

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-033

██████████ ██████████
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 February 16, 2021, 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 November 4, 2022, 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 (LT/O-3) on active duty, asked the Board to correct his record by removing a detachment Officer Evaluation Report (OER) covering his service from June 1, 2017, to July 4, 2018. He also requested that the Board remove his 2020 non-selection for promotion to Lieutenant Commander (LCDR) and direct the Coast Guard to convene a special selection board (SSB) to consider his promotion to LCDR. If he is selected for promotion, he asked for an adjustment to his LCDR date of rank and to receive back pay and allowances.

The applicant, through counsel, stated that in 2017, he was deployed in support of Hurricane Harvey as an Aircraft Commander as part of the search and rescue efforts. The applicant stated that he encountered a number of people in waist-to-neck deep water who were in immediate distress. His team hoisted the people from the water and ferried them to high ground. The applicant recounted a specific incident that occurred during the search and rescue efforts that is documented in the disputed OER and serves as the basis of his request to remove it from his record. On the day of the incident, the applicant was the "senior leader for the aircraft." The applicant and his crew were on their way to a designated location to enter crew rest. While on the way to the designated location, the applicant received an urgent tasking from a member of the Coast Guard Auxiliary. The auxiliarist stated that multiple women and children were trapped on the second floor of a flooded house without any food, water, or power. The applicant noted that two of the women in

the group were pregnant. He stated that he communicated on all working Coast Guard frequencies to determine if other assets were available to assist. However, the only response he received was from a fixed wing aircraft. The applicant stated that he conferred with his crew and determined that there was minimal fatigue. He also determined that the gain significantly outweighed the risk. The applicant and his crew proceeded to rescue the survivors in multiple loads and deliver them to a shelter. Once the last of the rescued were dropped off, the applicant and his crew proceeded to the designated area for crew rest.

The applicant stated that he continued flying as an Aircraft Commander for several weeks after the incident. At that point, the applicant was brought into his Commanding Officer's office and verbally reprimanded for "usurping his authority." Consequently, the applicant's Aircraft Commander and First Pilot designations were subsequently revoked. In addition to his designations being revoked, the applicant's command issued him the disputed OER.

The applicant argued that the disputed OER contains material errors. Specifically, the applicant contested the following comment in the personal and professional qualities section of the OER: "Demonstrated poor decision-making and communication skills while deployed to [redacted] in support of Hurricane Harvey relief efforts; exceeded COMDT Crew Mission Times & failed to secure appropriate waivers from Command elements; lost Acft Cmdr qual, reduced to Copilot." The applicant stated that the comment in this section accuses him of violating Coast Guard policy by exceeding mission times without command approval. However, he argued that his actions were in fact permitted by Coast Guard policy. The applicant cited Article 1.A.3. of the Coast Guard Air Operations Manual which states that "in the operational environment, mission demands may require on scene deviation from the prescribed Instructions or Policy when, in the judgment of the Pilot-in-Command, such deviation is necessary for the flight safety or the saving of human life." The applicant argued that as the Pilot-in-Charge, he acted properly by weighing the risks and determining that his crew should deviate from the prescribed policy to save human life.

The applicant also argued that the disputed OER is fundamentally unjust. First, he stated that one of the missions of the Coast Guard is to save lives. The applicant argued that it is "incomprehensible" that the Coast Guard would punish a member for deviating from policy when doing so resulted in the preservation of life. He argued that allowing the disputed OER to stand would signal to other members that deviation from Coast Guard policy is never acceptable, even when doing so could result in the preservation of life.

The applicant also argued that the disputed OER is unjust because the incident was never adjudicated in any forum. For example, the applicant stated that his command never initiated any adverse action against him for the incident. Instead, he argued that his rating chain concluded that he violated Coast Guard policy and issued him the disputed OER without any evidence or investigation. The applicant also argued that he was not afforded any due process and that he did not have the opportunity to explain the extenuating circumstances. As such, he argued that the disputed OER constitutes a one-sided and flawed accounting of the incident.

Finally, the applicant argued that the disputed OER is unjust because it violates the spirit of the regulatory guidance that govern OERs. He acknowledged that the disputed OER does not

meet the technical definition of a derogatory OER. However, the applicant argued that the substance of the disputed OER is derogatory in nature. He argued that his rating chain effectively usurped the requirements for a derogatory evaluation by drafting the disputed OER such that it contains adverse information but avoids the technical notations that would cause it to become a derogatory report. The applicant argued that by usurping the requirements for a derogatory evaluation, his rating chain deprived him of the normal due process protections that are afforded in connection with a derogatory OER.

The applicant concluded by stating that he is a superior performer with unlimited potential. To support this assertion, the applicant provided copies of his OERs that he received both before and after the disputed OER. He argued that the disputed OER should be removed from his record because it serves as a significant impediment to his career progression and professional development.

SUMMARY OF THE RECORD

The applicant was commissioned as an ensign through the Direct Commission Maritime Academy Graduate Program on June 18, 2010.

On June 18, 2013, the applicant graduated from basic flight school. Shortly thereafter, he was stationed as a Rotary Wing Aviator at an air station.

Disputed OER

The applicant received a detachment OER for the period of June 1, 2017, to July 4, 2018, which is the disputed OER in this case. The applicant's description of duties are as follows:

Second in command of helicopter, assists Aircraft Commander (AC) in safe operation of acft on local & OCONUS SAR/AMIO/CD/logistical missions; competent in acft systems, TTP & regulations. Weapons Officer: Supervises 2 GMs, \$270K arms, ammo & explosives (AA&E) & unit training plan. Survival Officer: Manages E8, E7 & 24 ASTs, \$316K bdgt, \$1.5M ALSE inventory. Ops Duty Officer (ODO): Prosecutes 24x7 launch/recovery & support for 10 H60s/4 C130s; oversees 60-person duty section.

For the section evaluating his performance of duties, on a scale from 1 (worst) to 7 (best), he received one standard mark of 4, four above-standard marks of 5, and two excellent marks of 6. The comments for this section are as follows:

Developed comprehensive plan to fill GM gap over 6 month period; qualified ASTs/self in USN Ordnance Information System (OIS); maintained strict accountability of 32 weapons, 8K rounds of ammo and 1.5K pieces of pyrotechnics. Supervised CG's largest operational AST Shop; led 24-mbr shop in daily maint of survival/rescue systems on 14 acft; supported 9.5K flt hrs that saved/assisted \$440K property and 280 lives; AST procedures noted as "flawless" during annual ATC STAN visit. Monitored 3,000+ Aviation Life Support Equip items totaling \$1.5M; directed completion of 5.3K inspections totaling 13K maint labor hrs; enabled unit to meet 100% SAR posture at AirSta and 2 Forward Op Bases (FOB). Teamed w/Dept Heads/enlisted leaders to optimize annual aviation survival trng; compressed schedules enabled qualification of 250+ unit aircrew & 20+ ATC TRADIB personnel. Demonstrated progression as H60 CP; earned highest FAA helicopter license; facilitated 20 aircrew upgrade flts, flew 308 hrs; 165 lives saved/assisted. Presenter at int'l ceremony w/[redacted] Prime Minister & prominent senior execs; highlighted CG msn/OPBAT partnership. Authored 15 awards & several special assignment pkgs, revised 3 OCS apps & unit's armory SOP.

For the section evaluating his leadership skills, he received one mark of 4, three marks of 5, and two marks of 6.

Assisted GM2 with RELAD process; compiled package for assimilation into CG Reserve & CBP Officer application; ensured all admin reqs met; enabled mbr's smooth transition within DHS. Implemented AST mentor pilot program at unit; liaised with HQ/ATTC on program requirements; assigned AST mentors to E3's from other local units; prepared 6 mbrs for challenging AST A-School. Worked with AST E8/E7 on AST scheduling during historic hurricane season; enabled 100% SAR readiness during evac of 10 MH60 helicopters; continued to meet msn reqs at unit, OPBAT sites & hurricane areas. Leveraged Firearms Instructor (FAI) support from local CG units; facilitated weapons qualification/proficiency for 45 Flight Mechanics supporting OPBAT msns. Actively pursued appropriated workplace climate; qualified as ASIST/CDAR/CISM peer; bolstered unit response capability & commitment to work-life balance. Submitted 60 EERs for AST/GM personnel; timely & accurate evaluation of performance.

For the section evaluating his personal and professional qualities, he received one below-standard mark of 3, two marks of 4, and two marks of 5. The comments for this section are as follows:

Implemented innovative pyro restocking procedure; streamlined inventory to account for 40% expenditure during annual C130 STAN vi sit; obtained buy-in from C130 aircrews; reduced pyro petty officer/weps labor hrs. Demonstrated poor decision-making and communication skills while deployed to [redacted] in support of Hurricane Harvey relief efforts; exceeded COMDT Crew Mission Times & failed to secure appropriate waivers from Command elements; lost Acft Cmdr qual, reduced to Copilot. Led armory preps ahead of FORCECOM Ordnance Safety Inspection (OSI); revised SOP to allow storage of personal firearms; enabled safe stowage of weapons during delicate personnel situations. Addressed 240 local elementary children during Great American Teach-In & AirSta tours; delivered positive CG message. Championed safety of 50+ mbrs during live fire rant trng.

When compared to other officers in the same grade, the applicant received a mark for "One of the many high performing officers who form the majority of this grade" in the third of seven possible marks ranging from "Unsatisfactory" to "Best officer of this grade." On the promotion scale, the applicant received a mark for "Promotion potential" in the second of six possible marks ranging from "Do not promote" to "Below zone select." The Reporting Officer's comments are as follows:

Motivated officer that sought higher levels of responsibility and leadership positions within the unit. Assumed Weapons and Ordnance Officer collateral duty to bolster knowledge of enlisted workforce management and leadership experience; oversaw armory administration and operation while filling GM role in absence. Demonstrated commitment to aviation progression after loss of Aircraft Commander qualification; has potential to continue pilot upgrade process after transfer to Air Station [redacted] this summer. Showcased initiative by volunteering for public affairs outreach events and other projects; brought credit to unit & Coast Guard. Technical acumen and management skills make this member a contender for grad school opportunities. With continued leadership growth and progression in judgment/decision making, will be candidate for promotion to LCDR.

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 March 7, 2020, CDR J, who served as the applicant's Supervisor during the reporting period, provided a declaration under penalty of perjury. CDR J stated that the disputed OER was a fair and accurate depiction of the applicant's performance during the evaluation

period. He stated that the disputed OER was submitted after serious reflection and input from the unit's most senior leaders. He stated that there were multiple meetings with the applicant's Commanding Officer (CO), Executive Officer, Operations Officer, and Engineering Officer to discuss the applicant's performance while on deployment. CDR J then addressed the incident. He stated that the applicant exceeded 6.0 flight hours in violation of Coast Guard policy. The Coast Guard Air Operations Manual provides clear guidance on rotary wing crew mission times and associated crew rest that is required before returning to a "ready" flight status. The manual further states that "when the tempo of operations requires individual flight time in excess of the extended period duty limits listed in this paragraph, flight personnel shall be closely monitored and specifically cleared by the aviation unit Commanding Officer on the advice of a flight surgeon." In this case, CDR J stated that there was no such clearance given by the CO. Further, CDR J stated that clearance would not have been given because of the presence of undue risks and the availability of other aircrews that were better suited to continue rescue operations. He noted that there were numerous other aircrews available that could have executed the assigned mission within the guidelines of Coast Guard policy. As a result of his judgment in the aircraft, the applicant's Aircraft Commander designation was revoked. This caused the applicant to revert back to copilot and negatively impacted his ability to perform his primary duties. CDR J noted that the applicant's loss of designation as an Aircraft Commander also negatively impacted the unit's duty and deployment schedule and required the assignment of additional training flights. He argued that the applicant's loss of designation had to be captured in his OER. CDR J concluded by stating that although his intentions were good, the applicant circumvented a process designed to keep aircrews safe. He argued that by ignoring critical risk management tools and processes, the applicant put the crew and those who depended on him at risk.

- On March 10, 2021, CAPT L, who served as the applicant's Reporting Officer during the reporting period, provided a declaration under penalty of perjury. He stated that the applicant's primary duty at the air station was as a Rotary Wing Aviator. CAPT L stated that the applicant received a mark of 3 in the performance dimension of Judgment due to the command's lack of confidence in his decision making ability. He stated that deployed in service of Hurricane Harvey, the applicant failed to communicate his intentions, flight time, waivers, and risk with the chief pilot. Subsequently, the applicant's Aircraft Commander designation was revoked and he was downgraded to copilot. CAPT L argued that this had to be documented on his OER. Further, he stated that this documentation was discussed at length with the Flight Examination Board, Operations Officer, and CO.
- On March 5, 2021, CAPT S, the applicant's CO and the Reviewer for the disputed OER, provided a declaration under penalty of perjury. He stated that the applicant demonstrated extremely poor judgment which led to the removal of his Aircraft Commander designation. CAPT S stated that the applicant's Supervisor and Reporting Officer would have been derelict if they failed to capture this event on an OER since a designation removal is rare and professionally significant. He stated that the disputed OER accurately captures the applicant's designation removal and the events leading up to the decision. In fact, CAPT S stated that if anything, the disputed OER understates the significance of the events. To support his assertion, CAPT S discussed the incident that led to the applicant's designation

removal. He stated that the applicant flew nearly twice the hours allowed by Coast Guard regulations. CAPT S acknowledged that Coast Guard policy allows crews to exceed flight limits in exceptional circumstances. Specifically, the Coast Guard Air Operations Manual allows crew utilization requirements to be waived by COs on a calculated risk basis. CAPT S stated that in this case, the applicant neglected to receive, or even request, a waiver to these requirements despite being in radio communication with Coast Guard assets that could have facilitated such a waiver. He stated that the applicant's reckless actions and poor judgment unduly jeopardized the safety of both himself and the crew. Finally, CAPT S addressed the applicant's assertion that the underlying events of his designation removal were never investigated. CAPT S stated that there is no burden of proof requirement or qualifying restriction for a CO to remove a designation. Nevertheless, CAPT S stated that the final revocation decision was made after lengthy discussions with personnel who had knowledge of the incident, in addition to the Operations Officer, Executive Officer, and Department Head.

VIEWS OF THE COAST GUARD

On July 29, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he 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 argued that the applicant failed to show that the Coast Guard committed an error. PSC contested the applicant's assertion that Coast Guard policy authorized him to exceed mission times. PSC acknowledged that the Coast Guard Air Operations Manual allows crews to exceed mission times in exceptional circumstances, but argued that the applicant neglected to receive the necessary waiver. PSC noted that the applicant failed to even request such a waiver despite being in radio communication with Coast Guard assets.

PSC also argued that the applicant failed to show that the Coast Guard committed an injustice. PSC contested the applicant's assertion that the Coast Guard failed to provide him a forum to adjudicate the alleged incident. PSC stated that the applicant admitted to exceeding the mission requirements set by Coast Guard regulations. Consequently, the applicant's Aircraft Commander designation was revoked.

The JAG argued that the applicant failed to prove that a misstatement of significant hard fact exists in the disputed OER. The JAG contested the applicant's assertion that a comment in the disputed OER is erroneous because Article 1.A.3. of the Coast Guard Air Operations Manual provided him the authority to exceed mission times. The JAG argued that a complete review of the manual reveals that the applicant's ability to deviate from policy was not absolute. According to Article B.4. of the manual, "For SAR missions in which saving life is probable, crew utilization requirements of this paragraph may be waived by Commanding Officers on a calculated risk basis. This authority may be not delegated." The JAG argued that the article makes clear that deviating from crew utilization requirements required approval beyond that of the applicant. However, according to the applicant's rating chain, the applicant failed to receive the required approval necessary to exceed crew rest requirements.

The JAG also argued that the applicant's inaction is evidence that the disputed OER does not contain a misstatement of significant hard fact. The JAG stated that the applicant failed to take certain key steps afforded by policy to challenge the comments and marks contained in the disputed OER. Specifically, the JAG argued that the applicant failed to submit a Reported-on Officer Reply to the disputed OER or apply to the Personnel Records Review Board. The JAG argued that such failure to timely complain about the evaluation is evidence that the report was accepted as valid.

The JAG also argued that the applicant failed to show that the disputed OER is unjust because it violates the spirit of the regulatory guidance that govern OERs. According to Coast Guard policy, derogatory OERS are a specifically defined subset of OERs. The JAG stated that simply documenting a weakness in a member's performance does not make an OER derogatory. In order to receive a derogatory OER, the appropriate accompanying circumstances must exist. The JAG stated that the temporary revocation of a designation is not such an occasion. The JAG also stated that while the disputed OER includes the applicant's loss of the Aircraft Commander designation, it also documents many accolades and accomplishments.

Finally, the JAG argued that the applicant failed to show that the disputed OER is unjust because the underlying incident has never been adjudicated in any forum. First, the JAG contested the applicant's assertion that the Coast Guard had not initiated any adverse action against him for the incident described in the disputed OER. The JAG stated that the adverse action was the removal of the applicant's Aircraft Commander designation. Further, the JAG argued that Coast Guard policy does not require that an incident be adjudicated before it is documented in an OER. Instead, the JAG stated that Coast Guard policy only requires a member's rating chain to accurately identify specific strengths and weaknesses of the member's performance.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. In his response, the applicant contested the JAG's recommendation to deny relief.

First, the applicant addressed the JAG's assertion that the disputed OER does not contain a misstatement of significant hard fact as evidence by his failure to take certain key steps afforded by policy to challenge it. The applicant argued that his failure to seek redress with the PRRB does not impact the substantive merits of his current application. He stated that his application to the Board is timely and includes evidence and arguments that show that the disputed OER is erroneous and unjust.

The applicant also disputed the JAG's interpretation of Article 1.A.3. of the Coast Guard Air Operations Manual. He argued that according to the JAG, a Pilot-in-Command can never deviate from prescribed instruction or policy. The applicant argued that this interpretation ignores both the plain language of the manual and common sense. Instead, he argued that the manual permits a Pilot-in-Charge some latitude for deviation when the safety of the crew is at risk. However, the applicant argued that should the Board find that he did not follow the necessary procedures before deviating from Coast Guard policy, he requested relief as a matter of equity given the extenuating and mitigating circumstances.

APPLICABLE LAW AND POLICY

Article 1.A.3. of the Coast Guard Air Operations Manual, M3710.1G, discusses procedures related to the mission of the Coast Guard:

Successful operations require the exercise of sound leadership principles, good judgment and common sense at all levels of command. When the need arises, special instructions or waivers will be issued by Commandant (CG-711), however, in the operational environment, mission demands may require on-scene deviation from prescribed instructions or policy, when, in the judgment of the pilot in command, such deviation is necessary for flight safety or the saving of human life. Such deviation must not be taken lightly and must be tempered by maturity and a complete understanding of the aircraft, mission, and crew.

Chapter B of the manual discusses aircrew requirements of flight planning in relevant part:

B.4. Crew Utilization

For SAR missions in which saving life is probable, crew utilization requirements of this paragraph may be waived by Commanding Officers on a calculated risk basis. This authority may not be delegated. It should be understood that flight safety will be affected with a corresponding rise in mishap potential. Advise cognizant operational commanders of the situation and action taken.

...

B.4.a. Command Responsibility

Prescribed limits are necessary for safe Coast Guard air operations. More conservative limits may and should be imposed at all command levels when deemed advisable. As these limits are approached, time available for group duties necessarily will be reduced. Such consequences must be anticipated and accepted during periods of heavy flight activity.

...

B.4.d. Post-Mission Rest Requirements

After a flight in which accumulated times total those in Table 3-7, a crew member shall be required to take no less than the indicated number of off-duty hours before being assigned as an aircrew member. These rest requirements shall be applied whenever an aircraft is safely on the ground or flight deck, regardless of engine or rotor operation or intent for further flight. Individual flight hours and crew mission hours, listed in Table 3-7, are cumulative unless 10 hours of rest are completed between sorties, regardless of duty status. If adequate crew rest facilities are not available between sorties, crew mission time shall continue to accrue. Off duty time must allow a minimum of 8 hours of bed rest.

B.4.3. Extended Period Duty Limits

When the tempo of operations requires individual flight time in excess of the extended period duty limits listed in this paragraph, flight personnel shall be closely monitored and specifically cleared by the aviation unit Commanding Officer on the advice of a flight surgeon.

Article 8.A.1. of the manual states that Commanding Officers have the authority to issue or revoke designations and qualifications.

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.¹
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 of June 1, 2017, through July 4, 2018, 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 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.⁴
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.
6. The applicant argued that the disputed OER contains material errors. Specifically, he contested a comment in the personal and professional qualities section of the OER that accuses him of violating Coast Guard policy by exceeding flight times without command approval. The applicant argued that his deviation from prescribed flight time limitations was permitted. He cited Article 1.A.3. of the Coast Guard Air Operations Manual, which states the following:

When the need arises, special instructions or waivers will be issued by Commandant (CG-711), however, in the operational environment, mission demands may require on-scene deviation from prescribed instructions or policy, when, in the judgment of the pilot in command, such deviation is

¹ *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).

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).

necessary for flight safety or the saving of human life. Such deviation must not be taken lightly and must be tempered by maturity and a complete understanding of the aircraft, mission, and crew.

The Board disagrees with the applicant's assertion that he was unilaterally permitted to deviate from flight time limitations. Article 1.A.3. of the manual states that mission demands may require deviation from prescribed policy when necessary for flight safety or the saving of human life. However, the applicant has not shown that his deviation from flight time limitations was necessary for flight safety or the saving of human life. The applicant stated that he deviated from flight time limitations to rescue multiple women and children who were trapped on the second floor of a flooded house without any food, water, or power. However, the language of Article 1.A.3. makes clear that on-scene deviation from prescribed policy must be necessary to the immediate saving of human life. Since the applicant was assisting in the search and rescue efforts after Hurricane Harvey, it is presumed that a majority of the rescues were of a similar nature described by the applicant. Despite the severity of the search and rescue mission, the applicant did not provide any evidence that the situation for which he deviated from flight time limitations posed an imminent threat to human life. In fact, the applicant's Supervisor stated in his declaration that there were numerous other aircrews that were available to execute the assigned mission within the guidelines of Coast Guard policy.

Even if deviating from flight time limitations was necessary to save human life, the applicant ignored other requirements provided in the manual. Specifically, Article B.4. states the following: "For SAR [search and rescue] missions in which saving life is probable, crew utilization requirements of this paragraph may be waived by Commanding Officers on a calculated risk basis. This authority may not be delegated." In this case, the applicant did not allege that he obtained a waiver of the crew utilization requirements from his CO. In fact, as noted by the applicant's rating chain, there is no evidence that he even attempted to obtain such a waiver from his CO. Regardless, the manual is clear that the authority to waive crew utilization requirements could only be waived by a CO. Accordingly, the applicant did not have the necessary authority to waive crew utilization requirements. Therefore, the Board finds that the applicant failed to prove by a preponderance of the evidence that the disputed OER contains a misstatement of significant hard fact.

7. The applicant also argued that the disputed OER is unjust because his deviation from policy resulted in the preservation of life. The applicant's assertion that any violation of Coast Guard policy should be pardoned if it results in the preservation of life is unpersuasive. The Coast Guard, as a branch of the United States Armed Forces, has specific rules and regulations that governs its personnel and operations. The applicant's argument fails to consider that many Coast Guard rules and regulations are in place to protect human life. For instance, flight time limitations are necessary for air crew safety. In this case, the applicant's Supervisor noted that the applicant's deviation from policy was an unnecessary risk for his crew given the availability of other aircrews to execute the mission.

8. The applicant also argued that the disputed OER is unjust because his violation of Coast Guard policy was never adjudicated in any forum. The Board disagrees. First, the applicant did not provide any evidence that shows that his deviation from flight time limitations should have been adjudicated before his Aircraft Commander designation was revoked. According to Article 8.A.1. of the Coast Guard Air Operations Manual, COs have the authority to issue or revoke designations and qualifications. There are no due process limitations on such authority.

Nevertheless, the declarations provided by the applicant's rating chain show that an informal investigation was in fact completed before the applicant's designation was revoked. Further, the applicant did not provide any evidence that an incident must be adjudicated for the matter to be documented on an OER. Article 4.B. of the Coast Guard Officer Evaluation System Procedures Manual provides an exhaustive list of prohibited comments. There is nothing in the manual that prohibits negative comments regarding matters that have not been adjudicated. In fact, Article 4.B.1. prohibits any mention of a judicial, administrative, or investigative proceedings. Finally, the applicant did in fact have an opportunity to respond to the comments contained in the disputed OER by submitting a Reported-on Officer Reply. This is an opportunity for the Reported-on Officer to express a view of performance which differs from that of the rating chain. However, in this case, he applicant failed to submit such reply.

9. Finally, the applicant argued that the disputed OER is unjust because it violates the spirit of the regulatory guidance that govern OERs. As noted by the JAG, derogatory OERs are a specific subset of reports. According to the OER manual, derogatory OERs must either contain a numerical mark of one in any performance dimension, contain an "Unsatisfactory" mark on the Comparison Scale, or document conduct or performance that results in the member's removal from their primary duties or relief for cause. In this case, the applicant did not receive a mark of one in any performance dimensions. The applicant's single below-average mark of three is not sufficient for the report to be considered derogatory. Further, he did not receive an "Unsatisfactory" mark on the Comparison Scale. In fact, the applicant was designated as "One of the many high performing officers who form the majority of this grade." Finally, the disputed OER does not document conduct or performance that resulted in the applicant's removal from his primary duties or relief for cause. The applicant's loss of his Aircraft Commander designation is different from being removed from his primary duties, which is a formal process in which an officer is transferred to another permanent duty station. In this case, the applicant continued to be a rotary wing aviator and remained at his duty station. Further, the applicant's loss of his Aircraft Commander designation is different from a relief for cause, which is an administrative removal of certain officers from their current duty assignment. As already noted, the applicant continued to serve at his duty assignment as a rotary wing aviator.

The applicant's assertion that his rating chain intentionally drafted the disputed OER in such a way that it contained adverse information but avoided the technical notations that would cause it to become a "derogatory" report is unpersuasive. The disputed OER does not even border a derogatory OER since the applicant did not receive marks of two in any performance dimension nor did he receive the second mark of "marginally performing officer" on the comparison scale. In fact, the vast majority of the disputed OER contains high marks and positive comments. Further, the fact that the applicant's rating chain included adverse comments does not equate the disputed OER with a derogatory report. According to the Coast Guard Officer Evaluation System Procedures Manual, OERs should include a fair and accurate assessment of an officer's performance. As noted by the applicant's rating chain, the loss of his Aircraft Commander designation was a significant event in the applicant's professional career that was properly documented on the disputed OER. Therefore, the Board finds that the applicant failed to show by a preponderance of the evidence that the disputed OER is unjust.

10. The applicant has not proven by a preponderance of the evidence that his OER covering his performance from June 1, 2017, to July 4, 2018, 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.⁵ Accordingly, his request for relief should be denied.

11. The applicant asked that his non-selections for promotion to LCDR 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.

12. Accordingly, the applicant’s request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

ORDER

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

November 4, 2022

[REDACTED] Digitally signed by [REDACTED]
Date: 2022.11.14 09:55:27 -05'00'

[REDACTED]

[REDACTED] Digitally signed by [REDACTED]
Date: 2022.11.16 10:00:16 -05'00'

[REDACTED]

[REDACTED] Digitally signed by [REDACTED]
Date: 2022.11.16 11:12:45 -05'00'

[REDACTED]