

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-076

██████████ ██████████ ██████████
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 August 6, 2019, and assigned the case to the Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 17, 2023, 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/O-2) on active duty, asked the Board to correct his military record by removing any mention of his January 11, 2019, arrest from a February 25, 2019, disciplinary Officer Evaluation Report (OER) and from his regular, semi-annual OER for the rating period of February 1, 2019, through July 31, 2019.

The applicant explained that on January 11, 2019, he was arrested for domestic violence. He alleged that instead of adversely affecting just one of his OERs, this arrest erroneously and unjustly affected three of his OERs:

- **OER 1:** His regular, semi-annual OER for the rating period October 1, 2018, through January 31, 2019;
- **OER 2:** A derogatory disciplinary OER documenting non-judicial punishment (NJP) awarded on February 25, 2019; and
- **OER 3:** His regular, semi-annual OER for the rating period February 1, 2019, through July 31, 2019.

The applicant further explained that as a result of his arrest, he received an unfavorable regular OER for the October 1, 2018, through January 31, 2019, rating period (OER 1). The applicant alleged that in addition to the unfavorable OER, on February 25, 2019, he was subjected

to NJP, which resulted in a Punitive Letter of Reprimand (LOR) and a derogatory disciplinary OER (OER 2). Finally, the applicant alleged that he received another unfavorable regular OER for the February 1, 2019, through July 31, 2019, rating period. According to the applicant, his arrest took place during the October 1, 2018, through January 21, 2019, rating period and should be reflected in only that OER, not in subsequent OERs covering completely different rating periods. The applicant alleged that following his arrest, up to the point of his NJP, he performed at the same level reflected in previous OERs. The applicant requested that his misconduct be represented only in the OER for the relevant rating and no others.

SUMMARY OF THE RECORD

The applicant enlisted into the Coast Guard on August 11, 2003, training as a Yeoman until becoming a commissioned officer on May 9, 2017.

On May 30, 2017, the applicant was assigned to a cutter as a Deck Watch Officer. He received good OERs as an ensign and was promoted to LTJG on November 9, 2018.

On January 11, 2019, the applicant was arrested outside of a local bar for domestic battery committed against his wife.

On January 12, 2019, the applicant's Commanding Officer (CO) determined that alcohol was a causative factor in the incident and issued the applicant a Page 7 (CG-3307) documenting an "alcohol incident."¹

On February 6, 2019, the State declined to press charges against the applicant.

On February 25, 2019, the applicant received NJP at a captain's mast from his CO and was found to have violated Article 128(b)—Domestic Violence—of the Uniform Code of Military Justice (UCMJ). The applicant's punishment consisted of a Punitive Letter of Reprimand wherein he was reprimanded for his conduct on January 11, 2019. The applicant's CO wrote that the applicant behaved in a "grievous manner" when he pushed his wife to the ground outside of a bar and walked away without checking on her well-being, which ultimately led to the applicant's arrest. The applicant was counseled that as a commissioned officer, he was expected to demonstrate the highest standards of moral, ethical, and legal behavior. The applicant's CO admonished the applicant for failing to uphold the Coast Guard's Core Values, in addition to violating the trust the Coast Guard vested into the applicant. Finally, the CO explained that the applicant's actions had brought great discredit to the applicant and the Coast Guard.

¹ Article 1.A.2.d. of COMDTINST M1000.10 defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

Also on February 25, 2019, the applicant received a disciplinary OER (OER 2) as a result of the NJP.² The OER was submitted in accordance with Article 5.F.3. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, because the applicant was found to have violated Article 128(b) of the UCMJ and was issued a Punitive Letter of Reprimand at mast. The applicant was not evaluated for most of the performance dimensions in OER 2 but received very low marks of 2 for his performance in two dimensions, “Judgement” and “Health and Well-Being.”³ These low marks are supported by the comment, “ROO [Reported-On Officer] exercised poor judgment and displayed conduct contrary to the core values in consuming an excessive amount of alcohol and pushing his wife to the ground in front of a bar in [redacted location]. ROO was arrested by the [local] Police Department for domestic battery. ROO was found to have committed the following offense, Article 128(b), Domestic Violence, at NJP.” On the Comparison Scale, the applicant was given a rating of “Marginally Performing Officer” in the second spot of seven on the scale, and he was not recommended for promotion. The CO provided the following supporting comment: “Recent conduct indicates officer is not ready at this time to assume positions with increased responsibility.”

On February 26, 2019, the applicant’s unit deployed for an extended underway period and did not return until May 23, 2019. The applicant did not accompany his unit and was assigned Temporary Duty to a different sector in anticipation of medical procedures.

On March 26, 2019, the applicant received OER 1, a regular, semi-annual OER for the rating period from October 1, 2018, through January 31, 2019. In OER 1, the applicant received seven 7s, nine 6s, and two 2s in the various performance dimensions. The marks of 2 were for the dimensions “Judgement” and “Health and Well-Being.” To support the 2s, the CO provided a supporting comment that stated, “ROO [Reported-On Officer] received an Alcohol Incident on January 11, 2019.” On the Comparison Scale, the applicant received a mark in the third spot of seven, which is the lowest of three marks defined as “One of many high performing officers who form the majority of this grade.” His Promotion Scale mark is “Recently Promoted,” which denotes that he had been promoted within the prior 12 months.

On September 27, 2019, the applicant received another regular, semi-annual OER for the February 1, 2019, through July 31, 2019, rating period (OER 3). On OER 3, the applicant received two 6s, three 5s, and thirteen middle marks of 4. In particular, he received a mark of 4 in “Judgment” and a 5 for “Health and Well-Being,” up from the 2s he had received in his derogatory OERs. The CO chose the performance dimensions of “Using Resources,” “Results/Effectiveness,” “Professional Competence,” “Looking out for Others,” and “Professional Presence” as the five dimensions that best characterized the applicant during that rating period. On the Comparison Scale, the applicant received another mark in the third spot on the scale, which is the lowest of three marks defined as “One of many high performing officers who form the majority of this

² Article 5.F.3.b. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, provides that subsequent to disciplinary action, an OER “[m]ust be submitted when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority’s action on an investigation includes direction that an OER must be prepared. In courts martial cases, this OER must be initiated once the convening authority has taken action and the finding of guilty has not been disapproved.

³ On a regular OER, Coast Guard officers receive numerical marks on a scale from 1 (worst) to 7 (best) in 18 different performance dimensions. A mark of 4 is considered the “standard” mark of performance expected of all officers.

grade.” The applicant was not recommended for promotion to lieutenant or positions requiring best leaders on OER 3.

The applicant did not file an addendum or reply to any of the disputed OERs. Nor did he timely apply to the Personnel Records Review Board (PRRB) for correction of the OERs.

VIEWS OF THE COAST GUARD

On September 2, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The JAG recommended the Board deny relief in this case.

The JAG argued that the applicant failed to exhaust all of the administrative remedies available to him as described in Article 5.K.2. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, and the Correcting Military Records Manual, COMDTINST 1070.1.

The JAG further argued that the applicant has failed to provide sufficient evidence to meet the standard for correcting an OER. The JAG explained that under *Hary v. United States*⁴ the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The JAG argued that the applicant must demonstrate, by competent evidence a 1) misstatement of a significant hard fact; 2) clear violation of specific objective requirement of statute or regulation; or 3) factors adversely affecting the ratings which had no business being the rating process. The JAG argued that the applicant has failed to establish any of the *Hary* factors.

According to the JAG, the applicant did not contest his January 11, 2019, arrest, or his Command’s decision to issue him an alcohol incident as a result of his January 11, 2019, conduct in accordance with Article 4.D. of the Military Drug and Alcohol Abuse Manual, COMDTINST M1000.10A. The JAG argued that pursuant to the Officer Evaluation System Procedures Manual, PSCINST M1611.1D., it is reasonable to conclude that the pendency of the State’s criminal case against the applicant, as well as any ongoing administrative or CGIS investigations regarding the underlying facts, limited the comments available to the applicant’s rating chain. However, the applicant’s rating chain could comment on the conduct involved and mark the impacted performance dimensions accordingly.

Regarding the applicant’s February 25, 2019, Disciplinary OER, the JAG explained that the applicant received NJP, and based on a preponderance of the evidence, was found to have violated Article 128(b) of the UCMJ, for domestic violence against his wife. The JAG claimed that there is no evidence to indicate that the applicant appealed the outcome of the NJP and in accordance with Article 5.F.3.b. a Disciplinary Action OER was required and completed by the applicant’s CO. In addition, the JAG stated that there is no evidence of an addendum or reply submitted for this OER.

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).

Finally, the JAG argued that the applicant failed to establish that any of the *Hary* factors for the OER for his February 1, 2019, through July 31, 2019, rating period. In addressing the applicant's allegations that he was erroneously evaluated by his unit's CO, despite having spent the majority of the rating period TDY with a different sector, the JAG argued that the OER was issued pursuant to Article 5.F.1., COMDTINST M1000.3A which states, "The unit to which the reported-on officer is permanently attached is always responsible for ensure that OER continuity is maintained with regular OERs." Moreover, the JAG argued that Article 5.F.1.b.1., COMDTINST M1000.3A, states that, "the concurrent report normally will be written upon the detachment of the TDY officer and cover only the period of temporary duty. This is an optional OER and will be submitted at the discretion of the TDY command." Barring the statutes cited, the JAG argued that the requirement to complete the applicant's regular OER for the period fell upon his permanent command and his new supervisor.

According to the JAG, the applicant's new supervisor, though unfamiliar with the applicant, gathered the necessary input from the applicant, other officers within the applicant's permanent unit, and the applicant's TDY supervisor and rated him accordingly. Regarding the applicant's contention that he performed at a higher level than reflected in his February 1, 2019, through July 31, 2019, OER's rating, the JAG stated that the applicant did provide his Officer Support Form (OSF), but otherwise failed to prove a clear violation of a specific requirement of a statute or regulation to establish that his OER marks were unjust. The JAG argued that the applicant's rating chain accurately evaluated the applicant and the corresponding marks were based on his rating chain's observations of him during the rating period. To provide insight into the nature of the applicant's marks, the JAG quoted the applicant's Reporting Officer, who stated, "While assigned to Sector [redacted], he did not lead or supervise any subordinates nor did he complete any projects that indicated he would be ready for promotion." The JAG argued that because the applicant failed to prove there was a policy violation, or a misstatement of significant hard fact in his OER, his request for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response was received.

APPLICABLE LAW AND POLICY

Article 1 of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, provides the necessary guidance on the procedures for alcohol incidents. In relevant part:

1.A.2.d. Alcohol Incident

1. Alcohol is the Significant or Causative Factor. Any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.

2. Alcohol Must be Consumed. The member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military (UCMJ) penalties.

...

2.B.2. Alcohol Incident. The definition of an alcohol incident (See Article 1.A.2.d. of this Manual.) gives commands broad latitude in curbing intemperate alcohol use. A key fact to keep in mind is that the member must actually consume alcohol for an alcohol incident to have occurred.

...

Coast Guard Officer Accessions, Evaluations, and Promotions Manual (COMDTINST M1000.3A) Article 5.F., provides the following guidance on Disciplinary Action OERs:

F. Occasions for Non-Regular OERs. The OERs listed in this Article do not count for continuity.

...

3. Subsequent to Disciplinary Action.

...

b. This OER must be submitted when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority's action on an investigation includes direction that an OER must be prepared. In courts martial cases, this OER must be initiated once the convening authority has taken action and the finding of guilty has not been disapproved.

c. The reporting period for this report will be the day that the proceedings were completed. The report must clearly state:

(1) The nature of the proceeding prompting the report and the result of the proceeding, (e.g., criminal conviction, non-judicial punishment, or final reviewing authority's action directing a OER due to criminal culpability),

(2) Any punishment imposed as a result of criminal conviction or non-judicial punishment, and

d. Other information as necessary to accurately reflect the performance being evaluated. Information about the proceeding may be included in the report even if the proceeding took place outside of the reporting period. The evaluation must be limited to those areas affected by such conduct, since all other dimensions will be evaluated in the regular OER. Any dimension which is not evaluated must be marked "not observed". A comparison or rating scale mark and comments on the officer's potential are required.

e. If the conduct resulting in the court-martial, non-judicial punishment, or investigation occurs during the current reporting period, a Subsequent to Disciplinary Action OER is not required if the process is completed, i.e., not subject to further review, by the time that the regular report is due to be submitted for the current period (within 30 days from the end of period of report). The basis for the court-martial, non-judicial punishment, or investigation must be reported in the regular report.

The Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10A, provides the necessary guidance on alcohol incidents. Specifically, Article 4.D. states:

1. Except as set forth in Paragraph 4.D.3. below, any behavior, in which the CO/OIC determines by a preponderance of evidence after considering the relevant facts (i.e., police reports, eyewitness statements, and member's statement if provided) that alcohol was a significant or causative factor that resulted in the member's loss of ability to perform assigned duties or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident.

Article 1 of the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, provides the following guidance on letters of reprimand:

1.E.2.a. Instructions for the issuance of punitive letters of censure, as a result of Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, are contained in reference (b), Military Justice Manual, COMDTINST M5810.1 (series). One copy of the punitive letter of censure, issued under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, with a copy of the individual's acknowledgment of receipt, shall be forwarded to Commander (CG PSC-OPM) or (CG PSC-EPM), as appropriate. This punitive letter shall be held until the appeal period specified by Part V, Paragraph 7 of reference (e), Manual for Courts-Martial (MCM), United States (current edition) expires. Upon expiration of the appeal period, the punitive letter shall be inserted into the member's CG Personnel Service Center (PSC) electronically imaged personnel data record (EI-PDR).

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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.⁵

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 that his arrest on January 11, 2019, was erroneously and unjustly documented on three OERs in his record, instead of just one. He alleged that OER 2 (dated February 25, 2019), and OER 3 (for the period February 1, 2019, through July 31, 2019) are erroneous and unjust because the marks and comments were affected by his January 11, 2019, arrest for domestic violence, which was already documented in OER 1. When considering

⁵ *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).

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.⁶ 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.⁷ To be entitled to relief, the applicant cannot "merely allege 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.⁸

5. **OER 1:** The record shows that on January 11, 2019, the applicant was arrested outside of a local bar for domestic battery committed against his wife. The record also shows that on January 12, 2019, the applicant's Command reasonably determined that alcohol was a causative factor in the incident and issued the applicant an "alcohol incident." The record shows that the applicant's alcohol incident was properly documented on his regular, semi-annual OER, which covered his performance from October 1, 2018, through January 31, 2019 (OER 1), with low marks for "Judgement" and "Health and Well-Being" supported by the comment that he had incurred an alcohol incident. The preponderance of the evidence shows that OER 1 was completed in accordance with Coast Guard policy.

6. **OER 2:** Based on his violation of Article 128(b) of the UCMJ on January 11, 2019, the applicant also received NJP on February 25, 2019. The NJP required his command to prepare a disciplinary OER. Article 5.F.3.b. of COMDTINST M1000.3 states that subsequent to disciplinary action a disciplinary OER, "[m]ust be submitted when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority's action on an investigation includes direction that an OER must be prepared. In courts martial cases, this OER must be initiated once the convening authority has taken action and the finding of guilty has not been disapproved." Therefore, the Board finds that Coast Guard policy required that the applicant receive a disciplinary OER as a result of his NJP on February 25, 2019. The applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it issued him OER 2, the disciplinary OER, in response to the applicant's NJP. His request for relief with respect to OER 2 should be denied.

7. **OER 3:** The applicant alleged that his Command erroneously considered his January 11, 2019, conduct while assigning the marks on OER 3, his regular, semi-annual OER for the period February 1, 2019, through July 31, 2019. The record shows that the applicant received a mark of 4 in "Judgment" and a mark of 5 in "Health and Well-Being," both of which he had previously received marks of 2 in on OER 1 and OER 2. The applicant received many mediocre marks of 4 in OER 3, and he has not pointed to any specific comment to demonstrate that there was a misstatement of a significant hard fact in the comments. Nor has he shown that OER 3 was adversely affected by a clear violation of a specific statute or regulation, such as consideration of

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ *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).

performance that occurred outside of the rating period.⁹ Nor has he shown that OER 3 was adversely affected by a factor that had no business being the rating process, such as bias or prejudice. Because the Board has found no evidence that his misconduct on January 11, 2019, was considered in the assignment of marks on OER 3, the Board finds no grounds for amending or removing OER 3 from the applicant's record.

8. For the reasons outlined above, the applicant has not proven, by a preponderance of the evidence that any of the disputed OERs are erroneous or unjust. Nor has he proven by a preponderance of the evidence that the OERs were 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.

⁹ Article 4.B.11. of the OER Manual, COMDTINST M1611.1C, "Members of the rating chain shall not: Discuss Reported-on Officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.E.7. and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of this Manual.

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).

ORDER

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

February 17, 2023

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]