

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-091



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 case after receiving the completed application on April 8, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 27, 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 asked the Board to remove his comments from a special officer evaluation report (SOER) covering his service from April 1 to May 12, 2013 while assigned to a cutter. The derogatory SOER contains low marks and negative comments from the applicant's superiors. The applicant submitted a written addendum to the SOER on June 17, 2013, which is attached to the SOER in the applicant's file. The applicant requested that the Board remove this addendum, and replace it with one that reads "I am aware of the contents of the performance report and decline comment" pursuant to Article 5.A.7.c. COMDTINST M1000.3A, which states the following in applicable part:

(2)(a) Reporting Officer. The reporting officer shall provide an authenticated copy [of an SOER] to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum. The supervisor and the reporting officer shall be afforded the opportunity to address the reported-on officer's addendum via individual one-page signed endorsements to the reported-on officer's addendum. The reporting officer will then forward the OER and attachments to the reviewer.

(2)(b) Reported-on Officer. The reported-on officer has the option to prepare an addendum using Coast Guard Memorandum limited to two pages with no

enclosures. The addendum must be submitted to the supervisor within 14 days of receipt of the OER unless an extension is specifically requested.

[1] The reported-on officer's addendum does not constitute an official request for correction of a record but provides the reported-on officer an opportunity to explain the failure or provide their views of the performance in question. Commenting or declining to comment does not preclude the reported-on officer from an official request for correction of the record under Article 5.B. of this Manual or submitting an OER Reply under Article 5.A.7.e. of this Manual.

[2] If the reported-on officer declines to make an addendum, they shall so indicate by attaching the following statement: "I am aware of the contents of the performance report and decline comment."

The applicant alleged that he was not made aware that he could decline to comment on the SOER. He claimed that his command misled him to believe that he was required to provide comments when he received the report. The applicant stated that he did not know he was able to decline to comment until February 16, 2016, when he received an email from the Coordination Branch Chief stating that the addendum could not be removed. On that date, he was advised that he would have to pursue recourse with the Personnel Records Review Board (PRRB) or the BCMR because it had been more than one year since the SOER was submitted. The applicant stated that after his non-selection for promotion to lieutenant (LT) by the LT selection board that convened in 2015, he attended several OER lessons via webinar or in-person sessions. The applicant asserted that during this training he learned that personal comments added to an SOER are always viewed as negative according to some captains and commanders who participated in the trainings. The applicant argued that it is in the interest of justice to remove his comments.

VIEWS OF THE COAST GUARD

On September 8, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC submitted sworn statements from the three officers who served as the applicant's rating chain aboard the cutter. The Operations Officer, who was the applicant's direct supervisor, stated that the applicant was "provided all applicable policy regarding the [SOER] process subsequent to sub-standard performance." He stated that the Officer Personnel Management Branch (OPM) of PSC guided and assisted the applicant with the process of submitting comments. The Operations Officer noted that at the time, the applicant "had a strong desire to comment via addendum." He further stated that he did not direct or advise the applicant whether or not he should submit comments.

The Executive Officer (XO) of the cutter stated that he disagreed with the applicant's claim that he was not aware of his ability to decline to comment. The XO had been in contact

with OPM regarding the proper procedures for creating an SOER for an Ensign, whom the command planned on removing from his primary duties. The XO stated that when the applicant was counseled on his SOER, he was provided a copy of COMDTINST M1000.3A, Article 5.A.7.c. The XO further stated that he recalled putting the applicant in touch with the assigned case officer at OPM in order to discuss whether or not the applicant should provide an addendum to the OER. The XO did note, however, that he likely did encourage the applicant to make a statement. The XO directed the Operations Officer to follow up with the applicant periodically in order to determine the status of any addendum the applicant wished to submit in order to conform with the 14-day time requirement.

The CO also stated that he believes the applicant was provided accurate information regarding his rights, which included being provided with a copy of COMDTINST M1000.3A, Article 5.A.7.c. The CO stated that he made the decision to remove the applicant from the ship following several months of professional counseling. The applicant was temporarily assigned ashore, where he was provided with the SOER and the applicable regulations. The CO stated that he recalls sitting with the applicant and going through the various options, rights, and responsibilities, to include going through applicable paragraphs of COMDTINST M1000.3A. On June 6, 2013, the CO received a call from the applicant's mother, who asked for advice on what the applicant should include in his addendum. The CO lost reception due to the geographic location of the ship, but followed up with an email the next day. The CO directed the applicant, through his mother, again to look at COMDTINST M1000.3A, and to ensure any response the applicant chose to submit was focused on the "trait-action-impact" format (commonly used in the Coast Guard). According to the CO, on June 10, 2013, the applicant emailed him directly asking for feedback on what to include in his addendum. The CO replied that any response was up to the applicant to write, suggested that any response should use the "trait-action-impact" format, and referred him to the assigned case officer at OPM.

PSC recommended denying relief because the applicant did not substantiate his claim that he was improperly counseled regarding his rights in the SOER process. PSC stated that the applicant was "made aware of and provided the policy and procedures outlining the addendum process." PSC also noted that the applicant's delay in requesting removal of his comments until after he had not been selected for promotion is further evidence that he accepted his addendum as accurate and fair at the time.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 17, 2016, the applicant submitted a response to the Coast Guard's advisory opinion. The applicant stated that he had one objection to the advisory opinion, regarding PSC's narrative of the applicant's timing. The applicant stated that he did accept the addendum as "accurate and fair" at the time, as the PSC stated. However, the applicant asserted that this acceptance was based on incomplete information, in that he was unaware that he could decline to comment.

After the applicant was not selected for promotion, he sought career counseling. The applicant stated that, based on counseling he received over a year and half, he believes that his response to the SOER was viewed in a negative light by members of the LT selection board. He

asserted that he believed “prior to seeking OPM-3 career counseling that [his] comments would not be held against [him].” The applicant restated his request that his comments be removed from his record. He further stated that he is “not trying to disguise what happened. [He] simply want[s] to let the evaluation stand on its own.”

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 SOER addendum 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.¹ 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.”²

3. The applicant alleged that his addendum to the disputed SOER should be removed and replaced with a statement that reads “I am aware of the contents of the performance report and decline comment,” pursuant to Article 5.A.7.c. COMDTINST M1000.3A, because he was unaware that he was able to decline to comment at the time he submitted his comments. He further claimed that he was misled by his supervisors that he was required to make a statement on his behalf. However, according to three of the applicant’s superior officers, the applicant was counseled properly and given a copy of COMDTINST M1000.3A, Article 5.A.7.c., which clearly states that the reported-on officer may decline comment. In addition to ensuring the applicant was counseled properly, the applicant was also instructed to speak with the case officer at OPM by two of his supervisors. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that he was miscounseled about his rights with regard to the SOER addendum.

4. The applicant stated in his response to the advisory opinion that he believed his comments would not be held against him prior to seeking counseling from OPM. It is unclear whether he sought advice from OPM at the time the SOER was created or if his first contact with OPM was around February 2016, when he claims to have discovered he was not required to comment. Either way, the record shows that the applicant was properly informed of his rights at the time the SOER was prepared and that he chose to submit an addendum on his own behalf. He has not shown that he should have been counseled not to submit comments at all and he has not shown that any substantive addendum a reported-on officer might submit in response to an SOER would always be construed negatively by the members of a selection board.

¹ 33 C.F.R. § 52.24(b).

² *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. The applicant has not proven by a preponderance of the evidence that he was misled to believe he was required to submit an addendum or that he was not properly counseled on his rights and responsibilities regarding an SOER. Therefore, his request to have the addendum removed from his record should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

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

January 27, 2017

