

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-054


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 28, 2023, 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 February 20, 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, an active-duty Lieutenant Commander (LCDR/O-4), requests the Board to correct his military record by removing his Officer Evaluation Report (OER) reporting from January 25, 2021 to April 30, 2022 from his military record and replace it with a Continuity OER. The applicant asserts that the current OER is erroneous, improper, and unjust towards the applicant. He has failed three (3) promotion boards each having reviewed the OER in question and seeks a special selection board to convene to consider his promotion eligibility.

SUMMARY OF THE RECORD

The applicant asserts that he should have received two distinct OER's; one covering January 25, 2021 through August 1, 2012 and another from August 2, 2012 through April 30, 2022 to accurately reflect his performance at two different chain of commands due to high turn-over at his unit forcing a new Reporting Officer (supervisor) to oversee the applicant over this course of time. Instead, the applicant received one ongoing OER spanning January 25, 2021 through April 30, 2022. When his second rating chain submitted an OER for the applicant's review the applicant requested that his prior supervisor be included in the marking process. His current rating chain agreed and reached out to gather marks and feedback to ensure both prior and current supervisors could include feedback on the applicant's OER.

The applicant shares that the previous unit (CG-MER) had high turn-over and extreme fatigue given the gaps and turn-over which led to the mishandling of his OER. It was not one person or chain of command, as it appears the position swapped so frequently that the unit as a whole failed to follow proper procedure in issuing an OER for the applicant upon departure. The applicant alleges at least five (5) different supervisors at varying times were responsible for reporting on the applicant for his OER. Some retired and others were not contacted for feedback for the applicant's OER until the applicant requested their inclusion. The feedback from the past supervisor was incorporated into his OER to cover the full span of time. Two sections of verbiage were adjusted given this new feedback, but no numerical marks were changed.

On July 18, 2022, the Commander Promotion Board convened, and the applicant failed to be selected for promotion. The applicant asserts that his failure to be selected is due to the improper OER. Each chain of command is required to comply with the procedural guidance provided by COMDTINST 1000.3A. Specifically the applicant alleges, an off-cycle regular OER (Detachment/Change of RO) should have been completed on August 1, 2021, but command failed to comply. Each new Reporting Officer should have provided notes on the applicant's performance to their relief, but this did not occur. Because his chain of command failed to follow Coast Guard policy the applicant claims error. The applicant asserts that Coast Guard policy requires he have two separate OER's with each proper chain of command reporting on. The applicant alleges this adversely affects his military record and opportunity for advancement to Commander.

THE APPLICANT'S ALLEGATIONS

The applicant alleges error in the issuance of a single OER written by one rating chain over a period of time where the applicant served two different rating chains. The applicant has not been selected for advancement to Commander after sitting for a review board in 2022, 2023, and 2024, which all three review boards reviewed the alleged errored OER. At this time, the re-creation of two separate OER's from previous supervisors would still not provide justice to the applicant because of the harm of time. The only method to correct the erroneous OER is for his record to be corrected by replacing the current OER with a Continuity OER and submitting this corrected record to a Special Selection Board (SSB). The applicant should be considered for Commander by the SSB and, if selected, be awarded backpay and allowances in that grade as if he had been selected during the regular promotion board in 2022.

VIEWS OF THE COAST GUARD

On December 5, 2024, a Judge Advocate (JA) 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 PSC.

The JA argued that the applicant failed to provide sufficient evidence to meet the standard for the correction of an OER. The JAG argued that under *Hary v. United States*,¹ the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective

¹ *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

in some sense. The applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.²

The JAG asserts that this was a shared error in which the applicant was equally required by Coast Guard regulation to request an OER from his command, which he did not do prior to his Reporting Officer rotating positions. The inclusion of the requested supervisors' remarks was completed for the applicant and reflective in his OER. The applicant received an improved OER from the inclusion of past and current supervisors to create the one OER. Because the applicant is viewed to have received a benefit, the JAG argues there has not been an injustice nor should the applicant's OER be removed from his record as they reflect with most timely accuracy the evaluation of the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The applicant was provided the Coast Guard Advisory Opinion, and an opportunity to respond by February 9, 2025.

On February 10, 2025, the applicant submitted a response to the Advisory Opinion. He restated his concerns for the Coast Guard not complying with established and promulgated policy, which in doing so violates recognized law. The applicant submitted a FOIA request and asserts the case cannot be concluded until this request is fulfilled. The request is to know the precise date of a rating chain member's starting period to better gauge her appropriateness in participation in the rating chain. The applicant requests that the Board grant a continuity OER and a removal of the previous OER to repair his perceived injustice of not receiving the two separate OERs from each chain of command as required by Coast Guard regulations. Additionally, the applicant seeks three (3) special selection boards because the applicant has been rejected by three (3) promotion boards who have viewed the current OER in question. The applicant asserts this would give him the appropriate opportunity to be considered for promotion.

APPLICABLE LAW AND POLICY

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (Jan. 4, 2018), provides the following guidance on the Officer Evaluation System (OES):

Section 5.A.1 Purpose. The Officer Evaluation System documents and drives officer performance and conduct in accordance with Service values and standards. This information is used to support personnel management; primarily selection boards and panels, retention, and assignments.

² *Id.*

Section 5.C.2. All Reported-on Officers must be counseled on their performance during the reported period. The Reported-on Officer is responsible to ensure this session takes place and is documented.

Section 5.E.3.a. Officers must receive this OER when their RO detaches or changes in the rating chain and more than the following number of days have elapsed since the ending date of the last regular OER:

(2) ADPL and IDPL Annual. 184 days.

Section 5.E.9. Continuity OER. This OER may be submitted in cases where full documentation is impractical, impossible to obtain, or does not meet OES goals. A continuity OER is not an occasion for report, and may only be submitted for a reason in Articles 5.E.2 to 5.E.7. of this Manual. (This includes when there has been a change in Reporting Officer).

The Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1D (December, 2021), provides the following policy and standards for OER's:

Chapter 12. Continuity OERS.

12.B. Function of the Continuity OER

1. The Continuity OER is used to ensure that all days of commissioned service are covered by OERs, to close out the end of commissioned service, and for judicial or administrative adjudications.
2. A Continuity OER can be used to implement judicial and administrative adjudication. The appropriate OER form revision that was in effect on the end-of-period date is used. Cite the current Continuity policy as per Reference (a) in Section 2, Description of Duties.

COMDTINST M1000.3 also establishes Coast Guard policy for Special Selection Boards:

6.B.13.d. Convening Authority for a SSB

Commander (CG PSC) shall be the convening authority for all officers eligible for consideration per 14 U.S.C. § 263.

6.B.13.e. Basis for convening a SSB

SSBs may be convened pursuant to 14 U.S.C. § 263 to consider or reconsider commissioned officers or former commissioned officers for promotion when one or more of the following occur:

- (1) An officer was not considered from in or above the promotion zone by a regularly scheduled selection board because of administrative error.

- (2) The Secretary determines that a selection board that considered an officer from in or above the promotion zone acted contrary to law or made a material error.
- (3) The selection board that considered an officer from in or above the promotion zone did not have before it some material information required to be presented to the board by Coast Guard policy.
- (4) The Coast Guard Board for Correction of Military Records (CG BCMR) or a federal court directs a SSB be convened.

6.B.13.f. Prohibition for convening a SSB

SSBs shall not be convened for the following reasons:

....

- (5) The convening authority determines that the error in the officer’s record was immaterial or could have been discovered and corrected prior to board convening.
 - (a) It is the officer’s responsibility to review his or her record before the board convenes and take reasonable steps to correct any errors or notify the board, in writing, of possible administrative deficiencies.
 - (b) The omission of letters of appreciation, commendation, or other commendatory data or awards of the Meritorious Service Medal and below from an officer’s record does not constitute grounds to initiate SSB action under this Article.

To prove an error or injustice the applicant must “demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.” *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

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. 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).

2. The Board may correct any military record of the Coast Guard when necessary to correct an error or remove an injustice.³ Error means either legal or factual error.⁴ Injustice, when not also error, is treatment by the military authorities that shocks the sense of justice but is not technically illegal.⁵ 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 record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ 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."⁷

3. The gravamen of the applicant's allegation of error is that he was issued one OER for a lengthy rating period (January 25, 2021 – April 30, 2022), which he claims should have been divided into two separate OER rating periods: January 25 – August 1, 2021, and August 2, 2021 – April 30, 2022. The Board notes that the Coast Guard's response acknowledges that his allegation of error is meritorious, describing it as a "shared failure between the [applicant] . . . and the rating chain to adhere to policy." Neither the applicant nor the Coast Guard dispute that, absent an exception to policy, the applicant was required to receive a Change in Reporting Officer OER for the period of January 25 – August 1, 2021.

4. While the Board acknowledges that the applicant had a responsibility to alert the rating chain to the need to execute an OER through August 1, 2021, his rating chain also failed to identify this requirement and either (1) execute an OER, or (2) request an exception to policy pursuant to paragraph 5.G of COMDTINST M1000.3A and provide draft OER comments as required by paragraph 1.A.3.b.8 of PSCINST M16112.1D. Simply doing nothing when the applicant's Reporting Officer changed in August 2021 was not an option. While the applicant had a shared responsibility for this failure, he alone has been prejudiced as a result. Under *Hary vs. United States*, the applicant has demonstrated a clear violation of specific objective requirement of statute or regulation by the Coast Guard. The Board finds that the failure of the Coast Guard to execute a Change of Reporting Officer OER for the period of January 25 – August 1, 2021 constitutes error for which the Applicant is entitled to relief.

5. As the applicant correctly points out, an OER may not "[d]iscuss Reported-on Officer's performance or conduct which occurred outside the reporting period . . .," pursuant to paragraph 4.B.12 of PSCINST M1611.1D. Applicant then lists seven remarks in his OER that reference events occurring outside the August 2, 2021 – April 30, 2022 reporting period. Inclusion of these remarks in an OER covering that period would constitute error.

³ 10 U.S.C. § 1552(a); 33 C.F.R. § 52.2(a).

⁴ *Sawyer v. United States*, 18 Cl.Ct. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577 (Fed.Cir.1991).

⁵ *Id.*

⁶ 33 C.F.R. § 52.24(b).

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

6. Removing the report in its entirety is appropriate to comply with Coast Guard policy. This may be controversial as the Coast Guard rightfully asserts the responsibility of the member to participate in the proper execution of his OER. It is also acknowledged that the applicant remained silent and compliant with this alleged error up to and until he failed to advance. The Applicant does not make any allegation, besides the comments he identifies not being observed by the listed Reporting Officer, that the report was improperly prepared or that the marks were not reflective of his performance during the adjusted rating period. In fact, the Applicant states that he received “continuous feedback” from his rating chain during that period. The second rating chain considered his performance during the initial period, spoke to the previous rating chain, and made adjustments to the qualitative language in the OER based on the prior chain’s feedback. The changes appear to have accrued only to the applicant’s benefit. It is apparent there was not an injustice towards the applicant in this case, but a procedural error of which the applicant may now assert to receive review by the SSB.

7. When considering whether more relief may be warranted, the Board observes that the Applicant appears to be arguing inconsistently. While this OER was being prepared, he provided comments to his rating chain and stated that he “wanted to ensure you both have full visibility of my work and performance” for the period before their arrival. While it is not clear from the record, it appears that some of the comments the Applicant now identifies as improper were either provided by him directly or at his request, or at least were not objected to by the applicant at the time of the report. At no point in the preparation of that report did the Applicant allege that the reporting period was erroneous or ask that his previous conduct not be considered; to the contrary, he asked that his current rating chain consult with the prior one and include his prior conduct in the OER. When considering an appropriate remedy for the Applicant, the Board is cognizant that the OER he ultimately received was, in its qualitative language, likely more favorable than the Applicant would have received if the rating chain was limited to assessing the August 2021 – April 2022 time period.

8. This Board finds, being bound by established law and the requirements to follow procedural guidelines, that the applicant be granted some relief. Despite the applicant’s professional failures to adhere to the guidelines to prevent this error, there are numerous senior members who should have also worked to avoid this error. For this reason, the Board will grant relief to include a Continuity OER, removal of the OER in question, and receive an SSB.

9. This Board will not, however, direct the Coast Guard to convene three (3) SSB’s as the applicant requests. The error in the applicant’s record – for which this Board is granting relief – likely could have been discovered and corrected prior to the promotion board convening. Coast Guard policy is clear that the applicant should have received an evaluation covering the period of January – August 2021. The applicant never alerted his leadership to this fact, either at the end of that rating period or when his April 2022 OER was being prepared. During the prior three years of promotion boards (2022, 2023, and 2024) the applicant does not notify the promotion board of an error in his file and instead proceeds with the promotion board, while at the same time seeking a Continuity OER from the BCMR. The applicant could have notified the Coast Guard prior to any of these three boards that the error that he openly claims to the BCMR exists but fails to do so choosing to instead sit before the promotion board with his file to include the errored OER. For this reason, the applicant now receiving a Continuity OER, which creates a substantial

change in his record may receive a single SSB. However, the Board does not find it within the interest of justice to order numerous opportunities for the applicant to appear before an SSB.

10. In ordering an SSB, this Board recognizes the prohibition placed on convening an SSB by COMDTINST M1000.3A is clearly aimed at preventing in allowing a member to sit before an SSB for an error they knew or should have known but failed to take steps to correct. However, as previously discussed, the applicant relied on his leadership who also contributed to this errored OER. The applicant spoke up to his rating chain to request input from his past supervisor, which should have triggered their awareness of an error and an effort to assist in correcting the error in preparation for future promotion boards. Instead, the applicant's leadership, while helpful in including all comments from current and previous rating chains to complete the OER in question to aid in improving the applicants OER, did so outside of Coast Guard policy and thus created an OER in error. In short, the applicant has shown that his OER was created in error, and thus convening an SSB to review the new package of the applicant to now include the Continuity OER is appropriate to remedy the applicant's harm.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of Lieutenant Commander [REDACTED], USCG, for correction of his military record is granted some relief. The Coast Guard shall remove the applicant's OER covering the marking period of January 25, 2021 to April 30, 2022 from his military record and replace it with a Continuity OER. The Coast Guard will convene a Special Selection Board (SSB) for the applicant utilizing his new record with the removal of the erroneous OER and review of the replacing Continuity OER. The Coast Guard should follow their regulations and procedures following the completion of the applicants one (1) Special Selection Board.

February 20, 2024

