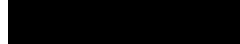


**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2024-060**

  
LTJG (active)

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**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 May 21, 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 May 22, 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 removal of an OER spanning an active-duty period of October 1, 2021 to January 31, 2022. During this OER an Equal Employment Opportunity (EEO) Investigation took place regarding treatment and performance review of the applicant by a supervisor of the applicant. The EEO investigation found the allegations of discrimination towards the applicant to be substantiated and required command to remove a negative page seven (Form CG 3307) from the applicant's record. However, similar language from the negative page seven is found within the applicant's OER. For this reason, the applicant requests that the OER in question be removed from his record and replaced with a continuity OER to ensure a complete restoration of justice is provided to him.

**SUMMARY OF THE RECORD**

On January 5, 2022, the applicant received a negative page seven (CG 3307) describing his lack of timeliness in getting qualified and including other disparaging comments on his leadership abilities.

The applicant received similar comments on his OER that covered a reporting period of October 1, 2021 to January 31, 2022.

On May 17, 2023, the EEO concluded their investigation finding the accusation of discrimination to be substantiated and requiring command to remove the negative page seven from the applicant's record.

On the FY24 advancement list, the applicant failed to be selected for advancement. He contacted OPM to advise on why he was passed over and the consensus was the poor reflecting OER containing the same descriptions as found in the negative page seven.

### **VIEWS OF THE COAST GUARD**

On March 10, 2025, a Judge Advocate (JA) for the Coast Guard submitted an advisory opinion in which he recommended that the Board administratively close this case.

The JA argues that the applicant failed to prove the existence of factual inaccuracies in the disputed OER. He also asserts the applicant did not use all of his available processes such as submitting a reply to his OER in question nor did the applicant apply to the Personnel Records Review Board as authorized by policy. Declarations were obtained from two members of the applicant's prior chain of command to support the inclusion of the OER in question. Each stated that the comments within the OER were accurate and reflect the applicant's performance at the unit.

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.<sup>1</sup>

The JA claims the applicant has failed to prove that there are inaccuracies or prejudicial review of the applicant within the disputed OER. The EEO report mentioned in the applicant's application was not included in applicant's documents for review. The JA recommends the Board administratively close the applicant's request for relief.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 13, 2025, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty (30) days. The applicant has not provided a response as of the date of this decision.

### **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."<sup>2</sup> 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

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<sup>1</sup> *Hary v. United States*, 618 F.2d at 708.

<sup>2</sup> *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).

three years after discovery or reasonably should have discovered the alleged error or injustice for a correction or relief.<sup>3</sup>

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).

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 M1611.1D

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.”

## 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:

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<sup>3</sup> 33 C.F.R. § 52.22

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. The applicant brings his claim within the required three (3) years since the date of the incident under review.
3. The applicant is seeking removal of an OER describing his performance from October 1, 2021, to January 31, 2022. The OER contains commentary that the applicant claims are in the same manner as the negative page seven, which after an EEO investigation surrounding a substantiated finding of discrimination had to be removed from the applicant's record. There was no directive given to the OER. However, it was unclear at the time the impact the OER would have on the applicant. The FY24 advancement list posted for Lieutenant and did not list the applicant as a selected member. The applicant spoke with OPM concerned for his lack of promotion and it was determined the disputed OER commentary and scoring hindered the applicant from advancement.
4. The JA argues the applicant did not use all possible remedies to amend his OER. However, that would have required the applicant to ask a chain of command who witnessed substantiated discrimination occur upon the applicant for an extended period of time to support his request. In any event, the failure of the applicant to pursue other administrative remedies which are now no longer available to him is not relevant to whether this Board can or should consider grant relief. The command either participated in exacerbating this discrimination or became complacent to it, but at no point was the applicant supported. This weakens the declarations asserted by members of the applicant's command stating the OER is factually sound. The applicant had to go outside of command to contact the EEO and take the long process of steps required to complete a discrimination investigation to which the applicant's concerns were found to be valid.
5. The JA argues that they should have the opportunity to read the EEO report to better understand the situation. While potentially giving the Coast Guard a more complete picture of the situation, it is not necessary for the Board to reach a fair conclusion. The EEO found a valid claim of discrimination that is sufficient. The EEO is trained specifically in these areas of law and policy, that reviewing their decision and body of facts to come to our own outside conclusion would not be appropriate and could ultimately harm the applicant again. The Board disagrees with the JA to administratively close this application due to lack of error or injustice. The injustice appears very well asserted and is easily correlated to the applicant's request to remove the disputed OER from his record.
6. The applicant received a poor scoring OER, which was clearly correlated to the removed Page 7, and therefore was the result of the discrimination the applicant endured during his time under this command. To remove this injustice fully from the applicant's record is the most equitable way to restore the applicant's career path free of discrimination.
7. After full review of the application, facts, regulations, and policies the Board finds the applicant has suffered an injustice by the inclusion of the disputed OER. The Coast Guard should remove the disputed OER and replace it with a continuity OER.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

**ORDER**

The application of Lieutenant Junior Grade [REDACTED] (O2), USCG, for removal of the requested OER from his military record is granted. A continuity OER will be added to the applicant's record in replace of the OER in question spanning the dates of October 1, 2021, to January 31, 2022.

May 22, 2025

