

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-063


LTJG (O-2)

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 16, 2023 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 October 10, 2024, 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 record by correcting his Officer Evaluation Reports (OERs) for the October 1, 2021 through January 31, 2022 and February 1, 2022, through July 31, 2022 rating periods. The applicant alleged that he was erroneously and unjustly marked down on these OERs because he refused to receive the COVID-19 vaccine. The applicant explained that in accordance with ALCGPSC bulletin 058/23 all negative personnel actions taken against him relating to the Coast Guard's COVID-19 vaccination policy should be corrected.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned an ensign on May 20, 2020.

On August 26, 2021, the Commandant of the Coast Guard announced that all Coast Guard active duty and Ready Reserve members who were not fully vaccinated and did not fall within an approved exception must be immediately vaccinated against COVID-19. Those members refusing to be vaccinated and who failed to secure an exemption were notified that they would face punitive administrative action in the form of negative CG-3307s ("Page 7"), reduction in marks on evaluations, inability to promote or advance, and up to separation from the service.

On May 5, 2022, the applicant received his semi-annual OER for the October 1, 2021 through January 31, 2022 rating period wherein he received one mark of 3 (out of a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), eight marks of 5, eight marks of 6, and one mark of 7. The applicant also received a mark of 4 (“One of the many high performing officers who form the majority of this grade”) out of 7 on the Comparison Scale. The applicant also received the following negative comments regarding his refusal to receive the COVID-19 vaccine:

Performance of Duties. Despite strong performance, unwilling to support USCG organizational policy and demonstrated a lack of responsibility by failing to obey a lawful general order. Received CG-3307 P&D 41C.

Reporting Officer Comments. While a strong performer with excellent skills and potential, ROO's unwillingness to follow a lawful general order and support USCG organizational policies demonstrates a lack of the necessary responsibility expected of a military officer and calls into question their commitment and ability for continued military service.

On December 15, 2022, the applicant received his semi-annual OER for the February 1, 2022 through July 31, 2022 rating period wherein in received one mark of 3, seven marks of 5, eight marks of 6, and two marks of 7. The applicant also received a mark of 4 out of 7 on the Comparison Scale. The applicant received the following negative comments regarding his refusal to receive the COVID-19 vaccine:

Performance of Duties. Demonstrated a lack of responsibility in unwillingness to support USCG org. policy by failing to obey a lawful general order. Rcvd CG-3307 P&D 41C.

Reporting Officer Comments: Continued refusal to follow a lawful general order and support USCG organizational policy demonstrates a lack of responsibility and jeopardizes ROO's ability for continued military service.

On February 4, 2023, the Coast Guard issued a memorandum to Personnel Service Center (PSC) wherein it provided the following guidance on correcting Coast Guard members' military records:

1. Subsequent to reference (a), CG PSC shall remove all CG-3307 (P&D-41(series)), administrative remarks referencing the Coast Guard's COVID-19 vaccine requirement from active duty and reserve service members' personnel data records.
2. The order of priority for removal of CG-3307s shall be as follows:
 - a. all members going before a board or panel (not later than 1 Jul 2023),
 - b. all members who return to active duty or Selected Reserve will have their records corrected at that time,
 - c. members who have requested correction,
 - d. all remaining members (not later than 31 Dec 2023).
3. For service record-keeping purposes, CG PSC shall document who was discharged in association with the Coast Guard's COVID-19 vaccine requirement. The documentation should include the basis for discharge, discharge characterization, reenlistment code, and date of discharge.

4. Guidance for separated members will be provided via separate correspondence.

VIEWS OF THE COAST GUARD

On April 18, 2024, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Coast Guard Personnel Service Center (PSC).

PSC stipulated to the applicant's allegations of error regarding his OERs and recommended that the Board grant relief in this case. PSC based their recommendation on sworn declarations submitted by the applicant's chain of command wherein they stated that the applicant would have received higher marks and more positive comments had he not failed to follow the vaccine mandates in place at the time. Specifically, Lieutenant Commander (LCDR) S, the applicant's Supervisor during the rating periods, stated that if the applicant had complied with the COVID-19 inoculation requirement, he would have received a mark of 6 in the Responsibility rating factor for both OERs. Further, Commander (CDR) B, the applicant's Reporting Officer during the rating periods, recommended the Comparison Scale mark be changed to 5 and provided recommended replacement language for both OERs.

Based on these sworn declarations, the Coast Guard recommended the Board grant the following relief:

- Change the marks in block 3a on both disputed OERs from "3" to "6" in the Responsibility dimensions in accordance with the recommendations in the sworn declarations.
- Change the marks in block 5b on both disputed OERs from "4" to "5" on the Comparison Scale in accordance with the recommendations provided in the sworn declarations.
- Redact the last two sentences of blocks 3a in both OERs in order to comply with the newly implemented guidance.
- Replace the text in the RO comments of block 5c of the October 1, 2021 through January 31, 2022 OER with the following:

ROO demonstrated stellar seamanship, ship handling skills, and respected leadership in some of the service's most challenging, highly dynamic maritime environments. Impressive work ethic and dedication yielded outstanding results as a Division Officer throughout high-tempo ATON and DOMICE period. A strong performer with strong management skills and potential, ROO is an excellent candidate for continued service afloat or transition to Ashore/Sector positions. Highly analytical thinker with strong attention to detail, ROO is excellent candidate for graduate school opportunities and challenging positions; promote with peers.

- Replace the text in the RO comments of block 5c of MOR C with the following:

Highly capable, intelligent officer with strong interpersonal skills and leadership; overcame complex personnel challenges and improved performance of subordinates with excellent results during high-tempo op schedule. Outstanding mariner and ship driver who excelled during challenging ATON/DOMICE evolutions and as a trusted coach; demonstrated excellent performance in assigned duties and training of newly reported junior officers. Highly analytical and detailed focused; ROO would be a great candidate for graduate programs, particularly OPS Research. Recommended for challenging positions and promotion with peers.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 20, 2024, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. As of the date of this decision, no response was received.

APPLICABLE LAW AND POLICY

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, provides the following guidance on the Officer Evaluation System (OES):

Article 5.A. Overview. This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers.

1. Purpose. The Officer Evaluation System documents and drives officer performance and conduct in accordance with Service values and standards. This information is used to support personnel management; primarily selection boards and panels, retention, and assignments.

...

Article 5.I. Prohibited Comments. The rating chain must not:

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

...

5.J. Required Comments.

1. The rating chain must support any mark of 1, 2, 3, and 7. Comments with 4, 5, or 6 do not require support.

5.K. Replies to OERs. The reported-on officer may reply to any OER. Replies provide an opportunity for the reported-on officer to express a view of performance which may differ from that of a rating official.

1. Content of Replies. Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 5.I. of this Manual apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.

2. Corrections. Reported-on officer replies do not constitute a request to correct a record. An officer who believes their OER contains a major administrative or substantive error should follow the procedures to correct military records as outlined in Article 5.N. of this Manual. This includes requests to have the OER, or a part thereof, removed from the record. Members of the rating chain who, in

their review of a reported-on officer's reply, concur with the reported-on officer that an error may be present in the OER, must return the reply to the reported-on officer and assist that officer in following the procedures of Article 5.N. of this Manual.

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.¹

3. The application was timely 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 the poor marks and negative comments he received on his OERs for the October 1, 2021 through January 31, 2022 and February 1, 2022 through July 31, 2022 rating periods were erroneous and unjust and should be corrected in response to Coast Guard policy mandating their correction. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.² Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."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 record shows that the Coast Guard issued a general order on August 26, 2021 wherein it required all Coast Guard members receive a COVID-19 vaccination. Those members who failed to abide by the general order and who did not qualify for an exemption received punitive

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).

administrative actions such as negative Page 7s, low evaluation marks, or separation. In this instance the applicant received a negative Page 7⁵ in addition to lower marks and negative comments on his OERs for the applicable rating periods. The applicant has requested that the Board correct those OERs. The Coast Guard as well as the applicant's chain of command have stipulated to the errors and have recommended that this Board grant relief. Accordingly, the Board finds that the applicant has proven, by a preponderance of the evidence, that the contested OERs were erroneous or unjust and is entitled to the following corrections on his OERs for the October 1, 2021 through January 31, 2022 and February 1, 2022 through July 31, 2022 rating periods:

- Change the marks in block 3a on both disputed OERs from “3” to “6” in the Responsibility dimensions in accordance with the recommendations in the sworn declarations.
- Change the marks in block 5b on both disputed OERs from “4” to “5” on the Comparison Scale in accordance with the recommendations provided in the sworn declarations.
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- Replace the text in the RO comments of block 5c of MOR C with the following:

Highly capable, intelligent officer with strong interpersonal skills and leadership; overcame complex personnel challenges and improved performance of subordinates with excellent results during high-tempo op schedule. Outstanding mariner and ship driver who excelled during challenging ATON/DOMICE evolutions and as a trusted coach; demonstrated excellent performance in assigned duties and training of newly reported junior officers. Highly analytical and detailed focused; ROO would be a great candidate for graduate programs, particularly OPS Research. Recommended for challenging positions and promotion with peers.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁵ The applicant's negative Page 7 was automatically removed pursuant to guidance issued from the Commandant. However, corrections to OERs were required to be submitted to the Personnel Records Review Board or the BCMR.

ORDER

The application of LTJG [REDACTED], USCG, for correction of his military record is granted. The Coast Guard shall make the following corrections to the applicant's OERs for the October 1, 2021 through January 31, 2022 and February 1, 2022 through July 31, 2022 rating periods:

- Change the marks in block 3a on both disputed OERs from "3" to "6" in the Responsibility dimensions in accordance with the recommendations in the sworn declarations.
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SIGNATURES ON FOLLOWING PAGE

October 10, 2024

