

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-108

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on April 3, 2000. However, because the applicant had not exhausted an administrative remedy available to him through the Personnel Records Review Board (PRRB), the BCMR notified the applicant that his BCMR application would not be processed until the PRRB had completed its review of his case.

On February 12, 2001, the BCMR received the PRRB's decision and notified the applicant that it would begin processing his application.

This final decision, dated December 20, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a lieutenant (LT) on active duty at the time he submitted his application, asked the Board to modify an officer evaluation report (OER) for the period from [REDACTED] (disputed OER) by raising a mark of 4 to 5 and deleting certain comments. He also asked the Board to remove his 1999 failure of selection for promotion to lieutenant commander (LCDR). The applicant also requested backdating his date of rank and back pay if he is selected by the first board to consider him based on a corrected record. (The applicant was selected for promotion to LCDR by the 2000 LCDR selection board, but he maintained his request to have his 1999 failure of selection removed from his record and to have his date of rank adjusted to the date he would have received if he had been selected by the 1999 LCDR selection board.) The applicant also requested restoration to the [REDACTED] graduate program at the earliest opportunity.

EXCERPTS FROM RECORD AND SUBMISSIONS

During the reporting period, the applicant was the commanding officer (CO) of a Coast Guard cutter that had a soft grounding during a patrol in the waters of the [REDACTED]. The cutter suffered approximately \$50,000 in damages. The applicant alleged that the mark of 4 (on a scale of 1 to 7, with 7 being the highest) in judgment and certain comments about his lack of judgment were in error and unjust because they were based on the assumption that the Group Commander (the applicant's higher authority at the time) did not have actual notice of the applicant's navigational plan. He

requested that the 4 in judgment be raised to a 5 and the following comments be deleted from the OER.

... Altho [sic] diligent in planning for the first 110 WPB visit to this marina, his track across a shallow bank, the poor scale & absence of detail on chart would have prompted many CO's to seek alternatives. [Delete from section 7.]

Poor judgment/risk assessment in planning port call to [REDACTED] [REDACTED] propellers required replacement following ship grounding ... [Delete from section 8]

In hindsight his risk taking in selecting that port and trackline were disproportionate to the benefit ... But I am convinced he understands and has taken lesson to heart. [Delete from section 10.]

The applicant alleged that his judgment should not be faulted in the OER through the 20/20 hindsight of the rating chain, because "(a) his immediate superiors knew of and approved the detailed plan for this [port] visit, (b) [the applicant] had a reasonable basis for believing that [the group's operations officer (OPS)] would brief the Group Commander and higher authority, and (c) no superior told him not to proceed."

The applicant was the CO of a cutter that was part of a larger group command, which was headed by a Group Commander. The Group Commander was the applicant's reporting officer. The applicant stated that the Group Commander decides, in consultation and under the larger direction of the District and Area Commanders, what such units will do, and when. The Group Commander possesses a staff to assist him in the performance of his responsibilities. That staff includes an Operations Officer (OPS), who, according to the applicant, is the primary intermediary for operational matters between the Group Commander and the COs of the group's units. The applicant stated that operational matters include "patrol duration, patrol areas, patrol missions and mid-patrol foreign and domestic port calls."

The applicant stated that on February 11, 1999, the Group's OPS was aboard his cutter on other business. He stated he took that opportunity to give the OPS a navigational brief for an upcoming patrol. The applicant stated that a navigational brief is an organized presentation, to a decision maker, of the patrol, usually for the benefit of the CO, officer of the deck and the navigation team. He stated that in this case, the navigational plan was presented to the OPS because it involved an element of risk. He further stated that during the navigational brief "appropriate charts are reviewed, along with pertinent tide and current factors, and a planned track (course) is presented. The applicant stated that at the time of the briefing, the OPS stated that, "It looks like you did your homework" and "It sounds like a good plan, good luck and let me know how every thing turns out." The applicant stated that the chief engineer, who attended the briefing, heard the OPS comments in this regard. The applicant further stated as follows:

At no time during or after the navigation brief, did the Operations Officer (or the Group Commander) instruct or urge [the applicant] to alter or

abandon the navigation plan discussed [during the brief]. Because no objection was raised at a time when the Group had an opportunity to do so, it was grossly unfair for the Group Commander to fault [the applicant] on [a] retrospective basis [in the disputed sections of the OER].

The applicant claimed that the OPS had received a navigational briefing far beyond the norm for conveying patrol plans to the Group Commander. The applicant also stated that weeks prior to the February briefing, when he conceived the idea of visiting the subject port, he asked the OPS if he would brief the Group Commander, to which the OPS stated that he would.

The applicant's cutter began its patrol, which included a port call (stop) at [REDACTED]. The applicant stated that a mid-patrol break at this port made sense because of the remoteness of the area from other ports. The applicant claimed that the cutter entered the port uneventfully and remained there for about three days. Upon departing the port at the minimum speed, the cutter touched the sandy bottom (described as a soft grounding). He stated that the cutter was never "hard ground" and was able to continue navigating back to its port. The grounding was the subject of both an administrative and safety mishap investigation.

Administrative Investigation

The administrative investigation was dated March 31, 1999. The investigating officer (IO) noted in his report that upon entering the port the CO and XO noted the shallowness of the port and declutched the engines which reduced the cutter's squat and allowed the cutter to pass over the shallow areas. He noted that the applicant and the XO were concerned about departing the port and monitored the tide during the three days they were in port. The IO further stated as follows:

While departing the marina, the wind, at 15-20 knots from the north, set [the cutter] away from the middle of the channel. To compensate the XO engaged the port engine. [The cutter] was not able to drift over the shallow spot . . . as it did upon entering. Since there were coral heads on either side of the channel, the CO made the correct decision to attempt to regain track. It is my opinion that this was the cause of the grounding. Had the wind not been as great, [the cutter] may have been able to drift over the shallow areas in this part of the channel.

The IO recommended that administrative action be taken against the CO (the applicant) for exercising poor judgment by deciding to make a port call at [REDACTED] Marina and Shipyard. The IO stated that he based this recommendation on the following:

The fundamental issue in this grounding is whether [the applicant's] decision to enter [REDACTED] for a rest and relaxation stop was worth the risk. As [the CO, the applicant] was charged with making a risk assessment in determining whether to enter the marina. [The cutter's] safe navigational draft is 12 ft. [The cutter's] transit across [REDACTED] in 9-10 ft of water lasted for approximately 17 nautical miles. The chart that was

used did not indicate the depth of the channel and basin at the marina. The pilot boat, originally promised by the marina, failed to come out to meet [the cutter]. To [the applicant's] knowledge no other 110 [ft. cutters] had entered [REDACTED]. He could not draw from the experience of another 110 [ft cutter]. The risks were countered by the training that [the cutter's] personnel would receive by navigating in restricted waters and by entering a port that other 110 [ft cutters] had not entered. Given that other 110 [ft cutters] operating in [REDACTED] waters occasionally are required to pass over banks with depths of water below their navigational drafts, it does not seem way off the mark that [the applicant] would think there was no problem with transiting across a bank with a charted depth of 9-10 ft. However, considering the many risks that were involved, [the applicant] used poor judgment in transiting the [REDACTED] and entering [REDACTED]. The risks weren't countered by any significant reason to go in there. If [the cutter] had been directed to enter [REDACTED] either for a search and rescue case or law enforcement or for diplomatic reasons, the risks may have been worth the trip. Here, entering for rest and relaxation does not counter the many risks undertaken to make the transit and entrance into [REDACTED].

Safety Investigation

A vessel mishap report had been prepared prior to the administrative investigation. It concluded that the overcompensating for the wind upon leaving port set the cutter left of the intended track and that clutching on the port engine to regain track caused the cutter to squat resulting in the cutter contacting bottom. The mishap report recommended, "[u]ntil there [are] more detail charts, sufficient aids to navigation and a dredged channel entrance . . . future port calls to Providenciales, Turks and Caicos should be avoided."

In June 1999, the supervisor (OPS) and reporting officer (Group Commander) prepared the disputed OER, and on July 11, 1999, the reviewer concurred in the marks and comments. However, the reviewer now states the following about the action he would have taken if he had known that the OPS has been briefed about the applicant's patrol plans:

I did not know that [the applicant] had thoroughly briefed his command via the Group Operations Officer. Had I known this as fact, I would have questioned the comments in block 8 that assert "poor judgment/risk assessment in planning port call to [REDACTED]." I would have discussed this with the reporting officer, and if the situation was as [the applicant] describes, and if the remarks had remained, I would have commented that I disagreed with the remarks. To put this in context, [the applicant] is correct that the [REDACTED] were tactically important in both counter drug efforts and migrant interdiction efforts. The Coast Guard has lost expertise and familiarity in the [REDACTED]; both [REDACTED] and [REDACTED] had planned and encouraged operations in the area to increase expertise and familiarity. Under these circumstances, and

especially if [the applicant] had laid out his planning for the Group, I would not have considered it poor judgment/risk assessment in planning.

Applicant's Other Allegations

The applicant stated the administrative investigation misstates the reason for the port visit. He stated the primary reason for the port visit was not rest and relaxation but "to investigate the concept of resuming the use of [REDACTED] as a logistics port for patrol boats operating in the area." With respect to this point, the XO of the cutter stated the following: "In order to operate in the infrequently patrolled area [the [REDACTED]], we needed to find a forward operating base to supply logistics including fuel, water, and food. . . . [The applicant] wanted to research the possibility of resuming the use of [REDACTED] as a logistics port."

The applicant stated that as a result of the recommendation contained in the administrative investigation, he was taken to non-judicial punishment (NJP) charged with "negligently hazarding a vessel". The OPS was the preliminary investigation officer for the NJP and he recommended that the applicant be taken to NJP. Although the charges were dismissed, the applicant asserted that the OPS should not have been the preliminary investigation officer because of the applicant's assertion that the OPS was aware of the applicant's plan to make the port call under review and failed to express any disagreement with it. According to the applicant, when asked at the applicant's NJP whether he had been briefed on the applicant's plans to make the port call, the OPS stated that he could not remember. The charge against the applicant was dismissed and the Group Commander stated the following: "[I]f the applicant had brought the charts to him before the patrol, 'we would not be in this mast today.'" The applicant stated that the Group Commander appeared to proceed on the assumption that his command had not been aware of the plan, when in fact the OPS had been informed.

The applicant stated that he did not have a duty to brief his superior echelon's representative, but he did so nonetheless. He stated that since the OPS failed to object or veto the patrol, it ill behooves the Group to fault the applicant after the fact.

PRRB Decision

On February 7, 2001, the PRRB entered a final decision in which it refused to make any corrections to the applicant's record. The PRRB stated that a CO's responsibility is absolute and the CO is solely responsible for the safe navigation of his vessel. Articles 4.1.2. and 4.2.2, Coast Guard Regulations. It stated that the applicant had failed to point to any statute, regulation, policy, naval tradition, or accepted practice where the CO of a naval vessel may shift that responsibility to a military superior.

The PRRB stated that there were no exigent circumstances involved in the applicant's decision to enter the subject port and he was never ordered or counseled by his superiors to enter the port. The PRRB stated that neither the Group Commander nor the OPS ever instituted a formal or informal practice of reviewing the navigational

plans of the patrol boats assigned to their command, and it further stated that the applicant had not proven that any such practice existed. "[E]ven if Applicant could prove such [a practice existed], [the PRRB] would still find that Applicant had objectively exercised poor judgment and risk taking by choosing to enter [the] port . . . notwithstanding his superiors' approval of such action."

The PRRB stated that the comments in block 7 are validated by the findings of the administrative investigation. The PRRB report stated that the IO found the applicant had employed a chart that did not indicate a depth of channel, or a depth of the basin at the subject port. The investigation further revealed that the applicant had laid tracklines across water with chartered depths of 9 and 10 ft. when his own shipboard instruction had established that the cutter's navigation draft at 12 ft. According to the PRRB, the administrative investigation also validated the comments in block 8 with respect to the reporting officer's comments about the applicant's poor judgment/risk assessment.

The PRRB stated that the applicant failed to prove by clear and convincing evidence that the evaluation of his performance in the disputed OER was inaccurate or unjust. The evidence of record supports the strong presumption that the reporting officer executed his duties correctly, lawfully, and in good faith. Arens v. United States, 99 F. 2d. 1034, 1037 (1992).

The PRRB obtained statements from OPS (the supervisor) and Group Commander (the reporting officer) for the disputed OER. Each is summarized below.

1. The OPS wrote under penalty of perjury that he did not approve the tracklines and navigation plan for the patrol because it was not policy for the OPS to approve tracklines or navigation plans for any afloat units assigned to the Group. He stated that the purpose of the port call was rest and relaxation and not for any operational purpose. The supervisor concluded his statement with the following: "The fundamental issue is that [the applicant] exposed his command to a high degree of risk when that risk was not justified. [The applicant] casually downplayed the risk and when [the cutter] grounded he failed to take appropriate responsibility for his actions."

2. The Group Commander wrote that he stands by the comments in the disputed OER. He stated that whether the purpose of the port visit was operational or rest and relaxation, and whether or not a navigational brief was presented to the OPS, the responsibility for working out the details for safe navigation was the applicant's. He further stated as follows:

For me the issue is this: [the applicant's] navigation chart was SO poor, of SUCH an inadequate scale, and SO lacking in land and bottom detail that no prudent mariner would have used it without the full understanding and concurrence of his chain of command - and I mean here one's commanders personally, not their staff officers.

The Group Commander vouched for the credibility of the OPS by stating that the OPS would never shade the truth. He stated that in his opinion, the OPS is the finest officer in the Coast Guard today.

Supplemental Information Submitted by the Applicant

After receiving the PRRB's final decision, the applicant submitted supplemental information for this Board to consider. He stated that the issue is not one of attempting to shift blame from the applicant to his superiors, but whether certain disputed comments in the subject OER are fair and accurate. The applicant also complained about the failure of the PRRB to address the issue of whether the OPS should have been permitted to serve as the preliminary investigating officer for the NJP. He alleged that the OPS had a conflict of interest, which was prejudicial to the applicant. The applicant also complained that the PRRB obtained and used statements from the rating chain in making its decision without giving him an opportunity to reply to them. The applicant submitted additional statements to the Board from his XO, his chief engineer, and himself. Each is summarized below.

a. The XO wrote that the applicant thought he had approval of his chain of command for the patrol because the OPS had approved the concept for the patrol during an operational brief given to him by the applicant. The XO stated that the OPS told the applicant that he would brief the Group Commander. The XO stated that the OPS never briefed the Group Commander as he stated that he would have. He questioned the credibility of the OPS by stating that he had been untruthful in another situation.

b. The chief engineer wrote an exhaustive statement. He stated that the OPS officer had received an extensive brief in which he was told exactly what the cutter's mission would be. He stated that the OPS officer was also told that a need existed to determine whether [REDACTED] could serve as an operational point for some missions. He stated that he showed the OPS a sailing guide and a local chart of the area and at no time did the OPS tell the applicant not to go to [REDACTED]. The chief engineer questioned the credibility of the OPS by stating that he had been untruthful in another situation.

c. The applicant claimed in his sworn supplemental statement that the navigational brief lasted 12 to 15 minutes. He stated he showed OPS the nautical charts and all tracklines. The applicant stated that he provided other details about the voyage, but he did not "point out [the cutter] would be deviating from the navigation depth [he] had prescribed for [it]," because he thought that was obvious from examining the charts.

In a later statement dated March 15, 2001, the applicant stated he never said there was an operational need to go to [REDACTED] but rather there was an operational purpose for going there. The purpose was to investigate [REDACTED] for future use by 110 ft patrol boats operating in the [REDACTED]. The applicant stated that if the OPS officer had stated at NJP that he had been briefed by the applicant on the patrol and did not order the applicant not to go to [REDACTED], "it is only reasonable to conclude that [the Group Commander] could never have fairly written the OER block 7 comment [-] 'Although diligent in planning for the first 110 WPB visit to this marina, his track across a shall bank, the poor scale & absence of detail on chart would have

prompted many CO's to see alternatives"- or the Block 8 comments about the applicant's failure in judgment.

The applicant stated that fairness required that the OER reflect his advance preparation, and [the Group's] knowledge and prior concurrence in his decision to make the voyage. He admitted that even with these comments, the OER would have mentioned the grounding. He stated that given his overall record and eventual selection for LCDR, it can not be presumed that he would have been passed over the first time if the subject OER had been couched in fairer terms.

The applicant also submitted statements from three other officers who served as COs of other cutters that belonged to the applicant's Group.

d. The CO of one cutter from July 1997 to June 1999 wrote that there were both formal and informal requirements to notify the chain of command about patrol intentions. "In terms of formal requirements, Quarterly Patrol Summaries, LOGREQS, Daily SITREPS and Foreign Port Call Requests were done via official correspondence. Informally, patrols were coordinated and discussed with the Group Operations Officer." He stated that although informal, the chain of command was emphasized and the Group Operations Officer expected to be briefed. He stated that during his time as CO emphasis was placed on regaining operational knowledge of the [REDACTED]. According to this individual, a program was started in late 1998 to formalize operations in the [REDACTED] area. He stated the applicant had mentioned to him [REDACTED] as a possible logistics stop and that he had wanted to patrol in the area.

e. A LCDR stated that he was the CO of a cutter that belonged to the same group as that of the applicant's. He stated the standard operating procedure was to brief OPS on planned patrols and on information that needed to be briefed up the chain; the COs never directly briefed the Group Commander. He stated that he attended a meeting in which the [REDACTED] emphasized regaining of knowledge of the [REDACTED], and the Group Commander was very eager to support this initiative. He stated that logistically, it made sense to investigate [REDACTED] because when cutters were operating on the [REDACTED] they were not close to any logistics port.

f. A CO of another cutter, a LT, stated that although not required, the cutter COs would generally brief the OPS of intended actions for a particular patrol. He stated that the OPS was always briefed if something was planned that was not routine. COs were encouraged to explore remote areas of the [REDACTED], especially if narcotics traffickers could use them to gain an advantage over law enforcement forces.

Applicant's Other Pertinent OERs

The applicant's LT OERs contained no performance marks lower than 4 and his block 12 marks are 5,5,5,5,5, 5, 5, and 6. In the OER before the disputed one, the applicant received a mark of 6 in judgment. In the disputed OER he received a mark of 4 in this category and in the OER after the disputed one, he received another mark of 6 in the judgment category.

Views of the Coast Guard

On August 1, 2001, the Board received an advisory opinion from the Chief Counsel of the Coast Guard, recommending that the Board deny relief in this case.

The Chief Counsel stated that to establish that an OER is erroneous or unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl Ct. 1446 (1992). In the instant case, the applicant has not alleged a misstatement of hard fact or any procedural defect in the disputed OER nor has he provided evidence, much less prima facie proof, of any violation of a statute or regulation. The Chief Counsel stated that in proving his case, the applicant must overcome the strong, though rebuttable, presumption that rating officials acted correctly, lawfully, and in good faith in executing their duties. Arens v. United States, 969 F.2d 1034, 1037 (1992). He stated that moreover, for the applicant to rebut the presumption of regularity, he must do so by clear, cogent, and convincing evidence. Decision of the Deputy General Counsel in BCMR No. 2000-037, citing Muse v. United States, 21 Cl. Ct. 592, 602 (1990).

The Chief Counsel stated that the applicant has failed to prove that the disputed OER comments were unjust or inaccurate. He stated that the subject OER comments address the fact that a CO's responsibility toward the safe navigation of his vessel is absolute, in this case the applicant's. See Article 4.2.2, Coast Guard Regulations. "[T]he operational decisions the [CO] makes when analyzing the risk of an undertaking remain with the [CO] and no one else. The disputed OER comments are narrowly tailored to address Applicant's risk assessment when he decided to transit the Port of [REDACTED]."

The Chief Counsel stated that the applicant has attempted to cloud the lines of responsibility in this case, by arguing that the dispute is about whether the OPS approved the [the cutter's] trip plan during a navigational brief prior to the ship's departure. The Chief Counsel stated however that the Group Commander's comments in the OER credited the applicant with diligence in planning the Port visit. "However, the [Group Commander] critically analyzed Applicant's judgment in the disputed OER." (Emphasis in original.) He stated that the challenged comments in the OER are narrowly tailored and specifically directed at the applicant's judgment in assessing the risk of entering the [REDACTED].

The Chief Counsel stated that the PRRB had exhaustively assessed the evidence in the record and independently concluded that the applicant had failed to rebut the strong presumption that his rating chain acted correctly, lawfully, and in good faith. The Chief Counsel argued that the applicant had failed to produce the clear and convincing evidence necessary to show that the disputed OER comments do not represent the honest professional judgment of those responsible for rating him.

Applicant's Reply to the Views of the Coast Guard

On August 10, 2001, the Board received the applicant's response to the views of the Coast Guard. The applicant disagreed with the arguments and recommendation of the Chief Counsel.

The applicant disagreed that the standard of proof in this case is clear and convincing evidence. He stated that the clear and convincing standard is one that reviewing courts have used, but he argued that it is not the correct standard of proof before a correction board. "To adopt the Coast Guard's theory would materially erode the principle of civilian control of the military." He stated that the statutory standard set forth in 10 U.S.C. § 1552 is whether there has been an error or injustice in the military record.

The applicant stated that whether or not the rating chain acted in good faith, the evidence in the record fully demonstrates the unfairness of the disputed mark in the judgment category and the challenged comments. Although the OPS was briefed on the patrol, it was only when things went sour due to a minor mishap did the Group Commander call into question either the port or trackline. The applicant stated that his record before and after the disputed OER is stellar.

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 of the case pursuant to section 1552 of title 10, United States Code. The application is timely.

2. The applicant requested an oral hearing. The Chairman, under section 52.31 of title 33, Code of Federal Regulations, recommended disposition on the merits of the case without a hearing. The Board concurred in that recommendation.

3. The evidence corroborates the applicant's contention that the OPS was given an approximately 15-minute navigational briefing of the cutter's plan to visit the [REDACTED]. The applicant, XO, and chief engineer of the cutter stated under penalty of perjury that the OPS officer was given the briefing, which included the sailing guide and a local chart of the area. The Board is further convinced that the OPS was briefed on the matter because he never denied being briefed. When asked about it at the applicant's NJP the OPS stated that he did not remember whether he was briefed. It appears to the Board that a briefing on a non-routine patrol to an area/port of questionable safety would be remembered by the OPS. Moreover, in his sworn statement to the PRRB, the OPS never denied that he was briefed on the patrol. Therefore, the Board finds that the applicant briefed the OPS on the patrol.

4. The applicant has also presented persuasive evidence that even though not required, it was the informal policy of the Group to brief the OPS on navigational plans, particularly non-routine plans. In addition, the Board is persuaded by the statements

from the three other COs who were members of the applicant's Group that the Group Commander was never briefed directly by the COs, but rather he was briefed through the OPS.

5. In addition, the COs corroborate the applicant's statement that they were encouraged by [REDACTED] the Group Commander's superiors, to investigate other ports for use in the [REDACTED]. Therefore, the Board is persuaded that the visit to the port in question was for rest and relaxation and to investigate whether the port could be used by cutters for future logistical purposes.

6. In light of Findings in 3., 4., and 5., the Board must decide whether the applicant was absolved from any responsibility for the grounding such that the mark in judgment and related comments were unfair because he had informed his supervisor of the patrol before hand. The Board finds that the applicant has failed to submit sufficient evidence establishing a material error or injustice in his military record.

7. In this regard, Article 4-1-2, Coast Guard Regulation provides that the "responsibility of the [CO] for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these Regulations." Moreover, Article 4-2-2(A.) states that the [CO of a ship] is responsible for the safe navigation of his vessel. The evidence is clear that the navigation of the applicant's ship into a marina at [REDACTED] was not entirely safe because of its inadequate water depth, causing the cutter to hit bottom and to suffer approximately \$50,000 in damage.

8. The applicant cannot alleviate himself of any blame for the grounding of the cutter by claiming that it was not his fault because he had briefed the OPS who did not forbid the applicant from making the voyage. While the Board believes the OPS was briefed, nothing has been presented to the Board showing that the OPS was required by the Group Commander or regulation to approve or disapprove the patrols or navigational plans of the Group's COs. Even the applicant admitted that he did not have an obligation to brief the OPS on the patrol under review. If there was no obligation to brief OPS, then there could be no requirement for the OPS to approve or disapprove a patrol, particularly in the absence of any regulation to do so. Merely because the applicant chose to brief the OPS on this patrol does not mean that the evaluation of the applicant's decision-making and judgment skills in choosing this patrol in the first place were in error or unfair. Moreover, the applicant knew there was an element of risk involved in making this patrol.

9. As the CO of the cutter, the applicant had ultimate responsibility for the safety of the cutter, not the Group's OPS officer. It was the applicant's decision to go into the subject port as part of his patrol, knowing that the safe navigational draft of the cutter was 12 feet while the water depth of the subject port was between 9 and 10 feet, which the applicant stated he failed to include in the briefing he provided to the OPS officer. It was the applicant's decision to investigate this port during the patrol knowing that it was not a port frequented by Coast Guard cutters. In making the decision to investigate this port, it was the applicant's responsibility to obtain the necessary information for making a safe voyage into this unfamiliar port.

10. The grounding of the ship needed to be recorded in the evaluation of the applicant's performance in some manner. It is a fact that it occurred on the applicant's watch and the cutter suffered \$50,000 in damage. The applicant's technical skills and those of his crew in dealing with the situation once they discovered they had a problem were not in question. According to the investigative report, the applicant appeared to have instituted the correct maneuvers in attempting to safely depart the port. He was not criticized on his ship handling duties, but rather on his decision to place the cutter at risk by taking it into this unfamiliar port.

11. All of the challenged comments relate to the applicant's decision/judgment in making a risky voyage without the existence of service need or orders from his superiors to do so. Even if the applicant had successfully navigated in and out of this port without touching bottom, his judgment for deciding to go there in the first place would be a proper subject of evaluation by the rating chain.

12. The applicant has not shown that the challenged comments are inaccurate. They represent the Group Commander's evaluation of the applicant's judgment with respect to the subject voyage. They are fair in light of the responsibility placed on a commanding officer for the safety of his ship. The Group Commander's comment – "his track across a shallow bank, the poor scale & absence of detail on chart would have prompted many CO's to seek alternatives" – is a fair criticism, particularly in the absence of evidence showing that the applicant had more developed charts. The IO stated that chart used by the applicant did not indicate the depth of the channel and basin at the marina. The Board also finds the remainder of the challenged comments to be appropriate and well tempered. Again, the fact is that the ship hit ground and sustained substantial damage, and it was the applicant's decision to make this voyage knowing that the patrol was a risky one.

13. In addition to not finding the comments to be erroneous, neither does the Board find them to be unjust. (See United States v. Reale, 208 Ct. Cl. 1010, 1011 which defines an injustice as treatment by military authorities that shocks the sense of justice but is not technically illegal.) The challenged comments do not shock the Board's sense of justice. The mark of 4 in judgment is fully supported by the comments.

14. The applicant complained that the comments were based on hindsight. However, almost all comments in any evaluation could be classified as hindsight because they are based on performance that occurred across a particular reporting period. The Board finds no merit in this argument. The applicant has not shown that the comments related to events that occurred outside the reporting period.

15. The mark in judgment and the challenged comments probably contributed to the applicant's failure before the 1999 LCDR selection board. However, since he has not shown them to be in error or unjust, there is no basis to remove the failure of selection.

16. The applicant's complaint about the OPS serving as the preliminary investigating officer for the NJP is moot because the charges against the applicant were dismissed by the Group Commander.

17. The applicant has failed to submit sufficient evidence establishing that the Coast Guard committed an error or injustice in this case.

18. Accordingly, the applicant's request for relief is denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of
his military record is denied.

USCG, for correction of

