

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-094

██████████
██████████; LTJG

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 case after receiving the completed application on February 8, 2018, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated September 28, 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 AND ALLEGATIONS

The applicant, an active duty Lieutenant Junior Grade (LTJG), asked the Board to correct his record by correcting his second Officer Evaluation Report (OER) as an ensign, which covers the period October 1, 2015, to March 31, 2016, when he was performing Incident Management at a large Sector as a Surface Operations Division Officer. He also asked the Board to remove his initial non-selection for promotion to LTJG and to back date his date of rank to LTJG to November 6, 2016.

The applicant provided a brief with his application in which he stated that he had done extensive research before becoming an officer from the enlisted ranks. He asserted that he specifically recalled “that to unsuccessfully promote to [LTJG] one would have to commit one of a number of egregious offenses related to ethics, integrity, fraternization, mishap, or being involved in a drug/alcohol incident.” He stated that throughout Officer Candidate School (OCS) and during his first tour, he was repeatedly told that an officer’s first tour “is for making mistakes and learning from those mistakes to become a better Officer.”

The applicant stated that when he arrived at his second duty station in May 2015, he was over-billeted because another ensign was filling the billet, which created challenges in defining his role in his division. When he received his first “tangible assignment” at the station, he was eager to tackle it. He claimed that it was not until after he had submitted a second draft to his supervisor

that his supervisor told him about a relevant Reporting System. Even then the applicant was provided with “extremely vague guidance” and was told that he could “find the information there.” After struggling for over a month without any assistance from his chain of command, the applicant stated, he sat down with his supervisor and told him that he had needed help because he had never written these types of reports either in college or in the Coast Guard as an enlisted member.

The applicant stated that attempting to learn by fire “absorbed a vast majority of [his] energy, focus and time,” which set into a motion a domino effect causing him to miss several deadlines. He stated that he felt “extremely uncomfortable approaching or expressing” himself with his supervisor because of his “robotic, forced and unapproachable demeanor, paired with expectations representative of a Lieutenant.” The applicant stated that these circumstances together caused him to question if he was right for the Officer Corps. He stated that he felt very alone at his Division until he witnessed colleagues leaving his supervisor’s office “in tears on multiple occasions.” The applicant stated that he was “both relieved and concerned to discover that [his] supervisor’s poor leadership was not an isolated incident” between the two of them.

The applicant stated that when he was counseled on his marks at the end of the period, he was very unsatisfied with his OER. He asserted that the OER was “grossly inaccurate and did not reflect the marked progress made, focusing almost entirely on the negatives.” He pointed out that it is not until Block 11 that mention is made of the applicant’s progress during the marking period. The applicant stated that because this was only his second marking period, he was unaware that he was not required to sign the OER. He stated that he believed his signature was “merely acknowledging [he] discussed it with [his] supervisor.” When the results of the promotion board were published, the applicant stated, he was called into Deputy’s office (not his supervisor’s) and informed that he had not been chosen for promotion.

The applicant stated that on July 28, 2016, during the next reporting period, his supervisor gave him a list of seventeen tasks in addition to his regular assigned duties to complete in their entirety by the end of August. He stated that his supervisor said completing the list would prove that the applicant was “able to perform at the O-2 level.” The applicant stated that over the next three weeks, he arrived as early as 5:00 a.m. and left as late as 9:00 p.m., including on weekends, in order to complete the list. He stated that he completed the list a week early. He alleged that his supervisor stated that he did not think the applicant could do it but he “really knocked this list out of the park.”

The applicant argued that his supervisor provided poor leadership and gave him an unjust OER which did not reflect on his “professionalism, knowledge, motivation, demeanor, and ability to thrive and excel as an Officer.” He asserted that he was “not given proper guidance and was misinformed on multiple occasions with career-altering information.” He argued that a first tour is supposed to be designed to challenge and expose an officer to as much as possible and is supposed to allow for minor mistakes to be made. The applicant stated that none of his mistakes were unique and none were egregious. He spoke of the tasks and qualifications he was able to accomplish during the reporting period that were not properly discussed or acknowledged in the disputed OER. Therefore, the applicant asked that the Board review the OER and take whatever action it deems appropriate, remove his non-selection, and back date his date of promotion.

In support of his application, the applicant provided three “Witness Statements.” The first is from a Commander who was the Chief of Response at the applicant’s Division. She had been serving as the Chief of Contingency Planning Force Readiness at the Sector in question since July of 2015. She stated the following:

Sometime after I arrived, [the applicant’s] immediate supervisor sought out my advice for some challenges he was having with supervising [the applicant]. As we discussed the issues of [the applicant’s] performance, specifically failing task deadlines and or submitting poor final products, I began to ask questions of how [the applicant] was being managed. My biggest concern was that [the applicant] was expected to act more as a Lieutenant and self-manage rather than that of an ENS where task direction includes oversight, management, and support. My advice was to treat [the applicant] as if he were an Ensign, provide clear expectation, guidance, and daily management/oversight for him to learn from. It sounded more like [the applicant] failed adequate supervision and oversight to guide him as an Ensign rather than personal will or capability to succeed. [The applicant’s] 2nd OER was extremely poor. When I discussed the OER with his chain of command I expressed my concerns that [the applicant] would not be promoted off this OER. They seemed surprised and did not think that would be the case. Prior to the end of his marking period, [the applicant] started to make improvements as he was being managed differently. I even received feedback from his immediate supervisor that [the applicant] was improving and doing much better. I was concerned that his OER did not reflect that. Based on both my personal observance and discussion with [the applicant’s] chain, there were not behavioral issues or discipline issues. I believe [the applicant] performed to the standards of an Ensign, but had higher expectations placed on him that were unattainable for a first year Junior Officer. I transferred over to the Response Department Head and was in his direct chain of command in June of 2016. I had no issues or concerns with his performance – he was exceeding expectations. While [the applicant] was finally promoted on July 1, 2017, he has been performing at the level of a LTJG for much longer and should have been promoted with his peers at the first promotion board.

The second statement is from a fellow LTJG who had arrived at the station as an ensign in May 2014. She stated that after a year of working in the same Division that the applicant later reported to, she felt she understood the expectations of a Junior Officer. She stated that after working with the applicant for a few months, she noticed he was struggling with his taskings. He would frequently come to her for guidance and advice. After she got to know the applicant, she realized “any issues with task completion or deadlines were not due to willingness on his part.” She asserted that he was “highly motivated, inquisitive, and had a positive, upbeat attitude during this period.” She claimed that her supervisor (the same as the applicant’s) asked if she noticed that the applicant was struggling and she told the supervisor that she felt that the applicant needed to be tasked differently. She claimed that “expectations were unrealistically high for [the applicant] from the start to the point where he was not recommended for promotion based off mistakes that would otherwise be reasonably expected from a first year junior officer.” The LTJG asserted that based on her personal experience and observations, she believed that the applicant should have been promoted with his peers. She stated that the applicant made minor mistakes that are normal for a first year junior officer and his “performance dramatically improved towards the end of his marking period.” She felt that his OER was marked unjustly and very harshly, and that the marks did not reflect any of the positive aspects from the marking period.

The last statement is from a chief warrant officer (CWO) in the Incident Management Branch who had over seventeen years of experience in the Coast Guard. He stated that he has had a hand in developing many junior officers. He stated that when he arrived at the station as a chief petty officer in August 2015, the applicant had been there for a few months. His desk was about ten feet from the applicant’s and they worked regularly with each other. The CWO stated that he observed the applicant “doing exactly what he should [have been] doing ... eagerly taking on

assigned tasking, learning the ropes, learning his position in the service and making some minor mistakes along the way which he learned from and from which he emerged stronger.” He stated that he never observed any behavior issues or lack of discipline from the applicant. He stated that when he learned the applicant received a poor OER he was “very surprised and deeply concerned.” The CWO stated that after the applicant received the unfavorable OER, his supervisor gave him a list “used to ‘prove’ his worthiness for promotion. ... This list was extremely extensive and required many early mornings, late nights and weekends in order to accomplish it.” He stated that it seemed as if “his supervisor expected that he perform at a Lieutenant’s level within his first year as an Ensign.” He asserted that from his own observations and experience in the Coast Guard “there is no reason that [the applicant] should have been passed up for promotion ... when he diligently performed at Ensign level.”

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 27, 2010. He was a Seaman prior to attending to attending Officer Candidate School and he was commissioned an ensign on May 6, 2015.

The applicant’s first OER is for the marking period May 6, 2015, through September 30, 2015. He was assigned to the same large sector and was in an “Incident Management” role. In the eighteen performance categories on a scale of one to seven (one is the worst and seven is the best), he received eight 4s and ten 5s. He received an average mark of four on the comparison scale indicating a “good performer, give tough, challenging assignments.” All of the comments were positive, including “progression of professional development places member in solid position for advancement LTJG with peers.”

The disputed OER is for the marking period October 1, 2015, to March 31, 2016.¹ The applicant received two 2s, three 3s, seven 4s, three 5s, and three 6s from his supervisor, a lieutenant, and his reporting officer, a commander. The marks of 2 are in Results/Effectiveness and Writing. The marks of three are in Planning and Preparedness, Professional Competence, and Initiative. He received a low mark in the third spot on the comparison scale, indicating “fair performer, recommended for limited responsibility.” In the block 8 Comments, which requires the supervisor to select three performance dimensions that best characterize the officer, the comments state:

Personable officer who supported operational missions through routine assignments. Conveyed a positive professional image: exhibited an unfailingly amenable demeanor & innate poise during tense situations, enhanced coworkers abilities to contribute at optimal levels; displayed a commendable commitment to physical well-being, set an example for sharp military appearance; an active presence in the community, mentored schoolchildren & distributed winter clothing to the homeless. Substandard initiative: able to accomplish specifically directed tasks w/oversight, worked on improvement of proactive approach; demonstrated poor time management, routinely late for meetings & assigned duties; failed to follow corrective actions, did not schedule additional break-in watches to ensure timely qualification. Inferior deliverables: passed OU [Operations Unit Watchstander] board w/great effort, feedback identified inadequate preparation of basic knowledge; unsatisfactory attention to detail in written work, products required multiple rounds of extensive

¹ The disputed OER is on the one-page version of the OER form, CG-5310E. In accordance with the Officer Evaluation System Procedure Manual, PSCINST M1611.1A, Article 2.C., Ensigns receive evaluations on the CG-5310E form.

revisions; frequently overcome by events, multiple missed deadlines resulted in cancellation of operations review w/sub-units.

Block 11 requires the reporting officer to discuss the officer's potential. It states:

An inconsistent period of performance, characterized by failure to meet job expectations for majority & then a marked improvement towards the conclusion. Mbr displayed flashes of potential, but struggled w/punctuality & professional development milestones. [The applicant] impressed supervisor several times at end of period w/rededication to Core Values & conduct of duties. Boat Ops & Law Enforcement background an asset to follow-on Response assignments. Not ready yet for promotion, but look forward to continued improvement through next period.

On July 25, 2016, the applicant received a letter from the Personnel Service Center informing him that he was not selected for promotion to LTJG by the selection board. He was provided with an excerpt from the board report giving the specific reason for his non-selection:

The Board determined that this officer is not fully-qualified for promotion to the rank of lieutenant (junior grade). [The applicant] exhibited poor performance, struggled with punctuality, and failed to obtain minimum qualifications. As documented in his Officer Evaluation Report with end of marking period 31 March 2016, he received substandard marks in Results/Effectiveness, Planning/Preparedness, Professional Competence, Initiative and Writing. Overall, this officer exhibited substandard performance, failed to meet job expectations, and was not recommended for promotion to lieutenant (junior grade) by his Reporting Officer.”

On July 26, 2016, the results were published from the LTJG selection board. Out of 293 ensigns, 290 were selected for promotion to LTJG.

On the applicant's next OER for the period of April 1, 2016, to September 30, 2016, he had the same supervisor but his reporting officer was the commander who wrote the first statement discussed above. He received five 4s, six 5s, six 6s, and one 7. He received a mark of four on the comparison scale. All of the comments were very positive. Following this OER, his marks continued to improve.

The applicant was promoted to LTJG on July 10, 2017.

VIEWS OF THE COAST GUARD

On June 25, 2018, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application was timely and it should therefore be considered by the Board. PSC stated that when the applicant's record when before the LTJG selection board, at least two-thirds of the members found that he was not qualified for promotion. The selection board articulated its reasons for not selection the applicant.² Specifically, the selection board found that the applicant exhibited poor performance, was repeatedly late, and had an inability to obtain minimum qualifications. PSC therefore recommended that this Board grant no relief because the

² COMDTINST M1000.3, Article 6.A.5.c.

applicant's claims have not been supported by evidence or policy. PSC argued that the OER was correctly executed and approved by the applicant's chain of command and the selection board properly and clearly articulated its reasons for not selecting the applicant for promotion. Therefore, PSC recommended that the applicant's requests be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 16, 2018, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. No response was received.

APPLICABLE REGULATIONS

According to the Officer Accessions, Evaluations, and Promotions Manual, Article 5.A.2.c.1., Commanding Officers must "ensure accurate fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible." Article 5.A.2.c.2. states that COs must ensure that "members of the rating chain carry out their OES [Officer Evaluation System (OES)] responsibilities."

Article 5.A.2.d.(1)(c) states that individual officers "are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback from the supervisor during the period, and using that information to meet or exceed standards." Subsection (k) states that the individual officer is ultimately responsible for their own performance, "notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough, and that OERs and associated documentation are timely and accurate."

Article 5.A.2.d.(2)(b)[1] states that the Supervisor must evaluate "the performance of the reported-on officer in the execution of their duties." Subsection [5] states that the Supervisor must provide "timely performance feedback to the reported-on officer upon that officer's request during the period, at the end of each reporting period, and at such other times as the supervisor deems appropriate."

Article 5.A.2.d.(3)(b)[1] states that the Reporting Officer shall base an "evaluation on direct observation[s], the Officer Support Form (OSF), ... other information provided by the supervisor, and other reliable reports and records." Subsection [2] states that the Reporting Officer must "describe the demonstrated leadership ability and the overall potential of the reported-on officer for promotion and special assignment such as command." Subsection [3] states that the Reporting Officer must ensure that "the supervisor fully meets responsibilities for administration of the OES. Reporting officers are expected to hold designated supervisors accountable for timely and accurate evaluations. The reporting officer shall return a report for correction or reconsideration, if the supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments." However, the Reporting Officer may not direct that a mark or comment be changed unless the comment is prohibited. Subsection [6] states that the Reporting Officer must provide "timely performance feedback to the reported-on officer at the end of each reporting period and at such other times as the reporting officer deems appropriate."

The Officer Evaluation System Procedure Manual, PSCINST M1611.1A, Article 2.E.4.b., states:

For each evaluation area the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reported period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor must take care to compare the officer's performance and qualities against the standards – not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Report-on Officer's performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form.

Article 2.E.4.d. states that in the comments block, the Supervisor must include “comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four (if applicable). The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period.” Article 2.E.4.e. states that the comments “should amplify and be consistent with the numerical evaluations (if applicable). 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 on the performance dimensions.”

Article 2.F.2.b. states that Reporting Officers must follow largely the same rules as Supervisors (Article 2.E.4.b.) when assigning marks. Article 2.F.2.d. states that in the comments block a Reporting Officer must include comments “citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Reporting Officer draws on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period.”

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 his OER for the period October 1, 2015, to March 31, 2016, should be corrected because it is erroneous and unjust. 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.³ 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.⁴ To be entitled to correction of an OER, the applicant cannot “merely allege or prove that an [OER] seems inaccurate, incomplete or

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).

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.⁵

3. The applicant did not make a specific request regarding the disputed OER, but asked that the Board take whatever action it felt necessary to correct the demonstrated injustice. Presumably, this would entail either raising his marks of 2s and 3s or removing the OER altogether and replacing it with a continuity OER. The applicant claimed that his supervisor provided poor leadership, did not provide proper feedback, and forced him to “prove” himself as an officer. He argued that his performance warranted a more favorable OER than he received. While the applicant made several allegations regarding his supervisor, the Board finds that he did not provide sufficient evidence to rebut the presumption that his rating chain acted “correctly, lawfully, and in good faith” in supervising him and preparing their evaluations.⁶ The Chief of Response who was on the applicant’s rating chain for the subsequent reporting period wrote on his behalf and speculated that he might not have been adequately supervised during the prior reporting period, but she did not state that she actually observed the supervision or his performance during the reporting period for the disputed OER. The CWO wrote that the supervisor gave the applicant a very difficult task list more appropriate for a lieutenant during the *subsequent* reporting period to challenge him to show that he could do such work. The ensign (now an LTJG) who worked with the applicant for the same supervisor during the reporting period for the disputed OER stated that the applicant struggled to do his assignments and needed to be “tasked differently” but did not state that their supervisor refused or failed to provide reasonable supervision and guidance. These affiants’ statements do not warrant correcting or removing the OER because they do not contradict the OER comments, for example, that the applicant was routinely late for meetings and assigned duties, failed to follow corrective actions, and “did not schedule additional break-in watches to ensure timely qualification.”

4. The applicant’s claims and evidence do not convince the Board that his 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 regulations.”⁷ The Board therefore finds that the applicant has not proven by a preponderance of the evidence that the disputed OER should be removed or corrected.

5. The applicant asked that his promotion to LTJG be backdated to what it would have been had he been selected for promotion in 2016. However, the Board cannot backdate commissioned officers’ promotions since the passage of 14 U.S.C. § 263. Instead, the Board must determine if the applicant is eligible for a Special Selection Board. However, the Board finds that the applicant’s evidence is insufficient to overcome the presumption of regularity with respect to the disputed OER. Although he alleged that the disputed OER marks are erroneous and unjust because of his supervisor’s inadequate management, he has not shown that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the

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).

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* at 1259.

rating process,” or a clear and prejudicial violation of statute or regulation.⁸ The Board finds no grounds for amending the disputed OER marks or for directing the Coast Guard to convene a Special Selection Board.

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

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *Id.*

ORDER

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

September 28, 2018

