

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-169

██████████
██████████ CDR

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on July 9, 2018, and assigned it to staff member ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 19, 2019, 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 Commander, asked the Board to correct his record by removing a negative Special Officer Evaluation Report (OER) for an evaluation period ending August 22, 2016.

The applicant stated that the Special OER was triggered by a “mandatory arrest” following a domestic dispute during which the applicant called the police to diffuse the situation. He contended that the police report misquoted his wife so that it looked like he hit her, when in reality she hit her own lip during an argument. He added that his wife, who is also a Coast Guard officer, supports his description of the incident, not law enforcement’s, and that she has consistently supported his description of the incident. He alleged that the command acted too quickly after his arrest, before he could clarify the story, and that this precipitous response, not his actions, led to the undermining of his ability to lead his crew. The applicant added that issuing a Special OER under these circumstances would only lead to service members hesitating to call the police in situations where they might be useful in de-escalating tensions. He stated that his conduct was “neither unlawful nor unbecoming.” The applicant argued that the inclusion of an alleged assault from 2008 should not be a part of this OER since it was so separate from the incident at hand and that at the time, he was merely trying to protect his daughter from an aggressive driver in the incident. He highlighted that, after reviewing the facts in February 2017, a Promotion Review Board (PRB) reversed the temporary suspension of his promotion to Commander (O-5) and retained him on the PY16 Commander Promotion List.

SUMMARY OF THE RECORD

The applicant was commissioned as an Ensign in the Coast Guard on May 17, 2000. He was promoted to Lieutenant, Junior Grade on November 17, 2001; to Lieutenant on May 17, 2004; to Lieutenant Commander on October 1, 2010; and to Commander on October 1, 2016. His record contains many awards and exceptional OERs dated both before and after the Special OER at issue here.

Special OER

The applicant received a Special OER for the period of May 1, 2016 to August 22, 2016. During this period, he reported for duty as the XO of a cutter on August 3, 2016. Block 2 of the OER states that it was required pursuant to Article 5.A.3.e.(1)(b) of COMDTINST M1000.3A because the applicant had been removed from his primary duty as XO of the cutter and his actions had “significant undermined [his] leadership authority.” Each section of the Special OER is marked “not observed” until the Personal and Professional Qualities section, where the applicant received a “2” in Responsibility and Professional Presence and a “3” in Health and Well-being. These marks were originally supported by the following comments, and those that were later removed by the PRRB are shaded gray:

As documented in the CGIS criminal investigation [number], [the applicant] demonstrated questionable ethics in dealings with civil authorities, supervisor, and CGIS investigators: officer’s statements changed over the course of the investigation to these authorities. [The applicant] displayed minimal support for Military Protective Order issued by supervisor, questioning basis and timeline. Per CGIS investigation, [the applicant] lost composure, conveyed an extremely poor image of the CG, and failed to display the core value of respect when the officer shoved a forearm across the chest of spouse and then pulled the spouse to the ground by the sweatshirt. Officer was arrested by police based on statements of witnesses and visible injury to wife’s lip. As documented in the investigation, [applicant] conveyed a poor image of the CG when he assaulted the driver of a car in 2008, after the driver traveled unsafely through a pedestrian crossing where the member was walking with his daughter. [The applicant] reported to [cutter] with poor personal grooming. [The applicant] was unable to adequately manage the stress of PCS: reported aboard visibly unsettled and arrived late to scheduled XO relief meetings with Department Heads and the CO.

The OER was signed by the CO of the cutter as both Supervisor and Reporting. She assigned the applicant the worst mark on the officer comparison scale, denoting “performance unsatisfactory for grade or billet” and did not recommend him for “promotion to Commander or positions of increased professional responsibility.” The Chief of Operational Forces signed the OER as the Reviewer.

The applicant provided an undated, two-page Addendum to the Special OER. He contended that he “twice held his wife ‘defensively’” rather than the shoving that the comments describe. He stated that his wife said she had no injury, and that none of the six witnesses reported seeing one. He claimed that, when asked by police if she was injured, his wife said, “I think I hit my lip with my hand,” rather than the “my husband’ [sic] hit my lip and hand,” as (he states) the police transcript says. He also attempted to correct an allegation that he choked his wife, saying that his eight-year-old son initially said that to the police, but his twelve-year-old sister corrected him. The applicant wrote that the OER ignored his characterization of the incident as self-defense,

saying that his wife blocked him from entering the house and he was simply trying to get through. The applicant also noted that the CGIS report of the event does not say he “lost composure,” which was just an interpretation by the CO, and he contested the inclusion of comments about the 2008 event, saying that his conduct during that incident was also defensive, this time, of his daughter, who was almost run over by a driver who ran a stop sign. He acknowledged that his statements had been inconsistent, but stated that he had changed his statement to a more incriminating one and that he had always wanted his wife’s version of events to be the “version to prevail.” Regarding his protests surrounding the MPO, the applicant said that he wanted to be home to help his wife, since they had just moved, highlighted that there was no threat of danger since she had voluntarily bailed him out, and questioned why the MPO remained in place after the charges were dropped. Turning to the lateness and personal grooming charges, the applicant again maintained that his appearance was acceptable in light of his cross country move and urged the ranking chain to look at his ID card as proof, since it was issued on his first day arriving on Base. He acknowledged that he was late to a meeting with the EO because he was getting his badge processed. He stated that the CO did not counsel him on the incident and accepted his profuse apology. He alleged that he was never late to meetings with the CO, but that he kept going to her cabin numerous times and “kept missing CO.”

The applicant’s CO and Reviewing Officer endorsed the Addendum with their own comments. The CO stated that the “felony assault” characterization came from the civilian police report describing the arrest on August 6 and 7, 2016, not from her own assessment of the situation. Regarding the applicant’s lateness and appearance on his first day of duty, she provided the following explanation:

[The applicant’s] PCS orders allowed for: one day Leave, four days Proceed Time, and nine days Travel Time. Based on his texts and emails with me, [applicant] began travelling just five days before his report date. I moved his scheduled reporting date from Monday August 1st to Wednesday August 3rd to ease pressure on his schedule. I would certainly have further delayed his report date to increase the overall safety of his drive had he asked.

Times were set for both Department Head meetings according to a relief schedule published by our outgoing XO. [Applicant] arrived approximately 75 minutes late to the EO meeting without notifying the EO of any change to the schedule. [Applicant] arrived 35 minutes late to the Suppo meeting without notifying the Suppo of any change to the meeting. 20 minutes after the scheduled beginning of my meeting with [applicant], I checked his office and the Wardroom and then his office again. When I couldn’t find him, I called his stateroom number and found him there.

The Reviewer submitted a brief, undated note saying that he had reviewed the applicant’s CGIS file and found the CO’s characterization of the incident to be accurate.

Promotion Review Board Application

After receiving the Special OER, the Coast Guard Personnel Service Center (PSC) convened a Promotion Review Board (PRB) to determine whether the applicant’s name should be removed from the pending CDR selection list. In a personal statement he provided to the PRB on February 14, 2017, the applicant reiterated that his wife was misquoted in the police report, maintaining that she said she had injured herself rather than him hitting her. He added that the Coast Guard and the police treated his wife like a victim despite her statements that she was not

one and despite civilian Department of Family Services (DFS) staff calling her case “ridiculous.” He described California as a “mandatory arrest” state and claimed that his arrest and ultimate release from jail without charges was standard procedure and claimed that the police said it was “outside our control.” He stated that his former CO relieved him of his duties by text while he was in prison, without a full understanding of the incident. He stated that this, not his conduct, led to a disruption of good order. The applicant noted that this OER is very inconsistent with all of his other, stellar OERs. Next, the applicant turned to his 2008 assault charge; he claimed that the CO misinterpreted the event by calling it an “assault,” when in reality, he was defending his daughter from an aggressive driver. He added that the fact that the CO needed to cite an event from 9 years ago also shows that his disciplinary record has been good overall. He next discussed the “unsettled appearance” allegation in the OER, saying that he was never counseled on his appearance upon arrival, so it could not have been as bad as the Reporting Officer alleged. He closed by urging the Promotion Review Board to look at all of the facts of the case and grant relief.

On March 30, 2017, the PRB released its decision retaining the applicant on the PY16 Commander selection list.

Personnel Records Review Board Application

After his successful PRB application, the applicant next appealed to the Personnel Records Review Board (PRRB) to get the Special OER removed from his record. The applicant’s package to the PRRB included a memorandum from his wife dated September 1, 2017. She confirmed the applicant’s claim that she had been misquoted and that she did inadvertently nick her lip over the course of the domestic dispute; though she could not fully remember the details, she hoped that the lack of clarity would not be held against her, especially since the injuries were so minor that the police did not photograph them. She expressed her frustration at the lack of respect the Coast Guard had shown to her statements that she was not actually a victim of domestic abuse. She stated that she had consistently protested the initial arrest in the moment and ensuing MPO and that any contact she had had with her command over the incident was to notify them of the situation and to state that she did not need an MPO. She criticized the Coast Guard’s lack of support during their transfer to Alameda and added that the family handled the stress and outward appearance as best they could under the circumstances. She closed by questioning why a 2008 incident was included in this OER, especially one when her husband was just protecting his daughter.

In response to the PRRB application, the Personnel Service Center requested another statement from the applicant’s CO, which is dated October 25, 2017. She started by saying that, even assuming that the applicant’s conduct was not unlawful or unbecoming, his arrest would still undermine his leadership ability, which was the overall basis for the OER. She contested the applicant’s description of California as a “mandatory arrest state.” She said that the OER was triggered by the applicant’s felony arrest, which occurs when the officers on the scene have probable cause to believe that a felony, here, domestic violence, occurred. She stated that the officers had probable cause to arrest him, given visible injuries and statements from the witnesses, and did arrest him, so there was no “mandatory arrest” situation. She added that the applicant gave six versions of events, with the later versions downplaying his involvement with his wife, which led her to question his integrity to the point where she included it in the OER. She focused on the inconsistent explanations of how his wife received her injury: The applicant initially said that the

baby had scratched it and then that a purse strap had nicked it. Regarding the alleged misquotation of the applicant's wife, she referred the Board to the CGIS report, which "leave[s] little doubt that violence occurred." (The CGIS report was not included in the BCMR application.) The CO next stated the standard burden of proof for OERs, which is that the behaviors occurred more likely than not, and she contended that the CGIS reports show that the violence occurred as she described it.

Turning to the 2008 assault, she cited a police report showing that the applicant punched the driver of the car before the driver had even exited the vehicle, and there were conflicting reports as to whether the applicant or the driver had opened the door. The CO noted that, while the applicant was never arrested, the acts were assault-like in nature. She added that his questioning of the MPO was "shocking," because an MPO is a standard procedure following a domestic violence incident, as the applicant should have known, since he previously was an XO. She said that between his reaction to the MPO and the description of the incident in the police report, she was justified in saying he "lost his composure." She closed by confirming that he had been late and sloppy in his appearance and noted that his lateness was unusual for an officer of his rank.

The Reviewing Officer submitted a brief statement, dated October 18, 2017, supporting the accuracy of the Special OER.

On May 8, 2018, the Personnel Records Review Board (PRRB) completed its review of the applicant's request to remove the Special OER from his record. The PRRB found that the applicant did not provide enough evidence to justify the removal of the entire Special OER but granted partial relief. The PRRB removed the sentence about the applicant having pulled his wife to the ground by her sweatshirt and the 2008 incident. On the first point, the PRRB found that there was not enough reliable evidence to support the inclusion of that remark in the CGIS report and the police report. On the second point, the PRRB decided that it was unrelated to the incident at hand, since it was an isolated incident that did not illustrate a larger pattern of aggressive behavior. However, the PRRB declined to remove the word "assault" from the description of the domestic dispute because the UCMJ definition of assault includes "unlawful force or violence to do bodily harm to another," and the UCMJ definition of bodily harm is "any offensive touching of another, however slight." After the PRRB's redactions, the Special OER comments now read:

As documented in the CGIS criminal investigation CSE-2016-08-001295, [applicant] demonstrated questionable ethics in dealings with civil authorities, supervisor, and CGIS investigators: officer's statements changed over the course of the investigation to these authorities. [Applicant] displayed minimal support for Military Protective Order issued by supervisor, questioning basis and timeline. Per CGIS investigation, [applicant] lost composure, conveyed an extremely poor image of the CG, and failed to display the core value of respect when the officer shoved a forearm across the chest of a spouse. Officer was arrested by police based on statements of witnesses and visible injury to wife's lip. [Applicant] reported to [cutter] with poor personal grooming. [Applicant] was unable to adequately manage the stress of PCS; reported aboard visibly unsettled and arrived late to scheduled XO relief meetings with Department Heads and the CO.

VIEWS OF THE COAST GUARD

On February 25, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC's memorandum stated that the CO was justified in submitting a Special OER to document the applicant's arrest and removal from primary duties and noted that an officer does not need to be arrested to trigger one. It added that the applicant failed to prove that the OER was an error or injustice since CGIS concluded that the applicant had committed an assault and the PRRB upheld that finding. PSC generally supported the edits the PRRB made.

In a separate memorandum, the JAG stated that each remaining sentence in the comment section is supported by evidence in the CGIS report or direct observation from the rating chain and that the Board should presume the rating chain acted appropriately absent evidence to the contrary. She added that the applicant "failed to establish a misstatement of a significant hard fact or a clear violation of a statute or regulation." The JAG closed by stating that the applicant did not actually suffer any injustice as a result of the Special OER since the PRB retroactively approved his promotion to commander and awarded him the necessary back pay.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 7, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Military Assignments and Unauthorized Absences Manual

Article 1.F.2.b. of COMDTINST M1000.8A states that an officer may be removed from his or her primary duties under these circumstances:

- (1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or
- (2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, or
- (3) The officer's actions significantly undermine their leadership authority.

Officer Accessions, Evaluations, and Promotions Manual

Article 5.A.3.e.(1)(b) of the Officer Accessions, Evaluations, and Promotions Manual in force at the time, COMDTINST M1000.3A, states the following about Special OERs:

A special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority's final action on a permanent relief for cause request per by Article 1.F. of reference (q), Military

Assignments and Authorized Absences, COMDTINST M1000.8 (series)). The OER will be defined as derogatory and shall follow the procedures for derogatory OER submission in accordance with Article 5.A.7.c. of this Manual. This OER will count for continuity.

OER Manual

Article 4.B.1. of the OER Manual in effect at the time, PSCINST M1611.A, describes the procedure for issuing a Special OER “subsequent to sub-standard performance or conduct”:

- a. Period of Report: The “From” date is the day after the last period of report ends. The “To” date is the day the rating chain or chain of command directed the completion of the OER. A Special OER may be completed to document performance or conduct that is sub-standard but does not necessitate a removal from duties if deferring the report until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection, retention, or reassignment.
- b. Description of Duties: Include the following statement, “This OER is submitted per COMDTINST M1000.3 (series), Article 5.A.3.e.(1) due to Sub-Standard Performance or Conduct.”
- c. All performance dimensions are evaluated; at least one performance dimension is marked to document performance or conduct which is sub-standard, i.e., below a mark of a four. Additionally, the Potential Section must mention the officer’s ability to assume greater leadership roles and responsibilities.

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.
2. The application is timely because it was filed within three years of the applicant’s discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).
3. The applicant alleged that his Special OER for the period of May 1, 2016, to August 22, 2016, should be removed from his record because it is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation 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 it is erroneous or unjust.¹ 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.² To be entitled to relief, the applicant cannot “merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense,” but must prove that the disputed evaluation was adversely

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).

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.³

4. The fact that the applicant received better OERs before and after the reporting period for the disputed OER is not evidence that the disputed evaluation does not accurately reflect his performance during the reporting period.⁴

5. Though the applicant alleged that a bad transcription of his wife’s statement to police negatively impacted the content of the Special OER, he has not effectively rebutted the findings of his CO, who reviewed the police and the CGIS reports and found that the applicant had committed an assault on his wife during their domestic dispute. The PRRB concurred with the CO’s assessment. And in her statement to the PRRB, the CO also claimed that the police were justified in arresting the applicant at the time on suspicion that he had committed a felony assault, and the PRRB apparently concurred. The applicant did not submit the police report, the CGIS report, or witness statements other than his own wife’s to the BCMR to rebut his CO’s findings, and he admitted that the incident started when he was trying to force his way into the house even though his wife was blocking his entry. He also admitted that he had vocally resisted the imposition of the military protective order. Without the CGIS and police reports and the witness statements therein, the Board presumes that the CO acted correctly in assessing their contents.⁵ Although the applicant’s wife denied the accuracy of the police transcription of her statement when she provided a statement for his PRRB application, the Board finds that he has not overcome the presumption of regularity or proven by a preponderance of the evidence that the CO’s marks and comments about this incident in the Special OER are erroneous or unjust.

6. The Board also presumes that the CO properly assessed the applicant’s appearance and tardiness in reporting aboard the cutter⁶ since she had first-hand knowledge of his appearance and conduct. According to the CO, the applicant began his travel approximately halfway through his authorized travel days, and she even extended his report date by two days. The applicant did not deny that he showed up late for three scheduled meetings his first day aboard the cutter. Nor did he claim that he had called in advance that morning to warn them of his delay. Given the importance of first impressions and setting an example, the Board finds that the applicant has not proven by a preponderance of the evidence that the CO erred in evaluating the applicant on this conduct and appearance on his first day aboard the cutter in the Special OER.

7. The fact that the applicant was never charged with a felony does not persuade the Board that the SOER is inaccurate or unwarranted. Per Article 1.F.2.b. of COMDTINST M1000.8A and Article 5.A.3.e.(1)(b) of COMDTINST M1000.3A, the Coast Guard can remove an officer from his primary duties and issue a Special OER documenting that removal for conduct that is not felonious. The applicant has not shown that the police did not have probable cause to arrest him or that his CO misinterpreted the police and CGIS reports. He has not shown that the

³ *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).

⁴ *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.”).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Id.*

CO committed an error or injustice by deciding that he had undermined his leadership authority and initiating his removal from primary duties. And Article 5.A.3.e.(1)(b) of COMDTINST M1000.3A requires preparation of a Special OER to document an officer's removal from primary duties. The applicant has not shown that his removal and/or the Special OER were unwarranted, erroneous, or unjust.

8. The applicant has not proven by a preponderance of the evidence that the Special OER in his record 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.⁷ Accordingly, his request for relief 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).

ORDER

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

July 19, 2019

