 3c, section a (Initiative) change from a mark of 5 to a 6. PSCINST M1611.1D states, “*Aggressively sought out additional responsibility. A self-learner. Made worthwhile ideas and practices work when others might have given up. Extremely innovative. Optimized use of new ideas and methods to improve work processes, decision-making and service delivery.*” The Applicant’s disputed OER reads, “*Willingly gave own time to redesign training program/or local/D[] CCSSC qualification, devoted over JOO hours to develop 67-page job aid & PQS containing over 150 regulations; revamp program will support future qualification for units throughout D[redacted].*” The Applicant made District wide improvement to the Prevention qualification process. Enclosure 20 Block 3.c under Initiative first bullet, details coordination with NAVCEN and EPA to create the ability to map all foreign vessel violations with detailed graphics and timestamps. The improvement would save 100s of work hours, in addition the improvement was linked to Department of Justice for use in air emissions and environmental crime prosecutions. The improved mark is based on the strength and impact of both examples listed above. The Board believes this documented performance merits and meets the 6 performance dimension.

2. Grant no other relief.⁵

As part of the PRRB process, LT C, CDR R, and CAPT M all submitted sworn declarations. All three individuals stood by their evaluations of the applicant and recommended that the applicant receive no relief.⁶ Here, not only did all three individuals stand by their marks and comments, but LT C stated in his sworn declaration that he originally intended to give the applicant marks of 3 in several performance dimensions—Adaptability, Professional Competence,

⁵ In conjunction with the applicant’s PRRB application, the Coast Guard requested and received three sworn declarations from LT C (Supervisor), CDR R (RO), and CAPT M (Reviewer). These declarations totaled 9 pages. For efficiency, given that LT C was the applicant’s direct supervisor and was responsible for marking the applicant’s overall performance, only LT C’s is recorded here.

⁶ In total, these declarations totaled 9 pages. The Board has read these sworn declarations and found them unpersuasive. The Board notes that LT C who was the same rank as the applicant and benefited from stifling the applicant’s career and marking him lower (LT C was appointed as the CID, a position previously held by the applicant but later taken by CDR R, and LT C was recommended for advanced education opportunities under CDR R, while at the same time CDR R refused multiple awards and recommendation for the applicant). The Board further notes that an AHHI investigation substantiated claims against CDR R, namely that he purposely stifled the applicant’s career and treated him unfairly due to his race. This investigation led to CDR R receiving a negative CG-3307 and retiring from the Coast Guard. Accordingly, those sworn declarations will not be summarized here. The Board’s position is supported by the PRRB’s decision wherein it recommended that six of the marks given by LT C to the applicant be raised and that one of CDR R’s comments be redacted from the OER.

Evaluations, and Judgment—but later changed them to 4s. The PRRB later ordered that the applicant’s mark of 4 in “Evaluations” be increased to a 5. LT C stated that he was “unable to justify a six (6) for any category as [applicant’s] performance did not meet every comment line of the block.”

On May 12, 2021, the Directory of Military Personnel approved the PRRB’s recommendations, and the disputed OER was corrected in accordance with the decision of the PRRB.

On June 16, 2021, the applicant received his annual OER for the May 23, 2020, through May 31, 2021, rating period. The applicant received eleven marks of 6 and seven marks of 7. On the Comparison Scale, the applicant received a mark of 5 out of 7, and on the Promotion Scale, he received a mark in the fourth spot of six (“Promote w/top 20% of peers”).

Second PRRB Application

On November 1, 2021, the applicant applied for reconsideration of the PRRB’s April 5, 2021, decision. The basis for the applicant’s relief was that the applicant had acquired new “material evidence” which was not reasonably available to him at the time of his initial application. In addition, the applicant submitted evidence that the PRRB had committed legal and/or factual errors in its final decision to the applicant’s first application. The applicant argued that absent those errors, the facts would have further shown that his disputed OER was erroneous and unjust and would have resulted in a different determination. The applicant made the following claims:

- The Board erred by not addressing an argument which may be dispositive to the case—that LCDR P failed to prepare and sign a draft OER, which was a violation of policy and prejudicial to his record.
- The Board erred in listing an inaccurate rating chain as a matter of record— In their PRRB declarations, LT C and CAPT M claimed that LCDR P was “removed from his primary duties,” but this fact was disputed by LCDR P and a Freedom of Information Act (FOIA) request resulted in no responsive records existed supporting the chain of command having removed LCDR P from his primary duties, or LT C being designated as his supervisor. Because of this error, the applicant claimed, LT C had no business preparing and signing the applicant’s disputed OER and any opinion that LT C may have had of the applicant’s performance was invalid.
- The Board erred by not addressing a second argument which may be dispositive to his case—The applicant argued that CDR R violated Coast Guard policy by discussing performance which occurred outside the reporting period in the disputed OER. In addition, the applicant alleged that CDR R erred by evaluating him in the context of his three-year tour rather than the one-year reporting period.
- The Board considered materially inaccurate declarations—the applicant claimed that LT C, CDR R, and CAPT M each misrepresented and minimized his performance in their PRRB declarations. The applicant stated that he could not have known that he would need to present evidence to refute these false characterizations before he submitted his PRRB application.

On February 2, 2022, the PRRB issued its decision on the applicant's request for reconsideration. All of the board members remained the same excluding Mr. N who was removed from the board out of an abundance of caution. The board provided the following Opinions and Conclusions:

Opinions:

1. While LCDR [P] (applicant's previous Supervisor) did not provide a draft OER to the incoming Supervisor, no policy exists which requires or obligates an incoming Supervisor to utilize the previous Supervisor's OER input.
2. The Applicant's chain of command had a published rating chain designation by position, as required by COMDTINST M1000.3A. This instruction designates the Chief of Inspections as the Supervisor. At the time of the OER in question, LT [C] was serving as the Chief of Inspections, even if in an unofficial capacity due to LCDR P's transition out of the position.
3. No additional material evidence has been presented to indicate further prohibitions exist in the OER in question, particularly in reference to comments considering performance outside the period of report. Block 5 of the OER in question has been redacted to align with policy requirements.
4. No additional material evidence has been presented to overcome the presumption of regularity in regards to materially incorrect declarations.
5. Quality Review and validation of an OER does not disqualify a member from serving on a PRRB. However, in an abundance of consideration the PRRB membership was modified to satisfy the Applicant's request.

Conclusions:

1. After a thorough review of the reconsideration request, application, supporting enclosures, and additional documents obtained by the Board, the Applicant has not provided clear and convincing evidence to overcome the presumption of regularity and prove additional modifications or removal of the OER in question are warranted beyond those previously granted.

Recommendations:

1. Do not grant any relief.

In 2022, with the OER amended by the PRRB in his record, the applicant was not selected for promotion by the PY2023 LCDR selection board.

Harassment Complaint

On March 4, 2023, the applicant filed a report with the Anti-Harassment Program officer, alleging that he had been subjected to harassing behavior by his Reporting Officer, CDR R, at his prior unit.

On March 15, 2023, the applicant's previous Sector Command was notified of the complaint, and on March 29, 2023, the complaint was forwarded to the District Commander.

On April 6, 2023, the Deputy District Commander initiated a standard investigation of the applicant's complaint.

On June 6, 2023, the Deputy District Commander issued a memorandum, "Final Action Memo Regarding Report of Prohibited Harassment." The contents of the memorandum are as follows:

2. For the allegations against CDR [R], USCG (retired), I have determined, based on a preponderance of the evidence, that the allegations of harassing behavior are substantiated after review of reference (a),^[7] enclosure (1),^[8] and consultation with counsel, CAPT [G]. The nature of the substantiated harassing behavior is harassment. For the allegations against the Sector [redacted] Command, I have determined, based on a preponderance of the evidence, that the allegations of failing to address or remediate harassing behavior are unsubstantiated after review of reference (a), enclosure (1), and consultation with counsel, CAPT [G].

3. Summary of pertinent facts: I have provided a summary of pertinent facts from the investigation pursuant to references (a) and (b).

a. LT [Applicant] served in different divisions of Sector [redacted] Prevention Department between June 2016 and May 2019.

b. From June 2016 to November 2018, LCDR [P] served as Sector [redacted] Chief of Inspections Division (CID). LCDR [P] was LT [Applicant's] direct supervisor during this time.

c. CAPT [Y] served as Sector [redacted] Prevention Department Head (PDH) from June 2016 to September 2018. CDR [R] took over as Sector [redacted] PDH in September 2018.

d. Between June 2016 and November 2018, in LCDR [P's] absence, LT [Applicant] would step in as Acting CID.

e. For LT [Applicant's] first three evaluations at Sector [redacted], his supervisor was LCDR [P], and his Reporting Officer (RO) was [then] CDR [Y]. The average total of assigned performance dimension marks for these three performance periods was 111.

f. Following LCDR [P's] departure in November 2018, CDR [R] verbally selected LT [C] to serve as CID.

g. For LT [Applicant's] last evaluation at Sector [redacted], his rating chain was LCDR [P] (first 6 months), Supervisor; LT [C] (last 6 months), Supervisor; CDR [Y] (first 3.5 months), RO; CDR [R] (last 8.5 months), RO; and CAPT [M], Reviewer. The total of assigned performance dimension marks for claimant's OER ending 31 May 2019 was 80.

h. When departing Sector [redacted], LT [Applicant] drafted his own departing award. He had drafted himself a Coast Guard Commendation Medal. On 14 April 2019, LT [Applicant] found out that his award submission had been downgraded to a Coast Guard Achievement Medal.

i. Following his assignment at Sector [redacted], LT [Applicant] was assigned to Sector [redacted], as Chief, Waterways Management Division. LT [Applicant] was evaluated over three OER periods while assigned to Sector [redacted]. The average total of assigned marks for these three performance periods was 117 with promotions scale marks of "Promote w/top 20% of peers" and "In-zone reorder."

⁷ Harassing Behavior, Prevention, Response, and Accountability, COMDTINST M5350.6.

⁸ Final Investigation

j. There were two formal complaints of harassment/discrimination made against CDR [R] while he was serving as Sector [redacted] PDH. One complaint was filed in August 2020, which was determined to be unsubstantiated. The other complaint was filed in October 2021. That complaint was determined to be substantiated. Following the substantiated claim of harassment, CDR [R] submitted his retirement letter, and the Sector [redacted] command documented the harassment on a negative CG-3307 and in CDR [R's] final OER.

4. Opinions/Analysis:

a. I find that CDR [R], USCG (retired), did engage in harassing behavior. The nature of the harassing behavior was based on LT [Applicant's] race. As the newly reported PDH, CDR [R] quickly selected an LT of similar race/ethnicity as CDR [R] to serve as the CID, despite LT [Applicant's] experience as Acting CID numerous times the previous two years. CDR [R] avoided/ignored LT [Applicant] but did not ignore other members in Sector [redacted] Prevention Department. CDR [R] was LT [Applicant's] RO for his last/final OER in [redacted]. On this OER, LT [Applicant's] total of assigned performance dimension marks was 80, 31 points lower than his average total of assigned performance dimension marks on his first three OERs. Finally, when departing Sector [redacted], LT [Applicant's] award was downgraded from a Coast Guard Commendation Medal to a Coast Guard Achievement Medal.

b. I find that no one in the chain of command knew or should have known of the alleged harassing behavior prior to the report. While there were negative comments about CDR [R] in the 2019 and 2020 DEOMI Organization Climate Surveys, there was also an investigation into alleged harassing/discriminatory behavior into CDR [R] around this time. The results of that investigation were unsubstantiated.

c. I find that no one failed to properly address the behavior or failed to follow the procedures in reference (a). Following the finding of a substantiated report of harassment in 2021, CDR [R] retired, but the Command made sure to document the finding on a negative CG-3307 and in CDR [R's] final OER.

d. I find that there are no facts to suggest that CDR [C] or the Sector [redacted] Command withheld the routing of LT [Applicant's] sustained success award in an effort to retaliate against or discriminate against LT [Applicant].

5. Actions: While I find the claim of harassment against CDR [R] [is] substantiated, the harassing behavior occurred between 2018 and 2019. Since then, CDR [R] has retired from the Coast Guard and LT [Applicant] has transferred out of Sector [redacted].

6. I reiterate that all Coast Guard personnel shall be treated with respect. References (c) and (d) reinforce the Coast Guard's commitment to the core values of Honor, Respect, and Devotion to Duty. I am personally committed to maintaining a work environment that does not compromise those core values or any other Coast Guard policy.

7. I will cause the aggrieved to be notified, either verbally or in writing, of the investigation's disposition and whether corrective action has been or will be taken.

8. I respectfully request your signature and date to acknowledge receipt. Please return the signed copy to me for my records.

In 2023, the applicant was not selected for promotion by the PY2024 LCDR selection board. Therefore, by law, he is slated to be discharged by June 30, 2024.

APPLICANT'S ALLEGATIONS

Violation of the Reporting Period Rule

The applicant explained that the regular reporting period “commences the day after the ending date of the previous regular OER” and it “ends on the date of the occasion for the current report.”⁹ The applicant stated that for a regular OER, the Supervisor is responsible for evaluating the performance and qualities of the Reported-on Officer (ROO) “observed and noted during the reporting period.”¹⁰ The Reporting Officer is responsible for evaluating the ROO “based on direct observation”¹¹ and commenting on performance and qualities demonstrated “during the reporting period.”¹² The applicant argued that rating officials are prohibited from discussing or considering performance that occurred outside the reporting period unless a ROO is removed from his/her primary duties, relieved for cause, or subject to disciplinary action for performance or conduct that occurred in an earlier reporting period.¹³ In those rare situations, which do not apply here, rating officials may discuss past performance.

Using these Coast Guard regulations as support, the applicant claimed that his rating chain violated these regulations, most specifically, the “Reporting Period Rule.” He noted that six of the nine points in CDR R’s declaration refer to his view of the applicant’s failure to gain certain qualifications (Points 4, 5, 6, 7, 8, and 12) and four of them impermissibly discuss performance that occurred outside the reporting period (Points 4, 5, 6, and 8). He also alleged that his rating chain—

- Lowered his OER marks because he had not obtained enough qualifications for his previous three year tour; more specifically, because the applicant took too long to obtain certain qualifications during his previous rating periods and because his previous command gave the applicant too much time to complete the qualifications;
- Unjustly lowered his marks for obtaining his qualifications at the “last minute” and because the applicant allegedly failed to “take complete advantage of second inspections tour & gained only 3 of 8 additional qualifications available while assigned to a Prevention feeder port”; and

⁹ Article 4.D.3.c. of the Officer Evaluation Systems Manual, PSCINST M1611.1, states, “The regular reporting period commences the day after the ending date of the previous regular OER...and ends on the date of the occasion for the current report.”

¹⁰ Article 4.E.2.f. of PSCINST M1611.1 states, “For each evaluation area, the Supervisor reviews the Reported-on Officer’s performance and qualities observed and noted during the reporting period...”

¹¹ Article 1.A.3.b.1. of PSCINST M1611.1 states that the Reporting Officer shall, “Evaluate the Reported-on Officer based on direct observation...”

¹² Article 4.F.3.a. of PSCINST M1611.1 states, “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.”

¹³ Article 4.B.11 of PSCINST M1611.1 states that the rating chain shall not, “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.” Articles 5.E.7 and 5.F.3. of reference (a) refer to Removal from Primary Duty and Subsequent to Disciplinary Action OERs, respectively. Chapter 10 and Chapter 15 of reference (c) refer to Removal from Primary Duty and Relief for Cause as well as Subject to Disciplinary Action OERs, respectively.

- Devalued his many and varied significant accomplishments by assessing his performance based solely on the number of qualifications he earned.

The applicant also claimed that the PRRB's decision on reconsideration erroneously relied on the premise that CDR R merely forgot the fundamental reporting period rule for his first comment in Section 5 alone but remembered and applied the rule to the marks he assigned on the Comparison and Promotion Scales and to every comment he wrote thereafter. The applicant also stated that the PRRB failed to address the crux of his arguments that the OER was infected and only recommended that the infected comment made by CDR R be removed from the OER, instead of having the OER in its entirety removed from his record.

Violation of the Rating Chain Management Rules

The applicant argued that the official designation of rating officials—in writing—is mandatory.¹⁴ The applicant further argued that when a designated rating official is “unavailable” or “disqualified,” the commanding officer “shall designate an appropriate substitute” and the Officer Evaluations Branch “shall be advised in writing of the designation(s),”¹⁵ with the supervisor normally being “senior to the [ROO],” but may be designated in appropriate situations regardless of grade relative to the [ROO].¹⁶

Using the aforementioned policies as support, the applicant argued that the contested OER was erroneous and unjust because:

- Although LCDR P had resigned his post, he was still in the best position to evaluate the applicant's performance for the first half of the period because LT C was not adequately familiar with the applicant's performance;
- After LT C became the acting CID, he directly observed the applicant's performance for only 80 days of the one-year reporting period before forwarding the OER to CDR R;
- LT C and CAPT M's claims that LT C was suitable to evaluate the applicant because he had worked with the applicant in the same “small,” 35-person department, were baseless because working in the same small department within close proximity to one another because you work in the same building does not establish the one-on-one supervisory relationship described in the OES;
- LT C's limited observation of the applicant and his admitted disregard for the applicant's Officer Support Form (OSF) does not meet the “well-substantiated performance

¹⁴ Article 5.B.5.a. of the Officer Accessions, Evaluations and Promotions Manual, COMDTINST M1000.3, states, “Commanding officers must: Designate and publish the command's rating chains.”

¹⁵ Article 1.B.1 of the Officer Evaluation Systems Manual, PSCINST M1611.1 states, “Designating substitutes in the Rating Chain. In instances where a Supervisor...is unavailable or disqualified to carry out their rating chain responsibilities, the commanding officer or the next senior officer in the chain of command shall designate an appropriate substitute suitable for evaluating the Reported-on Officer. Other members in the rating chain may be adjusted and designated, as appropriate. Commander (CG PSCOPM-3)...shall be advised in writing of the designation(s).”

¹⁶ Article 1.A.2.a.2. of PSCINST M1611.1 states, “The Supervisor will normally be senior to the [ROO]. However, in appropriate situations, the Supervisor may be designated, regardless of grade relative to the [ROO].”

evaluations” required by Article 2.C.2 of the Officer Evaluation Systems Manual, PSCINST M1611.1;¹⁷

- The PRRB failed to question whether LT C was suitable to evaluate the applicant, nor whether the OER was well-substantiated given his disregard for the applicant’s OSF;
- LCDR P was not removed from his primary duties or the applicant’s published rating chain, and LT C was never designated as a rating chain substitute.
- Since LCDR P was neither disqualified nor unavailable and still the applicant’s designated Supervisor, then he should have prepared the OER at issue, but he did not.

Violations of the Draft OER Rule

The applicant claimed that prior to assuming the unofficial CID role, LT C was assigned to the Investigations Division where he had minimal operations involvement with the Inspections Division and was generally unaware of the applicant’s work. The applicant alleged that he and LT C would go days or weeks without seeing each other or interacting at all. The applicant argued that the OES has a provision to ensure that this kind of change in Supervisors does not have a prejudicial effect on the ROO. The applicant claimed that when a Supervisor changes during the reporting period, the outgoing Supervisor must provide to the incoming Supervisor “a draft of the Supervisor’s portion of the OER,” which “shall include marks and comments for the period of observation.”¹⁸ The applicant argued that a draft OER provides a reliable report to an incoming Supervisor who did not directly observe the ROO so that information about the ROO’s past performance is not lost. In this instance, the applicant alleged that his outgoing supervisor, LCDR P acknowledged in his statement to the PRRB that prior to resigning he had not provided “formal input” to LT C regarding the applicant’s performance other than a midterm counseling sheet. The applicant alleged that even the midterm counseling sheet was likely directed and tainted by CDR R. The applicant claimed that CDR R was required to ensure that LCDR P prepared a draft OER rating the applicant’s performance but failed to do so.¹⁹

The applicant argued that even though LCDR P resigned his position, he was still in the best position to evaluate the applicant’s performance for the first six months. The applicant explained that as result of LCDR P’s departure, several of his notable performance accomplishments were not included in his OER. The applicant claimed that the PRRB did not address the performance accomplishments that LT C failed to document in the contested OER, but were observed by LCDR P and were specifically mentioned by LCDR P as noteworthy. The applicant further claimed that in his request for reconsideration, he alerted the PRRB that it had failed to address the missing draft OER, but the PRRB argued that no policy exists which requires or obligates an incoming Supervisor to utilize the previous supervisor’s OER input. According to

¹⁷ Article 2.C.2. of PSCINST M1611.1, states that the OSF “Assists the Supervisor and Reporting Officer in preparing well-substantiated performance evaluations.”

¹⁸ Article 1.A.2.b.10. of PSCINST M1611.1 states that the Supervisor shall, “Provide the incoming Supervisor a draft of the Supervisor portion of the OER when the Supervisor changes during a reporting period. The draft may be handwritten and shall include marks and comments (bullet statements are acceptable) for the period of observation. It shall be prepared and signed by the departing Supervisor prior to departure.”

¹⁹ Article 1.A.3.b.3. of PSCINST M1611.1 states that a Reporting Officer shall, “Ensure the Supervisor fully meets responsibilities for administration of the OES.”

the applicant, the PRRB's finding was plain error. The applicant argued that while preparing an OER, the Supervisor "draws on their observations, those of any secondary supervisors, and other information accumulated during the rating period."²⁰

The applicant argued that LCDR P's failure to prepare a draft OER was prejudicial for four reasons. First, LT C only directly observed the applicant's performance for 80 days of the year-long reporting period. Second, the applicant's three prior OERs, prepared by LCDR P, contained significantly higher marks and better comments than the OER at issue here. Third, LCDR P convinced LT C to raise four marks through a brief review of LT C's version of the OER at issue, and LCDR P's draft OER would have resulted in a more thorough comparison of their assessments. Fourth, by not providing a draft OER to LT C, LCDR P deprived him of material evidence to challenge LT C's assigned marks. The applicant argued that in its initial decision and on reconsideration, the PRRB disregarded clear and prejudicial violations of policy and failed to apply applicable precedent. Accordingly, the applicant claimed that the PRRB's decisions are arbitrary and capricious and contrary to law. Because these failings were prejudicial, the OER should be expunged.

Prejudicial Effect of Rating Chain's Accelerated Processing of OER

The applicant explained that the ROO submits the OSF to the supervisor "not later than 21 days before the end of the reporting period."²¹ Next, the Supervisor forwards the OER and supporting information to the Reporting Officer "not later than ten days after the end of the reporting period."²² Then the Reporting Officer forwards the OER to the Reviewer "not later than 30 days after the end of the reporting period."²³ Lastly, the Reviewer ensures that the Officer Evaluations Branch receives the OER "no more than 45 days after the end of the reporting period."²⁴ The applicant claimed that he provided the PRRB with evidence that LT C had required him to submit his OSF to him on April 15, 2019, 46 days before the end of the reporting period and 25 days before the OSF was due to LT C. The applicant stated that on both April 22, and April 27, 2019, he submitted supplemental information to LT C. The applicant alleged that on the latter date, LT C told the applicant that he planned to submit the OER to CDR R later that day, which was more than a month before the end of the reporting period and 44 days before the OER was due to CDR R, after which CDR R forwarded the OER to CAPT M. This resulted in both CDR R and CAPT M signing the OER on May 29, 2019, which was the day before the end of the reporting period and 46 days before it was due to the Officer Evaluations Branch. The applicant argued that there was no legitimate reason for preparing and routing the OER so prematurely. The applicant

²⁰ Article 4.e.2.h.1. of PSCINST M1611.1 states, "The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period."

²¹ Article 1.A.1e. of PSCINST M1611.1. states the Reported-on Officer shall, "Submit to the Supervisor, not later than 21 days before the end of the reporting period, a listing of significant achievements or aspects of performance which occurred during the period along with a copy of their updated Employee Summary Sheet (ESS)."

²² Article 1.A.2.b.9. of PSCINST M1611.1 states that the Supervisor shall, "Forward the OER; the Officer Support Form (OSF), Form CG-5308, (if used or required); ESS; OER attachments; and any other relevant performance information to the Reporting Officer not later than 10 days after the end of the reporting period."

²³ Article 1.A.3.b.6. of PSCINST M1611.1 states that the Reporting Officer shall, "Ensure the OER is forwarded to the Reviewer not later than 30 days after the end of the reporting period."

²⁴ Article 1.A.4.b.6. of PSCINST M1611.1 states that the Reviewer shall, "Expedite the reviewed report in a reasonable time to ensure the OER is received by Commander (CG PSC-OPM-3)...no more than 45 days after the end of the reporting period."

contended that because signing the OER signifies the end of a rating official's responsibilities, signing the OER before the end of the reporting period is expressly forbidden by Coast Guard policy.²⁵

The applicant claimed that the PRRB failed to address CDR R and CAPT M's premature signature dates despite the latter's acknowledgement that they were in error.²⁶ The applicant stated that neither LT C nor CDR R justified their rushed preparation and processing of the OER, with CAPT M trying to defend the hastiness by stating, "The rating chain did not appear to act in appropriately [*sic*] in setting a more advanced due date for member submission of OER input. This practice is not uncommon where there are large numbers of OERs to complete, especially when officers are subject to board/panel action that summer." However, the applicant claimed that the OES manual provides no exceptions to the submission timelines for a command with "large numbers of OERs to complete." In addition, the applicant stated that his record was not going to appear before a board or panel in 2019, and therefore the OER did not need to be submitted substantially earlier than the regular schedule.

Moreover, the applicant explained that the rating chain had up to 45 days after the end of the reporting period to submit his OER to the Officer Evaluations Branch and even if his Sector had such an extraordinary volume of OERs to complete, he asked, why did the rating chain rush the preparation and signing his OER instead of taking full advantage of the time allotted in Coast Guard policy. Accordingly, the applicant stated that CAPT M's excuses were counterintuitive and explicitly contrary to the Officer Evaluation Systems Manual. The applicant claimed that LT C's premature processing of his OER resulted in the last 33 days of his performance not being documented. The applicant supported his claim by pointing to a letter he received from Rear Admiral (RADM) B, validating processes the applicant had implanted that had previously been appealed. According to the applicant, he received RADM B's letter after LT C had already forwarded his OER to CDR R for signature.

Retaliation

The applicant explained that on July 12, 2022, Chief W provided a sworn statement attesting to the fact that CDR R believed the applicant had spoken negatively about him during a command climate survey. The applicant claimed that the anonymous comments found in the survey were available to CDR R in early 2020, long after the applicant had departed from the Sector, and therefore he could not have participated in the survey. According to the applicant, CDR R nonetheless suspected the applicant because the comments, which accused CDR R of being "a bully" who "used favoritism and retaliated against members who he did not like," were similar to comments made in the 2018 survey. The applicant argued that he had made no such comments in the 2018 or 2019 surveys. On the contrary, Chief W confirmed that he was the author of the 2019 survey comments. The applicant stated that the most notable evidence that CDR R used his OER to retaliate against him was the fact that the 2018 survey comments were available to CDR R on

²⁵ Article 4.F.4.e. and 4.G.1.f. of PSCINST M1611.1 state that for the Reporting Officer and Reviewer, the date of their signature on the OER form, "indicates when OES responsibilities were completed." Therefore, "a date preceding the end-of-report period is prohibited."

²⁶ CAPT M's PRRB declaration stating, "The signature dates of the Reporting Officer and Reviewer are an administrative error and should be corrected to 30 May 2019."

or about March 2019, at the time he would have reviewed the applicant's draft CGCM citation and just before he would have prepared the applicant's OER. The applicant stated that while CDR R would usually ignore the applicant's routine greetings in the morning and would only occasionally invite him to attend lunch meetings before the comments from the 2018 survey were released, he totally ignored his morning greetings and never invited him to lunch thereafter.

The applicant argued that CDR R's suspicion that the applicant made unfavorable comments in the 2018 survey would explain why the OER's content and overall tone differs starkly from every other OER the applicant has ever received. The applicant further argued that leveraging formal recognition and a performance evaluation as a form of reprisal for communicating outside the chain of command is a classic form of forbidden retaliation. The applicant stated that CDR R's paranoia that the applicant, by then assigned to a completely different unit, would participate in the 2020 survey, and the fact CDR R later sought to learn who had written the anonymous comments—a very serious violation of the survey process—is most concerning. The applicant alleged that unit personnel raised concerns about CDR R's behavior in three consecutive annual and anonymous command climate surveys, and he was the subject of two separate Anti-Hate and Harassment Incident investigations in only twelve months. According to the applicant, following the conclusion of the second investigation, he was issued a negative page 7 in his military record, and he was encouraged to retire, which he subsequently did.

The applicant explained that the OES manual states that the ROO should not be “surprised” with their OER at the end of the rating period and that the rating chain shall ensure “each [ROO] receives regular feedback” in addition to mid-term counseling.²⁷ The applicant explained that to say that he was “surprised” by his OER would be an understatement. The applicant alleged that the PRRB incorrectly concluded that additional counseling was not required because of LCDR P's mid-term counseling session. However, his session did not relieve CDR R of the duty to provide timely performance feedback, including at the end of the reporting period.²⁸ The applicant argued that effective and timely feedback is “a critical component of successful performance evaluation and should be used in conjunction with establishing and managing goals,” and that officers need to know “in a timely manner how they are performing, what they are doing well and areas of improvement.”²⁹

The applicant explained that although LT C told CDR R knew that the applicant was upset when he first received the OER, CDR R did not discuss it with him, did not ask what his objections were, and did not even say goodbye before going home for the day on the applicant's last day at the unit. The applicant questioned that if the OER was an accurate, fair, and objective evaluation, why could CDR R not bring himself to discuss it with the applicant? The applicant argued that CDR R's failure to provide feedback to a subordinate that he knew was upset is the icing on the cake for this flawed and unprofessional OER.

²⁷ Article 3.B. of the Officer Evaluations Systems Manual, PSCINST M1611.1.

²⁸ Article 1.A.3.b.7. of PSCINST M1611.1. states that the Reporting Officer shall “Provide timely performance feedback to the [ROO] during and at the end of each reporting period and at such other times as the Reporting Officer deems appropriate.”

²⁹ Article 3.A.1. of PSCINST M1611.1 states, “Effective and timely feedback is a critical component of successful performance evaluation and should be used in conjunction with establishing and managing goals. Officers need to know in a timely manner how they are performing, what they are doing well and areas of improvement.”

The applicant alleged that LT C implicitly threatened retaliation if the applicant exercised his right to appeal the OER through the necessary channels. According to the applicant, CDR R displayed bias and open animosity toward him following the release of the 2018 survey comments. The applicant contended that CDR R prepared and oversaw the preparation of an OER that was grossly inconsistent with his record, and he could not look the applicant in the eye and defend it. The applicant argued that considering the role retaliation most likely played in the events at issue and in preparing the OER, it should be removed and replaced with a Continuity OER in the interest of justice.

Unfounded Appraisal of Applicant's Performance

The applicant argued that the officers who prepared his OER showed that their appraisal of the applicant was unfounded and based on incomplete or inaccurate assumptions. The applicant explained that his Reporting Officer (RO) for his three prior OERs for that sector, CDR Y, specifically commended his strength as a leader and his regular performance as Acting CID. She also recommended him for assignment as a CID and as an Assistant Department Head which is a position above Division Chief in the service's organizational structure. The applicant contended that despite this well-documented record of demonstrated leadership, CDR R did not select him to serve as CID after LCDR P resigned even though he was the obvious choice. To defend himself, CDR R stated that when deciding who to appoint as the CID, he looked to the Prevention Officer Career Guide, which states that the CID should be an officer who has, "Sustained high performance and attainment of qualifications associated with your current assignment will increase the likelihood that you are afforded this opportunity." According to CDR R, the applicant did not meet those qualifications. The applicant argued that CDR R's claim that he did not meet CID qualification was false for a few reasons.

First, the applicant argued that he absolutely had the stated criteria for the CID position, most notably he had more vessel inspection qualifications than LT C and every other officer at the unit. Second, the applicant argued that the guide merely states "will increase the likelihood" for assignment as CID and is not a binding regulation. According to the applicant, the Prevention Officer Career Guide cannot impose restrictions on internal reassignment, as CDR R implied. Lastly, the applicant explained that the guide goes on to say that officers may also find themselves reassigned within a unit to "optimize operational readiness" or "match skill sets with positions," which are both reasons that would have supported the selection of him as the unit's CID over LT C.

The applicant pointed out the flaws in CAPT M's defense of CDR R's decision to appoint LT C as CID over him. In his response to the PRRB, CAPT M confirmed that the decision to select LT C as the CID was CDR R's, stating, "The decision to place LT C as the Chief of Inspections was made by CDR R and supported by me (in the capacity of Deputy Sector Commander) and the Sector Commander." In defense of CDR R's decision, CAPT M stated, "While the Applicant's performance was satisfactory, the leadership capabilities were not strong enough to assume the duties of Chief of Inspections. The Sector Commander and I would have objected to this

assignment if made.” The applicant argued that CAPT M’s statements are unworthy of belief, noting that CAPT M failed to explain what made LT C a better candidate to serve as CID.³⁰

The applicant explained that two days before LCDR P resigned, CDR R designated the applicant as a Performance Qualification Standard (PQS) Verifying Officer (VO), which indicated that he had “demonstrated the ability to instruct, coach and train” trainees. This designation is “highly sought after” and “assigned judiciously.” The applicant stated that CDR R never rescinded this designation, which the applicant maintained all three years of his tour, and LT C assigned the applicant an above average mark of 5 in the OER at issue in the Developing Others performance dimension. Accordingly, the applicant contended that CDR R took him by surprise when he wrote in the OER, “...however member’s leading, mentoring, or developing subordinates skills need to be further develop *[sic]*.” The applicant argued that this suggestion is ambiguous, contrary to CDR R’s own conduct in designating the applicant as a PQS VO, and contrary to his OSF.

The applicant explained that CAPT M claimed in his declaration to the PRRB that CDR R’s comment “regarding the need for further development of leadership and mentoring skills is accurate,” and that “[w]hile the Applicant’s leadership and mentorship is not a cause of any problems, the efforts and outcome did not warrant marks greater than a 5 in Developing Others and a 4 in Directing Others, Looking Out for Others, and Teamwork.” However, the applicant noted that the PRRB properly found sufficient supporting material in the matters of record to raise four marks in the Leadership Skills portion of Section 3, including three of the marks CAPT M specifically insisted were accurate.

The applicant argued that CAPT M’s treatment and appraisal of his performance during the rating period was inconsistent and unfounded, as proven in CDR Y’s statement that he set a “stellar example of responsiveness & leadership,” and her recommendation of him for assignment as a “CID and Asst. Dept Head” in his 2018 OER. The applicant stated that confusingly, CAPT M inexplicably selected the “Concur” mark in both that OER and the 2019 OER at issue here. The applicant contended that CAPT M had an opportunity to explain the dramatic 27-point decline between these two OERs by attaching Reviewer Comments to the contested OER and was given a second opportunity to explain the significant difference to the PRRB, but he failed to do so on both occasions. The applicant argued that CAPT M’s failure to provide a single substantive explanation for the shocking disparity between the two OERs seriously undermines his insistence that the one at issue is accurate. The applicant stated that the inconsistent and unfounded appraisals of the applicant coupled with the new evidence that unlawful discrimination and retaliation likely played roles in CDR R’s treatment of the applicant further supports the fact that he did not receive an accurate, fair, or objective OER. Thus, the OER should be removed and replaced with a Continuity OER.

³⁰ To support his contentions, the applicant provided a substantial review of his credentials. However, the Board is willing to stipulate that the applicant was well-qualified to serve as CID given that his previous Supervisor and Reporting Officer had designated him as the acting CID in the absence of the Supervisor. Accordingly, the Board will not summarize the applicant’s accomplishments here.

Disqualification of PRRB Members

The applicant alleged that Mr. N, a civilian OER Quality Reviewer at the Officer Evaluations Branch, failed to return the OER to the rating chain as an unacceptable report and validated it, erroneously certifying that it met OES guidelines. The applicant claimed that upon receiving the PRRB's initial decision, the applicant realized that Mr. N had served on the PRRB considering his case. The applicant contended that this violated agency policy that governs the PRRB's composition, which unexceptionally states: "No person may be a member of the Board in a case in which he or she has been personally involved."³¹ Within his application for reconsideration to the PRRB, the applicant explained that because Mr. N's own error and inaction had contributed to the flawed OER, he was disqualified from serving on the Board when it considered his case. Despite this clear error, the applicant stated that neither Mr. N nor the remainder of the PRRB took action to disqualify the prohibited member.

The applicant explained that on reconsideration, in response to his objections, the PRRB stated that "Quality Review and validation of an OER does not disqualify a member from serving on a PRRB. However, in an abundance of consideration the PRRB membership was modified to satisfy the Applicant's request." The applicant argued that the PRRB's finding was arbitrary and capricious. According to the applicant, the Correcting Military Records Manual, COMDTINST M1070.1, does not define what constitutes "personally involved" but makes no exception for an individual who performs quality control review of OERs. The applicant stated that the PRRB is composed of *ad hoc* members, and neither regulation nor policy prevented a completely new panel from reconsidering his case. However, three of the four members who participated in the initial decision were asked to consider whether they had committed legal and factual error. The applicant argued that the substantial conflict of interest involved in asking Mr. N, who had already found the contested OER to meet OES guidelines, to rule again on whether the same OER met those same guidelines should be obvious. The applicant claimed that the substantial conflict of interest also involved asking most of the original members of the PRRB to consider whether they had committed legal and factual error under reconsideration should likewise be obvious. The applicant contended that in both cases, acknowledging personal error in ones' own prior actions is a conclusion clearly subject to bias.

The applicant claimed that the PRRB purports to perform the same record correction function of the BCMR, which means when reconsidering an original application, the role and function of the PRRB is perfectly analogous to those of the BCMR. The applicant contended that in the same spirit of impartiality and due process that bars BCMR members from reconsidering their own prior decision, the PRRB was wrong to reconvene the original members who sidestepped evidence of their own errors and found no further relief was warranted. The applicant argued that due process entitled the applicant to "a proceeding in which he may present his case with assurance" that no member of the PRRB was "predisposed to find against him." The applicant argued that in both the initial and reconsideration phases, his case was decided by PRRB members

³¹ Article 7.c.(4)(a) of the Correcting Military Records Manual, COMDTINST M1070.1, states: "Under the cognizance of the Director of Personnel Management, the PRRB will consist of at least three ad hoc members...there will be a fourth member from the Coast Guard Personnel Service Center, Evaluations Branch (CG PSC-OPM-3)...if error is alleged in an officer evaluation report (OER)...No person may be a member in a case in which he or she has been personally involved."

who had already found against him. According to the applicant, on the PRRB's first hearing, Mr. N was clearly disqualified because his own error and inaction contributed to the OER under consideration. Furthermore, the applicant contended that in the PRRB's second hearing, three members of an adjudicatory body served as judges of their own prior actions, which involved a collegial decision that was infected by the participation of the disqualified, Mr. N. The applicant argued that a completely new panel should have decided his reconsideration request. The applicant claimed that the PRRB process was unfair in both phases and its decisions should be afforded no deference. For the reasons outlined above, the applicant argued that the PRRB's decisions should be removed from his record in their entirety.

VIEWS OF THE COAST GUARD

On September 21, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG stated that the Coast Guard investigated allegations of harassing behavior towards the applicant by his Reporting Officer CDR R on the applicant's OER for the June 1, 2018, through May 30, 2019, rating period, and determined that the allegations were substantiated. The JAG stated that CDR R did not fulfill his obligations with regards to the applicant's OER. However, the JAG stated that the Coast Guard does not agree that the applicant met his burden of establishing error or injustice by a preponderance of the evidence with regards to the remaining procedural errors raised by the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 28, 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 October 31, 2023.

The applicant agreed with the Coast Guard's position and recommendation and asked the Board to grant the requested relief.³²

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 2120(b) provides the following guidance on Special Selection Boards:

...

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

³² The applicant submitted a four page response to the advisory opinion and out of an abundance of caution—knowing that the Board is not bound by the Coast Guard's recommendation—repeated his contentions that the PRRB did not adequately address his allegations of error and restated his requested relief. Given that the Board has already adequately addressed the applicant's allegations previously in this decision, his response to the advisory opinion will not be summarized here.

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

(A) an action of the selection board that considered the officer or former officer –

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

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

(2) Effect of failure to recommend for promotion. If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered –

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

(c) Requirements for special selection boards. Each special selection board convened under this section shall–

(1) be composed in accordance with section 2107 and the members of the board shall be required to swear the oaths described in section 2109;

(2) consider the record of an applicable officer or former officer as that record, if corrected, would have appeared to the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board and that record shall be compared with a sampling of the records of –

(A) those officers of the same grade who were recommended for promotion by such prior selection board; and

(B) those officers of the same grade who were not recommended for promotion by such prior selection board; and

(3) submit to the Secretary a written report in a manner consistent with sections 2117 and 2118.

(d) Appointment of officers recommended for promotion—

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

(2) Effect. An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade,

and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

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

(e) Application process and time limits. The Secretary shall issue regulations regarding the process by which an officer or former officer may apply to have a matter considered by a special selection board convened under this section, including time limits related to such applications. ...

The Coast Guard Officer Evaluation Systems Manual, PSCINST M1611.1, provides the following guidance on preparing both the Officer Support Form and the OER:

Article 1.A. The Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and Reviewers who present independent views and ensure fairness, accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure. The rating chain consists of the Reported-on Officer, the Supervisor, the Reporting Officer, and the Reviewer (if applicable).

...

Article 1.A.2. Supervisor.

...

b. Responsibilities. The Supervisor shall:

1. Evaluate the performance of the Reported-on Officer in the execution of their duties.
2. Provide direction and guidance to the Reported-on Officer regarding specific duties and responsibilities.
3. Discuss at the beginning of the period, upon request, or when deemed necessary, the Reported-on Officer's duties as prescribed by Article 1.A.1 of this Manual and areas of emphasis.
4. Encourage the use of the Officer Support Form (OSF), Form CG-5308, (required for ensigns and lieutenants (junior grade) or other appropriate means, to note important aspects of the Reported-on Officer's performance during the reporting period. Significant events, problems, achievements, shortcomings, or personal qualities should be noted.
5. Provide timely performance feedback to the Reported-on Officer upon that officer's request during the period, at the end of each reporting period, and at such other times as the Supervisor deems appropriate.
6. Counsel the Reported-on Officer during and at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discuss duties

and responsibilities for the subsequent reporting period and make suggestions for improvement and development.

7. Provide mid-term counseling as requested by the Reported-on Officer.

8. Finalize the optional or required Officer Support Form (OSF), Form CG-5308, if used.

...

10. Provide the incoming Supervisor a draft of the Supervisor portion of the OER when the Supervisor changes during a reporting period. The draft may be handwritten and shall include marks and comments (bullet statements are acceptable) for the period of observation. It shall be prepared and signed by the departing Supervisor prior to departure.

Article 1.A.3. Reporting Officer.

...

b. Responsibilities. The Reporting Officer shall:

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 OES. 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 this Manual. Instead, they have the option to select 'Do Not Concur' and explain why in the Reporting Officer Comments block.

...

7. Provide timely performance feedback to the Reported-on Officer during and at the end of each reporting period and at such other times as the Reporting Officer deems appropriate. Provide mid-term counseling as requested by the Reported-on Officer.

...

Article 1.A.4. Reviewer.

...

b. Responsibilities. The Reviewer shall:

1. Ensure the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.

2. If necessary, add comments, using the Reviewer Comments block on Form CG-5310 (series). These comments should only be submitted to comment on performance and/or

potential which is significantly different than the Supervisor or Reporting Officer. These comments can be positive or negative in nature.

3. Ensure the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES and meets all submission schedules. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the evaluation and written comments (as applicable). However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed unless it is prohibited by Article 5.I. of reference (a) and Article 4.B. of this Manual.

4. Counsel Reporting Officers whose evaluation habits deviate significantly from the prescribed procedures. Deficiencies in OES performance on the part of Reporting Officers and Supervisors should be noted for performance feedback and considered in the respective officers' OERs. Provide for midterm counseling as requested by the Reported-on Officer.

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

Article 5.B.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.
- g. Require mid-period counseling.

...

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

...

11. Discuss reported-on officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.F.3. of this Manual.

...

Article 5.K. Replies to OERs. 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.

1. 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 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.

2. Corrections. Reported-on officer replies do not constitute a request to correct a record. An officer who believes their OER contains a major administrative or substantive error should follow the procedures to correct military records as outlined in Article 5.N. of this Manual. This includes requests to have the OER, or a part thereof, removed from the record. Members of the rating chain who, in their review of a reported-on officer's reply, concur with the reported-on officer that an error may be present in the OER, must return the reply to the reported-on officer and assist that officer in following the procedures of Article 5.N. of this Manual.

...

Article 5.N. Correction of OERs and Military Records.

1. Quality of Comments. Comments in the OER must be sufficiently specific to present a complete picture of the reported-on officer's performance and qualities during the period. They should be both reasonably consistent with the numerical marks assigned. On those marks indicated by Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) as not being supported, the rating chain must either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided.

2. Comments.

a. Marks and comments may be changed only by the original supervisor and reporting officer.

b. All changes to the original OER must be initialed.

c. The signature dates must be adjusted to reflect the date that the necessary changes and reviews were actually made. Reported-on officers must be afforded an opportunity to review and sign the updated OER.

3. Correction of Military Records. Coast Guard officers are encouraged to review their record periodically. While Commander (CG PSC) attempts to ensure that OERs accurately reflect officers' performance, the possibility of administrative or substantive error still exists. Accordingly, officers may seek correction of any OER, or any portion thereof, if in their opinion the report is in error.

a. Those officers wishing to exercise this right should follow the procedures to correct military records contained in Correcting Military Records, COMDTINST 1070.1 (series) for forwarding the application to the Personnel Records Review Board (PRRB) or Board for Correction of Military Records (BCMR), as appropriate.

b. The application may be forwarded through the original rating chain at the officer's option. If the whereabouts of the original members of the rating chain are unknown, officers should submit the application directly to the PRRB or BCMR. Additionally, an officer may forward their application via the officer's current chain of command but is not required to do so and may send the application directly to the PRRB or BCMR.

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 her 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 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.³³

4. The applicant alleged that his OER for the June 1, 2018, through May 30, 2019, rating period was erroneous and unjust because his rating chain violated multiple Coast Guard policies when completing the OER and because his RO used the OER to retaliate against the applicant for negative comments made in a Command Climate Survey. The applicant requested that once the OER is removed from his record, an SSB be convened to review his promotion to LCDR absent this erroneous and unjust OER. 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.³⁴ 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."³⁵ And to be entitled to removal 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."³⁶

5. The applicant has alleged that the PRRB made fundamental errors in its decision to allow the OER to remain in the applicant's record. According to the applicant, the entirety of the OER was tainted with bias and ulterior motives that warranted the OER's removal. The Coast Guard agreed with the applicant and recommended that the OER be removed from the applicant's record and replaced with a Continuity OER. The applicant and the Coast Guard have also

³³ *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).

³⁴ 33 C.F.R. § 52.24(b).

³⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

³⁶ *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).

recommended that the Board order the Coast Guard to convene the necessary Special Selection Boards to review the applicant's record absent the prejudicial OER. For the following reasons, the Board agrees:

- a. Reporting Officer. The record shows that on March 4, 2023, the applicant made a report that he had been subjected to unlawful harassing behavior at the hands of his former Reporting Officer, CDR R. As a result of the report, an investigation was initiated to investigate reports that CDR R had engaged in unlawful harassing behavior of his subordinates.³⁷ Upon the conclusion of the investigation, CAPT P found that a preponderance of the evidence established that the applicant's claims were substantiated. Specifically, CAPT P concluded that CDR R had engaged in harassing behavior that was based on the applicant's race. In her memorandum on the disposition of the investigation, CAPT P stated:

As the newly reported PDH, CDR [R] quickly selected a LT of similar race/ethnicity as CDR [R] to serve as the CID, despite LT [Applicant's] experience as Acting CID numerous times the previous two years. CDR [R] avoided/ignored LT [Applicant] but did not ignore other members in Sector [redacted] Prevention Department. CDR [R] was LT [Applicant's] RO for his last/final OER in [redacted]. On this OER, LT [Applicant's] total of assigned performance dimension marks was 80, 31 points lower than his average total of assigned performance dimension marks on his first three OERs. Finally, when departing Sector [redacted], LT [Applicant's] award was downgraded from a Coast Guard Commendation Medal to a Coast Guard Achievement Medal.

The record shows that as a result of the investigation and of CAPT P's findings, CDR R was issued a negative CG-3307 counseling form and the conduct was reflected on CDR R's subsequent OER. After these events, CDR R retired. As already stated, 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."³⁸ Given that the AHHI investigation concluded that the applicant's RO had treated him prejudicially by avoiding and ignoring him because of his race throughout the reporting period, the Board is willing to presume that this same bias adversely affected the RO's rating of the applicant's performance on the contested OER, particularly his assignment of the Comparison Scale and Promotion Scale marks. Accordingly, the preponderance of the evidence shows that the applicant's RO violated the second *Hary* prong when he used factors to rate the applicant—his race—that had no business being in the rating process.

- b. Supervisor. The applicant's first Supervisor, LCDR P, failed to provide a draft OER for the applicant when he resigned in December 2018, as required by policy.³⁹ The Coast Guard's argument that this error was harmless because LT C was not required to rely on the draft OER is not persuasive. The record shows that a draft OER prepared by LCDR P would likely have had much higher marks and more laudatory comments than the disputed

³⁷ The previous investigation had concluded that the allegations were unsubstantiated.

³⁸ *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).

³⁹ Article 1.A.2.b.10. of PSCINST M1611.1.

OER because LCDR P had previously assigned the applicant significantly higher OER marks. Given that LT C's observance of the applicant's performance was limited to the final five months of the reporting period—and to just 80 days of actual interaction, according to the applicant—the Board will not presume that LT C would have ignored LCDR P's draft OER and so find the error harmless. A draft OER from LCDR P could have cast a different light on the applicant's performance, overcome some of the bias created by CDR R, and resulted in LT C entering higher marks and more laudatory comments on the disputed OER. The Board therefore finds that the applicant has proven by a preponderance of evidence that the disputed OER was adversely affected by a prejudicial violation of the policy requiring Supervisors to provide draft OERs for their subordinates if they depart the unit during the middle of a rating period.

The second Supervisor, LT C, was responsible for assigning the marks in the eighteen performance dimensions on the disputed OER. LT C was of the same race and country of origin as the applicant's RO, CDR R. The record also shows that LT C received the benefit of CDR R's dislike and bias toward the applicant, as evidenced by the fact that LT C was appointed as the division's acting CID and all training and opportunities that would have gone to the applicant went to LT C. At the time of the contested OER, the applicant and LT C were of the same rank and their signal numbers were close enough on the Active Duty Promotion List that they could expect to be competing, and did compete, against each other for promotion to LCDR within a few years. While this did not disqualify LT C from serving as the applicant's Supervisor, it presented a potential conflict of interest for LT C in evaluating the applicant.⁴⁰ Moreover, the Board finds sufficient anomalies in the disputed OER, such as the applicant being marked down for not earning his qualifications ahead of schedule, even though he did earn them on time, and the errors that the PRRB corrected, to conclude that the LT C's preparation of the OER was adversely affected by the lack of a draft OER from LCDR P and possibly other factors that should not have been in the rating process.

6. Commendation Medal. The applicant has alleged that his end of tour medal was downgraded by CDR R from a Commendation Medal to an Achievement Medal. The applicant has requested that his 2019 Achievement Medal be replaced with his 2023 Commendation Medal awarded to him by Vice Admiral L because the Coast Guard does not allow for dual recognition for personal awards and awards that recognize a member for the same acts, achievements, and period of service. Given that the Board has found that the applicant has proven, by a preponderance of the evidence, that his RO engaged in prohibited harassment of the applicant based on the applicant's race and took adverse personnel actions against the applicant as a result of that bias, the Board finds that the applicant's Achievement Medal should be replaced with his 2023 Commendation Medal. In addition, the Commendation Medal should be corrected to say, "(GOLD STAR IN LIEU OF A THIRD)." Accordingly, the Coast Guard should replace the applicant's 2019 Achievement Medal with his 2023 Commendation Medal and correct the language on the certificate for the Commendation Medal to read "(GOLD STAR IN LIEU OF A THIRD)."

⁴⁰ The Board notes that LT C was selected for LCDR while the applicant went on to be twice non-selected for LCDR and is at the heart of his petition to this Board.

7. PRRB Decisions. The applicant has alleged that allowing the PRRB decisions to remain in his record is prejudicial and should be removed. Coast Guard selection boards, however, are not allowed to view either PRRB or BCMR decisions, which are masked when viewed the Coast Guard's various boards selecting officers for promotion, command, and other opportunities. Although the BCMR is, in essence, overturning the PRRB's decisions because of the new evidence of bias, which was not in the record before the PRRB, the PRRB's decisions accurately reflect its deliberations and recommendation, and the applicant has not shown how having the PRRB decisions in his record is erroneous or prejudicial to him.

8. Special Selection Board. Because the Board has found, by a preponderance of the evidence, that the applicant's 2019 OER must be removed from his record as an erroneous and unjust product of his RO's bias and the prejudicial lack of a draft OER from his departing Supervisor, the Board also finds that the applicant is entitled to an SSB for the PY2023 ADPL LCDR selection boards, in accordance with 14 U.S.C. § 2120, and if not selected for promotion by that SSB, he is entitled to an SSB for the PY2024 ADPL LCDR selection board.

9. For the reasons outlined above, the Board finds that the applicant has proven, by a preponderance of the evidence, that his OER for the reporting period June 1, 2018, through May 30, 2019, is erroneous and unjust and should be removed from his record. The applicant has also proven that because of this error and injustice he is entitled to at least one SSB and possible two.⁴¹ Therefore, the Coast Guard should remove the applicant's contested OER from his record, replace it with one prepared for continuity purposes only, and order an SSB to evaluate the applicant's record for promotion for PY2023 promotion cycle. If the first SSB does not select him for promotion, the Coast Guard should convene an SSB for the PY2024 promotion cycle to evaluate his record for promotion.

10. If neither SSB selects the applicant for promotion, no further corrections are warranted. If either SSB selects the applicant for promotion, the Coast Guard should put his name on the next promotion list for appointment to LCDR and, once he is promoted, backdate his date of rank to what it would have been had he been selected for promotion by the original PY2023 or PY2024 selection board, based on his selection by the applicable SSB, and he should receive all due backpay and allowances.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁴¹ *Hary*, 618 F.2d at 708.

ORDER

The application of LT [REDACTED] [REDACTED] USCG, for the correction of his military record is granted as follows. The Coast Guard shall—

- Remove his OER for the period June 1, 2018, through May 30, 2019, from his military record and replace it with a Continuity OER.
- After his record is corrected, convene a Special Selection Board to re-evaluate his record for promotion by the PY2023 ADPL LCDR selection board, and if that SSB does not select him for promotion, convene a second Special Selection Board to re-evaluate his record for promotion by the PY2024 ADPL LCDR selection board. If neither SSB selects him for promotion, no further correction of his record shall be made.
- If either SSB selects him for promotion, place his name on the next LCDR promotion list for appointment to LCDR; once he is promoted, backdate his date of rank to what it would have been had he been selected for promotion by the original PY2023 or PY2024 ADPL LCDR selection board, based on which SSB selected him for promotion; and pay him all back pay and allowances due as a result of these corrections.
- Replace his 2019 Achievement Medal for his tour of duty with his 2023 Commendation Medal and correct the wording on the Commendation Medal to state, “(GOLD STAR IN LIEU OF A THIRD).”

April 17, 2024

[REDACTED] Digitally signed by [REDACTED]
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