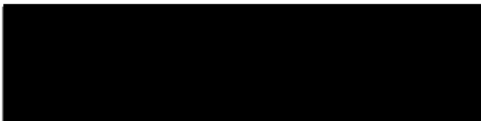


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-074



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 February 25, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 13, 2017, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

BACKGROUND: BCMR DOCKET NO. 2015-136

In BCMR Docket No. 2015-136 (see attached), the applicant asked the Board to remove from his record a special Officer Evaluation Report (SOER) covering the period June 1, 2011, through May 24, 2012, when he was the Operations Officer (department head) for a Maritime Safety & Security Team (MSST) with 39 subordinate junior and petty officers and six response boats, as well as other vehicles and weaponry. The SOER documents his removal from his primary duty after approximately one year on the job and includes below standard marks of 3 (out of 7) for Professional Competence, Workplace Climate, Initiative, Judgment, Responsibility, and Health & Well-Being.

The applicant alleged that he was unjustly removed from his position and unfairly marked in the SOER. He stated that as the Operations Officer, he led and managed more than 60 members through various deployments, operations, and events, and the MSST earned an award for readiness and easily passed inspections. He alleged that he was removed from his position and received the SOER in retaliation for his comments in a workplace climate survey, which was needed because his commanding officer (CO) continually undermined his authority by, for example, refusing to punish and counsel the applicant's subordinates as needed. The applicant alleged that all of the officers in the wardroom "felt powerless to manage personnel. As Operations Officer, I experienced the brunt of the CO's displeasure. I received constant negative, yet vague feedback." The applicant submitted eleven statements from fellow junior officers and chiefs who supported his claim that the SOER was erroneous and unjust. The record before the Board

also included the report of the workplace climate survey; an administrative letter of censure issued to the applicant by the CO in February 2012; a statement by the CO supporting the validity of the SOER and his decision to remove the applicant; statements by the XO that contradicted each other; and the decision of the Personnel Records Review Board, which had denied the applicant's request to remove the SOER.

The Coast Guard recommended denying relief in BCMR 2015-136 and noted that the CO had provided the applicant with mid-period counseling and an administrative letter of censure and had consistently maintained the accuracy of the SOER. The Coast Guard noted the XO's contradictory statements and concluded that his more recent statements supporting the applicant's request constitute retrospective reconsideration without new information and so should be considered unreliable.

The Board denied relief in BCMR 2015-136, finding that the report of the climate survey did not support his claims and that the applicant had "not overcome the presumption of regularity accorded his CO's intentions and actions, much less proven by a preponderance of the evidence that his removal and the resulting SOER were retaliatory for a complaint." The Board noted that the record contained "numerous contradictory statements by the XO," and found that "the XO's claims about the SOER are unreliable." The Board also noted that "such retrospective reconsideration of an OER is not grounds for removing it."¹

APPLICANT'S NEW REQUEST AND ALLEGATIONS

While the decision in BCMR 2015-136 was pending, the applicant filed an application asking the Board to remove his non-selections for promotion to lieutenant commander (LCDR/O-4), so that he would have two more opportunities for promotion. He argued that he should have two more opportunities for promotion because the disputed SOER was in his record when it was reviewed by the LCDR selection boards.

The applicant repeated his allegation that his voicing of "concerns in regard to leadership shortcomings" during the workplace climate survey caused the CO to remove him from his position." He claimed that the CO's decision "had nothing to do with my actual or perceived performance" and that he "became a scapegoat for the negative feedback intended for the command" in the report of the climate survey. He again stated that the CO's refusal to hold subordinates

¹ *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[t]he supporting statement by the senior rater is a case of retrospective thinking motivated by the knowledge of the applicant's non-selection for promotion to major."); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976) (noting that the letters submitted by two members of the plaintiff's rating chain did not identify any misstatements of fact and offered "only opinions they no longer entertained"); Decision of the Deputy General Counsel in BCMR Docket No. 84-96 (denying relief because the CO's statement arguing that the marks should be raised constituted "retrospective reconsideration"); see also BCMR Docket Nos. 2011-179 (denying relief and finding that a CO's statement constituted "retrospective reconsideration" that did not warrant changing the OER); 67-96 (denying relief because three statements by the rating chain supporting the application "constituted 'retrospective reconsideration' induced by the applicant's failure of selection"), 189-94 (denying relief and finding that a supervisor's claim that a mark should be raised because the applicant was never counseled about the deficiency constituted "retrospective reconsideration" that did not justify raising the mark); 24-94 (finding that a reporting officer's statement that "had I known then what I know now I would have marked him differently" constituted retrospective reconsideration that did not justify changing the OER).

accountable for misconduct led to the poor workplace climate and the need for the climate survey. He stated that “[i]n the midst of serving as OPS, sole disciplinarian, and constantly raising concerns in regard to the unit, [he] had fallen out of favor with the CO. The animosity intensified after the CO asked for [his] concurrence to relieve the Waterside Chief, a LTJG who had held the position for approximately one month, and [he] refused.”

The applicant complained about the fact that the CO submitted a copy of the Administrative Letter of Censure that he had given the applicant in February 2012 as supporting evidence for his statement, which the Coast Guard submitted to the Board with the advisory opinion. The applicant noted that Article 1.G.1.d. of the Military Justice Manual, COMDTINST M5810.D, states, “Nonpunitive letters of censure are private in nature and, other than administrative letters of censure issued by the Commandant, shall not be forwarded to the Chief of Personnel, quoted in, or appended to, performance reports, included as enclosures to investigative reports, or otherwise included in official Coast Guard records of the recipient.” He argued that the Coast Guard’s inclusion of the letter of censure in the advisory opinion was therefore erroneous and prejudicial.

The applicant stated that after he received the letter of censure, he was required to update the XO weekly about his progress on certain projects, but he exceeded this requirement by engaging with the XO daily and implementing protocols that improved the functioning of the unit. The feedback he received from the XO was “consistently positive. As such, it was a complete shock when I was removed from my primary duties.”

The applicant noted that he submitted statements from the entire Chiefs’ Mess of the MSST and the XO directly refuting the CO’s allegation that they had observed the applicant being “intimidating and threatening.” He also argued that his addendum to the SOER “identifies several specific examples of contradiction from the CO regarding [his] performance. The inconsistency of reporting shows disjointed evaluation with zero basis on actual performance.”

The applicant also noted that the XO had submitted several statements on his behalf and strongly supported his request. The applicant resubmitted the final statement that the XO had signed on his behalf for BCMR 2015-136. In his final statement, the XO tried to “clarify [his] earlier statements.” He wrote that he regrets going along with the CO’s decision regarding the applicant and not speaking up. He stated that the CO sometimes reprimanded the applicant for actions that the XO had approved. He argued that the applicant was not actually “slow to come up to speed” and should not be held accountable for certain issues because the XO himself “did not provide him with any expectations” when he reported for duty. He stated that the applicant’s management of was “free of any safety or security issues” and his prior statements about the applicant “lacking the skills and knowledge required ... were not true. There is no set standard in the MSST ROC/POE or the MSST Master Training List (MTL) that are required for an Ops boss ... [T]here are no needed skills or experience needed, in my opinion.” The XO stated that he and the CO had had “numerous conversations about [the applicant’s] performance ... we agreed on [a] majority of the unit’s issues with the exception of [the applicant].” He stated that when the CO informed him that the applicant was being removed, the XO thought that the applicant “was not performing at a level in which a relief was necessary; however I did not voice my opinion.” Finally, he noted that the CO “still stands by his decision to relieve [the applicant] today, even after reading the statements provided by myself and the MSST ... Chiefs Mess.”

VIEWS OF THE COAST GUARD

On August 4, 2016, the Judge Advocate General submitted the Coast Guard's advisory opinion in which he recommended that the Board deny relief and adopted the advisory opinion submitted for BCMR No. 2015-136. The JAG argued that the applicant did not submit any new evidence that would warrant reconsideration of his request.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 12, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. No response was received.

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 requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.²

3. The applicant alleged that his non-selections for promotion to LCDR are erroneous and unjust because the disputed SOER was in his record when it was reviewed by the LCDR selection boards. In 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.³ 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."⁴ To be entitled to correction of an OER, an applicant must prove 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.⁵ To be entitled to removal of

² *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *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 non-selection or to a Special Selection Board, an officer must prove that his or her record contained a material, prejudicial error when it was reviewed by the selection board.⁶

4. The Board finds that the applicant has not shown that the Board's decision in 2015-136 should be overturned. He has not submitted any new evidence warranting different findings, and his XO's final statement, contradicting his prior statements, is unreliable and apparently a result of retrospective reconsideration.⁷ His CO's statement, the Administrative Letter of Censure, and the emails criticizing the applicant's performance support the CO's decision to remove the applicant, and pursuant to Article 5.A.3.c.(1) of COMDTINST M1000.3, an SOER is required when an officer is removed from his primary duties. Although the applicant alleged that his removal and the SOER were retaliatory because he had complained about the CO's refusal to punish a subordinate in the May 2012 unit climate survey, he submitted no evidence that supports this claim. The executive summary of the climate survey, which he submitted, does not show that any such complaint was made, much less reported in a way that revealed the applicant to be the source. In addition, although the applicant alleged that he was the scapegoat for criticism aimed at the CO, the executive summary shows that the crew primarily criticized the "middle management" of the MSST and specifically the leadership of the Operations Department, which included the applicant, who was the Operations Officer, for the poor workplace climate—not the CO. The Board finds that the applicant has not overcome the presumption of regularity accorded his CO's intentions and actions, much less proven by a preponderance of the evidence that his removal and the resulting SOER were retaliatory for a complaint.

5. The applicant complained that the Coast Guard forwarded the Administrative Letter of Censure that the CO submitted to defend himself when the applicant accused him of retaliation in challenging the SOER through the Personnel Records Review Board (PRRB) and the BCMR. He alleged that such use of the Administrative Letter of Censure is prohibited by Article 1.G.1.d. of the Military Justice Manual, COMDTINST M5810.D, which states, "Non-punitive letters of censure are private in nature and, other than administrative letters of censure issued by the Commandant, shall not be forwarded to the Chief of Personnel, quoted in, or appended to, performance reports, included as enclosures to investigative reports, or otherwise

⁶ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982). The Board notes that the applicant's non-selections occurred before the Coast Guard issued regulations implementing the Special Selection Board statute, 14 U.S.C. § 263, which was enacted in December 2012.

⁷ *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[t]he supporting statement by the senior rater is a case of retrospective thinking motivated by the knowledge of the applicant's non-selection for promotion to major."); *Tanaka v. United States*, 210 Ct. Cl. 712 (1976) (noting that the letters submitted by two members of the plaintiff's rating chain did not identify any misstatements of fact and offered "only opinions they no longer entertained"); Decision of the Deputy General Counsel in BCMR Docket No. 84-96 (denying relief because the CO's statement arguing that the marks should be raised constituted "retrospective reconsideration"); *see also* BCMR Docket Nos. 2011-179 (denying relief and finding that a CO's statement constituted "retrospective reconsideration" that did not warrant changing the OER); 67-96 (denying relief because three statements by the rating chain supporting the application "constituted 'retrospective reconsideration' induced by the applicant's failure of selection"), 189-94 (denying relief and finding that a supervisor's claim that a mark should be raised because the applicant was never counseled about the deficiency constituted "retrospective reconsideration" that did not justify raising the mark); 24-94 (finding that a reporting officer's statement that "had I known then what I know now I would have marked him differently" constituted retrospective reconsideration that did not justify changing the OER).

included in official Coast Guard records of the recipient.” Thus, Administrative Letters of Censure are treated differently from Punitive Letters of Censure, which are forwarded to PSC for inclusion in an officer’s official military record and are appended to the officer’s OER. The private Administrative Letter of Censure that the CO gave the applicant is not in the applicant’s official personnel file and so was not reviewed by the LCDR selection boards. The letter remained private and was submitted by the CO for the PRRB and the BCMR to review only when the applicant accused the CO of retaliation and claimed to be surprised by the CO’s decision to remove him. The letter, which predated the climate survey, rebuts the applicant’s allegations of retaliation and surprise. The Board finds that the CO’s use of the letter to defend himself and his decisions from the applicant’s accusations was neither prohibited under the regulation nor unwarranted under the circumstances. However, to ensure that the letter has not been included in any of the applicant’s personnel records as a result of its submission for review by the PRRB and the BCMR, the Board should direct the Coast Guard to ensure that no copy of the letter is included or quoted in or appended to any performance reports, investigative reports, or other “official Coast Guard records of the recipient.”

6. Because the applicant has not proven by a preponderance of the evidence that the SOER is 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,⁸ there is no basis for removing or amending the SOER and no basis for removing his non-selections for promotion to LCDR or for directing the Coast Guard to convene a Special Selection Board.

7. Accordingly, the applicant’s request should be denied but the Board will direct the Coast Guard to ensure that no copy of the Administrative Letter of Censure is included or quoted in or appended to any performance reports, investigative reports, or other “official Coast Guard records of the recipient,” in accordance with Article 1.G.1.d. of the Military Justice Manual, COMDTINST M5810.D.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *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).

ORDER

The application of [REDACTED] [REDACTED] USCG, for correction of his military record is denied, except that the Coast Guard shall ensure that no copy of the Administrative Letter of Censure is included or quoted in or appended to any performance reports, investigative reports, or other official Coast Guard records of the recipient in accordance with Article 1.G.1.d. of the Military Justice Manual, COMDTINST M5810.D.

January 13, 2017

