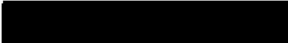


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2024-032


LCDR (active)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552. The Chair docketed the case after receiving the completed application on January 23, 2024, and assigned it to an attorney to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision dated April 24, 2025, 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 is seeking, through counsel, removal of an OER spanning active-duty period of June 1, 2018 to February 12, 2019. The reason for the report was due to "relief for cause" which occurs when a member is relieved of their duty to be reassigned. The applicant argues that the adverse comments and OER rating contain factual errors and should be removed from his record and replaced with a continuity OER. After receiving a continuity OER, the applicant requests a special selection board for the opportunity to promote to Commander (O5) and if selected he requests back promotion with back pay.

The applicant submits a large application with related material to include several awards, OER's, and two recommendation letters in support of the applicant. The prior Department Head of USCG Sector NY wrote on the applicant's behalf as he was his direct supervisor until October 2018 when he began to process for retirement. His relief worked in tandem to oversee a smooth transition and this relief became the OER reporting officer for the event that created the disputed OER. The former supervisor was not a part of the decision to pursue a relief for cause against the applicant and affirms that he finds it to not be justified. The recommendation letter supports the applicant's pursuit of advancement and finds that the applicant has faced an injustice through the alleged errors within the disputed OER. The recommendation letter asserts their dissatisfaction with the wording against the applicant as unfair. The failure of the mission ready hinged on the lack of engineers in a deployable status and the XO (an engineer) had to have emergency appendicitis surgery. The applicant knew the XO went to the hospital the day before, but did not report that to Sector to update the mission status change because he believed it would just be an upset stomach and the XO could return home. The morning of the surgery for the XO, Sector requested the SITKINAK to respond to contingency and the applicant declined to respond sharing

the cutter was not mission ready due to the XO being hospitalized. The Sector viewed this to be a failure on the applicant's part for not notifying in a timely manner the status of the XO and instead waiting until a mission request came through to then decline the mission. The recommendation letter for the applicant shares holding the applicant responsible for the XO's appendicitis does not appear to be a fair or reasonable criticism of the applicant.

The event leading up to the applicant's relief for cause dealt with confusing tasking of the applicant. The SITKINAK went to one location as directed by Sector Command only to realize that it was not the location desired to support a vessel on fire requiring a tow. The fire department and a commercial tow were already on scene and when the applicant was instructed to get the SITKINAK on scene he pushed back at his command. The applicant stated there was no value for the SITKINAK to go to this position as it was two hours away and he felt confident in the agencies already on site. The applicant is described as explosive in his demeanor by the command and clearly frustrated by the applicant's recommendation writer. The applicant returned to homeport instead of going on site to the scene requested by Sector Command. This decision led to the applicant's chain of command starting an investigation for relief for cause.

The investigation showed that on its own the return to homeport would not meet the standards required for relief for cause, but this incident – taken with the prior incident for failure to be mission ready for failure to notify of the XO's health status until after being requested to respond to a mission the investigation – affirmed there was reason enough to permit relief for cause. The paperwork and corresponding OER to document the incident were created. The applicant was transferred to a new unit.

The applicant asserts that the disputed OER has material errors and mistaken facts creating an injustice and barrier to his ability to promote to Commander (O5). He requests removal of the disputed OER and replacement with a continuity OER and the opportunity for a Special Selection Board for promotion to Commander.

SUMMARY OF THE RECORD

On June 28, 2017, the applicant assumed Command of Coast Guard Cutter SITKINAK, a 110-foot patrol boat with a homeport in New York.

On October 8, 2018, the applicant in charge of the SITKINAK experienced multiple communication failures between himself and Sector Command in response to a vessel being towed due to a fire aboard the vessel.

On October 11, 2018, a Captain in the command of this evolution canceled the remained of the SITKINAK's patrol schedule and notified the applicant of the Captain's request to relieve the applicant of command. That evening the results for the Lieutenant Commander (O4) Board selections were announced and the applicant had been selected to make rank.

On October 18, 2018, the applicant was relieved as the Commanding Officer of the SITKINAK. An investigation was conducted and identified that applicant had made errors on the October 8th evolution and coupled with previous counseling concerns, the investigating officer recommended the removal for cause against the applicant.

In April 2019, the applicant reported to USCG Headquarters to assume the role of Assistant Navigator of the Coast Guard. Pending a record review and special board, the applicant's promotion selection was suspended. In February 2020, the applicant was approved for promotion and back dated pay to the original promotion date.

From May 2021 to July 2023, the applicant served as the Operation Officer aboard Coast Guard Cutter WAESCHE at his new LCDR ranking.

In October 2023, the applicant reported to the OPNAV as the USCG Office of C4IT Capabilities liaison. During this time, the results for promotion from O4 to O5 (Commander) were released and the applicant did not make the advancement list.

VIEWS OF THE COAST GUARD

On November 27, 2024, a Judge Advocate (JA) for 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 on August 23, 2024, prepared by the Coast Guard Personnel Service Center (PSC).

The JA concurred with the PSC evaluation of the applicant's request. PSC determined there was no error or injustice and the applicant's request should be denied. The JA argues that the applicant failed to prove the existence of factual inaccuracies in the disputed OER. The applicant points to certain phrases within the OER to be inaccurate. These phrases include:

1. "Effectively planned and managed resources when [applicant] deemed missions worthy of effort."
2. "However, at times [applicant] displayed a lack of ability to appropriately prioritize and overlooked critical demands; once incident resulted in the unit under the [applicant's] command failing to meet readiness requirements set forth by the operational commander."
3. "Overreacted to a sudden change in leadership direction; [applicant] displayed combative and condescending attitude with tasking during the response to a major SAR case after [applicant's] unit was requested to respond and provide assistance."
4. "Internally motivated to achieve a shared mission success when deemed appropriate by [applicant]."
5. "At times displayed selective obedience. Directed by Sector to escort a dead-ship tow of a 480' motor tanker into NY harbor that had experienced a major fire offshore. After arriving on scene to predict pos * no sign of dead-ship tow; [applicant] departed the scene w/o further guidance or tasking, failing to grasp the alternatives & impacts of decision."

The applicant fails to overcome the Coast Guard's presumption of regularity by lacking evidence overturning or factually disproving the statement above. The applicant uses their own version of the facts and a submission of a retired Commander, who was assisted in the issuance of the OER, as an assertion that the OER is factually errored, however differing perspectives do not constitute factual evidence. Additionally, the Coast Guard produced additional witness statements to bolster their positioning of the OER and relief for cause through sworn declarations by Rear Admiral who acted as the reviewer of the OER and a retired Captain who acted as the reporting officer for the OER. Both statements affirm the OER to be an accurate representation of the incident and review of the applicant's performance.

As explained in *Hary v United States*, the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) prejudicial violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.¹

The applicant has failed to prove that there are inaccuracies or prejudicial review of the applicant within the disputed OER. The JA recommends the Board deny the applicant's request for relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 20, 2024, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty (30) days. The applicant requested an extension until April 19, 2025, which was approved.

On March 28, 2025, the applicant submitted a signed response to the Coast Guard's advisory opinion. The applicant produced transcripts of the call logs in conjunction with the SITKINAK event that created the relief for cause, an investigation recommendation, and articles regarding the military's increasing "zero-defects mentality."

The call logs do not prove or disprove the findings in the disputed OER but provide a glimpse into some of the communication that occurred during the event. The applicant argues that any errors made by the applicant were not to the level for a relief for cause and the Sector Command's indecisive tasking aided to the conflict. The investigation determined that the actions at the event alone would not warrant a relief for cause, but taken in tandem with the failed operational readiness under the applicant's command does justify command action to pursue a relief for cause and subsequent OER required to describe the decision. The applicant argues that the event was not a SAR case, which is a search and rescue evolution. The event is better described as a marine safety and public affairs evolution as there was not a risk of life according to the applicant.

Additionally, the applicant argues the Coast Guard did not follow its procedural process before conducting a relief for cause because he was only counseled once for the failure of mission readiness. Then, the event occurred with the SITKINAK in leaving the position without sector

¹ *Hary v. United States*, 618 F.2d at 708.

guidance resulting in command starting an investigation to determine if relief for cause is warranted. The command was told after the investigation that relief for cause could be asserted due to the combination of events leading to a “substandard performance of duty over an extended period of time.” The applicant believes this conclusion to be an error because he was only counseled once, he was not provided with guidance on how to best correct actions, not provided training, nor was he given performance evaluations to understand how to course correct prior to this disputed OER.

Lastly, the applicant asserts the JA misapplied the prongs in *Hary* because he believes he has proved irrefutable hard facts that show an error within the facts asserted in the disputed OER and that the second prong requiring following of agency regulations, which the applicant asserts the Coast Guard did not follow its own regulations.

The applicant requests relief in the form of removal of the disputed OER and to create a continuity OER in its place along with the approval of a Special Selection Board (SSB) for promotion to Commander (O5) and if selected he should be back dated in rank and pay to either the 2023 or 2024 selection board dates, whichever the SSB determines appropriate.

APPLICABLE LAW AND POLICY

The Board may correct errors or remove injustices in a service member’s records pursuant to 10 U.S.C. § 1552(a).

(1) Error can be defined as either legal and/or factual.

(2) Injustice, when not also error, is treatment by the military authorities that “shocks the sense of justice.”² In addition, the Board has the authority to decide whether an injustice exists in an applicant’s record on a case-by-case basis. The application must file within three years after discovery or reasonably should have discovered the alleged error or injustice for a correction or relief.³

33 C.F.R. § 52.24(a). Burden of Proof: It is the responsibility of the Applicant to procure and submit with his or her application such evidence, including official records, as the Applicant desires to present in support of his or her case.

33 C.F.R. § 52.24(b). Presumption of Regularity: The Board begins its consideration of each case presuming administrative regularity on the part of the Coast Guard and other Government officials. The Applicant has the burden of proving the existence of an error or injustice by the preponderance of the evidence.

Hary v. United States, 223 Cl.Ct. 10, 18, 618 F.2d. 704, 708 (1981).

² *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976).

³ 33 C.F.R. § 52.22

Applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The Applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) prejudicial violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.

Art. 4.E, Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.ID.

Article 4.E.2.f states “for each evaluation area, the Supervisor reviews the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor must take care to compare the officer’s performance and qualities against the standards – not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form.”

Article 4.E.2.j. states “comments shall amplify and be consistent with the numerical evaluations. They should amplify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.”

Military Assignments and Authorized Absences, COMDTINST M1000.8A

Unsatisfactory Performance. One or more significant incidents resulting from gross negligence or substantial disregard of duty may provide the basis for relief for cause (RFC). Substandard performance of duty over an extended period of time may also provide the basis for relief for cause (RFC), but only after the command has taken corrective action such as command counseling, guidance, training and appropriate use of performance evaluations, which have proved unsuccessful.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant’s military record and submissions, the Coast Guard’s submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. The applicant brings his claim outside of the required three (3) year mark since the date of the incident under review, however as an active duty member the tolling provision afforded under the Servicemembers’ Civil Relief Act the applicant is considered having submitted an

application timely for review since he has been an active duty member since the incident and currently to date.⁴

3. The applicant is seeking removal of an OER describing his “relief for cause” as being removed as the SITKINAK’s Commanding Officer. In 2017, the applicant held the rank of Lieutenant and the tasking as a command member of the SITKINAK. The applicant notes that his command consisted of shore-based responsibilities and that none of his supervisors held an afloat officer career track, which he asserts limits their understanding in making on scene decisions and the natural risks associated with being on an afloat mission. During his time assigned to the SITKINAK, the applicant had two separate incidents of command concern. One being failure to be mission ready when Sector called to task the SITKINAK to mission response and the applicant told Sector that he would not respond because his XO was in the hospital. This information should have been provided the day before when the applicant knew the XO was ill. The applicant’s failure to timely correspond information with Sector Command is the reason for the appeared frustration of Sector Command with the applicant because they then had to scramble to send a different cutter to respond to the mission after receiving delayed information, not because the XO had appendicitis. That was information that needed to be passed sooner, and the applicant waited until he received tasking to share with Sector Command a status update. Additionally, the applicant, frustrated with receiving unclear and conflicting taskings, took it upon himself to not respond to the October 8 mission with the dead-tow vessel. This decision was in direct conflict with the Captain and Sector Command tasking, which led to the applicant’s investigation for relief for cause.

4. The Coast Guard appeared to properly follow its policies on this process by conducting an investigation and ensuring multiple parties were included to gather a full picture of the circumstances before executing a relief for cause. It was ultimately found that the applicant should be relieved. The items identified within the OER are worded in a way that still accurately depicts the way the reporting officer clearly views the facts, which is the role of the reporting officer.

5. The applicant responds to the Advisory Opinion (AO) as being opinion instead of fact, but this is without reasonable evidence. The evidence provided by the JA in the AO included testamentary statements by the acting leadership at the time of the event and subsequent OER creation. Their account of the events does not appear to be prejudicially motivated to lie and therefore the affidavits presented by the former Captain and Flag Officer should be treated as factual accounts. The idea that the applicant shares a different perspective of the events coming from his vantage point does not overcome the presumption of regularity granted to the Coast Guard. The idea of an injustice comes from behavior by command that is “shocking to the conscience” and is out of the realm of normal conduct. The relief for cause does not appear to shock the conscious nor did it occur without proper review of a third-party investigation.

6. The Board recognizes the applicant took on challenging duties and pursued career opportunities that held a higher risk, but this came with a higher reward if successful. The fact that the applicant failed to meet the success of the mission does not require command to write an OER in a more forgiving light because the applicant was performing in high-risk scenarios. The idea

⁴ *Detweiler V. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994).

that this reprimand creates the idea of a zero-mistake environment for the applicant is unfounded, especially since after this incident the applicant was selected to promote and continue in high responsibility roles. The Coast Guard clearly wanted to permit additional opportunities for growth for the applicant, but had a responsibility to document the previous missteps of the applicant with the clear hope he would improve as an officer.

7. The applicant endured a review of record suspending his originally selected spot for promotion to O3. After review of the facts at their most recent nature, the applicant was still successful in making promotion to O4. This undercuts the idea that the sole reason for the applicant's non-selection to Commander (O5) is the Coast Guard placing too much weight on the relief for cause. The selection boards have clearly found the applicant worth promotion after review of his full record, to include the OER in question, but there is more to selection boards than the applicant's record. Every member of the Coast Guard must be stacked against other members' records when competing for the next rank. Jumping from O4 to O5 is challenging for even the most impressive record holders. To claim that the relief for cause OER cannot be overcome and thus needs removal is not factually accurate given that the applicant did make rank despite the disputed OER. Lastly, the Board does not find the disputed OER contains error or factual inaccuracies as asserted by the applicant. The events transpired and though the applicant does not agree that his actions rise to the result of relief for cause, the actions occurred. The OER is not in error nor was it created with prejudicial motivation creating an injustice towards the applicant. The fact that the OER is a blemish in the record of the applicant does not atomically equate to an injustice towards the applicant, as the OER appears to be appropriately created.

8. After full review of the application, facts, regulations, and policies, the Board finds the applicant has not suffered an error or injustice by the inclusion of the disputed OER.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of Lieutenant Commander [REDACTED] (O4), USCG, for removal of the requested OER from his military record is denied.

April 24, 2025

