

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-021


LCDR (O-4)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on March 24, 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 August 29, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, an active-duty Lieutenant Commander (LCDR/O-4), asked the Board to correct his record by changing his Comparison Scale mark of 4 (the middle mark for the “One of the many high performing officers who form the majority of this grade” section) to a mark of 5 (the highest mark of the “One of the many high performing officers who form the majority of this grade”) on his Officer Evaluation Report (OER) for the August 3, 2020 through April 30, 2021, rating period. The applicant claimed that this change would accurately reflect his performance during the applicable rating period.

The applicant explained that he was assigned to a Civil Engineering Unit (CEU) and was asked to report to the new unit in May 2020, but was unable to report until August 3, 2020 because he was teaching an engineering course over the summer. The applicant alleged that when he did finally arrive at the unit, he was told that he was “the last person to finally show up,” which made him feel singled out, but he did not discuss it with his command.

The applicant stated that upon arriving at the CEU, his Executive Officer (XO) asked him to become the Leadership Advisory Council (LDAC) Chair for their unit. According to the applicant, he told his XO he was not sure if he was interested in the position because he did not want to be chosen to so they could check a box that they had a “token Latino officer.” The applicant claimed that despite his reluctance, he was ordered to become the LDAC Chair. The applicant stated that his role on the LDAC was the only 7 he earned during the applicable rating period and was concerned that it was for something that was not related to a primary duty. The applicant

alleged that he has heard personal stories where people who do diversity, equity and inclusion (DEI) are pigeon-holed into it. To support his claims, the applicant stated that he provided two sentences in his draft OER discussing DEI, but his final OER had three times as much verbiage on the subject matter. The applicant stated that in his opinion, the emphasis on DEI downplayed the impact of his efforts and the results he achieved in fulfilling his primary duties and were counterproductive to his promotion goals. The applicant claimed that he asked his Commanding Officer (CO) to step down as LDAC chair on July 14, 2021 because he felt that being associated with LDAC would continue to have a negative impact on his subsequent OERs.

The applicant stated that as a single parent he voiced the challenges he faced with childcare availability due to COVID-19. The applicant explained that he emailed his XO on August 5, 2020, outlining his childcare schedule and asked to meet with the XO to discuss the details. The applicant claimed that his goals were to be in the office as much as possible because he noticed the rest of the officers were in the office on a regular basis and did not want to be ostracized for working from home. The applicant explained that he emailed his XO as soon as he discovered any changes in his circumstances such as school closures or the cancellation of his childcare. The applicant claimed that on August 25, 2020, he received an email from his XO asking the applicant to provide a bulleted list of all the work he had performed from home. The applicant contended that this was the first time he felt like working from home would not work because he would be treated differently than officers working in the office because he was required to “check in” to ensure he was doing his work.

The applicant explained that he did his best to manage his responsibilities as a single parent and Coast Guard officer. The applicant stated that he believed he was doing a good job until he received an email from his XO on October 13, 2021, wherein the XO claimed that he had to “micromanage” the applicant because he had to direct the applicant to share the applicant’s calendar with him, so the XO could get a better grip on the applicant’s schedule. The applicant alleged that he asked other officers within the unit and no other officers reported having to share their schedules with the XO. The applicant claimed that this interaction with his XO really put pressure on him because it validated his concerns that teleworking was not an option for an officer. The applicant further claimed that his XO would make disparaging comments when he couldn’t find the applicant like, “where is he now.”

The applicant explained another incident that made him feel insignificant at the CEU was during the XO vacancy in the month of July. The applicant claimed that initially he was told that he and another LCDR would be doing a round robin and sharing the duties of XO during the gap, however, during a branch chiefs meeting, he learned that it would only be the other LCDR fulfilling the roles of the XO. The applicant stated that when he brought it up to the CO, the CO told the applicant to work it out with the XO. The applicant felt as though he was purposely left out. The applicant further stated that it was not until he read his XO’s comments in the “Potential” block on his OER that he learned the XO did not believe the applicant possessed the aptitude to be in a command position. The applicant contended that in totality, he did a very good job managing two distinct divisions through a very difficult period caused by COVID-19, personnel shortages, new employees, and poorly performing employees. He stated that there were some challenges to this new position that included learning two different jobs, but his midterm counseling session with the XO did not reveal any instances of subpar performance or any feedback on how to improve.

According to the applicant, his XO told him he was doing a good job and focused the counseling session on the challenges he was having with his employees. The applicant claimed that the feedback he received from his XO revolved around two situations, errors the applicant made while filling out 2021-2022 civilian evaluations and a chaotic phone conference about homeporting two cutters, but at no time was he counseled for subpar performance.

The applicant explained that he submitted a draft OER and an Officer Support Form (OSF) on April 8, 2021, and then verbally asked his XO if he needed anything or had any questions, but the XO stated he did not require anything else from the applicant. The applicant alleged that his counterpart LCDR M was provided an extension to write his OSF and was also emailed by the XO to provide additional comments in his OSF. The applicant also alleged that LCDR M was also counseled in person before the XO departed our unit, but he was provided his OER in an email on Monday June 28, 2021, after the XO had departed the unit. The applicant claimed that he sent his XO an email with outlining his concerns the next day and his XO responded on Wednesday June 30, 2021, responding to the applicant's concerns. The applicant alleged that he had a nervous breakdown in front of his CO after reading the email because it was personally hurtful and mentioned issues that he was never aware of. He stated that he felt blindsided, but what hurt most was the XO pointing out that he should work with the new XO to set goals and meet their expectations. The applicant explained that he felt as if the XO was passing the buck because he did not believe the applicant was worth his time.

The applicant explained that in the XO's email, he outlined the following failures by the applicant:

- The applicant did not complete a required White Paper. However, the applicant stated that he submitted the first draft on April 28, 2021, so any concerns the XO had were outside of the applicable rating period of August 3, 2020 through April 30, 2021. The applicant claimed that he continued to work on the White Paper and submitted the final draft for review in July 2021.
- The applicant failed to homeport two cutters. The applicant stated that while he did agree that the project had been difficult and encompassed many moving parts, he disagreed that the project was on track despite his "lack of complete ownership or engagement." The applicant claimed that he worked extremely hard with many different groups to relocate the two cutters despite many challenges. According to the applicant, the XO's comments were erroneous because his efforts were routinely praised by numerous officials as high as two 3-star admirals.
- The applicant made too many revisions on a required proposal. The applicant alleged that the proposal referred to by his XO had already gone through three branch chiefs and four planners for nearly ten years, but he finished it in the first six months. The applicant claimed that he submitted the proposal for final approval after nearly a decade of rewrites.
- The applicant has a "casual demeanor that does not inspire confidence." The applicant claimed that the only example his XO could give was the XO's perceived unprofessional interaction that the applicant had with Commandant of Cadets.

The applicant alleged that he discussed his OER with his local personnel management office who confirmed to the applicant that one of the most important components of the OER is

the Comparison Scale mark. The applicant claimed that a mark of 4 is not good and will negatively impact his assignment selection and promotion potential. The applicant contended that the disputed OER does not reflect his prior performance record and that had he been counseled that he was not meeting the mark of 5 on the Comparison Scale, he would have done everything he could to prove that he was at least at a 5 on the Comparison Scale.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy on May 20, 2009, and was commissioned an Ensign.

The applicant promoted to Lieutenant Junior Grade (LTJG) on November 20, 2010.

The applicant promoted to Lieutenant (LT) on May 20, 2013.

The applicant promoted to LCDR on July 1, 2020.

On August 3, 2020, the applicant transferred to a CEU as the Real Property Section Chief.

On July 1, 2021, the applicant received his annual OER for the August 3, 2020 through April 30, 2021 rating period. This was the applicant's first OER as a LCDR. The applicant received eleven marks of 5 (on a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), six marks of 6, and one mark of 7. The applicant also received a mark of 4 (middle mark on the "One of the many high performing officers who form the majority of this grade") out of 7 (with 1 being "Unsatisfactory" and 7 being "Best officer of this grade").

VIEWS OF THE COAST GUARD

On September 25, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC explained that the Reporting Officer is responsible for filling out the Comparison Scale section of the OER, and for the disputed OER, the applicant's Reporting Officer and Supervisor were the same. PSC further explained that the Comparison Scale serves not just as a reflection of the performance rendered during reporting period, but also the performance of the Reported-on Officer relative to all other officers of the same grade that the Reporting Officer has known. PSC stated that the Reporting Officer/Supervisor provided amplifying information in their declarations regarding the performance of the applicant compared to that of other officers of that same grade at their unit and other units. PSC cited to Article 4.F.3.e of the Officer Evaluation System Procedures Manual, PSCINST M1611.1C, which states:

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

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

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

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

PSC argued that the applicant provided no evidence that the comments were not completed in accordance with policy and a mark of 4 is supported by the comments made by the Reporting Officer.

Regarding the applicant's claim that a mark of 4 on the Comparison Scale is "not good and will negatively affect my assignment selection and promotion potential," PSC stated that pursuant to policy, the only Comparison Scale mark deemed derogatory would be a mark of 1, which reflects "Unsatisfactory." PSC argued that nothing in Coast Guard policy supports the applicant's claim that a mark of 4 on the Comparison Scale is negative. PSC explained that the applicant disputed OER was reviewed alongside evidence presented by the applicant and it was determined that the applicant's rating chain performed their rating duties in accordance with policy. PSC argued that the applicant failed to provide evidence to overcome the presumption of regularity afforded to the Coast Guard and its officials with respect to the disputed OER and the OER contains no substantive errors. For the reasons outlined above, PSC recommended the Board deny the applicant's request for relief.

To support its application, the Coast Guard submitted the following sworn declaration from the applicant's Reporting Officer who was also the applicant's supervisor, CDR M:

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

1. I presently serve as the Facilities Engineer at Base [redacted]. I have served in this capacity since July 2021. I previously served as the Executive Officer of Civil Engineering Unit [redacted], a role I held from June 2018 to June 2021.

2. I was Lieutenant Commander [Applicant's] direct supervisor as the Executive Officer of Civil Engineering unit [redacted] from the time Lieutenant Commander [Applicant] reported in August 2020 until my departure in June 2021.

3. I stand by my original rating in the comparison scale of a "4 - One of the many high performing officers who form the majority of this grade." Throughout my 19 years of active-duty service, I have interacted with hundreds of Lieutenant Commanders. Over my three years at Civil Engineering Unit [redacted], I directly supervised a total of five different Lieutenant Commanders and completed six ratings on the officer comparison scale as documented in Direct Access. Of those six, I issued a "4" two times, one to Lieutenant Commander [Applicant]. Of the 26 OERs that I have completed, I have issued a "4" four times. Lieutenant Commander [Applicant] represents one of those four officers. I present this as evidence that I have used and will continue to use this mark as afforded to me by the Officer Evaluation System when I deem it appropriate.

4. Given the subjective nature of this rating, it is my opinion that I rated him fairly and objectively when I compared him to other Lieutenant Commanders that I have worked with, both at Civil Engineering Unit [redacted] and other units. Beyond the OER in question, a succinct summary of my opinion of Lieutenant Commander [Applicant's] performance is documented in my 30 June 2021 email (included in Lieutenant Commander [Applicant's] package) where I identified several initiatives where his performance did not meet my expectations. To achieve a rating of 5 or higher, Lieutenant Commander [Applicant] would have needed to complete all assigned tasks and excel in at least some of them.

5. I am saddened to learn of the immense stress that Lieutenant Commander [Applicant] was under during my tenure as his supervisor. I sincerely believe that Lieutenant Commander [Applicant] is a good person who simply had room for professional growth. His parental status and race were not factored into my evaluation of him.

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

Executed this 31st day of May 2023.

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 November 13, 2023.

The applicant refuted the Coast Guard's position and stated that his mark of 4 on the Comparison Scale for the disputed OER does not correlate with his average score of 5.44 in 2020 or the four years adjacent to it.¹ The applicant contended that pursuant to Article 4.E.3.h.2. of PSCINST M1611.1C, which states, "a mark of four represents the expected standard of performance," if a mark of 4 on the Comparison Scale is the "expected standard" and not derogatory, it would statistically represent the middle of a bell curve, but his XO stated in his declaration that he had only given out four marks of 4 in his career and inferred that it's the lowest mark he uses. According to the applicant, this represents the bottom 15% of officers whom he has known in his career. The applicant noted that the XO failed to provide feedback on what he characterized as subpar performance during the applicant's mid-point counseling session, which is mandated by policy so that officers are not surprised by their OERs. The applicant stated that his understanding is that the "true" expected standard of performance for an officer is a mark of 5, which is based off of his 18 plus years of career counseling, advice, and mentorship from officers at every level of experience including those that have sat on promotion panels.

The applicant stated that as he understands it, an average mark of below 5 in the officer Comparison Scale would automatically put him in a category with the lower percentage of officers making Commander (CDR/O-5). The applicant alleged that he was told by a previous board member that the Comparison Scale is very important in separating the "promote" and "do not promote" candidates.

The applicant alleged that some of the comments made by his XO during his counseling sessions with the applicant, namely discussing performance that occurred outside of the applicable rating period. The applicant stated that while his OER did not include explicit mention of those comments, this was the data that was used to rate him. The applicant pointed to paragraph 4 from his XO's declaration that noted the applicant's overall performance did not meet his expectations. However, the applicant stated that section 10 of his letter to the board describes that two of his

¹ The applicant provided a table of his average OER marks from 2019 through 2023, however, this table does not prove or establish error or injustice with regard to the disputed OER. Accordingly, for clarification and efficiency, this table was not recorded here.

comments in the phone counseling, the White Paper and bearing a casual demeanor with a senior officer, took place outside of the rating period.

APPLICABLE LAW AND POLICY

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (September 2013), provides the following guidance on the Officer Evaluation System (OES):

Article 5.A.1.a. Purpose. This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers. The OES has been designed to:

- (1) Provide information for important personnel management decisions. Especially significant among these decisions are promotions, assignments, career development, and retention,
- (2) Set performance and character standards to evaluate each officer,
- (3) Prescribe organizational values by which each Coast Guard officer can be described, and
- (4) Provide a means of feedback to determine how well an officer is measuring up to the standards.

...

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.

...

Article 1 of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C (December 2016), provides the following guidance on the role of the rating chain in the officer evaluation process:

...

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 4.B. Prohibited Comments.

...

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

Article 4.E.2. Section 3, Evaluation.

...

f. For each evaluation area, the Supervisor reviews the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor must take care to compare the officer’s performance and qualities against the standards — not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form. Refer to Table 4-2 below and Chapter 19 in determining the appropriate mark to assign to each performance dimension. Inflationary markings dilute the actual value of each evaluation, rendering the OES and the OER itself ineffective.

MARK	MEANS THE MEMBER CONSISTENTLY
1	(Derogatory) – Met all the written performance standards in the “2” level and the rater considered the impact severely detrimental to the organization or to others.
2	(Below standard) – Met all the written performance standards in this level.
3	Did not meet all the written performance standards in the “4” block.
4	(Standard) – Met all the written performance standards for this level and none in the “6” level.
5	Met all the written performance standards in the “4” level and at least one of those in the “6” level.
6	(Above Standard)– Met all the written performance standards for this level and did not exceed any of them.
7	Met all the written performance standards in the “6” level and exceeded at least one of them.

...

Article 4.E.2.h. Comments Required for CG-5310A and CG-5310C.

1. In the “comments” block following each evaluation area, the Supervisor includes comments citing specific aspects of the Reported-on Officer’s performance and behavior. Well-crafted comments may apply to more than one dimension. Decreased comment space will require concise yet readable supporting verbiage and allow more flexibility to comment on significant performance. The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period.

2. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of 1, 2, 3, and 7. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six “above standard” block.

...

Article 4.F.2. Section 5, Comparison, Promotion, and Rating Scales.

...

a. The Reporting Officer fills in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has

known. [NOTE: This section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category.] The visual graphic shows expected (not required) distribution.

...

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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

3. The applicant alleged that his OER for the August 3, 2020 through April 30, 2021 rating period is erroneous and unjust because his mark of 4 on the Comparison Scale does not accurately reflect his performance during the applicable rating period. The applicant further alleged that while his OER does not specifically cite to performance that took place outside of the rating period, he was evaluated for performance that took place outside of the applicable rating period, making the disputed OER erroneous and unjust. 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.² 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."³ 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.⁴

4. The applicant alleged that the mark of 4 that he received on the Comparison Scale was erroneous and unjust. According to the applicant, this mark does not accurately reflect his performance during the applicable rating period and the Comparison Scale mark should be raised to a 5. For the following reasons, the Board finds that the applicant has not proven that the mark of 4 was erroneous or unjust:

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

- a. First Hary Prong. Here, the applicant has only provided as evidence his own subjective interpretation and defense of his performance during the applicable rating period. The applicant has not pointed to one comment in the contested OER that was a misstatement of significant hard fact. As stated in *Arens*,⁵ to be entitled to relief, the applicant cannot “merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense.” Other than his own subjective opinions as to the quality of his work, which the Courts have already ruled is not enough,⁶ the applicant has provided nothing to support his claims that his contested OER was erroneous or unjust. He has provided a lot of commentary as to the struggles he faced and his subjective opinions that he was treated differently for being a single parent and having to telework, but no actual proof that the evaluations and marks he received from his chain of command were not accurate and fair. The applicant’s subjective opinion that his work exceeded that mark of 4 when compared to other officers of the same grade does not make it so. Furthermore, this was the applicant’s first OER as a LCDR and was being evaluated based on the higher, tougher standards of a LCDR not a LT. The fact that he received better OERs before and after is not surprising nor is it persuasive evidence that the disputed OER is erroneous or unjust.
- b. Second Hary Prong. In addition to failing to prove that the first *Hary* prong was violated, the applicant also failed to prove that his supervisor used factors to evaluate him that had no business being in the rating process. Although the applicant alleged that his supervisor treated him differently because he often had to telework due to childcare issues, other than his own statement, the applicant provided no additional evidence to substantiate his claims of bias or that this bias in some way infected the applicant’s evaluation. The applicant also claimed that his command required him to sit as the Chair of LDAC in order to have a “token Latino,” but provided no evidence that his rating chain exhibited bias that was based on a protected status, such as the applicant’s race. Therefore, the Board cannot conclude that the disputed OER was adversely affected by illegal bias.
- c. Third Hary Prong. The applicant attempted to support his claims of error by arguing that his supervisor could not prove that he provided him any negative feedback during the rating period, but the fact that they did not officially document the applicant’s performance deficiencies is not uncommon, as senior officers often deliberately avoid providing official counseling in an officer’s record because they know that it can have a negative impact on an officer’s career. Nor is documented negative feedback required by policy. Article 1.A.2.[5]. of the Officer Evaluation Systems Procedures Manual, COMDTINST M1611.1C, only requires that the Supervisor “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.”⁷ It is the applicant’s responsibility to ensure he received counseling, whether formal or informal. At

⁵ *Id.*

⁶ *Hary*, 618 F.2d 704, 708 (Ct. Cl. 1980).

⁷ Additional guidance on performance feedback can be found in Article 1.A.2.[6] of COMDTINST M1611.1C, which states the Supervisor must, “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.” Again, there is no requirement that the counseling or feedback be in writing.

no point is the counseling or feedback required to be in writing except for the formal submission of the OER form. Moreover, the applicant did not receive “negative” marks as argued by the applicant, but received a mark of 4. Article 4.E.2.h.2. of PSCINST M1611.1C (December 2016), states that a mark of 4 represents the expected standard of performance, and supporting comments are only required for marks of 1, 2, 3, and 7. Because the applicant received only one mark of 7, his supervisor was only required by policy to support these marks. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his supervisor failed to follow applicable policy when he rated the applicant and supported their marks with comments required by policy.

Finally, the applicant failed to prove a violation of a specific statute or regulation. The applicant alleged that his supervisor violated Article 4.B.11. of the Officer Evaluation Systems Manual, PSCINST M1611.1C, which states the rating chain shall not, “Discuss Reported-on Officer’s performance or conduct which occurred outside the reporting period...,” when they evaluated him on a White Paper and bearing a casual demeanor with senior officials, both of which took place outside of the applicable rating period. However, the applicant failed to submit any evidence, other than his own verbal claims, that he was rated on performance that took place outside of the rating period. The applicant himself admitted that there is no comment contained within the OER that indicates that he was rated for performance the occurred outside of the rating period, but stated it can be inferred by the supervisor’s comments in response to his request for counseling. In that same email, the applicant’s supervisor specifically stated he evaluated the applicant “using [his] performance and the input [he] provided from this period and this period only.” In the same email, the supervisor separately discussed the White Paper and the applicant’s casual demeanor in the context of opportunities to improve in the future. Therefore, the applicant has failed to prove, by a preponderance of the evidence, that his supervisor violated the third *Hary* prong when they evaluated him.

5. The applicant made numerous allegations with respect to the actions and attitudes of various officers. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.⁸

6. For the reasons outlined above, the applicant has failed to show that his April 30, 2021 OER contained a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a prejudicial “violation of a statute or regulation.”⁹ Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the OER should be removed from his record or that his marks should be adjusted. His requests for relief should therefore be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ 33 C.F.R. § 52.24(b); see *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board’s ultimate disposition”).

⁹ *Hary*, 618 F.2d at 708.

ORDER

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

August 29, 2024

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