

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-059

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 14, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated September 7, 2012, 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 asked the Board to correct his record by removing an officer evaluation report (OER) for the period from June 1, 2009 to May 31, 2010 (disputed OER) and by replacing it with an OER for continuity purposes.

The applicant asserted that the disputed OER should be removed from his military record due to what he "perceived to be a hostile working environment." He stated that in November 2009 he submitted a special request for reassignment within his command to remedy the perceived hostile work environment that allowed little opportunity for his professional growth. He argued that his supervisor denied his request without any investigation or the "external notification" required by COMDTINST M5350.4C.¹ According to the applicant, this provision requires that the District Equal Employment Opportunity Officer be notified of all requests for transfer due to an alleged "hostile working environment."

The applicant alleged that his hostile work environment experience began after he made a verbal request to his supervisor that a fellow crewmember receive treatment for abuse (the applicant did not describe the abuse). He alleged that after reporting the situation as required by

¹ The applicant did not cite to a specific provision of this instruction and the staff could not identify which provision he intended to reference.

Chapter 20 of COMDTINST M6200.1A,² his working environment quickly deteriorated. He stated that after he left the command, there were “multiple investigations due to the actions of the same crew member.”

The applicant alleged that the disputed OER resulted from his rating chain’s inaction on his request for reassignment. He also asserted that the disputed OER failed to capture an accurate account of his contributions and it significantly decreased his upward career mobility. He stated that his supervisor did not provide any mid-period counseling or verbal feedback, which led him to believe that his performance was satisfactory.

The applicant submitted three letters from other officers (none in his reporting chain) who spoke highly of his skill, competence and character as an officer.

The Disputed OER

The disputed OER lists the applicant’s primary duty as “enforcement division duty.” The only below standard mark (4 is the standard) the applicant received was a “3” in the “workplace climate” dimension of the supervisor’s portion of the OER. The “3” was supported by the following comment: “Exhibited inappropriate & degrading behavior & poor [leadership] to subordinates & was removed from [the subordinate’s] chain of command; counseled & monitored, [reported-on officer] made improvements in behavior, no reoccurrences of inappropriate behavior.”

The applicant received a mark in the middle block on the comparison scale in section 9 of the disputed OER that described him as a “Good performer; give tough, challenging assignments.” In block 10, the reporting officer described his potential as follows:

Solid performer; outstanding skills in tactical operations, innovative solutions, & completing missions safely. Unique skills at developing partnerships and in building rapport w/partner agencies at all levels as seen in joint ops. Excellent selection & strongly recommended for MSST Ops & Enforcement Div Chief at large sector. Demonstrated skills and performance excellence w/cmd & control make [the applicant] extremely strong candidate for District or higher [level] Cmd Center Controller or Sector Cmd Center Supervisor position; also strong candidate for Intel field assignment. Good choice & recommended for Homeland Security graduate school prgm. Recommended for promotion to LCDR.

VIEWS OF THE COAST GUARD

On May 15, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG, citing *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992), stated that the threshold issue is whether the disputed OER was prepared in violation of a statute or regulation or contained a misstatement of significant

² There is no Chapter 20 to this instruction. Chapter 2 sets policy and procedures for the Coast Guard Substance Abuse Prevention and Treatment Program.

hard fact. In addition, the JAG argued that the applicant must overcome the presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluations of his performance under the Coast Guard's Officer Evaluation System.

The JAG stated that the evidence shows that the rating chain evaluated the applicant's performance in accordance with the Personnel Manual. The JAG stated that an October 2009 investigation revealed that the applicant had made inappropriate comments to a subordinate. As a result of that investigation, the applicant was removed from his position as Assistant Response Department Head. The JAG stated that the applicant was given a non-punitive letter of censure and was advised that although the letter of censure would not be documented in his official record, his conduct would be documented in his OER. The JAG stated that based upon the investigation and letter of censure, the applicant (and not any other officer) was responsible for the conflict that existed in the workplace climate during the period covered by the disputed OER.

The JAG concluded his comments by stating that the evidence submitted by the applicant was insufficient to rebut the presumption that his rating chain carried out their duties correctly, lawfully, and in good faith. The JAG also stated that the applicant failed to prove that the disputed OER was prepared in violation of the Personnel Manual or that it contained misstatements of fact.

The JAG attached comments from the Commander, Personnel Service Center (PSC) as a part of the advisory opinion. PSC agreed with the JAG that the applicant did not provide evidence that the disputed OER was prepared in violation of the Personnel Manual or that it contained misstatements of fact. PSC also noted that affidavits from the rating chain for the disputed OER confirmed the accuracy of the OER. The supervisor's and reporting officer's affidavits are discussed below.

Supervisor's Affidavit

The supervisor stated she was the applicant's supervisor from June 23, 2008 to July 2, 2010. She stated that in March 2009 she counseled the applicant on his lack of positive leadership and advised him to stop disparaging others and to encourage his subordinates, particularly a LTJG for whom he was the direct supervisor. The supervisor confirmed that an investigation was conducted into alleged inappropriate comments by the applicant covering the period from November 1, 2008 to November 1, 2009. The supervisor stated that the investigation confirmed that on October 18, 2009, the applicant made derogatory remarks regarding a subordinate's male anatomy and those remarks did not foster a healthy, positive work environment. The supervisor stated that the applicant was given a letter of censure by the Sector Commander, in which the applicant was told that "he would not currently be recommended for promotion to the next higher pay grade, but since he was at the mid-point of his evaluation period, he could still salvage the period and earn a positive command recommendation for promotion." The applicant was also removed from his position as Assistant Response Chief and as the direct supervisor for the LTJG. The supervisor stated that after receiving the letter of censure, the applicant requested reassignment, but that request was denied in order to allow him the opportunity to demonstrate his changed behavior, while contributing to the mission of an already short-staffed department.

The supervisor stated that in preparing the applicant's OER she compared his performance to the given OER standard. She stated that his documented behavior failed to meet expectations in the "workplace climate" category. The supervisor stated that the applicant failed to demonstrate actions that enhanced overall quality of life, to serve as a strong advocate for others, to encourage respect, and to promote an environment which values dignity. The supervisor stated that the disputed OER is not in error or unjust.

Reporting Officer's Affidavit

The reporting officer agreed with the supervisor's comments. He stated that the applicant received a "3" in "workplace climate" from his supervisor for exhibiting inappropriate and degrading behavior and poor leadership. He stated that based on his knowledge of the applicant's performance and conduct during the marking period, he fully supported the supervisor's decision. The reporting officer stated that the applicant created the hostile work environment. He stated that he is convinced that the applicant made inappropriate comments on repeat occasions and behaved in a manner inappropriate for a professional workplace.

Letter of Censure

On November 23, 2009, the Sector Commander gave the applicant a letter of censure for his inappropriate conduct from November 1, 2008 to November 1, 2009 and specifically for inappropriate comments he made to a subordinate on October 16, 2009. The Commander stated that the applicant conducted himself "in a boisterous, obnoxious, and annoying manner, frequently displaying a lack of maturity and professionalism expected of a Coast Guard officer." The Commander also stated that the applicant engaged in "immature practical jokes and childish game playing, used offensive language, degraded and humiliated peers and subordinate personnel, and failed to set a positive example expected of someone with your rank and position." The Commander gave the applicant steps to complete if he wanted to obtain a promotion recommendation. The Commander also told the applicant that his actions and performance during the period may be documented in his OER, although the letter of censure would not be a part of his OER or official record.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 18, 2012, a copy of the Coast Guard's views was mailed to the applicant for his response. The Board did not receive a response from the applicant.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant alleged that the disputed OER is the result of a hostile work environment and is not an accurate assessment of his performance for the period under review. The preponderance of the evidence shows that the applicant created or contributed to conflict in the workplace by making inappropriate comments to subordinate personnel during the period under review. To hold the applicant accountable for his conduct, he was given a below standard mark of 3 in the “workplace climate” dimension of the disputed OER. The applicant submitted three statements from Coast Guard officers attesting to his skill, competence, and character, but those statements do not dispute the comment in the OER that the applicant “[e]xhibited inappropriate & degrading behavior & poor [leadership] to subordinates & was removed from [member’s] chain of command; counseled & monitored, [reported-on officer] made improvements in behavior, no reoccurrences of inappropriate behavior,” which supports the mark of “3.” Therefore, the applicant has not presented sufficient evidence to prove that the disputed OER is inaccurate.

3. The applicant alleged that his supervisor violated COMDTINST M5350.4C by not investigating his request for reassignment due to an alleged hostile work environment and by not providing notification to the District Equal Employment Opportunity Officer that he had requested reassignment on that basis. The applicant did not cite the specific provision of the instruction that required his request for reassignment to be investigated and to be reported to the District Equal Employment Officer and the Board was not able to identify the specific provision mentioned by the applicant. Nonetheless, even if such a provision existed, the Board finds that the applicant was not prejudiced by the manner in which his command handled the situation. The command had investigated the matter and determined that the applicant was the cause of the unfavorable work environment. The applicant has not presented evidence that a further investigation would have reached a different conclusion or that referral of his request for a transfer would likely have been approved since under the circumstances he was the problem and the command had taken action to fix the problem by removing him from the victim’s chain of command. The Board notes that the command was generous toward the applicant by admonishing him for his conduct through a non-punitive letter of censure and by giving him the opportunity to redeem himself during the OER period. He received only one below standard mark and he was recommended for promotion. The OER speaks highly of the applicant’s skills and abilities, except for in the performance category “workplace climate.” The disputed OER reflects the applicant’s achievements while holding him accountable for his shortcoming.

4. The applicant has failed to prove an error or injustice in the disputed OER. Accordingly, his application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX for correction of his military record is denied.

Peter G. Hartman

Dana Ledger

Adam V. Loiacono