

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-195

████████████████████
██████████ LT

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 September 6, 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, a Lieutenant on active duty, asked the Board to correct his Coast Guard record by—

- Changing the following marks on his Officer Evaluation Report (OER), covering his work as the Executive Officer (XO) of a Marine Safety Unit (MSU) from the July 3, 2015, to May 6, 2016, evaluation period:
 - Changing the mark for “Workplace Climate” in Section 5, Leadership Skills from 4 to 6 (on a scale from 1 (worst) to 7 (best)),
 - Changing the mark for “Judgment” in Section 8, Personal and Professional Qualities from a 3 to a 6,
 - Changing the mark for “Professional Presence” in Section 8, Personal and Professional Qualities from a 3 to a 6, and
 - Changing the Section 9, Comparison Scale mark from the middle, fourth mark (of seven), denoting a “Good performer, give tough, challenging assignments,” to a mark in the fifth spot, denoting an “Excellent performer, give toughest, most challenging leadership assignments”;

- Removing the following comments from the same OER:
 - Section 8, Personal and Professional Qualities: “mbr exercised poor judgment & breach of core values by posting an image on social media that made a mockery of NJP proceedings,”
 - Section 8, Personal and Professional Qualities: “Counseled by Sector Cdr for poor leadership & unprofessional behavior in the office space. ROO damaged ability to hold others accountable to CG Policy/Procedures thru unprofessional social media posting,” and
 - Section 10, Potential: “mbr learned from their mistakes, back on track & will be a valuable & productive officer to any unit”;
- Removing a negative CG-3307 (“Page 7”) dated May 6, 2016, about the meme posting;
- Convening a special selection board (SSB) to reconsider his promotion if the above relief is granted; and
- Backdating any promotion to Lieutenant Commander to the date he would have been promoted had he been selected for promotion by the promotion year (PY) 2017 selection board, which convened in August 2016, and awarding him back pay and allowances.

To support his request, the applicant provided a written statement describing what happened. He pointed out that his OERs before and after the disputed OER were excellent and showed good leadership potential. After this, he turned to the events that led to the below-standard OER marks and negative comments. He said that in spring 2016, he, along with the Response Department Head (RDH) of the unit, counseled a petty officer for disciplinary action. A few days after the meeting, the petty officer leveled a civil rights complaint against him and the RDH for creating a hostile work environment. In the report of the investigation, the applicant stated, he was found not guilty, but the RDH was found to have committed misconduct.

On April 4, 2016, the applicant stated, he created a Facebook post where he shared a meme from a “Coast Guard Memes” Facebook page depicting a still shot from Michael Jackson’s “Thriller” video “eating popcorn and appearing scared and nervous by what he’s watching”¹ with the caption “How you look attending an open mast.” He said that the RDH had been informed that she was being referred to mast on April 15, but he had not known about the referral. He stated that the RDH took a screenshot of the applicant’s Facebook post on April 19 and brought it to District legal offices out of concern for inappropriate behavior. The applicant said that the ensuing civil rights investigation cleared him of all charges under Articles 92 and 133 of the Uniform Code of Military Justice (UCMJ) but determined that the timing of the post was unfortunate. The applicant alleged that his command “injudiciously associated [his] sharing of a meme... with RDH’ spending Mast” and that his record was unfairly tarnished because of it. He stated that his below-

¹ The Board notes that in the “Thriller” video, Michael Jackson is grinning broadly while eating popcorn and is clearly enjoying the movie he is watching. His girlfriend in the video asks him if he’s scared, and he responds, “No, I’m enjoying this.” The meme is normally used to indicate watching and enjoying drama in someone else’s life.

average marks related to the “false and unsubstantiated accusations” are “almost certainly career-ending.”

The applicant provided copies of his excellent OERs and the OER he is disputing. He also provided a copy of a Defense Equal Opportunity Management Institute Climate Survey Report for his Base from October 16, 2015, showing a general climate of satisfaction with the work environment there.

The applicant also included a copy of Chapter 6 of the Coast Guard Social Media Guidance, COMDINST M5700.13. He highlighted the following section in particular:

3. Guidelines for Unofficial and Personal Works:

- a. Unofficial and personal works shall not be created, managed, or updated during Coast Guard work periods.
- b. Unofficial and personal works shall be created in compliance with policies and guideline [sic] for personal use of government materials and equipment as outlined in reference (f).
- c. In all forums of personal public engagement, Coast Guard personnel shall avoid off-duty behavior that negatively impacts or conflicts with their ability to execute their duties as outlined in Reference (g).
- d. Any employee who publicly communicates is personally responsible for everything they produce. Producing content via commercial publishers or posting content online does not absolve the employee from Coast Guard regulations and policies concerning operational security (OPSEC) and information security (INFOSEC). Additionally, Coast Guard members are accountable for violations of the Uniform Code of Military Justice for any published content.

The applicant also enclosed six letters from coworkers at his Coast Guard post. These letters speak to the applicant’s qualities as a leader and promotion potential. Several discuss the incident with the meme, saying that it was a social media image posted when the applicant, and the command in general, had no idea that the RDH in question would be going to mast. Some described the post as innocent, while others described it as a warning about the seriousness of Captain’s Mast. Several added that the meme could not have created a hostile work environment for the RDH in question, because she was transferred to a new Base where the applicant knew no one, and the meme was only shared with the applicant’s Facebook friends.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on [REDACTED]. He was enrolled in Officer Candidate School and graduated as an Ensign on [REDACTED]. He was promoted to Lieutenant, Junior Grade on [REDACTED], and to Lieutenant on [REDACTED].

Prior OERs

The applicant’s OERs have generally improved over time as he has advanced. However, once before, he contested another OER before the BCMR when he was assigned marks of 3 in Planning and Preparedness and Using Resources in his OER dated January 31, 2009. The applicant submitted an OER reply for inclusion in his record, and his Commanding Officer stressed that while the applicant had started performing better, the marks in that OER accurately reflect his work during the marking period. The Board denied relief.

On July 1, 2013, the applicant reported for duty to the MSU as the head of the Prevention Department. On his annual OERs dated May 31, 2014, and July 2, 2015, the applicant received primarily marks of 6, a mark in the fifth spot on the Comparison Scale, and a strong recommendation for promotion. In June 2015, the applicant was reassigned as the Executive Officer of the MSU.

Meme Incident and Investigation

On April 27, 2016, a Preliminary Inquiry Officer (PIO) released his report on a civil rights investigation into the applicant's social media conduct on April 4, 2016. The PIO found the applicant not in violation of UCMJ Article 92 for Dereliction of Duty or UCMJ Article 133, Conduct Unbecoming of an Officer.

The PIO stated that the applicant and the RDH in question were the subjects of a civil rights complaint and that the RDH had been transferred to another Base in February 2016. It stated that on April 4, 2016, the applicant had posted the meme he referenced in his BCMR application to his personal Facebook page and that the RDH also shared it on her personal page after seeing it on his page before she knew she was going to mast. The investigator found that the applicant did not know about the RDH's case going to mast when he posted the meme and that he first heard of the RDH's referral to mast on April 14. It stated that the RDH accepted NJP, in lieu of trial by court-martial, after being notified on April 15, 2016, and she presented a District staff attorney with a copy of the meme on April 19.

In the opinion section, while the PIO found that the applicant did not violate UCMJ Article 92 for dereliction of duty, he also found the following:

While [the applicant's] Facebook post demonstrated a lack of judgment and insensitivity to events taking place at his unit, the act did not demonstrate a dereliction in the performance of his duties. At the time of the posting, the outcome of [RDH's] investigation was merely speculation. Additionally, if it resulted in a mast the location could have reasonably been established in Cleveland where she was assigned TDY.

The PIO also found that the applicant did not show "any conscious or unconscious ... intent to influence ... NJP proceedings or reference them in any way," and added, "As an executive officer in the Coast Guard, he is expected to be held to a higher standard of maturity and judgment." Because of this, the PIO concluded, he should have anticipated that the correlation between the meme and the RDH's potential punishment was possible.

OER and Page 7

The OER at issue in this case is a Detachment of Officer OER covering the applicant's final reporting period as XO of the Marine Safety Unit from July 3, 2015, to May 6, 2016. The applicant earned marks of 6 and 7 for the various categories in "Performance of Duties" and received generally positive comments. He received marks of 5 and 6 in "Communication Skills" and generally positive comments. He mostly received marks between 6 and 7 in "Leadership Skills" but a standard mark of 4 in "Workplace Climate"; for the last mark, the comments state

that he “failed to make sound decisions off duty as demonstrated thru social media posts that undermined cmd authority, damaged service’s credibility & hindered ability to hold mbrs accountable.” In “Personal and Professional Qualities,” the applicant received marks from 5 to 7 in most categories but 3s in “Judgment” and “Professional Presence.” To back up these marks, the OER comments state that the applicant was “counseled by Sector Cdr for leadership & unprofessional behavior in office space. ROO damaged ability to hold others accountable to CG policy/procedures thru unprofessional social media posting.” The applicant received a mark in the fourth spot on the Comparison Scale, denoting a “Good Performer; give tough, challenging assignments.” The comments state, “Recommended for promotion; mbr learned from their mistakes, back on track & will be a valuable & productive officer to any unit.”

The disputed Page 7, CG-3307, also issued on May 6, 2016, addresses the meme incident. It states that the meme “made a mockery of the motive of personnel that attend open non-judicial proceedings.” In addition, it notes that the applicant did not understand why the meme was a problem days after the matter was referred for investigation:

You still failed to fully comprehend the extent of the matter, suggesting that it was simply “bad timing” relative to an ongoing investigation at [Base]. Let me be clear, it will never be appropriate as a leader within the Coast Guard, especially as an Executive Officer, for you to make any attempt at humor that undermines your command’s authority, damages our Service’s credibility, and/or hinders – in any other way – your ability to hold other members accountable to Coast Guard policies and procedures.

Personnel Records Review Board Application

The applicant submitted an application to the Personnel Records Review Board (PRRB) to correct the disputed OER. He asked for the same relief as in this application without the upgrade in his Comparison Scale rating and asked that the PRRB increase his marks to 5 instead of 6. In a decision dated January 9, 2017, the PRRB denied his request, saying that the applicant did not provide evidence to show that the disputed OER contains errors or that the OER comments do not justify the marks he received. The PRRB stated that while the applicant did not violate a policy, he did not exercise good judgment and restraint in posting the meme, which he did not understand days after the incident. As a result, the PRRB found that the applicant did not provide enough evidence to refute the marks and comments in either the OER or Page 7.

For the PRRB opinion, the Personnel Service Center (PSC) requested statements from the applicant’s chain of command, which they provided. In his statement dated November 22, 2016, the applicant’s supervisor, who was the Commanding Officer of the Marine Safety Unit, stated that the applicant admitted to being Facebook friends with subordinates, so sharing a post on the social media site would impact his ability to work with his crew. He added that the applicant “failed to immediately acknowledge the consequences of the decision” when the Sector Commander confronted him about the posting, which does not merit an increase in his Judgment mark. The supervisor noted that the Sector Commander had verbally counseled the applicant during the OER reporting period for unprofessional behavior during his previous years at the unit, so the applicant should have known better than to share a meme that could be interpreted incorrectly. He stated that posting the meme mocking NJP was enough to earn a “3” in Professional Presence. Finally, the supervisor stated that the applicant’s failure to take responsibility for his action in

posting the meme, which he said the applicant admitted to doing in his PRRB application, precludes him from getting better than a 4 in Workplace Climate.

In his statement from November 21, 2016, the applicant's Reporting Officer (RO), who was the District Chief of Prevention, wrote that the members of the command on Base "were all troubled by [the applicant's] poor leadership and inappropriate behavior," which led to informal counseling prior to sharing the meme. The RO said that, as a result of the counseling, the applicant should have known better than to share the meme and that his failure to take responsibility for his actions only compounded the problem and did not merit better marks. The applicant's Reviewing Officer reiterated concerns about the applicant's unprofessional behavior before the social media posting.

The applicant's Sector Commander provided a statement on November 28, 2016, that provided further detail about the informal counseling session on January 28, 2016. The Sector Commander said that he had been troubled by the applicant's behavior as noted in a January 8, 2016, report of a sexual harassment investigation, though the charges against him were found to be unsubstantiated. He stated that in the counseling session, he informed the applicant that his comments of "mammals rape mammals" and decision to call coworkers "donkey" were inappropriate and that he should exercise better judgment going forward. The Sector Commander echoed the rating chain members' complaints that the applicant did not fully understand the consequences of his social media post or promptly take it down, even after being confronted by his superiors. He highlighted that the applicant had admitted this was improper behavior in his PRRB application, which reads in part, "[I] should have acknowledged that the posting prompted unintended consequences and ... taken corrective actions." The full PRRB application package was not provided. The Sector Commander described the applicant as a "highly skilled marine inspector" but noted that previous supervisors had apparently allowed his unprofessional behavior to continue without consequence. He stated that the applicant had received warnings that his previous behavior would not be tolerated under the new command through the informal counseling session, but he did not change.

Missed Promotion

Selection board announcements show that the applicant was not in the zone for promotion when the PY17 Lieutenant Commander selection board convened in 2016, but he was in the zone for promotion considered by the PY18 Lieutenant Commander selection board in 2017. He was not selected for promotion, however.

VIEWS OF THE COAST GUARD

On April 22, 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 began its analysis by noting that the applicant did not submit a Reported-On Officer (ROO) reply to the OER or apply to the PRRB, even though the applicant's record shows that he applied to the PRRB in this instance. It added that the applicant presented no evidence that showed

his sharing of a meme was unfairly tied to the RDH's NJP. PSC noted that the applicant's OER was based on multiple incidents, including the informal counseling session, and not just the isolated meme posting as the applicant described. PSC closed by saying, "since the applicant has not provided clear and convincing evidence that overcomes the presumption of regularity with respect to the disputed OER and CG-3307, PSC finds no grounds to conduct a Special LCDR Selection Board."

In her memorandum, the JAG said that the Page 7 was appropriately issued because even though the applicant's conduct, particularly his inability to recognize the consequences of his actions, was "not necessarily in violation of external affairs/public affairs policy, [it] was nonetheless inconsistent with the behavior of an Executive Officer of a unit." She also noted that the applicant provided no evidence to support his claim that his meme was unfairly tied to the RDH's NJP and that he did not contest the Page 7 before the PRRB, though the PRRB's report states otherwise. The JAG stated that while the applicant generally received positive OERs, he provided no evidence to show that the marks he received on this OER in particular did not accurately represent his performance in that time period, given the comments of his superiors showing that they had ongoing concerns about his professionalism and had already counseled him about it.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 2, 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

Commandant Instruction M1000.3A, the Officer Accessions, Evaluations, and Promotions manual, Article 5.A.7.f.(1), states that an OER may not

[m]ention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), Coast Guard Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as provided in Article 5.A.3.e. of this Manual. Referring to the fact conduct was the subject of a proceeding of a type described above is permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.A.4.g. of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

Article 2.E.4.b. of the OER Manual, PSCINST M1611.1A, states the following about how a Supervisor should prepare and OER (similar instructions are provided for the Reporting Officer in Article 2.F.2.):

b. For each evaluation area, the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reporting 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 Reported-on Officer's performance and qualities during the marking period, the Supervisor

selects the appropriate circle on the form. Refer to Table 2-2 Performance Dimension Marking below in determining the appropriate mark to assign to each performance dimension. Inflationary markings dilute the actual value of each evaluation, rendering the OES and the OER itself ineffective.

• • •

d. In the “comments” block following each evaluation area, the Supervisor includes 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.

e. 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 marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

On an OER form, CG-5310B, to receive a mark of 6 for “Workplace Climate,” a lieutenant must meet all of the following criteria: “Excelled at creating an environment of fairness, candor, and respect among individuals of diverse backgrounds and positions. Optimized use of different perspectives and opinions. Quickly took action against behavior inconsistent with Coast Guard human resources policies, or which detracted from mission accomplishment.”

On an OER form, to receive a mark of 6 for “Judgment,” a lieutenant must meet all of the following criteria: “Combined keen analytical thought, an understanding of political processes, and insight to make appropriate decisions. Focused on the key issues and the most relevant information. Did the right thing at the right time. Actions indicated awareness of impact of decisions on others. Not afraid to take reasonable risks to achieve positive results.”

On an OER form, to receive a mark of 6 for “Professional Presence,” a lieutenant must meet all of the following criteria: “Always self-assured, projected the ideal CG image. Poised in response to others’ provocative actions. Contributed to leadership role in civilian/military community. Exemplified and held others accountable for the core values and finest traditions of military customs and protocol. Meticulous uniform appearance and grooming; inspired similar standards in others.”

According to Article 1 of the Military Justice Manual, COMDTINST M5810.1E, the Executive Officer of a unit normally performs the following duties when a member of the command is charged with an offense and taken to mast:

- Reviewing the Report of Offense;
- If the offense is minor and NJP is appropriate, advising the member of the nature of the offense and of the fact that NJP may be imposed;
- Designating a PIO and receiving the PIO’s report;
- Dismissing an offense, if delegated that authority by the commanding officer, or forwarding the matter to the CO with a recommended disposition of the charges;

- Amending the Report of Offense and Disposition as needed to ensure that the charges are supported by evidence;
- Arranging with the PIO to make witnesses, statements, documents, and other physical evidence available for the mast;
- Appointing the accused's mast representative;
- Attending the mast;
- Questioning the accused at mast, if authorized by the CO; and
- Commenting on the offenses and the accused's prior conduct and performance at mast.

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 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. The applicant alleged that his OER for the period July 3, 2015, to May 6, 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 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.² 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.³ To be entitled to correction of an OER, 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 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.⁴

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ *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).

5. 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.⁵

6. By failing to mention prior counseling sessions from his command the applicant implied that his substandard OER marks and negative comments came without warning. However, the record shows that the applicant received informal counseling about his judgment related to his communication style during the reporting period before he posted the meme, and he did not deny that this counseling took place. After this counseling, he was on notice to be more careful about his communications, including what he posted on personal social media accounts that his colleagues and subordinates could see.

7. As the XO of the unit, the applicant had substantial responsibilities and authorities for arranging investigations and masts for his subordinates under the Military Justice Manual. His decision to mock a type of disciplinary proceeding that he would normally be responsible for arranging by posting a meme suggesting that people attend masts because they enjoy watching others' drama was very inappropriate. Although the applicant alleged that his meme from Michael Jackson's "Thriller" video was not mocking and showed the star "eating popcorn and appearing scared and nervous by what he's watching," that is not an accurate description of the content or common usage of the meme, as the video shows the star grinning broadly, clearly enjoying the movie he is watching without fear or nervousness, and telling his date that he is enjoying the movie when she asks if he is scared. The applicant did not submit a copy of the meme, and he appears to have significantly mischaracterized it in his application to the Board.

8. Given an XO's responsibilities and authorities with regards to investigations and masts, the applicant's posting of the meme where colleagues and subordinates could see it showed poor judgment and cast doubt on his integrity in performing those duties whether or not anyone at the unit had recently been referred to mast. Therefore, the applicant's evidence that he did not know that the RDH had already been referred to mast is not evidence that his judgment, professional presence, and impact on workplace climate were better than indicated by the marks he was assigned in the disputed OER. Given the written standards for the numerical marks on the OER form, the applicant has not shown that his rating chain erred in marking his performance in the judgment, professional presence, and workplace climate categories in the OER or in adding comments that support those marks as required by the OER Manual, PSCINST M1611.1A.

9. The applicant alleged that his sharing of the meme was inaccurately and unfairly associated with the RDH's upcoming mast, which he was unaware of. He argued that but for this inaccurate association, he would not have received the low OER marks and Page 7. Although the RDH apparently reported the applicant's meme, there is nothing in the record that suggests that his rating chain thought he knew she had already been referred to mast when he posted the meme. In fact, the Page 7 states that he knew a subordinate's conduct was under investigation when he posted the meme—which is true—not that he knew she had been referred to mast. The rating chain's comments in the OER and Page 7 concern the inappropriateness of the meme given his

⁵ *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.”).

role as XO, the applicant's lack of judgment with respect to the meme, and his earlier unprofessional actions. The applicant has not submitted any evidence that casts doubt on the validity of their concerns or criticisms. Therefore, he has not proven by a preponderance of the evidence that the disputed OER or Page 7 is erroneous or unjust just because he was unaware that the RDH had already been referred to mast when he posted the meme.

10. The applicant argued that his meme did not violate the Coast Guard Social Media Guidelines, but the guidelines state that “[i]n all forums of personal public engagement, Coast Guard personnel shall avoid off-duty behavior that negatively impacts or conflicts with their ability to execute their duties.” Given the duties of an XO, the applicant's CO apparently concluded that his meme “negatively impact[ed] or conflict[ed] with [his] ability to execute [his] duties,” contrary to the guidelines. Moreover, the applicant was not charged with disobeying an order in the guidelines in violation of the UCMJ; he was found to have shown poor judgment and professional presence and to have negatively affected the workplace climate, and he was evaluated accordingly.

11. The Board notes that Article 5.A.7.f.(1) of COMDTINST M1000.3A prohibits an OER comment from mentioning that the officer is the subject of a proceeding, such as NJP. One of the contested comments states, “mbr exercised poor judgment & breach of core values by posting an image on social media that made a mockery of NJP proceedings.” The Board finds that this comment is not prohibited because it refers generically to “NJP proceedings” and does not indicate that the applicant himself was the subject of a proceeding.

12. The applicant has not proven by a preponderance of the evidence that the disputed OER 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.⁶ Because the applicant has not shown that either the OER or the Page 7 is erroneous or unjust, there is no basis for amending either document, for directing the Coast Guard to convene a Special Selection Board, or for backdating any date of promotion.⁷ Accordingly, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁶ *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).

⁷ 14 U.S.C. § 2120.

ORDER

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

July 19, 2019

