

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

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Application for the Correction of  
the Coast Guard Record of:

BCMR Docket No. 2015-020

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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on January 29, 2015, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 6, 2015, 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, a [REDACTED] in the Coast Guard Reserve, asked the Board to remove from his record an Officer Evaluation Report (OER) covering his service from July 5, 2011, to June 15, 2012, and to replace it with a Continuity OER or an OER containing "Not Observed" in its entirety. He stated that this OER is erroneous and unjust because he was injured and not fit for full duty (NFFD) throughout the reporting period and because his commanding officer (CO) was biased against him. The applicant argued that because he was injured throughout the reporting period, he should have received an OER prepared for continuity purposes only with no substantive marks or comments.

The applicant also requested that his non-selection by the promotion year 2015 commander (PY2015 CDR) selection board be removed from his record, and that his record be placed before the promotion year 2016 commander (PY2016 CDR) selection board as an in-zone officer. Additionally, if he is selected for promotion by the PY2016 CDR board, the applicant asked that his CDR date of rank be backdated to the date he would have received if he had been selected by the PY2015 CDR board. The applicant also asked the BCMR to assign him to a Selected Reserve (SELRES) billet within reasonable commuting distance or to authorize him to "Drill for Points Only" at Sector [REDACTED]

*Allegations About Medical Conditions*

The applicant alleged that prior to the OER evaluation period, he suffered three separate deployment-limiting injuries as a result of being mobilized for Deepwater Horizon (DWH) response operations. The applicant alleged that on July 5, 2011, he was demobilized from DWH response operations, but remained on Active Duty for Operational Support of the Active Component (ADOS-AC) Medical Hold<sup>1</sup> orders assigned to his SELRES unit. He alleged that he was never returned to a fit for full duty status and/or released from doctor's care during the OER period. The applicant further alleged that for the first five months of the OER period, he was undergoing invasive surgical procedures and extensive rehabilitation, and remained in an NFD status either on convalescence leave or was rendered completely incapacitated, sick in quarters, or severely restricted in the ability to perform as directed by his surgeon and the Coast Guard medical staff.

The applicant alleged that on December 16, 2011, Reserve Personnel Management (RPM) and his Coast Guard Primary Healthcare Provider (PHP) demobilized him from ADOS-AC Medical Hold and returned him to SELRES in a NFD status. The applicant alleged that he was placed under a Notice of Eligibility (NOE)<sup>2</sup> for medical benefits on this date as well.

The applicant claimed that while he was on NFD status, he offered to perform limited Reserve Inactive Duty for Training (IDT) drills but his rating chain was not receptive. The applicant claimed that his rating chain was fully aware of his NFD status, but at no time during the OER period was he provided an alternative drill schedule that took into consideration his medical limitations, restrictions, and rigorous medical treatment schedule. The applicant claimed that he received orders for IDT drills for the FY12 schedule and was told by a LCDR supervisor that failing to attend any weekend drill would be counted as an unexcused absence and documented as failure to participate.

The applicant alleged that his PHP decided to conduct rehabilitation of the three injuries one at a time. The applicant alleged that on January 25, 2012, he met with his CO to discuss his concerns about his ongoing medical treatment, about not having an assigned job at the unit, and about how these issues were preventing him from contributing to the mission. The applicant claimed that he requested the presence of the unit's Executive Officer (XO) because at a meeting on May 10, 2011, the CO had physically threatened the applicant, intimidated him, spit on him, and demeaned him. The applicant claimed that he specifically raised concerns about the OER

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<sup>1</sup> Article 6.H.2. of the Coast Guard Reserve Policy Manual (RPM), COMDTINST M1001.28B, sets forth the regulations for a Medical Hold. It reads, "[w]ith the approval from Commander (CG PSC-RPM) and members consent, a member may be recalled to or retained on active duty for the purpose of receiving medical/dental care and treatment until the member is determined FFD or the member is separated or retired as a result of a PDES determination." Article 6.H.2.e. reads, "Med Hold orders may be appropriate when a reservist in a qualifying duty status suffers an injury or illness of such severity the injury or illness cannot be adequately treated with a NOE. As the BIA, Commander (CG PSC-RPM) determines whether a member is placed on Med Hold or provided a NOE, based on the extent and care required for the injury, illness or disease."

<sup>2</sup> Article 6.I. of the RPM states that "[an] NOE for authorized medical/dental treatment is issued to a reservist following service on active duty or inactive duty to document eligibility for medical/dental care as a result of an injury, illness, or disease incurred or aggravated in the [line of duty]. . . . The command must either schedule the member in a limited duty status for IDT or reschedule drills for future dates when the member is FFD."

and whether or not his medical issues and restricted capacity would be negatively perceived by the rating chain and/or would negatively impact his evaluation.

The applicant alleged that on March 10, 2012, he received a revised unit Reserve Organization Chart from his supervisor. The applicant claimed that his supervisor explained that a new position of Readiness Officer was created to “shut him up.” The applicant claimed that block 2 of the OER is misleading because the reader is led to believe that the titles, associated duties and management of personnel were available and afforded to him during the entire 346 days of the OER period, when in fact he did not receive his new position until 249 days into the OER period when there was only one more IDT drill day prior to the end of the OER period.

The applicant alleged that on March 15, 2012, he submitted his OER input to his rating chain outlining his activities and medical rehabilitation and a draft OER reflecting marks of “Not Observed.” The applicant claimed that RPM-1 instructed him that a “Not Observed” OER was warranted and appropriate for his situation. The applicant alleged that his rating chain refused to accept his draft submission, which is evidence of the rating chain’s abuse of power. However, the applicant stated, that it became clear that his rating chain fully intended to perform a complete OER evaluation on him as if he were FFD, even while the applicant had been told by RPM-3 that he was exempt from performing any type of duty while NFD.

The applicant alleged that on March 16, 2012, the XO forwarded a memorandum from the CO that documented their January 25, 2012, meeting. The applicant claimed that CO had written the self-serving memorandum to undermine his legitimate concerns.

The applicant alleged that on March 26, 2012, he was deemed FFD in relation to his right arm by his PHP, but that he was not FFD in relation to his ongoing medical treatment for his right knee and worsening abdominal issues. The applicant explained that on May 23, 2012, he was treated at a medical facility for severe abdominal pain. Subsequently, he was diagnosed with an inguinal hernia and an abdominal tumor and scheduled for surgery at the first available opening, which was July 3, 2012.

The applicant alleged that on June 9, 2012, he was informed by his rating chain that his OER evaluation period had been extended to June 15, 2012, the date his Reporting Officer was leaving the unit, and so he should submit additional OER input for the period of extension. The applicant stated that he once again submitted a draft OER with all “Not Observed” marks.

The applicant argued that the marks on the OER when compared with his previous OERs reflect a deviation from the norm that can only be explained by his medical status and the bias and injustices overseen and controlled by his CO.

### ***Allegations About Disqualification of CO from Rating Chain***

The applicant alleged that his CO should have been deemed disqualified from serving on his rating chain. He alleged that on May 10, 2011, while serving active duty for DWH operations, his CO made him drive four hours to his office regarding a farewell e-mail the applicant had sent to all members working on DWH operations. The applicant claimed that at the meeting the CO invaded his personal space and screamed at him to such an extent that spit from his mouth sprayed on his face and on his arm. The applicant claimed that his CO screamed “Are you

stupid?” and “How the hell did you get promoted to LCDR?” at him. The applicant claimed that he was extremely uncomfortable and asked that another officer be present. The applicant claimed that he was left alone for 40 minutes before being rejoined by the CO and a captain, who would later be the senior officer on the promotion year 2015 CDR selection board that did not select him for promotion. The applicant claimed at the end of the meeting, the CO laughed at him and informed him that he was going to be the CO of the unit to which the applicant was being transferred on medical hold.

The applicant alleged that the CO also harbored resentment against him because he challenged the departure OER that he received for his work on DWH operations. The applicant argued that regulations and prior BCMR cases have found that a personal conflict disqualifies a member from the rating chain. The applicant alleged that he immediately lodged an objection to the biased rating chain in the OER Reply.

The applicant argued that the inclusion of the disputed OER in his record clearly prejudiced him before the PY2015 CDR selection board and that it is not unlikely that he would have been promoted had the OER not been present.

### *Applicant's Evidence*

In support of his allegations, the applicant submitted copies of many documents, including the following:

- A copy of the decision from PRRB Case No. 005-13, decided July 29, 2013, in which the PRRB denied relief for the applicant's claims that the OER contained major administrative and substantive errors and that the rating chain erroneously marked applicant as if he were in FFD status when he remained NFD throughout the evaluation period. The PRRB granted relief only by changing the word “drills” to “drill” in Block 5 and by removing the word “devil's” from the phrase “devil's advocate” in Block 4 because the applicant found the origin of the phrase offensive in a religious context. No further relief was granted.
- A copy of an email chain between the applicant and a LT at PSC-RPM-1 dated from May 16-17, 2012. The email discusses OERs that were erroneously submitted to the wrong personnel offices. Regarding the OER in dispute, the LT wrote, “Per M1000.3 Article 5.A.4.c, this OER may be marked “not observed” if the command feels it has had insufficient information to provide a mark or if observations are believed inadequate to render a judgment.”
- A copy of Standard Travel Orders, which show that the applicant was on ADOS-AC medical hold orders for the period of July 5, 2011, to December 15, 2011.
- Physician's reports and memoranda, which are included in the summary of the record below.
- A copy of the unit Reserve Member IDT orders for FY2012.
- A copy of an email from the applicant to his XO dated March 15, 2012. The email submitted by attachment the applicant's OER input. The description of duties on the attached draft OER reads, “Members primary duty was to rehabilitate, attend all appointments, keep supervisor advised and become deployable. Secondary duty was to perform limited administrative duties as available. IDT drill Scheduled/Attended: 23/23; ADOS-AC: 163 days.” The applicant entered marks of “Not Observed” for all of the performance categories.
- A copy of a memorandum from the CO to the applicant dated March 10, 2012, which summarizes the January 25, 2012 meeting between the applicant, CO, and XO. The CO charac-

terized the applicant's attitude as consistently argumentative and combative. The CO wrote, "in no circumstance did I intentionally 'spit on you' or demean you in any way. . . . I do not want to aggravate this issue in any way and will limit my direct contact with you. . . . While attempting to record the conversation without our knowledge or consent, you immediately assumed a combative and argumentative attitude, repeatedly making baseless accusations without first taking the time to ask for the facts or an explanation."

- The unit Reserve Organization Chart attached to an email from the applicant's supervisor. The applicant's name is typed under the title Readiness Officer.
- The applicant's second OER input with all performance categories marked "Not Observed."
- ALCGRSV 031/14, which announced the PY2015 IDPL CDR selection board to be convened on July 14, 2014. The applicant was listed as a candidate for promotion.
- A copy of a memorandum from the applicant to the PY2015 IDPL CDR selection board dated June 30, 2014, in which the applicant described his many accomplishments.
- A copy of ALCGPSC 124/14 dated September 11, 2014, which announced the selections of the PY2015 IDPL CDR selection board. The applicant was not selected for promotion.
- A farewell email dated May 8, 2011, which the applicant sent out after the Coast Guard decided not to extend his active duty assignment. The copy the applicant provided does not show the names or email addresses of the recipients. In this email, the applicant included four substantial paragraphs describing his accomplishments, his expertise, his 110% effort, and his utmost integrity. He noted that "[i]n the face of difficult and often trying circumstances, [his] duties have involved significant and substantial interaction with command structure, federal and state authorities, the responsible party and its contractors, elected officials and the general public." He also wrote that just three days after the team's last meeting, he was "thanked for all of [his] hard work and contributions to the response and then official notified that [his] orders would come to an end" and that "someone with 'fresh eyes' could make important decisions." His email was then replied to by a city mayor on May 9, 2011, who wrote, "We finally have a meeting where the Coast Guard was truly our advocate and this occurs. Any clue as to who made this decision and why? I am stunned and disappointed. He told us this could possibly happen, who's [sic] toes did he step on?" The mayor sent that reply to more than ten others, some of which had house.gov email addresses. The applicant's CO responded to the email on May 10, 2011. He wrote, "Please make arrangements to meet with me to discuss this issue, in person – here in . . . today. I can be here after hours if required. I am VERY CONCERNED about how this was presented to your branch and need to have a face to face discussion with you ASAP."
- A copy of the decision of the Personnel Records Review Board (PRRB) on his challenge to his OER, which is summarized below.
- A copy of the Board's decision in BCMR Docket No. 2004-159, in which the Board granted relief to a lieutenant in the Reserve who alleged that a personal conflict should have disqualified his supervisor from serving on his rating chain for an OER. The conflict arose from the lieutenant reporting that his supervisor had elicited a bribe from a civilian entity submitting an application to the Coast Guard for review.

The applicant concluded by arguing that providing a complete OER under the aforementioned circumstances was unfair, prejudicial, an abuse of discretion, and an injustice on the part of his rating chain. Additionally, he argued that the marks on the disputed OER when compared with previous OERs reflected a deviation from the norm that can only be explained by his medical status and the inclusion of his biased CO on his rating chain. He argued that the language

used on the OER is repetitive, and evidence that his rating chain had insufficient information and observations to perform a complete evaluation. Finally, he argued that the inclusion of the biased OER in his record before the PY2015 CDR selection board was prejudicial to him. He also asked to be reassigned from the IRR to a SELRES billet within a reasonable commuting distance or to be allowed to drill at Sector [REDACTED].

### SUMMARY OF THE RECORD

The applicant served on active duty as an enlisted member from July 25, 1989, to September 4, 1997. On September 5, 1997, the applicant enlisted in the Coast Guard Reserve as a [REDACTED] for a period of two years. On July 21, 1999, the applicant was commissioned as an ensign (O-1) in the Reserve. He was promoted to LTJG on March 24, 2001; to LT on August 6, 2003; and to LCDR on July 1, 2009.

On May 11, 2010, the applicant began serving on involuntary active duty in support of Operation Deepwater Horizon (DWH). On his first OER as a LCDR, dated June 30, 2010, the applicant received one "standard" mark of 4 (out of 7), eleven marks of 5, five marks of 6, and one mark of 7 in the "Speaking and Listening" performance category from his prior command. He was rated in the fifth spot (of seven) on the comparison scale, denoting an "Excellent Officer," and received his reporting officer's recommendation for promotion with peers.

His next OER, dated May 27, 2011, documented the applicant's service on active duty for DWH operations, he received one mark of 4, four marks of 5, ten marks of 6, and three marks of 7 in the "Developing Others," "Planning and Preparedness" and "Using Resources" performance categories. He was rated in the fifth spot on the comparison scale and his Reporting Officer noted that the applicant was "well qualified & highly recommended for promotion w/peers." This OER was not signed until February 8, 2012, and on that day the CO also issued a memorandum responding to the applicant's informal complaint that some of the marks were too low. The CO advised the applicant that he had raised two of the marks based on the applicant's submissions and discussions with other officers but was leaving the other contested marks unchanged. He noted that higher marks for "Judgment" and "Responsibility" were not warranted at least in part because of the applicant's actions and attitude around the time of his transfer from DWH operations. The applicant later received a Meritorious Service Medal for his work on DWH.

On July 5, 2011, the applicant was transferred to another unit on medical hold orders because he had injured his shoulder. The record contains the following documents concerning the applicant's medical conditions and status:

- A memorandum from the applicant's XO to PSC-RPM-3 dated June 30, 2011, requests an NOE for medical treatment for the applicant because he "was seen by LT . . . for joint pain, localized to right shoulder on 21JUN11 and given Fit for Limited Duty for 60 days. [Applicant] also has an MRI appointment on 30JUN11, followup with LT . . . 08JUN11 and physical therapy referrals."
- A doctor's report dated July 20, 2011, stating that the applicant had a torn right labrum and rotator cuff, as well as right shoulder impingement and that he should perform desk work only, have physical therapy and surgery in a few weeks to correct the tear.

- A doctor's report dated August 23, 2011, stating that the applicant would have surgery on August 30, 2011, and would need at least one month of convalescent leave with no duties and possibly a second month.
- A doctor's report dated September 27, 2011 noting that the applicant had undergone "SLAP repair" on his right shoulder on August 30, 2011, had been on convalescent leave and would need another month of convalescent leave and then physical therapy for six to nine months. The applicant stated that when the second month of convalescent leave ended, the applicant could return to desk work.
- A doctor's report dated November 10, 2011, noting the applicant's post-surgery status, prescribing 12 weeks of physical therapy, and authorizing desk work only.
- A doctor's report dated December 12, 2011, prescribing 8 to 12 more weeks of physical therapy and noting that his knee problem, which the applicant "doesn't want to fix ... now" required a line of duty determination. The applicant was authorized desk work only and a Notice of Eligibility (NOE) for continuing medical care because his active duty orders were ending on December 15, 2011.
- A memorandum from PSC-RPM-3 to the applicant dated December 15, 2011, states, "Your duty status is determined to be 'Fit for Limited Duty' . . . you are issued a Notice of Eligibility (NOE) for Medical Treatment . . . You may not perform any type of duty while in a Not Fit for Full duty status. You may attend IDT drills at the discretion of your command while in a Limited Duty status . . . this NOE shall remain in effect until 08 FEB 2012."
- The applicant released from active duty on December 15, 2011.
- Two doctor's reports dated January 27, 2012, noting that the applicant had a meniscus tear in his right knee and needed arthroscopic surgery and an NOE for his knee treatment. One authorizes both limited duty and "desk work only." The other authorizes performance of duty limited by no running or marching, instead of "desk work only."
- A memorandum from PSC-RPM-3 to the applicant dated February 17, 2012, states, "An extension [of the applicant's NOE] from 09 FEB 2012 through 02 MAY 2012 is authorized."
- A memorandum from PSC-RPM-3 to the applicant dated March 20, 2012, states, "Your duty status is determined to be 'Fit for Limited Duty' . . . you are issued a Notice of Eligibility (NOE) for Medical Treatment . . . You may not perform any type of duty while in a Not Fit for Full duty status. You may attend IDT drills at the discretion of your command while in a Limited Duty status . . . this NOE shall remain in effect until 11 JUN 2012."
- At a follow-up appointment on March 26, 2012, the doctor noted that the applicant's right arm was FFD but that he was scheduled for an MRI of his right knee because of the meniscus tear although the applicant "doesn't want any med's for pain." He was "released w/o limitations."
- At a follow-up appointment on April 20, 2012, to discuss the MRI results, the applicant stated that he had intermittent knee pain and used Naproxen, especially when he used his elliptical machine to exercise. The applicant was released without limitations. According to an email dated June 6, 2012, the applicant was found FFD on April 20, 2012.
- On May 25, 2012, the applicant was diagnosed with an inguinal hernia on his right side. He was released without limitations, but his discharge instructions were "no heavy lifting" and to take Percocet for pain until the hernia was surgically repaired.
- On June 9, 2012, a doctor noted that the applicant reported that his hernia pain "has progressively worsened" and that he would have surgery on June 9, 2012. The applicant reported that his pain was 8/10 and stated that he would drive himself to the hospital. The doctor placed him in sick-at-home status for 48 hours.

A print-out of the applicant's electronic record shows that after he was released from active duty on December 15, 2011, he performed multiple drills and a few readiness management periods in December 2011 and January, February, March, April, and June 2012.

On the disputed OER, dated June 15, 2012, the applicant also received three low marks of 3 for "Judgment," "Responsibility" and "Professional Presence." He received five marks of 4, five marks of 5 and five marks of 6. He was rated in the third spot on the comparison scale, denoting that the applicant was a "fair performer," and "recommended for increased responsibility."

In Block 2 on the OER, where the supervisor lists an officer's duties, the applicant's supervisor wrote:

Reserve Readiness Officer(Ofcr): leads & prepares a Deployable Specialized Force (DSF) of 36 Reserve mbrs to respond to oil spills, hazmat releases & natural disasters in support of USCG/DOD/interagency incident commanders (EPA,FEMA) in 13 SE states w/12 CG Sectors & Federal Regions IV/VI; tracks & maintains administrative/ medical/personal readiness of Reserves; liaisons w/unit's Readiness/Ops Ofcrs & Corpsman on Reserve mbrs' deployability; deploys on incidents as NSF Response Member(RM). Special Projects Officer(163days): coordinates Deepwater Horizon awards submission. IDT Drills scheduled/attended: 27/27; ADT: 7 days; RMP: 3 days; ADOS-AC 163 days.

In Block 10 on the OER, where the reporting officer discusses an officer's potential, the applicant's reporting officer wrote:

ROO [reported-on officer] currently does not earn my recommendation for promotion. Having served 22 years, ROO is obviously dedicated to the CG. However, ROO displayed zero commitment to this Cmd, failed to demonstrate core values & when held accountable – submitted an unendorsed e-resume to transfer, while actively working to create a rift between the Active & Reserve Components. Possesses broad CG operational experience; needs more time to hone leadership & interpersonal skills. When ROO demonstrates the core values, takes responsibility for personal actions & accepts the role of the rating chain, ROO may become recommended for promotion. Capable of assuming more responsibility.

The unit XO served as the Reporting Officer for this disputed OER, and the CO reviewed and endorsed the OER. This OER was completed on July 2, 2012. On January 22, 2013, submitted a memorandum with the subject line "OER Reply."<sup>3</sup> He stated that the OER contains major errors and false information and is a direct result of retaliation, reprisal, and oppression. He complained about the use of the term "devil's advocate" based on its original meaning in a religious context. He stated that he had had limited opportunity to perform because of his medical conditions, was treated as an outcast, and had felt "physically ill each and every time I reported to the unit due to such oppression and discrimination."

On his following OER, dated December 28, 2012, the applicant received three marks of 5, seven marks of 6, and eight marks of 7. He was again rated in the fifth spot on the comparison scale and was "strongly recommended for promotion w/best peers." For the period of August 24,

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<sup>3</sup> Under Article 5.A.4.g. of COMDTINST M1000.3, OER Replies must be submitted within 21 days of the dated the officer receives the validated OER.



2012, to December 23, 2012, the applicant was brought onto active duty in support of a contingency operation.

On January 25, 2013, the applicant submitted an application, No. 005-13, to the PRRB challenging his disputed 2012 OER on the basis that it contained many errors and was factually inaccurate, repetitive, and retaliatory and because he claimed he was not fit for full duty throughout the marking period. On July 29, 2013, the PRRB issued a decision denying the applicant's request for relief, finding that the applicant had not submitted sufficient evidence to prove that his rating chain did not evaluate him properly, that the OER was retaliatory, or that he should have received a Continuity OER with "not observed" marks. The PRRB found that the applicant was in a fit for limited duty (FLD) status for all but 60 days of the evaluation period, could perform desk work while he was FLD, and had drilled when released from active duty. The PRRB also found that the applicant had failed to provide sufficient evidence to show that the command did not have adequate opportunities to observe the applicant. Because the applicant had objected to the phrase "devil's advocate" as being offensive due to its original religious usage, the PRRB removed the word "devil's." The PRRB also corrected an error by taking the "s" off the word "drills" in block 5. No further relief was granted.

On July 31, 2013, the applicant voluntarily transferred to the Individual Ready Reserve (IRR). Since that time he has received Continuity OERs, with no performance marks or comments, dated July 9, 2014, and May 5, 2015.

On January 3, 2014, the PRRB issued its opinion for Case No. 001-13,<sup>4</sup> in which the applicant had applied for relief regarding the OER dated May 27, 2011, which documented his work on DWH. The applicant had alleged that the OER had been prepared by the wrong rating chain; that the new Reporting Officer, the CO, had directed the applicant's supervisor to lower applicant's mark in the "Workplace Climate" performance category; that his OER input and Meritorious Service Medal showed that he had earned higher marks; and that the Reporting Officer had assigned him low marks in reprisal. The PRRB found that the rating chain that prepared the OER was correct and that the rating chain had properly performed their duties. The supervisor had submitted a declaration stating that no one in the rating chain directed him to change the marks or comments. The PRRB found that the applicant failed to submit sufficient evidence to prove his claims.

The applicant was notified on September 8, 2014, that he was not selected for promotion to CDR by the PY2015 CDR selection board.

### **VIEWS OF THE COAST GUARD**

On June 25, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Service Center (PSC) in a memorandum on the case and recommended that the Board deny relief.

JAG argued that the Board should deny relief because the applicant had failed to meet his burden and establish by a preponderance of the evidence that there was an error or injustice with

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<sup>4</sup> The date of the application is not shown on the PRRB's decision.

his record. JAG emphasized that the applicant was on NFD status for approximately 60 days of the OER marking period, but for the remainder he was on a FLD status and specifically instructed that he was fit for desk work. JAG also emphasized that the applicant performed a total of 14 IDT multiple drills, 1 IDT single drill, 3 RMPs, 7 days of ADT at a training center and 164 days of ADOS-AC.

PSC argued that the disputed OER was completed in compliance with Coast Guard regulations. PSC argued that the number of drills performed and work completed during the OER period provided a sufficient basis for the rating chain to complete the OER. Additionally, PSC argued that the PSC-RPM-1 OES Manager properly instructed the applicant's command to include the ADOS-AC time in the OER, and for the OER submission date to extend beyond the regular submission schedule to align with the detachment of the applicant's XO, who was his reporting officer, in accordance with regulations.

In regards to the CO's possible disqualification, PSC argued that the negative interactions that the applicant experienced with his CO were triggered by the applicant's own attitude and performance while at the unit. According to PSC, the applicant's claim that the CO was retaliating for the applicant's challenge to a previous OER, without further documentation to support the claim, was insufficient to disqualify the CO from the rating chain.

In regards to the applicant's non-selection by the PY2015 CDR selection board, PSC argued that since the applicant could not establish that the OER was erroneous or unjust the non-selection should remain in his record. PSC noted that according to the non-selection letter, the applicant may be eligible for selection consideration by the PY2016 CDR selection board.

In regards to the applicant's request to be assigned to a SELRES billet within reasonable commuting distance or be permitted to Drill for Points, PSC stated that all assignment decisions are made by the Assignment Officers based on a specific criteria, and that the applicant should contact the Assignments Branch for further guidance.

#### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On June 29, 2015, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. The applicant submitted his response on July 23, 2015.

The applicant argued that the Coast Guard was incorrect when it stated that he was on a NFD status for only 60 days of the marking period and that for the remainder he was on FFD status. The applicant argued that this is incorrect because he was on NFD status for 163 days, from July 5 to December 15, 2011. He argued that his ADOS-AC Medical Hold orders which were issued and executed for this time period stated "[r]eport to the command(s) above for 30 days of ADOS-AC. Purpose of this duty is medical treatment." He argued that the 163 day active duty orders continued well beyond the initial 30 days and ended only on December 15, 2011, and that during this period he was under strict doctor's care.

The applicant also argued the advisory opinion was incorrect regarding his status during the OER period because his FLD status applied to only one of the three medical issues he was being treated for. The applicant argued that after being released from active duty, he remained on

Medically Restricted Duty status and received an NOE and two extensions, covering the period of December 15, 2011 to June 11, 2012. The applicant argued that during this period he was under strict doctor's care and placed under periods of "Convalescent Leave" and "Limited Duty" with specific restrictions from his health care provider to perform deskwork only as available. The applicant argued that he was only fit for full duty from June 12 to 15, 2012, and so his rating chain had insufficient time to evaluate his performance.

The applicant argued that the advisory opinion was incorrect when it stated that the OES Manager instructed the applicant's command to include the ADOS-AC time in the OER. The applicant argued that the email chain provided by the Coast Guard reflects that the OES Manager merely recommended that as an option after it was proffered by the applicant's XO.

The applicant highlighted the fact that the advisory opinion does not reference the fact that the applicant was on ADOS-AC Medical Hold for the first 163 days or that he was covered under NOEs and in a medically restricted status for 179 days. The applicant also argued that the advisory opinion does not address the fact that the applicant was not afforded a place in the unit organizational structure until May 18, 2012. The applicant argued that he was given only one work assignment during the entire marking period, and was given no other assignments or opportunities based upon his medical limitations or restrictions.

The applicant argued that the advisory opinion was incorrect when it stated that he was released and deemed fit for full duty on April 20, 2012. He asked the Board to review the physician report dated March 26, 2012, stating that the applicant was "fit for duty with right arm." The applicant argued that the Coast Guard ignored the medical records and the properly issued NOEs for the period. Additionally, the applicant noted that he was still in a limited duty, "Medically Restricted" status covered under a NOE that was executed for the period of March 20 to June 11, 2012, for his knee injury.

The applicant noted that the Coast Guard's observation that he would be eligible for consideration by the next selection board was incorrect. The applicant noted that the PY2016 CDR selection board had already met on July 20, 2015 and has again observed the disputed OER. The applicant argued that the disputed OER when compared with all of his previous OERs reflects a drastic deviation from the norm that can only be explained by his medical status and the bias and injustices overseen and controlled by his CO.

The applicant again described his confrontational meeting with his CO which occurred prior to his transfer to the CO's command at the unit. He argued that this meeting should have disqualified the CO from his rating chain.

In summary, the applicant argued that he was not "Medically Restricted" for only 1.1% of the entire period covered by the OER. He argued that he was therefore unable to perform at the level of a senior lieutenant commander approaching promotion to O-5. The applicant noted that the comparison scale on an OER explicitly states "compare this officer with others of the same grade whom you have known in your career." He argued that his medical restrictions severely and negatively impacted his ability to perform his duties as compared to the other officers of his pay grade who were in a fit for full duty status with unlimited opportunities.

### APPLICABLE REGULATIONS

Article 5.A.2.c. of the Coast Guard's Officer Accessions, Evaluations, and Promotions Manual (OAEP), COMDTINST M1000.3A, provides guidelines to Commanding Officers for completing OERs of officers. It reads:

(1) Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers. In using the Officer Evaluation Report (OER), Form CG-5310 (series), strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

Article 5.A.2.c.2.(i). of the OAEP provides guidelines to Commanding Officers for completing OERs for officer who are unable to fully perform due to injury. It reads:

[1] Periodically, officers may experience circumstances due to a temporary condition which result in a limited opportunity to perform. These circumstances may involve specific performance restrictions (e.g., those imposed by a medical authority), which require restructuring or reassignment of duties. While no preferential treatment shall be given, commanding officers shall ensure that these individuals do not receive below standard evaluations strictly as a consequence of these circumstances.

[2] Commanding officers, in consultation with the health care providers, must establish a reasonable expectation of performance given the individual's current circumstances. In particular, commanding officers must determine whether or not an individual requires reassignment to a different work environment and/or restrictions on performing specific types of tasks. Additionally, reduced work hours may be necessary. When considering reassignment or restructuring of duties, commanding officers should strive to identify service needs which complement the temporarily limited abilities of the officer.

Article 5.A.2.e. of the OAEP provides for exceptions to the regular rating chain. The commanding officer or the next senior officer in the chain of command is required to designate an appropriate substitute suitable for evaluating the report-on officer when a supervisor, reporting officer, or reviewer is disqualified to carry out their rating chain responsibilities. "Disqualified" is defined to include "relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the supervisor, reporting officer, or reviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation."

Article 5.A.7.e. of the OAEP provides a mechanism for a reported-on officer to submit a reply to an OER. It states that "[c]omments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. . . . Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted."

Article 1.B.10.a.(1)(f) of the Coast Guard's Medical Manual, COMDTINST M6000.1E, requires Coast Guard medical officers to assign a member to one of three medical duty statuses:

(1) Fit for Full Duty (FFD). The member is able to perform the essential duties of the member's office, grade, rank, or rating. This includes the physical ability to perform worldwide assignment.

(The exception to this is if a member is HIV positive; refer to Coast Guard Human Immunodeficiency Virus (HIV) Program, COMDTINST 6230.9 (series) for details)

(2) Fit for Limited Duty (FLD). The interim status of a member who is temporarily unable to perform all of the duties of the member's office, grade, rank, or rating. This includes the physical ability to perform worldwide assignment. A member placed in this temporary status will have duty limitations specified, such as: no prolonged standing, lifting, climbing; or unfit for sea or flying duty.

(3) Not Fit for Duty (NFD). The member is unable to perform the essential duties of the member's office, grade, rank, or rating. (If needed specific instructions should be given (i.e. confined to rack, sick in quarters or sick at home).

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that the disputed OER documenting his performance for the period of July 5, 2011, to June 15, 2012 is 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 his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>5</sup> 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."<sup>6</sup> To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>7</sup>

3. The applicant has not proven by a preponderance of the evidence that any member of his rating chain should have been disqualified from serving on his rating chain pursuant to Article 5.A.2.g. of the OAEP. These officers presumptively performed their evaluation duties properly, and the applicant has submitted nothing to show that they were biased against him based on a conflict of interest or any issue other than their professional assessment of the applicant's performance. Article 5.A.2.g.(2)(b) states that a rating official may be disqualified if a conflict "raise[s] a substantial question as to whether the [applicant would] receive a fair, accurate evaluation." The fact the applicant's CO was apparently angry about the applicant sending a self-promoting email noting the circumstances of his reassignment to numerous non-Coast Guard officials upon his departure from DWH operations does not persuade the Board that his CO should have been disqualified. Nor does the fact that the applicant had asked his CO to raise his

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<sup>5</sup> 33 C.F.R. § 52.24(b).

<sup>6</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>7</sup> *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).

marks on his 2011 OER or that the unit's organizational chart did not originally include a position for him when he was transferred there on a medical hold persuade the Board that his rating chain was biased against him. The Board finds that the applicant has submitted insufficient evidence to show that the disputed OER is retaliatory.

4. The preponderance of the evidence in the record does not support the applicant's claim that he was not fit for duty (NFD)<sup>8</sup> for most of the disputed OER's evaluation period or that his rating chain had insufficient opportunity to observe his performance, which would justify a Continuity OER under Article 5.A.2.c.2.(i) of the OAEP. The applicant's medical records show that he was fit for limited duty (FLD)—desk work—for most of the evaluation period except for the 60 days of convalescent leave following his surgery on August 30, 2011. His military records show that he in fact performed desk work and regularly performed multiple drills after he was released from active duty on December 15, 2011. FLD status is *not* the same thing as or a subset of NFD status.<sup>9</sup> The applicant's FLD status throughout most of the evaluation period allowed him to perform assigned desk work. The fact that the NOE memoranda, which advised him that his status was FLD, also stated that an officer who is NFD may not perform any duty does not mean that the applicant was actually in an NFD status or that he could not perform duty. Moreover, the disputed OER comments provide details of work he performed and could rightly be evaluated on. He received high marks of 5 and 6 in the performance of duties categories and was praised for "exceptional results" and proficient planning in the comments. The few low marks are supported by comments concerning his attitude and demeanor—not the quality or amount of his work. In light of this evidence, the Board is not persuaded that the applicant's rating chain had insufficient opportunity to evaluate his performance because of his medical conditions or that his medical conditions caused him to receive low marks for his attitude and demeanor. He has not shown that the command committed an error or injustice by preparing a substantive OER for him instead of a Continuity OER.

5. The applicant has not proven by a preponderance of the evidence that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>10</sup> Therefore, the Board will not remove the OER, and there are no grounds for removing his non-selection for promotion to CDR because he has not shown that his record was prejudiced by error when it was reviewed by the selection board. Nor has the applicant persuaded the Board to interfere in the Reserve's assignment process to guarantee him a particular position or status in the Reserve.

6. The applicant has failed to prove by a preponderance of the evidence that his military record is adversely affected by error or injustice. His application should be denied.

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<sup>8</sup> The applicant used the abbreviation NFFD, stated that it means "not fit for full duty," and appears to argue that FLD and NFFD are equivalent. However, the Medical Manual does not authorize an NFFD status and defines only FFD, FLD, and NFD—"not fit for duty." Coast Guard Medical Manual, COMDTINST M6000.1E, Art. 1.B.10.a.(1).

<sup>9</sup> *Id.*

<sup>10</sup> *Hary*, 618 F.2d at 708.

**ORDER**

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

November 6, 2015

