

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-252

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application September 21, 2010, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 3, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, who was selected for promotion from lieutenant (LT) to lieutenant commander (LCDR) in 2010, alleged that her military record contained several prejudicial errors when it was reviewed by the LCDR selection board in 2009. She asked the Board to correct the alleged errors, to remove her 2009 failure of selection for promotion,¹ and to backdate her date of rank to what it would have been had she been selected for promotion in 2009. To correct the prejudicial errors that she alleged were seen by the LCDR selection board in 2009, the applicant asked the Board to do the following:

- (a) Place her current, active duty Acceptance and Oath of Office (CG-9556) dated September 12, 2008, in her record. (This correction was made by the Coast Guard Personnel Service Center (PSC) before the LCDR selection board convened in 2010.)
- (b) Place her current Record of Professional Development (CG-4082) in her record, which shows that she passed a course in Tactical Emergency Vehicle Operations offered by the xxxxxxxxxxxxxxxxxxxxxxxx on January 14, 2008, and passed a course to be certified as a

¹ The applicant asked the Board to promote her directly to LCDR as alternative relief. However, the Board's policy is not to promote officers directly but to remove their failures of selection so that they have more opportunities to be selected for promotion through regular selection boards. Moreover, because the applicant has already been selected for promotion to LCDR, this request is moot.

XXXXXXXXXXXXXXXXXXXXXXXXXXXX on February 4, 2008. (This correction was also made by the PSC before the LCDR selection board convened in 2010.)

- (c) Raise the mark of 4² she received for “Responsibility” on her Officer Evaluation Report (OER) covering her service from June 1, 2005, to June 18, 2006, to a mark of 6. (This is the only requested correction contested by the Coast Guard.)
- (d) Correct her rank on her BAH/Dependency Data form and her Emergency Contact Information form from her rank in the Reserve (LCDR/O-4) to her rank in the regular, active duty Coast Guard (LT/O-3)³ so that LCDR selection boards will not be confused about her current rank. (The PSC notes both that officers are responsible for updating these forms themselves and can do so at any time and also that these forms are not seen by selection boards. Therefore, the fact that the applicant had not updated these forms since her return to active duty as a LT could not have affected her chance to be selected for promotion in 2009.)

APPLICANT’S ALLEGATIONS

The applicant alleged that she was not selected for promotion to LCDR in 2009 because of the above-listed errors in her record. With regard to the missing CG-9556 and CG-4082, the applicant stated that before the LCDR selection board met on August 18, 2009, she requested a copy of her record to ensure that it was complete, and she noticed that these forms were missing. Without the CG-9556, she alleged, her record appeared to be that of a Reserve officer serving active duty instead of the record of a regular officer because the most recent CG-9556 in her record was the one she completed when she became a Reserve officer during her two-year temporary separation. Without the CG-4082, she alleged, the LCDR selection board had no way of knowing what courses she had passed during her two-year temporary separation.

The applicant alleged that on August 6, 2009, she emailed copies of the CG-9556 and the CG-4082 to the Personnel Service Center (PSC) and asked that they be put in her record before the selection board convened on August 19th. She stated that she did this because she knew that it was important for the selection board to know that she was a regular Coast Guard officer and to know that she had spent her two-year separation as a XXXXXXXXXXXXXXXXXXXX. She submitted a copy of this email with the two attachments, which was addressed to Mr. H, who in turn forwarded it to Ms. T (with a cc to the applicant) and told Ms. T to ensure that the documents were entered into the applicant’s record. However, on April 27, 2010, the applicant alleged, she requested another copy of her record and discovered that the CG-9556 and CG-4082 had not been entered in her record.

Regarding the mark of 4 she received for “Responsibility” on her OER for the period June 1, 2005, to June 18, 2006, the applicant argued that the mark is unjust because the written comments are inconsistent with a mark of 4 and support a mark of 6. In this regard, she pointed

² Coast Guard officers are evaluated on numerous aspects of their performance, such as “Responsibility,” “Adaptability,” “Teamwork,” and “Professional Competence,” on a scale of 1 (worst) to 7 (best).

³ Active duty officers who elect to participate in the Temporary Separation Program return to active duty in the rank they last held on active duty even if, in the interim, they were promoted as a Reserve officer.

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d. In the “comments” block following this evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Reporting Officer shall draw on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Well-written 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. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for marks.

The reporting officer’s marks and comments in the disputed OER appear below with the contested mark and the associated comments highlighted:

REPORTING OFFICER’S MARKS AND COMMENTS IN THE DISPUTED OER

#	CATEGORY	MARK	WRITTEN COMMENTS
7	Reporting Officer Comments	NA	[The applicant] increased the utilization of the various divisions within the Operations Dept and created a greater synergy with the Planning Dept which has resulted in increased unit efficiency and effectiveness. Continued unit tradition of working alongside other federal, state and local agencies to accomplish homeland security mission goals and worked to expand those efforts by engaging with the XXX, an agency which this unit had not previously worked with. Actively grew the future workforce of the CG by efforts to increase the knowledge of the JOs assigned in the Ops Dept.
8a	Initiative	6	Good initiative. Hosted Ferry Captain Meeting at MSST w/ concerned BMC & Sector Rep during MARSEC II Ops to improve escort procedures, improved working relationship w/ ferry companies & appropriate visibility of MSST vs other USCG units. Created & drafted new OPSUM for all xxxAREA MSSTs to reflect ONS msg req & insisted new OPSUM be sent via SIPR, xxxAREA req all xxxAREA MSSTs to submit product drafted by xxxx. Sound judgment. Provided insightful guidance to PO conducting first telephone hearing, resulted in excellent testimony & impressive civil penalties. Provides solid recommendations to TAOs when called regarding RBS Boardings, PSBs, crew fatigue limits & Sector conflicts. Unwavering responsibility. Set clear goals for AOPS while on leave, fulfilled tasks to include xxxx MOU, Surge Op Planning, new Surge OP AAR. Work until job is done, closely monitor inbox to ensure leave chits, memos & projects not neglected. Self assured presence. Impressively represented MSST at AMSC Operations Meetings. Assisted remedial PT Group when taking PT Test, paced members in 1.5 run, significantly better times achieved. Participated in 2 MSST Team Runs, placed 3 rd in military category at xxxxxxx.
8b	Judgment	6	
8c	Responsibility	4	
8d	Professional Presence	6	
8e	Health & Well-Being	7	
9	Comparison Scale	5	[This mark means that in comparison to all other LTs whom the Reporting Officer has ever known, the applicant ranked as an “[e]xcellent performer; give toughest, most challenging leadership assignments.”]
10	Potential	NA	[The applicant] hit the ground running upon reporting aboard as the Operations Officer, a challenging job at any unit, but especially challenging at a still burgeoning unit like the MSST. Was able to stay focused on key issues despite constantly changing MSST program policy and utilization and positively effected change. Clearly an outstanding representative of the Coast Guard as was demonstrated by the myriad of high level visitors and high vis media engagements with the unit. Well-suited and highly recommended for XO of an MSST or TACLET, Sector Response Enforcement Division Chief, and any PG School program of her choosing and for promotion with the best of peers.

VIEWS OF THE COAST GUARD

On February 17, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant most of the relief requested by the applicant. In so doing, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the PSC.

The PSC stated in its memorandum that all of the requested corrections have been or should be made, or she can make them herself, except that no correction should be made to the contested OER mark. Regarding corrections already made, the PSC stated that the applicant's latest CG-9556 and CG-4082 have been entered in her record, and the Register of Officers has been fixed so that her name appears only once. Regarding corrections she can make herself, the PSC stated that the applicant may update her own BAH/Dependency Data and Emergency Contact Information forms at any time, that it is her responsibility to do so, and that these two forms are not seen by selection boards anyway.

Regarding corrections the Board should make, the PSC recommended that the Board remove the applicant's failure of selection in 2009 by the promotion year (PY) 2010 LCDR selection board from her record and backdate her LCDR date of rank as requested because the CG-9556 and CG-4082 were not in her record when the LCDR selection board reviewed it in 2009. Because the proceedings of selection boards are secret, the PSC could not determine if the omission of these documents caused the applicant's failure of selection in 2009. However, PSC argued, "[w]ithout clear evidence to show that the member was not impacted by the errors in her record [the missing CG-9556 and CG-4082] and considering she was subsequently selection for promotion" after the forms were entered in her record, it would be "prudent to err on the side of the applicant." Therefore, the PSC recommended that the Board grant relief "back dating the applicant's date of rank to when she would have been promoted if selected by the PY2010 ADPL LCDR selection board [which convened in August 2009] with back pay and allowances."

Regarding the contested OER mark of 4, however, the PSC recommended that the Board deny the requested relief. The PSC noted first that the applicant waited four years to complain about the mark and never exercised her right to submit an OER Reply to address the mark after she received it or to seek correction through the Personnel Records Review Board within a year of receiving it.

To investigate the validity of the contested mark, the PSC sought and received declarations from the applicant's reporting officer, who assigned the mark, and the OER reviewer, who was responsible for ensuring the consistency of the OER. Based on these declarations, which are summarized below, the PSC stated that the contested mark "is a fair and accurate assessment of the member's performance" in the category "Responsibility" and should not be raised.

Declaration of the Applicant's Reporting Officer

The applicant's reporting officer for her 2006 OER was the commanding officer (CO) of her unit, a Maritime Safety and Security Team (MSST), where the applicant served as the Operations Officer. The CO stated in his declaration for the PSC that the mark of 4 for "Responsibil-

ity” was warranted. The CO indicated that the mark was based on several aspects of the applicant’s performance. For example, he stated that as the Operations Officer, the applicant was responsible for achieving “boat hours,” which received a lot of scrutiny from the Area Command and Coast Guard Headquarters. The goal for the MSST was 6,000 boat hours, the ceiling was 9,000 boat hours, and the minimum was 3,600 boat hours. The applicant’s predecessor achieved the goal of 6,000, and her successor as Operations Officer achieved 5,000, but during the year the applicant held the responsibility, the MSST “barely made the minimum” of 3,600.

As another example, the CO stated that on a trip to New York in January 2005, he noticed that Coast Guard boats in the harbor had two machine guns mounted, fore and aft, instead of just one. Thereafter, he ordered the MSST to adopt this as a new operational standard, and the only obstacle was a lack of locker space in the armory. In May 2005, two gunner’s mates told him that they had advised the applicant weeks earlier that they had cleared sufficient space in the armory to implement to plan. However, nothing had been done. Therefore, the CO shared this information with the applicant, “and still nothing was done. Approximately two weeks later, the change had not been effected by the applicant, and I instructed the armory staff directly to make the change I had directed five months earlier.”

The CO stated that “[t]hese were just two of the major items I can recall four years later, but there were others where the applicant performed to a level thereby earning a mark of ‘4’ in Responsibility.”

Declaration of the OER Reviewer

The reviewer for the disputed OER was the Chief of Shore Forces for the xxxxx Area and the CO’s supervisor. The reviewer stated that he did not personally observe the applicant’s daily performance, but he carried out his responsibilities as OER reviewer in accordance with the Personnel Manual. He stated that the comments in block 8 about the applicant’s responsibilities are consistent with the mark of 4. He noted that “[t]he general comments of what she did are not followed by specific comments of how well she did them or what the specific results of her actions were.” Therefore, he concluded that the comments do not support a higher mark.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 25, 2011, the applicant responded to the views of the Coast Guard. She stated that she agreed with the Coast Guard’s recommendation for relief except for the recommendation not to raise the OER mark. Regarding the CO’s declaration about the OER mark, the applicant noted that, as shown on the OER itself, she did not report for duty to the MSST until June 20, 2005. Therefore, she was not even assigned to the MSST when the CO had difficulty implementing his plan to use two machine guns on each boat.

Regarding the CO’s complaint about boat hours, the applicant admitted that the MSST achieved only 3,639 boat hours but alleged that this was “the second highest number of boat hours of the xxxxxxxxxxxx Area MSSTs” that year. She also argued that “[d]uring my tenure as Operations Officer, my highest priority was the crew’s safety and fatigue factor, rather than achieving 6,000 boat hours.”

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed even with respect to the applicant's 2006 OER because she has been serving on active duty for all but two years since she received the OER, and the Board's three-year statute of limitations⁴ is tolled while a member is serving on active duty.⁵

2. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁶ 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."⁷ When challenging an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER 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

3. Because of the corrections already made by the Coast Guard and the applicant's own ability to update her BAH/Dependency Data and Emergency Contact Information forms, the only issues before the Board are (a) whether the applicant's OER mark for "Responsibility" on her 2006 OER should be raised and (b) whether her 2009 failure of selection should be removed and her date of rank backdated to what it would have been had she been selected for promotion to LCDR in 2009.

4. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the mark of 4 she received for "Responsibility" on her 2006 OER is erroneous or unjust. The applicant argued that the mark must be erroneous because, she alleges, it is inconsistent with the comments. OER comments are supposed to "amplify and be consistent with" the numerical marks.⁹ However, in preparing an OER, officers do not write the comments and then pick a numerical mark that matches the comments; instead, they read the standards for the numerical marks on the OER form, assign marks by comparing the reported-on officer's performance to the standards, and then add a comment or two to support each mark. The applicant's

⁴ 10 U.S.C. § 1552(b).

⁵ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

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).

⁹ Personnel Manual, Article 10.A.4.c.7.e.

reporting officer apparently found that her performance met the standard for a mark of 4 for “Responsibility” but not a mark of 5 or 6. His declaration indicates that the mark of 4 was intentionally assigned, even if four years later he cannot perfectly remember the reasons he assigned it.

5. The Board finds that the reporting officer’s comment—“Unwavering responsibility. Set clear goals for AOPS while on leave, fulfilled tasks to include xxx MOU, Surge Op Planning, new Surge OP AAR. Work until job is done, closely monitor inbox to ensure leave chits, memos & projects not neglected”—is not inconsistent with a mark of 4 in light of the standards for marks of 4 and 6 on the OER form. The comment alone is insufficient to prove that the applicant’s performance met the written standard for a mark of 6 during the evaluation period. Therefore, the Board finds no grounds for raising the mark.

6. The applicant asked the Board to remove from her record her failure of selection for promotion in 2009 by the PY 2010 LCDR selection board and to backdate her LCDR date of rank to what it would have been had she been selected for promotion by that board. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if the applicant is entitled to the removal of her failure of selection, the Board must answer the following two questions: “First, was the [applicant’s] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [she] would have been [selected for promotion in 2009] in any event?” When an officer shows that her record was prejudiced before a selection board by error, “the endburden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff’s *prima facie* case, there was no substantial nexus or connection” between the prejudicial error and the failure of selection.¹⁰ To void a failure of selection, the Board “need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”¹¹

7. The only proven errors in the applicant’s record when it was reviewed by the selection board in 2009 were the lack of her most recent CG-9556, showing that she had returned to the regular Coast Guard from the Reserve, and her most recent CG-4082, showing that during her temporary separation, she had passed a course in Tactical Emergency Vehicle Operations offered by the xxxxxxxx and a course to be certified as a xxxxxxxxxxxxxxxxxx. The applicant presumably submitted her own communication to the selection board revealing her regular active duty status and what she accomplished during her temporary separation,¹² but she did not submit a copy of this communication. Therefore, it is not clear whether the selection board could have been confused about her regular status or about her training and accomplishments at the xxxx. However, her record does appear stronger with the most recent CG-9556 and CG-4082 in it, and the PSC has admitted that it is possible the lack of these updated documents might have

¹⁰ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005).

¹¹ *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982).

¹² Personnel Manual, Article 5.A.4.e.1., states that “[e]ach officer eligible for consideration by a selection board may communicate with the board through the officer’s chain of command by letter arriving by the date the board convenes, inviting attention to any matter in his or her Coast Guard record that will be before the selection board.”

prejudiced her record before the selection board. Therefore, the applicant has met the first prong of the *Engels* test.

8. With regard to the second prong of the *Engels* test, the Coast Guard has neither argued nor shown that even without the errors in her record in 2009 it is unlikely that the applicant would have been selected for promotion in any event. Nor can the Board see any obvious obstacle to her selection in 2009, especially given the fact that she was selected for promotion in 2010. Therefore, and in light of the presumption, the Board finds that the applicant has met both prongs of the *Engels* test and is entitled to the removal of her failure of selection in 2009.

9. For the same reasons that the Board will remove the applicant's 2009 failure of selection for promotion, the Board finds that she is entitled to have her LCDR date of rank backdated to what it would have been had she been selected for promotion in 2009, as well as to back pay and allowances. Under 10 U.S.C. § 1552, an applicant is entitled to "placement in the same position [she] would have been had no error been made."¹³ Although the Board cannot be certain that the applicant would have been promoted in 2009 had her most recent CG-9556 and CG-4082 been in her record, the Board finds that she is entitled to full relief in this regard because it is not unlikely that she would have been promoted.¹⁴

10. Accordingly, the Board will grant partial relief by removing the applicant's failure of selection for promotion to LCDR in 2009 by the PY 2010 selection board; by backdating her date of rank, after she is promoted, to what it would have been had she been selected for promotion by that selection board; and by awarding her corresponding back pay and allowances.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹³ *Denton v. United States*, 204 Ct. Cl. 188, 199-200, *cert. denied*, 421 U.S. 963 (1975), *cited in Bliss v. Johnson*, 279 F. Supp. 2d 29, 35 (D.D.C. 2003); *see Kimmel v. United States*, 196 Ct. Cl. 579, 591 (1971) ("The injustice was removed by placing plaintiff in the same position he would have been had no error been made. This was all that plaintiff was entitled to receive."); *Hamrick v. United States*, 120 Ct. Cl. 17, 25, 96 F. Supp. 940, 943 (1951) (holding that "full correction of the error would require plaintiff's being put in the same position he would be in had the erroneous determination not been made"), *cited in Ramsey v. United States*, 123 Ct. Cl. 504, 506 (1952), *cert. denied*, 345 U.S. 994 (1953).

¹⁴ "[O]nce the Board decides to give a remedy, it should not be free to slice the relief illegally or arbitrarily, sending the claimant forth with half-a-legal-loaf or even less." *DeBow v. United States*, 193 Ct. Cl. 499, 504 (1970), *cert. denied*, 404 U.S. 846 (1971); *see Bonen v. United States*, 229 Ct. Cl. 144, 149 (1981) ("The 'half-a-loaf' doctrine normally applies where a corrections board grants plaintiff's claim, but stops short of awarding the full appropriate relief requested by plaintiff. Failure of the board to grant full relief where it is mandated by the records change results in 'a new cause of action' or 'continuing' claim' which revives the statute of limitations.") (citing *Denton v. United States*, 204 Ct. Cl. 188, 195, *cert. denied*, 421 U.S. 963 (1975)).

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is granted in part as follows:

The Coast Guard shall remove her failure of selection for promotion by the PY 2010 ADPL LCDR selection board, and after she is promoted, the Coast Guard shall backdate her date of rank to what it would have been had she been selected for promotion by the PY 2010 ADPL LCDR selection board and shall pay her any back pay and allowances she is due as a result of these corrections.

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