

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-037



FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the applicant's completed application on February 5, 2016,¹ the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 8, 2017, 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, [REDACTED] asked the Board to correct a comment in his Officer Evaluation Report (OER) dated May 31, 2013, and to remove his non-selection for promotion to lieutenant commander (LCDR) in August 2015 by the LCDR selection board, as well as any potential non-selection for promotion in August 2016 if the correction was not made before it convened.² The applicant alleged that the disputed OER comment was prohibited by Article 5.A.7. of COMDTINST M1000.3A, which prohibits comments about an officer's medical or psychological condition. He also alleged that the comment caused his non-selection for promotion in August 2015.

The applicant alleged that the disputed OER comment concerns a mishap he had at his residence, which required medical care. He stated that the accident was not a workplace incident, never affected his duty status, and did not violate any rules or policies. He alleged that a reader of the OER comment "can easily speculate that this comment [is] referring to [his] medical condition," especially because it supports the numerical mark he received for the performance dimension "Health and Well-Being."³

¹ Upon his request, the applicant was granted an extension of 180 days of the Board's ten-month period.

² The applicant was selected for promotion in August 2016.

³ On an OER form CG-5310B, officers are rated on a scale of 1 (worst) to 7 (best) in eighteen different performance dimensions. According to the instructions on the form, each numerical mark deviating from the standard mark of 4

In support of his request, the applicant submitted a copy of the OER. The disputed comment supports an excellent mark of 6 (on a scale of 1 to 7) that the applicant received for the performance dimension “Health and Well-Being.” The comment states the following:

Strong dedication to health & fitness, strict adherence to safety as recreational sailing race club leader and responded to own MISHAP with humility and used event to further promote safety.

The applicant asked that the comment be corrected to state the following:

Strong dedication to health, fitness & safety; as sailing club leader/instructor led 15 week rec boat safety trng, 35+ members, resulted in zero safety incidents, set standard for other clubs.

The applicant also submitted statements signed by his reporting officer, who was responsible for the disputed comment, and by OER reviewer:

- The applicant’s reporting officer wrote on January 21, 2016, that he supports the applicant’s request. He stated that when he used the word “mishap” in the OER, he did not intend to reflect negatively on the applicant’s medical condition or performance, but he “fully understand[s] that a negative connotation could possibly be associated with the use of the word ‘mishap’.” He noted that he has signed an alternative OER (which the applicant submitted) with the comment corrected as the applicant has requested.
- The OER reviewer likewise endorsed the applicant’s request on January 25, 2016. He stated that the comment refers to a medical condition, and such comments are prohibited. In addition, he stated that the comment was not intended to be negative but it could be read as having a negative connotation.

VIEWS OF THE COAST GUARD

On June 15, 2016, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC noted that the applicant did not submit an OER reply for inclusion in his record with the disputed OER and did not submit an application to the Personnel Records Review Board (PRRB) within a year of receiving the OER, as he was authorized to do.

must be supported by a comment showing how the officer’s performance met the written standard for the numerical mark. The written standards for the numerical marks for the “Health and Well-Being” dimension concern an officer’s fitness, stress management, compliance with weight standards, commitment to safety, commitment to physical and emotional well-being, and leadership of others in such matters.

PSC stated that Article 5.A.4.f.(5) of COMDTINST M1000.3, which was in effect in 2013, states that OER comments may not “[m]ention any medical or psychological conditions, whether factual or speculative. Restriction applies to Reported-on Officer and family members. The mention of NFFD [not fit for duty] status is prohibited.”

PSC stated that the disputed comment is not prohibited because it does not mention any medical or psychological conditions. Therefore, the disputed comment is not erroneous. PSC also stated that the disputed comment properly supports the high mark of 6 that the applicant received for “Health and Well-Being.”

Regarding the allegation that the use of the word “mishap” could be read as having a negative connotation, PSC stated that the fact that the comment supports a high mark of 6 refutes this claim. “[T]he numerical evaluation demonstrates that the comment was clearly not intended to indicate negative performance or poor safety. In fact, the comment is drafted to suggest that the Applicant responded effectively to a mishap and his command evaluated him positively for it.” Therefore, PSC argued, the applicant has not shown that the disputed comment constitutes an error or an injustice, and the Board should deny relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 15, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. On July 25, 2016, the applicant requested a 180-day extension of the time to respond by email, which was granted. However, the applicant was selected for promotion in August 2016, and 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 to the Board is timely.⁴

2. The applicant alleged that a comment referring to a mishap on his May 2013 OER and his subsequent non-selection for promotion in 2015 are erroneous and unjust because, he alleged, the comment refers to a medical condition and so is prohibited by Article 5.A.4.f.(5) of COMDTINST M1000.3, and because a reader might interpret the comment negatively although his reporting officer did not intend the comment to reflect negatively on the applicant’s performance. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.⁵ Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating

⁴ 10 U.S.C. § 1552(b) (requiring application within 3 years of the applicant’s discovery of the alleged error).

⁵ 33 C.F.R. § 52.24(b).

chain acted “correctly, lawfully, and in good faith” in preparing their evaluations.⁶ 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.⁷

3. The Board finds that the applicant has not proven by a preponderance of the evidence that the disputed comment violates Article 5.A.4.f.(5) of COMDTINST M1000.3, which states that OER comments may not “[m]ention any medical or psychological conditions, whether factual or speculative. Restriction applies to Reported-on Officer and family members. The mention of NFFD [not fit for duty] status is prohibited.” The disputed comment does not mention the applicant’s medical status or any medical or psychological conditions. Moreover, as required by the OER instructions,⁸ the comment properly supports the mark of 6 that the applicant received for “Health and Well-Being” by explaining that the applicant used his own mishap to promote safety, which is one of the components of that performance dimension. Therefore, the applicant has not shown that the OER comment about the mishap constitutes an error.

4. Furthermore, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed comment constitutes an injustice.⁹ Although since he was non-selected for promotion in 2015, the applicant, his reporting officer, and OER reviewer have speculated that the disputed comment might have been interpreted negatively, as PSC noted, the comment positively supports a high mark of 6 for “Health and Well-Being.” Therefore, their speculation appears to be “retrospective reconsideration”¹⁰ of the OER comment that is not based on any new information except the applicant’s non-selection for promotion and is not grounds for changing the comment.

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

⁷ *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).

⁸ See Coast Guard OER form CG-5310B.

⁹ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for the purposes of the BCMRs, “injustice” is “treatment by the military authorities that shocks the sense of justice but is not technically illegal”).

¹⁰ See *Tanaka v. United States*, 210 Ct. Cl. 712 (1976) (upholding an Air Force BCMR decision to deny relief because letters from the plaintiff’s raters had not shown any misstatements of fact but “only opinions they no longer entertained”); *Paskert v. United States*, 20 Cl. Ct. 65 (1990) (upholding an Army BCMR decision to deny relief because the letter of the plaintiff’s senior rater stating that the plaintiff should have been selected for promotion and retained in the Army but not denying the underlying facts “is a case of retrospective thinking motivated by the knowledge of the applicant’s non-selection for promotion”); BCMR 2015-136 (noting that “retrospective reconsideration” following non-selection without new information is not grounds for removing an evaluation); BCMR Docket No. 84-96, Decision of the Deputy General Counsel (finding that a CO’s statement that he would raise the applicant’s marks retroactively if he could, but that did not identify any misstatements of fact, constituted “retrospective reconsideration that should be afforded little weight”); BCMR Docket No. 67-96 (finding that relief should be denied because the recent statements of the applicant’s supervisors constituted “retrospective reconsideration”); BCMR Docket No. 24-94 (finding that “retrospective reconsideration” did not warrant relief when the reporting officer wrote, “had I known then what I now know I would have marked him differently”).


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.¹¹ Therefore, the Board finds no grounds for removing or changing the disputed comment. Moreover, because the applicant has not shown that his record contained a material error or injustice when it was reviewed by the LCDR selection board in 2015, he has not shown that he is entitled to removal of the non-selection or to a special selection board pursuant to 14 U.S.C. § 263.

6. Accordingly, the applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ *Hary*, 618 F.2d at 708.

ORDER

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

June 8, 2017

