

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-023

████████████████████
██████████ LCDR

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the application upon receiving the applicant's completed application on November 17, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated September 14, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a lieutenant commander (LCDR/O-4) on active duty, asked the Board to correct his record by removing pages 2 and 3 of his three-page Officer Evaluation Report (OER) covering the period June 19, 2010, through June 6, 2011. This period is the second of his two years of service as the Operations Officer of a cutter. The OER states that as the Operations Officer he was responsible for planning and executing missions on a 270-foot cutter with a crew of more than a hundred. He supervised five divisions with five junior officers, three chief petty officers, and twenty-seven petty officers. He was also the Navigator and the Command Security Officer.

The applicant stated that he did not request the correction earlier because he only recently consulted the Officer Personnel Management (OPM) Division of the Personnel Service Center and "learned that an OER, or portion of an OER, could be removed because of evidence of lack of judgment from the rating chain." The disputed 2011 OER includes the following marks and comments:

1. Page 1 of the disputed OER shows that the applicant's Supervisor, who was the Executive Officer (XO) of the cutter, assigned him very high marks of 6 and 7 (on a scale from 1 to 7) in five performance dimensions: Planning and Preparedness, Using Resources, Results/Effectiveness, Adaptability, and Professional Competence. The high marks were supported by laudatory comments regarding the applicant's accomplishments that year.

2. Page 2 shows that the XO, as Supervisor, assigned the applicant four mediocre marks of 4 for Speaking and Listening, Looking out for Others, Directing Others, and Workplace Climate; one above-standard mark of 5 for Teamwork; and three excellent marks of 6 for Writing, Developing Others, and Evaluations. The comments supporting the mediocre marks of 4 include the following:
 - “Extremely focused on own conversational goals; sometimes glossed over, cut short, or descended into argument when others attempted to communicate. Subordinates sought out Chiefs Mess & Cmd for comms facilitation to preserve functional Cmd Climate. Disagreements w/ Cmd occasionally veered fm professional to near-insubordinate.”
 - “Responded to some impromptu ldrshp scenarios in a manner counter to stated intentions; affected subordinates qual of life & fostered distrust.”
 - “If attempt to inspire a mbr was frustrated, [the applicant] displayed a tendency to publicly belittle or discount them by emphasizing shortcomings.”
 - “Took responsibility for & attempted to change when informed his words & actions adversely impacted others. Response to feedback often came across as disingenuous prompting shipmates to question if [the applicant] cared to improve work environ.”

3. Page 3 shows that the Commanding Officer (CO) of the cutter, as the Reporting Officer on the applicant’s rating chain, concurred with the XO’s evaluation and assigned the applicant one mark of 4 for Responsibility, two marks of 5 for Judgment and Professional Presence, a mark of 6 for Health and Well-Being, and a mark of 7 for Initiative. The CO also assigned him a mark in the fourth (middle) spot on the officer comparison scale, indicating that in comparison with all of the other lieutenant commanders the CO had worked with during his career, the applicant was a “good performer; give tough, challenging assignments.” The CO’s comments supporting the mediocre marks include the following:
 - “He demonstrated exceptional technical competence as a cutterman, however autocratic leadership style frequently at odds w/command’s people oriented leadership philosophy. Rather than delegate, took on much of the workload on himself successfully accomplishing the mission but missing opportunities to teach future ldrs.”
 - “Prided self on grueling work ethic & repeatedly reminded subordinates of inability to compare. Missed cues when ldrshp approach did not work; resulting issues req’d Cmd intervention.”
 - “Recommended for promotion with peers to O-5. Highly recommended for the most challenging administrative staff assignments including personnel management positions at CG-1, PSC OPM/EPM, OPS research or instructor billets at the Coast Guard Academy where his intellectual strengths will allow him to excel. Currently not recommended for future assignments afloat because of demonstrated inability to reliably demonstrate servant leadership qualities required to successfully perform in Command Cadre Afloat positions affecting larger numbers of personnel.”

APPLICANT'S ALLEGATIONS

The applicant alleged that pages 2 and 3 of his 2011 OER should be removed because his CO during the reporting period had poor judgment and because he received no feedback until three days before the end of the reporting period.

As evidence of the CO's poor judgment, the applicant noted that he had received a much better OER in 2010 for his first year aboard the cutter before there was a change in command. On his 2010 OER, which was completed by the XO and outgoing CO, he received all high marks of 6 and 7 on page 1 from the XO; high marks of 6 and 7 on page 2 from the XO except for above-standard marks of 5 for Directing Others and Workplace Climate; and high marks of 6 and 7 on page 3 from the outgoing CO. The CO also assigned him a mark in the highest spot on the comparison scale, denoting "BEST OFFICER of this grade"; recommended him for command afloat; and "strongly recommended [him] for promotion to O5 ahead of peers."

The applicant stated that the outgoing CO was subsequently "afforded additional opportunities for command afloat." (The applicant implied but did not state that the outgoing CO's subsequent assignments show that he had excellent judgment.) The applicant alleged that his performance did not change between the two reporting periods. And although he was praised for his "high work ethic, willingness to support subordinates unless the ship's safety was degraded and upholding high standards for qualifications to keep the ship and crew safe" in his 2011 OER, he also was unjustly assigned much lower marks and negative comments for the same performance.

Additional evidence that the new CO lacked judgment, the applicant claimed, is found in the fact that the cutter ran aground in March 2012 (when the applicant was no longer aboard) and the new CO subsequently retired. He alleged that while he was the Operations Officer from June 2009 through June 2011, his actions had "potentially avoided many situations similar" to the one that led to the grounding in March 2012 and yet he unjustly received a negative OER. He alleged that the new CO's lack of good judgment is proven by the Area Commander's action memorandum concerning the grounding, dated April 26, 2012, which states the following:

- On March 16, 2012, the cutter was directed to make a port call at [REDACTED] for a media event and to offload 52 bales of cocaine interdicted while on patrol. The port call at [REDACTED] was the first for the CO, XO,¹ Deck Officer, and Operations Officer. The Conning Officer had made one previous transit. The cutter was also expected to be back at homeport in [REDACTED] on March 20, 2012.
- The cutter had sent a LOGREQ message requesting the help of a tug and pilot to enter the port, but the message was not received and no tug was arranged. The standard reply message from [REDACTED] upon receiving a LOGREQ "warns of the challenges of

¹ The record does not show whether the XO aboard the cutter in March 2012 was the same officer who evaluated the applicant as the XO of the cutter in 2010 and 2011.

the currents and recommends mooring and unmooring at slack water,”² but the cutter did not receive this reply. Waiting for a tug would have delayed the cutter’s arrival by an hour and so it entered the port without the assistance of a tug. The CO claimed that he had previously discussed the available moorings with the COs of other large cutters, but he had not sought advice from the commands of local cutters homeported at the Base. The CO of one local cutter stated that he “recommends to visiting cutters to only moor and unmoor at slack water.”

- After offloading the cocaine and unloading lube oil, the outbound navigation brief was conducted at 7:15 p.m. A risk assessment had shown a low overall risk, but there were high scores for complexity and environment because of vessel traffic, the tides, and the lack of daylight. During the brief, the XO mentioned the possibility of “taking red buoy 18 to starboard” (the wrong side) if the cutter did not turn fast enough while entering the channel, but no one pointed out that taking red buoy #18 to starboard would cause the cutter to transit over charted shoal water. In addition, the CO never authorized a deviation from navigation standards to enter shoal water.
- The cutter got underway at 7:55 p.m., after sunset. Both engines were working, but while engine #1 was in pilot house control, #2 was in emergency management control. As the cutter was turning to leave the pier, the XO saw that red buoy #18 was “just off the starboard bow” and the Deck Officer notified the Operations Officer that the cutter “was standing into shoal water.” The Operations Officer entered the bridge to check the charts and heard the fathometer alarm, which was set to 5 feet. The cutter grounded sometime between 8:01 and 8:03 p.m. on a shoal of sand and mud when the fathometer at the keel read 4 feet. A rapid response team was used to check the watertight integrity of the hull from inside. The cutter sent a request for a tug and one was available nearby but the cutter then canceled the request. The CO had assumed the Conn from 8:09 to 8:12 p.m. and successfully “walked” the cutter back off the shoal.
- The Engineering Officer reported no damage and no changes in the “liquid load.” The CO considered mooring at [REDACTED], but the line handlers had already left and because of the current, the proximity of shoal water, the darkness, and the vessel traffic, he decided that it would be safest to get to sea instead of attempting to remain in place until the line handlers could be recalled.
- While outbound, an engine overheated twice and a generator had low sea water pressure. Sand and mud were cleaned out of the sea strainers. After sea trials the next morning showed normal results, the cutter moored at another port for an underwater inspection, which showed that all of the paint had been scraped off the width of the keel in a six-foot-long band. The cutter returned to homeport on March 20, 2012.
- A MISHAP message released by the cutter on April 11, 2012, acknowledged that “IF THERE IS ONE LESSON TO BE LEARNED FROM THIS MISHAP, IT IS NOT TO BECOME COMPLACENT WITH CHART REVIEW JUST BECAUSE IT IS A US PORT AND A COAST GUARD BASE.”

² Slack water is the short period at the turn of the tide (in a body of water subject to tides) when there is no strong current.

- The Area Commander concluded that the “grounding was fundamentally caused by a lack of awareness of the location and proximity of shoal water by the CO, XO, OPS/Navigator, Deck Officer, Conning Officer, and the entire navigation team.” A more thorough study of one of the navigation charts would have revealed that the contingency plan “to take red buoy 18 to starboard” was unsafe. Contributing causes included the following:
 - unfamiliarity with environmental conditions in the harbor;
 - the Base’s non-receipt of the cutter’s LOGREQ;
 - “inconsistent marking of shoal water on the Nav, Conn and CIC charts”;
 - the decision to get underway after dark;
 - pressing to get back to [REDACTED];
 - a poor risk assessment that found an overall low risk despite the intention to navigate charted shoal waters in an unfamiliar port at night with a strong ebbing current and “a non-standard machinery configuration”; and
 - the CO’s decision not to have a tug help with the departure (“It is incumbent upon COs to maximize opportunities to develop ship handling skills of subordinates. However, having a tug standing by would have been a more appropriate contingency plan by enabling [the cutter] to increase her rate of turn in lieu of taking red buoy 18 to starboard.”).
- The Area Commander also concluded that, after the grounding, “the CO further jeopardized the safety of the cutter by neither accepting assistance of a nearby tug to return to the pier, nor immediately proceeding to safe anchorage in order to conduct extended damage inspections and the clearing of sea-strainers. Instead, the CO elected to proceed to sea while [generator and engine] cooling water flow were noticeably reduced.”
- No action under the Uniform Code of Military Justice was warranted, but the incident would be reflected in the OERs of the CO, XO, and Operations Officer/Navigator.

VIEWS OF THE COAST GUARD

On April 26, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief and adopting the findings and analysis of the case provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC noted that the applicant did not file an OER Reply when he received the disputed OER and also failed to apply to the Personnel Records Review Board (PRRB) for correction of the alleged error.

PSC stated that in accordance with Article 10.A.2.c.2.c. and 10.A.2.c.2.k. of the Personnel Manual then in effect, officers are responsible for managing their own careers and seeking feedback and clarifications from supervisors. In addition, there is no evidence that the applicant requested and was denied performance counseling.

PSC noted that both the XO and the CO assigned the applicant “less than stellar” marks and comments during the reporting period. Although they both contributed to the grounding of the cutter in March 2012, the Area Commander never concluded that they were “unfit to conduct OERs or other Coast Guard work past or present.” PSC attached to its memorandum an email from the Chief of the Evaluations Branch of PSC-OPM, who stated that they “do not see any justification here that would support removing any pages.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 8, 2018, the Chair mailed the applicant a copy of the views of the Coast Guard and invited him to submit a response within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual in effect in June 2011 states that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.1.c.5. of the Personnel Manual states that “[n]o specific form or forum is prescribed for performance feedback. Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If the feedback is not fully understood, it is the Reported-on Officer’s responsibility to immediately seek clarification and the rating chain’s responsibility to provide it.”

Article 10.A.4.c.4. provides the following instructions for Supervisors completing their section of an OER (similar instructions are provided for Reporting Officers in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. ... After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.



d. In the “comments” block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.



g. A mark of four represents the expected standard of performance. . . .

Article 10.A.4.c.8.a. of the Personnel Manual states that on the Comparison Scale in an OER, a Reporting Officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.”

Article 10.A.4.g. allows an officer to submit, within 21 days of receiving a copy of a validated OER from the Personnel Command, a reply to an OER to express his own views of her performance for inclusion in her record. Members of the rating chain may attach their own responsive comments to the OER Reply.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter under 10 U.S.C. § 1552. Although the application was not filed within three years of the applicant’s receipt of the disputed OER and discovery of the alleged error, it is considered timely because it was filed within three years of his separation from active duty.³

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.⁴

3. The applicant alleged that his 2011 OER is erroneous and unjust because his CO lacked judgment and he received no performance feedback until three days before he was transferred from the unit. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant’s military record 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 chain have 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,”

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

⁴ *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).

⁵ 33 C.F.R. § 52.24(b).

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).

factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁷

4. The applicant did not challenge the disputed OER by filing a reply as allowed by Article 10.A.4.g. of the Personnel Manual in effect in June 2011 or by applying to the PRRB within a year of receiving the OER. His failure to avail himself of these ways to challenge the accuracy of the OER is evidence that he accepted the evaluation at the time.

5. The Board finds that the applicant has not overcome the presumption of regularity regarding his rating chain’s willingness to provide performance feedback. He alleged that he did not receive any feedback during the reporting period until three days before his transfer, but he has not shown that he was entitled to formal counseling, and under Article 10.A.1.c.5. of the Personnel Manual, it was his responsibility to learn the expectations of and seek feedback from his rating chain. Moreover, the OER itself discusses his response to feedback he received during the reporting period: “Took responsibility for & attempted to change when informed his words & actions adversely impacted others. Response to feedback often came across as disingenuous prompting shipmates to question if [the applicant] cared to improve work environ.”

6. The applicant has not overcome the presumption of regularity that the XO and CO of the cutter accurately evaluated his performance during the reporting period. The fact that the XO and the prior CO gave him much higher marks in June 2010 is not evidence that his performance during the subsequent report period was not accurately reflected in the disputed OER.⁸ Nor does the fact that the cutter grounded in March 2012—apparently due to inconsistent charts and some complacency in navigation—show that the XO and CO were unable to accurately assess the applicant’s leadership of the Operations Department during the reporting period for the disputed OER.

7. The applicant has not overcome the presumption of regularity with respect to the preparation of the disputed OER nor proven by a preponderance of the evidence that it 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.⁹ Therefore, the Board finds no grounds for removing the OER from his record. His request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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 *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) (“[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.”).

⁹ *Hary*, 618 F.2d at 708.

ORDER

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

September 14, 2018

