

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-066

██████-██████-██████-██████
LTJG

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 January 17, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 23, 2021, 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 Junior Grade (LTJG/O2) on active duty, asked the Board to remove one mark on his semi-annual Officer Evaluation Report (OER) covering his performance from October 1, 2016, through January 31, 2017, when he was an Assistant Damage Control Officer aboard a cutter. Specifically, he asked the Board to remove the mark of 3¹ for the performance dimension of “Workplace Climate” and the associated negative comment.

The applicant argued that the single below-standard mark on the disputed OER and the associated comment were a significant factor in his two non-selections for promotion to Lieutenant. The applicant asked the Board to remove his non-selections for promotion and convene a Special Selection Board (SSB) to consider him for selection for promotion after his OER has been corrected. If selected for promotion by the SSB, he asked that his date of rank be backdated and that he receive all due back pay and allowances.

The applicant explained that his low mark in the performance dimension of “Workplace Climate” was the result of allegations of harassment made against him. In March 2017, the applicant’s command started an administrative investigation into inappropriate comments he

¹ On an OER form (CG05310A), Coast Guard officers are rated in eighteen different performance dimensions on a scale from 1 (worst) to 7 (best). A mark of 4 means that the officer has met the expected standard of performance.

allegedly made to a direct subordinate regarding her reproductive intentions due to being married to a same-sex spouse. During the investigation, the applicant's command discovered another report of inappropriate comments allegedly made by the applicant to a service member in which he suggested that she and another female member, both of whom the applicant knew to have same-sex spouses, shower together to conserve water.

The applicant argued that his mark for "Workplace Climate" should be removed because it is inaccurate. He argued that the mark is inaccurate because the investigation into the harassment allegations against him was inconclusive. Furthermore, the applicant argued that the mark is inaccurate because the harassment allegations were counter to the positive marks and comments included in his other performance evaluations. Finally, he argued that the mark is inaccurate because it was based on a single event during the reporting period.

The applicant also argued that his mark for "Workplace Climate" should be removed because his rating chain violated Coast Guard policy. He stated that his Supervisor had originally assigned him a mark of 5 for "Workplace Climate." However, the applicant alleged, either his Reporting Officer or the Reviewer² of the disputed OER improperly lowered this mark to a 3.

Finally, the applicant argued that the comment in the disputed OER to support the mark of 3 for "Workplace Climate" should be removed. The comment states that he "[m]ade insensitive comments to a subordinate that strained working relationship, failed to take ownership of mistakes & awkward interactions." First, the applicant argued that the comment should be removed because it is strictly an opinion of his attitude. Further, he argued that the comment should be removed because he took ownership of the situation after the reporting period ended.

SUMMARY OF THE RECORD

The applicant attended the Coast Guard Academy and was commissioned as an ensign on May 20, 2015. Shortly afterward, he was stationed aboard a medium endurance cutter.

On March 7, 2017, the applicant's Commanding Officer (CO), CDR B, sent a Harassment Incident Report to the Coast Guard Civil Rights Directorate. CDR B stated that two separate incidents had occurred involving the applicant. The first incident, which allegedly occurred in August or September 2016, involved the applicant making a statement/inquiry into a subordinate member's reproductive intentions due to the subordinate being married to a same-sex spouse. Then, the applicant graphically hypothesized about related reproductive mechanics. The second incident, which allegedly occurred in November or December 2016, involved the applicant making a joke to two female members who both had same-sex spouses that the two should shower together in order to conserve potable water. CDR B stated that he intended to meet with the applicant. If the applicant disputed the allegations, CDR B stated that he would convene an administrative investigation. However, if the applicant substantiated the allegations, CDR B would document his informal inquiry, take pertinent action, and report his findings.

² OERs are normally prepared by a "rating chain" of three superior officers, including the Supervisor, who supervises the officer on a daily basis; the Reporting Officer, who is normally the Supervisor's Supervisor; and the OER Reviewer, who ensures the OER is consistent and substantiated.

On March 19, 2017, the applicant provided a statement to his command. Regarding the allegation that he had made an inquiry into a subordinate member's reproductive intentions with her wife, the applicant denied making any derogatory or insensitive statements. The applicant acknowledged that he had a conversation with the member about having kids. In fact, he stated that before their conversation, he clearly remembered telling the member that he would understand if she did not want to discuss the topic. The applicant stated that the member consented to the conversation and willingly divulged information that she and her wife were potentially looking for a sperm donor. However, the applicant did not recall making a statement about the process of insemination. He stated that the conversation with the member continued in a positive manner and that he did not feel as though he had offended her. Regarding the allegation that he told two female members that they should shower together to conserve water, the applicant denied making this comment. He stated that he admired both members, and he would never suggest anything other than a friendship between the two of them.

On April 6, 2017, the applicant received an Administrative Letter of Censure from CDR B that stated that he was being formally counseled on the inappropriate comments he had made to two enlisted members of his department. According to a formal investigation, in the winter of 2016, the applicant had suggested that two female members, both of whom the applicant knew had same-sex spouses, shower together to conserve water. CDR B stated that the applicant's comment clearly constituted sexual harassment in violation of the Coast Guard's Anti-Discrimination and Anti-Harassment Policy. CDR B also stated that the applicant's conduct demonstrated questionable judgment and respect for others and that he had fostered an unprofessional and offensive climate that alienated members of the Service. The applicant was notified that while the Letter of Censure was non-punitive, the facts upon which the letter was based could be the basis for adverse marks or comments in his fitness report.

Disputed OER

The applicant received a semi-annual OER for the period of October 1, 2016, to January 31, 2017, which is the disputed OER in this case. The OER shows that the applicant received seven marks of 6, ten marks of 5, and the disputed below-standard mark of 3 for "Workplace Climate" in the section evaluating his leadership skills. The low mark is supported by the following comment: "Made insensitive comments to a subordinate that strained working relationship, failed to take ownership of mistakes & awkward interactions." The applicant also received a mark in the fourth spot on the Comparison Scale, denoting "One of the many high performing officers who form the majority of this grade."

On December 18, 2019, LT M, who served as the applicant's Supervisor aboard the cutter, wrote a statement at the request of the applicant regarding the disputed OER. He stated that when the applicant's OER was routed from him to the Reporting Officer, the OER had a mark of 5 for "Workplace Climate." LT M explained that it was not until after he had submitted the applicant's OER that he was notified of the applicant's inappropriate comments. While he acknowledged that the applicant's mark for "Workplace Climate" was changed by either the Reporting Officer or the Reviewer of the disputed OER, LT M stated that he felt as though he had "input control" regarding the change. LT M concluded by stating that the applicant performed all of his duties and

responsibilities well and that future evaluations would be the way for him to prove his leadership and technical abilities.

Before preparing the memorandum in this case, the JAG obtained the following statements from the applicant's Supervisor, Reporting Officer, and the Reviewer for the disputed OER.

- On June 30, 2020, LT M provided a declaration under penalty of perjury. LT M stated that he had previously submitted a statement explaining his role in the applicant's disputed OER, but that he would like to clarify portions of his prior statement and provide additional context. LT M stated that he prepared and submitted the disputed OER before he was aware of the allegations against the applicant. LT M acknowledged that the original draft of the applicant's disputed OER had a mark of 5 in the performance dimension of "Workplace Climate." However, before the disputed OER was finalized, the applicant's inappropriate comments were administratively investigated and found to be substantiated. Specifically, LT M stated that the administrative investigation confirmed that several members of the crew overheard some of the alleged statements made by the applicant. After hearing the results of the administrative investigation, LT M agreed that the applicant had made inappropriate comments. LT M stated that in light of the administrative investigation and the nature of the applicant's conduct, he agreed with lowering the applicant's mark for "Workplace Climate" to a 3. LT M concluded by stating that the disputed OER was a fair appraisal of the applicant's performance during the marking period.
- On March 17, 2020, LCDR E, who served as the applicant's Reporting Officer during the reporting period, provided a declaration under penalty of perjury. LCDR E stated that on or about March 4, 2017, he received two reports of potential incidents of sexual harassment aboard the cutter. Soon after, he directed an administrative investigation to determine the facts and circumstances regarding the allegations. On March 20, 2017, LCDR E received the investigation report which showed evidence that the applicant had made insensitive comments to two female crewmembers on two separate occasions. Additionally, LCDR E stated that the investigation revealed a pattern, beyond the two specific incidents, of "inappropriately familiar interpersonal communication" between the applicant and other crewmembers. However, LCDR E stated that only one of the incidents occurred during the reporting period. Regarding the incident that occurred during the reporting period, LCDR E stated that the applicant failed to apologize for his insensitive comment. LCDR E stated that while all elements of the applicant's performance were considered in preparing the disputed OER, the egregiousness of his comments influenced the rating chain's assessment of him.
- On March 19, 2020, CDR B, the applicant's CO and the Reviewer for the disputed OER, provided a declaration under penalty of perjury. He stated that he had observed the applicant display determination and leadership commensurate with the majority of officers in his paygrade. While CDR B generally found the applicant's traits and attributes consistent with the Coast Guard's core values, he noted deficiencies during the October 2016 to January 2017 reporting period that justified documentation in the OER. Specifically, he stated that an administrative investigation had found that the allegation of harassment against the applicant was substantiated. Therefore, he fully supported and

endorsed the applicant's mark of 3 in the performance dimension of "Workplace Climate." CDR B stated that the mark is appropriate because the applicant contributed to an uncomfortable or degrading climate which alienated crewmembers. Further, he stated that the applicant's conduct failed to value individual differences, undermined an atmosphere of respect, and affected the good order and discipline aboard the cutter.

VIEWS OF THE COAST GUARD

On July 22, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case.

The JAG argued that the applicant failed to show that the Coast Guard committed an error or injustice. First, the JAG addressed the applicant's allegation that his mark for "Workplace Climate" should be removed because there was no conclusive evidence that he made the alleged comments. The JAG argued that the applicant's assertion is based on a misunderstanding of the standard for inclusion in an OER. The JAG argued that there is nothing in Coast Guard policy that requires formal adjudication of an allegation or incident in order for it to be included in an OER. In this case, the JAG stated, the applicant's command determined, after having the matter investigated, that two separate incidents of harassing conduct had occurred. The JAG argued that no other finding was required.

The JAG also argued that the applicant failed to show that his mark for "Workplace Climate" was improperly changed by the Reporting Officer or the Reviewer of the disputed OER. The JAG argued that the original declaration provided by the applicant's Supervisor, LT M, dated December 18, 2019, was taken out of context. The JAG argued that LT M's second declaration, dated June 30, 2020, explained that his submission of the applicant's OER had occurred before he became aware of the allegations of harassment against the applicant. The JAG argued that after LT M was provided the results of the administrative investigation, he had agreed with the conclusion that the applicant had made inappropriate comments and agreed with lowering the applicant's mark in "Workplace Climate."

Finally, the JAG argued that the applicant's assertion that the comment associated with his mark of 3 for "Workplace Climate" should be removed because it is strictly an opinion with no legal significance. The JAG stated that OER marks and comments are the subjective opinions of a member's command. Further, the JAG argued that the comment in question is not prohibited by Coast Guard policy, the comment does not include a misstatement of significant hard fact, and the applicant has not proven that the comment had no business being in the rating process.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 6, 2020, 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

Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C

Article 1.A.2.b of the manual discusses the responsibilities of a Supervisor in assessing an officer's performance in relevant part:

[1] Evaluate the performance of the Reported-on Officer in the execution of their duties.

...

[9] Initiate an OER if the Reported-on Officer is unavailable, unable, or unwilling to initiate one in a timely manner. Forward the OER; the Officer Support Form (OSF), Form CG05308, (if used or required); ESS; OER attachments; and any other relevant performance information to the Reporting Officer not later than 10 days after the end of the reporting period.

Article 1.A.3.b. of the manual discusses the responsibilities of a Reporting Officer in assessing an officer's performance in relevant part:

[3] Ensure 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 (if applicable). The Reporting Officer shall not direct that an evaluation mark or comment be changed, unless the comment is prohibited under Article 5.I. of reference (a) and Article 4.B. of this Manual. Instead, they have the option to select 'Do Not Concur' and explain why in the Reporting Officer Comments block.

Article 1.A.4.b. of the manual discusses the responsibilities of a Reviewer in assessing an officer's performance in relevant part:

Ensure the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES and meets all submission schedules. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the evaluation and written comments (as applicable). However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed unless it is prohibited by Article 5.I. of reference (a) and Article 4.B. of this Manual.

Article 4.E.2. of the manual discusses the Supervisor's role in preparing Section 3 of an officer's OER in relevant part:

b. The Supervisor will mark the Reported-on Officer on all dimensions. Several performance dimensions (rating scales) define each evaluation area. Each performance dimension is defined in terms of three performance standards: below standard, at standard, or above standard. A space for supporting comments follows each set of dimensions.

Figure 19-1 of the manual defines the performance dimension of "Workplace Climate" and defines the marks of 2, 4, and 6, as it relates to the dimension:

Workplace Climate: Ability to create and maintain a positive environment where differences of all personal are included, valued, and respected in alignment with Civil Rights and Human Resource policies. Capacity to optimize diverse perspectives to improve team contributions to mission performance.

(2) Intolerant of individual differences; exhibited discriminatory tendencies toward others. Tolerated or contributed to an uncomfortable or degrading climate which alienated people. Failed to take responsibility for own words and actions and their impact on others.

(4) Valued individual differences and encouraged open communication and respect. Supportive of human resource initiatives to promote a climate which values fairness, dignity, creativity, and diverse perspectives. Took responsibility for own words and actions and their impact on others.

(6) Optimized individual differences and prioritized open communication to ensure all personnel contribute to mission performance. Actively promoted human resources policies to create a climate where individuals of diverse backgrounds and perspectives are included, valued, and respected.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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 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.³
3. 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).
4. The applicant alleged that his performance evaluation for the period October 1, 2016, through January 31, 2017, 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.⁴ 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.⁵ 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 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
5. The applicant did not challenge the disputed OER by filing a reply as allowed by Article 17.A.1. of the Coast Guard Officer Evaluation System Procedures Manual 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.

³ *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).

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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).

6. The applicant argued that his mark of 3 for “Workplace Climate” should be removed because it is inaccurate. However, the Board disagrees. The OER and the applicant’s rating chain are accorded a presumption of regularity, and the applicant has not provided enough evidence to overcome that presumption. The applicant argued that his mark is inaccurate because the investigation into the harassment allegation against him was inconclusive. But the record shows otherwise. On April 6, 2017, the applicant received an Administrative Letter of Censure from his CO. The letter states that a formal investigation had determined that the applicant suggested that two female members, both of whom the applicant knew to have same-sex spouses, should shower together to conserve water. The letter states that the applicant’s comment clearly constituted sexual harassment in violation of the Coast Guard’s Anti-Discrimination and Anti-Harassment Policy.

The applicant argued that even if the harassment allegation against him was conclusive, his mark for “Workplace Climate” should not be based on a single event. However, the fact that a comment cites a particular event is not evidence that the numerical mark was solely selected on that basis. OERs are not prepared by selecting numerical marks that are consistent with the written comments. Instead, the numerical marks are selected after comparing the officer’s performance to the prescribed standards for the marks printed on the OER form and then including a comment with one or more examples of performance showing why the numerical mark was selected.⁷ Further, the declaration provided by the applicant’s Reporting Officer, LCDR E, shows that the applicant’s mark was not based on a single event. LCDR E stated that the administrative investigation revealed “a pattern, beyond the two specific incidents, of inappropriately familiar interpersonal communication between the applicant and other crewmembers.” Therefore, the applicant has failed to show by a preponderance of the evidence that his mark of 3 for “Workplace Climate” is inaccurate.

7. The applicant also argued that this mark of 3 for “Workplace Climate” is inaccurate because it is counter to other positive marks and comments included in his other performance evaluations. But the fact that the applicant has 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.⁸

8. The applicant argued that his mark of 3 for “Workplace Climate” should be removed because his chain of command violated Coast Guard policy. Specifically, the applicant argued that his Reporting Officer or the Reviewer of the disputed OER improperly changed his mark from 5 to 3. The applicant’s supervisor, LT M, acknowledged in a letter dated December 18, 2019, that he had assigned the applicant a mark of 5 for “Workplace Climate.”⁹ LT M explained that it was not until after he had submitted his part of the disputed OER that he learned of the harassment allegation against the applicant. As such, LT M stated that either the applicant’s

⁷ OER Manual, PCSINST M1611.1A, Article 2.E.4.b. & d.

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 LT M submitted a second statement on June 30, 2020. However, nothing in LT M’s second statement contradicts the information in his first statement.

Reporting Officer or the Reviewer of the disputed OER changed the applicant's mark for "Workplace Climate" to 3. However, Articles 1.A.3.b. and 1.A.4.b. of the Coast Guard Officer Evaluation System Procedures Manual prohibit a Reporting Officer or Reviewer of an OER from changing an evaluation mark. In fact, the manual prohibits a Reporting Officer or Reviewer of an OER from directing that an evaluation mark be changed. Instead, a Reporting Officer or Reviewer of an OER must return an OER to the Supervisor for correction or reconsideration if it is determined that the OER is inconsistent with the officer's actual performance. This is because the Supervisor should be the one responsible for marking the reported-on officer on all performance dimensions. In this case, LCDR E or CDR B should have returned the disputed OER to LT M once they learned of the harassment allegation against the applicant. Instead, the record shows that either LCDR E or CDR B changed the applicant's mark for "Workplace Climate" from 5 to 3 in contravention of Coast Guard policy.

The applicant has shown that his chain of command committed a violation of the Coast Guard Officer Evaluation System Procedures Manual when either his Reporting Officer or the Reviewer of his OER improperly changed a mark on the disputed OER. However, to get an OER corrected or removed, the applicant must prove by a preponderance of the evidence that the disputed OER is adversely affected by a prejudicial violation of a statute or regulation. In this case, LT M stated that he assigned the applicant a mark of 5 for "Workplace Climate" before he was aware of the harassment allegation against the applicant. Once LT M learned of the results of the administrative investigation, he agreed that the applicant had made inappropriate comments. While LT M did not change the mark on the applicant's OER himself, he stated that he "felt as though he had the input control regarding the change" and agreed with lowering the applicant's mark for "Workplace Climate" to a 3. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed OER was adversely affected by a prejudicial violation of a statute or regulation because LT M admits that he had "control regarding the change" that lowered his mark for "Workplace Climate" from 5 to 3.

9. Finally, the applicant argued that the comment in his OER to support his mark for "Workplace Climate" should be removed. The relevant comment in the OER states that the applicant "[m]ade insensitive comments to a subordinate that strained working relationship, failed to take ownership of mistakes & awkward interactions." First, the applicant argued that the comment should be removed because it is inaccurate. Specifically, the applicant argued that the comment is inaccurate because he took ownership of the situation after the reporting period ended. However, the applicant has not provided any evidence that he took ownership of the situation at any time. In fact, in the applicant's statement to his command dated March 19, 2017, he vehemently denied the harassment allegations against him, which shows that he failed to take ownership of his actions. Even if the applicant took ownership of the situation after the reporting period, the comment is not inaccurate for the reporting period in which the OER covered. In his statement dated March 17, 2020, LCDR E confirmed that the applicant failed to apologize for his insensitive comment. Second, the applicant argued that the comment should be removed because it is his command's opinion of his attitude. However, the applicant has not shown that the comment contains prohibited information. Instead, the Board finds that the comment is permissible because it cites a specific aspect of the applicant's behavior as it relates to the performance dimension of "Workplace Climate." Further, as the JAG noted, OERs are inherently subjective and are based on the rating chain's observations of the reported-on officer. Therefore, the applicant has not proven

by a preponderance of the evidence that the comment supporting his mark for “Workplace Climate” should be removed.

10. The applicant has not proven by a preponderance of the evidence that his semi-annual OER covering his performance from October 1, 2016, through January 31, 2017, 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.¹⁰ Accordingly, his request for relief should be denied.

11. The applicant asked that his non-selections for promotion to LT be removed from his record and that the Board convene an SSB to determine if he would have been promoted with a corrected record. However, the applicant has not proven by a preponderance of the evidence that the disputed OER was erroneous or unjust when it was reviewed by the selection boards. Therefore, the Board finds no grounds for directing the Coast Guard to convene an SSB.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁰ *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).

