

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-091

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FINAL DECISION

The 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 application on April 13, 2008, upon receipt of the application, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

The final decision, dated January 8, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in the case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct her military record by removing two officer evaluation reports (OERs) for the periods from May 13, 2003 to April 30, 2004 (first disputed OER) and from May 1, 2004 to May 31, 2005 (second disputed OER) and by replacing them with reports for continuity purposes only. The applicant twice failed of selection for promotion to LCDR before the promotion year (PY) 2005 and 2006 selection boards, but was selected for promotion to this grade by the PY 2007 selection board. She requested that if her record is corrected that it be evaluated by a special selection board to determine whether she should have been promoted by one of the earlier two LCDR selection boards that did not select her for promotion.¹

The applicant provided the following summary of her allegations in this case:

Some cases involving gender or race bias are incredibly complex. This is not that case. To the contrary, the issue here is stark and simple—did [the applicant's] superiors treat [the applicant] unfairly when they arbitrarily assigned her a non-competitive position because she had become a mother? She was a fast burner,

¹ The Coast Guard does not have authority to hold special selection boards. Therefore, applications requesting such relief are treated as requests for removal of failures of selection for promotion.

destined for likely advancement with her peers. Now, she was transferred to a job carrying little chance of promotion.

When she returned to duty after maternity leave, she was ready to accept whatever challenges the Coast Guard presented. Management then made an arbitrary decision—she was downgraded to a pedestrian position with little chance of recognition or promotion. Her complaint echoes that of Sylvester Stallone in the “rocky” movie series—she “coulda been a contender.” [sic] This is the matter upon which [the applicant] grieves.

The applicant stated that prior to leaving on maternity leave in 2003 she was a young officer with an extremely competitive record, particularly after September 11, 2001. Some of the highlights of her career included:

- As a proven leader, she led Activities New York Command Center to an above average score on HQ Stan Team Visit; prior to her arrival, they had failed a District visit.
- She successfully led the Engineering Logistics Center, with over 300 documented processes, through a successful ISO 9000 recertification.
- She facilitated the rescue of hundreds of boaters, swimmers, and people otherwise imperiled while Assistant Operations Boss at Group Galveston.
- She ably served as representative of the COTP for New York while standing the Sector Duty Officer of the watch, functioning as the first contact for marine casualties, search and rescue, and waterways issues.
- She inspired 50+ military and 20+ civilian employees to begin a degree program.

The applicant is complaining about her assignment to the Preparedness Staff where she was the Area Maritime Security (AMS) Committee Infrastructure Sub-Committee Coordinator.² The evaluation of her performance in this job is covered by the first disputed OER. Her next assignment was as Sector Command Center (SCC) Duty Officer (SDO). Her assignment in this job is covered by the second disputed OER. Prior to her assignment to the Preparedness Staff, the applicant was assigned to duty as the “Assistant Surface Forces Management Branch Chief/Command Control & Communication” officer.

The applicant alleged that after her return from maternity leave she was downgraded and reassigned away from a highly-visible slot with supervisory and operational impact to an administrative job on the preparedness staff planning for the prevention of and recovery from terrorist attacks to the area’s ports. The assignment was not at her request and was not due to unsatisfactory performance. She stated that she complained about the assignment but was told by her leadership that it was not a downgrading but simply an opportunity for her to “adjust” to

² The applicant’s assignment to the Preparedness Staff is may be referred to in this decision as an assignment to “planning” or the “Preparedness Staff’s AMS Committee”

being a new mother. She argued that although she was successful in the planning assignment, her accomplishments in that job paled in comparison to her previous assignment in which she supervised seven search and rescue controllers and 20 communications watchstanders in facilitating emergency rescues of the boating public.

The applicant also alleged that when she returned from maternity leave she was primed to give 100% percent to her [operations] job. Her superiors, however well intentioned, elected to “take her out of the rat race” and reassign her to a far less-stressful position. She stated that no matter how well intentioned, these seniors denied her the honest chance to perform and compete for advancement. She argued that her record was not competitive when compared against those officers who had performed in the more challenging positions. “It’s as if I moved from managing a large fitness center to handing out towels in the shower room” She contended that the reassignment stripped her of her chance to compete for promotion to LCDR and were the cause of her failures before the PY 2005 and 2006 LCDR selection boards.

The applicant alleged that she was denied equal protection under the Fifth Amendment and under traditional concepts of fairness and equity when her superiors reassigned her to the planning job upon her return from maternity leave. The applicant stated that when her superiors employed alleged unlawful gender considerations – “she’s a new mom” – it wrongly denied her a fair chance to succeed in the Coast Guard. She further alleged that she “was denied a competitive position because: [a] she had become a parent, and [b] they were not sure she could handle the fast pace. Denying [the applicant] a chance was an improper, gender-based decision. It was unlawful under current law.” The applicant argued that the BCMR should apply the strict scrutiny standard in determining whether the action by her leadership was permissible or unconstitutional discrimination. In support of her application, the applicant stated the following:

When I returned from the birth of my first son, my bosses decided that I should move to a planning job to allow me time to adjust to being a new mother. I was specifically told that the move had nothing to do with my performance and that my evaluation would reflect being “hand selected” for the new position. However, the truth of the matter is they didn’t like to wait 10 minutes in the middle of the day while I pumped breast milk for my infant son.

And then I got pregnant again. My second pregnancy came with complications during the second trimester. I was put on bed rest six weeks prior to my due date as a precaution to save my life and the life of my baby.

For the longest time I couldn’t figure out why my supervisors had graded me so harshly on my evaluations during this period, especially with no counseling. Or why they thought it necessary to take my [assistant operations] boss job away from me. My work still far surpassed that of most of my peers. Then I realized they were not grading me on my performance; they were penalizing me for the time I wasn’t there. They were discriminating against me because of getting pregnant. It was causing them more work, whether in rescheduling or just having to do more with less.

Some in senior leadership seemed to think I must choose between my two beautiful, healthy and intelligent boys or my military promotion. The question is pointless—I shouldn't have to.

First Disputed OER

The OERs contain a description of the applicant's duties and an evaluation of her performance, which consists of three parts: the supervisor's portion, the reporting officer's portion, and the reviewing officer's portion.

The first disputed OER covers a period when the applicant was assigned to the Preparedness staff of Activities New York. Her job description, in pertinent part, was as follows: "Area Maritime Security (AMS) Committee Infrastructure Sub-Committee Coordinator: Led Infrastructure Sub-Committee in managing Maritime Security Planning for all of Greater New York Harbor & connecting waterways serving New Jersey, in order to prevent, prepare for, respond to and recover from terrorist attacks, major disaster, and other waterborne emergencies."

Under performance of duties in the supervisor's portion of the OER, the applicant received marks of 6 in planning and preparedness and results/effectiveness, marks of 5 for using resources and adaptability, and a mark of 4 for professional competence.³

In the communication skills section of the OER, the supervisor gave the applicant a mark of 6 in speaking and listening and a mark of 5 in writing.

In the leadership skills section of the OER, the supervisor gave the applicant a mark of 6 for developing others, a mark of 5 for directing others, and marks of 4 for looking out for others, teamwork, workplace climate, and evaluations. The comments supporting the marks in each section were very complimentary of the applicant and the section 5 comments noted that the applicant "[l]ed 25+ Infrastructure Sub-committee [members] for 8 month period."

The reporting officer wrote in block 7 of the OER that he concurred with the remarks of the supervisor and he added that the applicant was an exceptional resource to the Commandant's Performance Challenge. He further stated that the applicant volunteered to facilitate the unit's first strategic planning effort.

In the personal and professional qualities section of the OER, the reporting officer gave the applicant a mark of 6 for initiative, and marks of 5 for judgment, responsibility, professional presence, and health and well-being.

On block 9 of the comparison scale where the reporting officer compared the applicant with all other LTs he has known throughout his career, the reporting officer evaluated the applicant as an "excellent performer; give toughest, most challenging leadership assignments," which is the equivalent of a mark of 5 on a scale of 1 to a high of 7.

³ Marks on an OER are from a low of 1 to a high of 7. A 4 is considered to be an average mark.

In potential section in block 10, the reporting officer wrote that the applicant was hand selected to be a part of the AMS Plan Development Team, which produced a plan touted as best in LANT. He recommended her selection for advanced education in leadership, human resources or public administration. He stated that she was a top choice for strategic planning or CPC position in a command cadre. He recommended her for promotion with her peers.

The reviewer authenticated the OER without comment. According to the military record, the applicant did not submit a reply to the OER.

Second Disputed OER

During the period covered by the second disputed OER, the applicant was assigned to duty as Sector Command Center (SCC) Duty Officer (SDO). The description of duties indicates that the applicant supervised sector command center watches that included 18 junior officers, 2 E8s, 5 E7s, 22 enlisted members, 12 civilians, and active and reserve members. The applicant was also assigned to collateral duty as the information management officer and continuity of operations planner. The second disputed OER noted that the applicant was awarded the Coast Guard Achievement Medal for her superior performance of duty from May 2002 to June 2005.

Under performance of duties in the supervisor's portion of the OER, the applicant received a mark of 6 in adaptability and marks of 5 in planning and preparedness, results/effectiveness, using resources, and professional competence.

In the communication skills section of the OER, the supervisor gave the applicant marks of 5 in speaking and listening and writing.

In the leadership skills section of the OER, the supervisor gave the applicant marks of 5 in looking out for others, developing others, directing others, workplace climate, and evaluations. The applicant received a mark of 6 in teamwork. The comments supporting the marks in each section were very complimentary of the applicant.

The reporting officer wrote in block 7 of the OER that he concurred with the remarks of the supervisor, and he added that the applicant embraced the challenge of a new SDO program with an exemplary positive attitude and that she exhibited sound judgment and contributed to the overall readiness of the command.

In the personal and professional qualities section of the OER, the reporting officer gave the applicant marks of 5 for initiative, judgment, responsibility, and professional presence, and a mark of 6 in health and well-being.

On the block 9 comparison scale where the reporting officer compared the applicant with all other LTs he has known throughout his career, the reporting officer evaluated the applicant as a "good performer; give tough, tough challenging assignments," which is the equivalent of a mark of 4 on a scale of 1 to a high of 7.

In describing the applicant's potential in block 10, the reporting officer wrote that the applicant will excel in the Field Intelligence Support Team Environment. He recommended her for follow-on tours in Sector Response and Sector Planning. He recommended her for promotion with her peers.

The reviewer authenticated the OER without comment. According to the military record, the applicant did not submit a reply to the disputed OER.

Applicant's Other LT OERs

- The applicant's first OER in the rank of LT shows that she was assigned to duty as the Productivity Program Manager/Training Officer, where she mainly "develops/implements plans, policies, procedures for the command's quality management system & command training programs." The applicant supervised one E-4. The marks on this OER were 5s, 6s, and some 7s. She was marked in the sixth highest block (strongly recommended for accelerated promotion) in block 9.
- The applicant's second LT OER shows that she was the Training & Quality Team Leader, where she "develops/implements plans, policies, procedures, [and] provides oversight." The applicant also "serves as command facilitator for strategic planning and manages 22 facilitators. She supervised one E-4. Her marks on this OER were 5s, 6s, and some 7s, and she was marked in the seventh and highest block on the comparison scale, which described her as the best officer of that grade. The reviewer attached comments where he indicated that he would have placed her in the sixth block on the comparison scale.
- On the applicant's third LT OER and the one immediately prior to the first disputed OER, the applicant was assigned to duty as the "Assistant Surface Forces Management Branch Chief/Command Control & Communication Officer." She directly supervised 1 E-8, 1 E-7, and 20 enlisted watchstanders including the Group's search and rescue controllers. In this duty, the applicant was responsible for coordinating all operations center training and scheduling of watches and reserve drills, and for ensuring SAR response and record keeping by the operations center and small boat stations. Her marks were mostly 5s, with occasional 4s and one 6. On the block 9 comparison scale, the applicant was rated in the fourth block as a "good performer, give tough, challenging assignments." The reviewer attached comments stating that he would have raised her one mark in the evaluation category from 5 to 6, and that he would have raised her block 9 comparison scale mark from the fourth block to the fifth block, which would have described the applicant as an "excellent performer; give toughest, most challenging leadership assignments." Block 1.h. showed 18 leave days and 76 other days as non-observed.
- The applicant's fourth and fifth LT OERs are the first and second disputed OERs discussed above. The fourth/first disputed OER showed 15 leave days and 22 other days as non-observed. The fifth/second disputed OER showed 52 leave days and 45 other days as non-observed.

- The applicant's sixth OER and the one immediately after the second disputed OER shows her duty as the "Field Intelligence Support Team Norfolk Team Leader." In this assignment the applicant was mainly responsible for collecting, researching, and disseminating tactical and actionable national intelligence for Coast Guard operations. Her marks were all 6s, except for three 7s. On the block 9 comparison scale she was marked as an "excellent performer give toughest most challenging leadership assignments" which is the fifth highest block.

VIEWS OF THE COAST GUARD

On August 26, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG stated that the applicant was assigned to the Area Maritime Security (AMS) Committee Infrastructure Sub-Committee because of her knowledge and valuable management experience, not because she was a new mother. The JAG stated that in proving her case, the applicant must overcome the presumption that her rating chain officials acted correctly, lawfully, and in good faith in marking their evaluations under the officer evaluation system. *Arens v. United States*, 969 F.2d 1034, 1037 (1992).

On the issue of removal of the applicant's failures of selection for promotion to CDR, the Coast Guard relied on *Engels v. United States*, 678 F. 2d. 173 (Ct. Cl. 1982), which states that before addressing a failure of selection "an applicant must first show that the service committed a legal error." After which, the next question is whether the error is causally linked with the pass over, i.e. whether it is harmless or prejudicial. According to *Engels*, if the applicant meets his burden of proving a causal connection between the alleged error and the failure of selection for promotion, the "end-burden of persuasion falls to the government to show harmlessness – despite the applicant's prima facie case, there was no substantial nexus or connection." *Id.*

The JAG stated that with respect to the first step under *Engels*, which is proving the existence of an error, the applicant has not shown that her assignment to the planning team resulted from gender discrimination. In this regard, the JAG stated that the applicant provided as evidence a "brief", family picture, and the two OERs in question. According to the JAG, this evidence taken as a whole fails to satisfy her burden of proving her claim and certainly falls short in establishing that her rating chain and chain of command did not carry out their duties correctly, lawfully, and in good faith. The JAG stated that the rating chain provided viable answers to the applicant's allegation of gender discrimination. They noted that following the Maritime Security Act of 2002, significant security enhancements were being mandated within the industry and to achieve compliance by July 1, 2004. This legislative action necessitated Sector New York to reorganize the staff in order to achieve the required outcomes. One of the staff elements was to develop the first ever area Maritime Security Plan. The lieutenants assigned to the staff were hand-selected by the CO based on their talents and skills. From the statements of the rating chain and others, it is clear that the applicant was selected as part of the planning team because of her talents and skills and not because she was a new mother. The JAG stated that mere conjecture and theory, without more, does not rise to the level of strong proof required to rebut the presumption of regularity.

The JAG stated, however, that the applicant's superiors committed an error by reassigning the applicant. The JAG stated that the CO lacked the authority to internally reassign the applicant to another position within the command without CGPC concurrence. The JAG stated that under Article 4.A. of the Personnel Manual the authority to make officer assignments is specifically reserved for CGPC.

With respect to step two under *Engels*, the JAG stated that the applicant has not made a prima facie showing of a substantial connection between the improper reassignment and her failure to be selected by the promotion year PY 2005 and 2006 LCDR selection boards. In support of this conclusion, the JAG offered the following analysis:

[The] applicant fails to make a prima facie showing of a substantial connection between the error and the passovers. There is no identifiable nexus between her position and failing to promote. Again, speculation does not equate to evidence. In fact, as the [applicant's] supervisor declared in written statement (discussed later) "along with [the applicant] two other female LTs were assigned. They were both exceptional officers. Both have been promoted to [LCDR] and one of the two was selected for graduate school and attended Princeton University where she received her MPA. The court in *Engels* placed the burden of establishing a prima facie case of showing a substantial connection between the error and the passover on the applicant. The court explained this step of the analysis by breaking it down into "two separate but interrelated standards: 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 errors? Second, even if there was some prejudice, is it unlikely that [she] would have been promoted in any event? *Id* at 176. The applicant's record was not prejudiced by the reassignment error, but assuming, *arguendo*, that it was, the applicant has not shown that the alleged worsening of her record contributed substantially to her non-selection. On the contrary and in support of the government's ultimate burden of harmlessness, the applicant was selected by the PY 2007 selection board, with no change in [her] record from the previous years.

The Coast Guard obtained declarations under penalty of perjury from some members of the applicant's rating chain for each of the disputed OERs.

Statements from Rating Chain for First Disputed OER

1. The supervisor for the first disputed OER wrote that it was the development and finalization of the Area Maritime Security Plan that led the Command to create the Preparedness Staff for an 8 month timeframe. She stated that she was the leader of the special project and that the LTs assigned to the staff were hand selected by the CO based on their talents and skills. The supervisor stated that the applicant brought the talents and skills needed to make the project a success. She met all deadlines and her speaking skills were very polished. The supervisor stated that she does not recall the applicant ever complaining about being a member of the

Preparedness staff; but she does remember the applicant being excited about working on the project.

2. With respect to the first disputed OER, the reporting officer, who was also the Deputy Commander, stated that he had direct observation of the applicant during the period in question and recalled that he had several conversations with her before and after the birth of her child. The reporting officer stated that following the passage of the Marine Safety Act, the Sector reorganized the staff to develop a first-ever Area Marine Security Plan. The Plan required the organization of four sub-committees, one led by him, two by senior commanders and one by an industry leader. The plan developed by the committee members changed the manner in which the port community detected, prevented and responded to man-made or natural disasters. The use of the plan continues to this day. The reporting officer stated that he could not think of anything more important to the Coast Guard than doing everything reasonably possible to protect our nation's ports.

With respect to the applicant's contention that the LCDR selection board did not place sufficient value on her service because of her assignment to the planning committee, the reporting officer wrote that this claim is usually made after an officer is not selected for promotion. On this issue he stated the following: "I know the Coast Guard must continue to select the best for what they need to meet future operational requirements, [and that officers are] not chosen or selected based solely on an officer's past performance. I often used the analogy while in the service, that if the Coast Guard needed to select a new General Counsel for flag, then the Coast Guard was going to consider only captains with JD degrees, even if that meant leaving a high performing captain sailor in the "non-select" group." In summary, the reporting officer wrote the following:

[O]ne thing is certain I would not have tolerated any adverse conduct or assignment solely due to her pregnancy. She was one of several, men and women, for a variety of reasons ranging from family considerations to serious medical conditions which we had to balance with work assignments. So for her to claim she was penalized for her absence is not accurate. I would add that one clear advantage of a large command was the opportunity to work on demanding assignments in a variety of specialties. You might even make a case that her change in assignments was complimentary to her career development vice detrimental. [The applicant] was one of many high performing officers I had the pleasure to serve with during my assignment to New York . . .

Statements from Rating Chain for Second Disputed OER

1. The supervisor for the applicant's second disputed OER stated that he was the senior watch officer and was the applicant's direct supervisor for the period covered by the second disputed OER. He stated that the sector duty officer (SDO) to which the applicant was assigned, and a duty he had performed previously, was and still is a very competitive position. He noted that he was promoted to LCDR at his first opportunity. He also noted that he had medical issues within his family that required him to be away from the command. He stated that the command

was fully supportive of his need and it was never suggested that he should be moved from his position because of his absences from the command to care for his family.

2. The reviewer stated that his review of the second disputed OER remains firm. He wrote he had or have no knowledge of any command or “management” decision to “downgrade” the applicant by placing her in a Planning Section position. He stated that if he were aware of such a thing he would have immediately objected. He stated that throughout his career he has vigorously reinforced the Coast Guard’s diversity management and civil rights policies. He stated that the applicant never voiced any concerns to him about the commands downgrading her. He further stated:

[The applicant] was not denied the chance for development and promotion based on unfair treatment because of her status with a new baby. Actually quite the opposite, and that development and promotion opportunity was quite abundant at Sector New York . . . She was definitely not reassigned to Planning based on a mediocre past record or inferior performance . . . I place the highest of premiums on our Planning Workforce since “planning drive operations” and we exist to “operate effectively and efficiently for the American Public. Without exemplary Planners we just tread water as an organization and we don’t move out with strategic intent and purpose. Thereafter, if she was not valued as a solid junior officer in Planning with promotion potential, why would we also place her in the most critical operation billet at the command, as a SDO in the Sector Command Center. [The applicant] had nothing but ample opportunity at this command to excel and demonstrate performance warranting recommendation for selection for LCDR.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 24, 2008, the Board received the applicant’s reply to the views of the Coast Guard. She stated that the statements obtained by the Coast Guard were hearsay. She stated that the officers offer their opinion but no proof. She stated that the supervisor for the first disputed OER was herself passed over twice for CDR due to her back to back planning assignments but was selected on her third try after she was moved into a new assignment. The applicant stated that the Coast Guard did not obtain statements from the officer who devised the plan to move her (LCDR P) or the officer (CDR M) who told her she was being moved to allow her to more easily adjust to being a new mother. In addition, she noted that a CAPT M who told her it was a good time to have a baby did not provide a statement. The applicant further stated the following:

None of the responses addresses the Coast Guard’s lack of policy to backfill for women who become pregnant and must temporarily leave the workplace. No mechanism is in place to protect women facing promotion boards when their maternity leave shows up as “unobserved time” on their OERs. The Coast Guard has implemented safeguards for those officers who complete advanced education programs and end up with “unobserved time” on their OERs – but not for pregnant females.

* * *

I seek removal of the 2nd OER based on substantive and procedural grounds. Substantively, [the reviewer] commented about my assignment to the position of [SDO]; during that meeting, he also assured me that [the supervisor of that OER] would not be my supervisor for OER purposes since I out-ranked [him]. Based on that meeting, at no time during the reporting period was I under the impression that [the supervisor] would be writing my OER. Procedurally, Sector New York did not publish a unit rating chain instruction, as directed by Coast Guard policy. The unit was cited for the oversight in a MLC compliance inspection. Additionally, [the supervisor] and I competed for the assignment of the Team Leader for Field Intelligence Support Team Philadelphia. I received the assignment. His lack of objectivity is proven by his very vocal negative comments about me in front of enlisted personnel as his view of my ability to handle the position.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in her Coast Guard military record. The Board finds that the applicant has exhausted her 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. Although the application was not filed within three years of when the alleged error or injustice was or should have been discovered, it is considered timely under *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).

3. 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. *See Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

4. The Board begins its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁴ For the reasons discussed below, the Board finds the applicant has failed to meet her burden of proof.

⁴ 33 C.F.R. § 52.24(b).

5. Chapter 3 of the Coast Guard Equal Opportunity Manual prohibits discrimination which is any action prohibited by law, executive order, regulation or policy in which members of a category or group of individuals are treated differently from members of another category or group. This Chapter also makes it clear that it is the policy of the Coast Guard to provide its military members equal opportunity during their military service and access to the rights, responsibilities, and privileges of such service, regardless of their sex, race, color religion, national origin, or participation in equal opportunity related activities.

6. The applicant alleged that the Coast Guard discriminated against her based on her gender upon her return from maternity leave by assigning her to the Preparedness staff for work on the Area Maintenance Security Committee because she was a new mother, rather than returning her to her previous assignment. She also alleged that the first and second disputed OERs are the product of that discrimination and should be removed from her record. She also asserted that the discriminatory assignment resulting in the first and second disputed OERs was the reason her failure to be selected for promotion to LCDR in PY 2005 and 2006. In this regard, she argued that the planning staff assignment was not as challenging, as high tempo, or as important as the one she held prior to maternity leave and that the planning assignment paled in comparison with the assignments of her peers. The applicant claimed that her superiors graded her harshly on the disputed OERs, but she did not challenge any of the individual marks and comments of either disputed OER. In addition, the applicant was not assigned to the planning staff for the second disputed OER; instead, she was assigned as a sector command duty officer. In order to prevail on her gender discrimination claim, the applicant must show (1) that she was a member of a protected class; (2) that she performed her job satisfactorily; (3) that she suffered an adverse employment action; and (4) that her command treated similarly situated males more favorably. See *Clegg v. Arkansas Department of Correction et al*, 496 F.3d 922, 926 (8th Cir. 2007); citing *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 805-806 (1973).

7. It is clear from the record that the applicant, a female, is a member of a protected class, and that she performed her jobs in a satisfactory manner. However, the applicant has not proven that her assignment to the Preparedness staff's AMS committee was an adverse employment action. An adverse employment action "is a tangible change in working conditions that produces a material employment disadvantage." See *Clegg* at 926. An adverse employment action requires a "materially adverse change" in the terms and conditions of employment such as firing, hiring, failing to promote, reassignment, or a significant change in benefits. Adverse actions usually inflict direct economic harm. *Novotny v. Reed Elsevier, et al.*, No. C-3-05-424, 2007 U.S. Dist. Lexis 66608, at * 46 (Sept. 10, 1007), *affirmed* 2008 U.S. App. LEXIS 18777 (6th Cir. 2008). Even if there was reassignment as in this case, a reassignment that "involves no corresponding reduction in salary, benefits, or prestige is insufficient to establish an adverse employment action. *Clegg* at 927-928. The applicant has not shown in this case that her assignment to the Preparedness staff resulted in a materially adverse change in her employment. While she argued that it was a less competitive position for promotion than the position she held previously and that it was a less competitive assignment than that of her peers, she offered only her opinion in this regard. She offered no evidence that an assignment to the Preparedness Staff was one that should not have been assigned to an officer of her rank or that the functions she performed in that assignment were any less important than the functions she previously

performed. She complained that the Preparedness Staff assignment had no supervisory responsibilities but a review of the section 5 comments for the first disputed OER note that the applicant led “25+ Infrastructure Sub-committee [members] for 8 month period.” She has not put forth any evidence of a causal connection between the planning assignment and her failure to be selected for LCDR by the PY 2005 and 2006 selection boards, except for her conjecture that the assignment was the reason for her non-selections. The fact that the other two LTs assigned to the same Preparedness Staff were selected for promotion to LCDR is proof that the assignment did not *per se* cause the applicant’s failures of selection.

8. Nor has the applicant shown that she was treated differently from male officers similarly situated. In this regard, she did not put forth the names of males, or females for that matter, who upon becoming new parents and returning from maternity leave were allowed to remain in their original assignments. In addition to the applicant, two other female LTs were assigned to the Preparedness Staff. There is no evidence that they were assigned because they were new mothers. Nor has any evidence been presented on how many males, if any, were assigned to the Preparedness Staff, and if no males were assigned, whether that was by design of the CO or simply due to the fact that the applicant had the necessary skills for the job. The applicant’s earlier OERs show that she had a background in planning. Therefore, the applicant has not presented sufficient evidence for the Board to conclude that similarly situated males were treated more favorably than she was. She has failed to prove by a preponderance of the evidence that she was assigned to the Preparedness Staff’s AMS sub-committee upon her return from maternity leave because she was a new mother.

9. Even if the applicant had made a *prima facie* case of gender discrimination, the burden would shift to the Coast Guard to show that it had a legitimate business need for assigning the applicant to the Preparedness Staff’s AMS sub-committee. *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1824 (1973). The applicant’s chain of command denied that she was assigned to the AMS committee because of her new mother status. They stated she was assigned to that staff to meet the Coast Guard’s congressional mandate for significant security mandates by developing the first ever Maritime Security Plan. The supervisor for the first disputed OER stated that the applicant was hand chosen for the AMS assignment due to her talents and skills. The reviewer for the second disputed OER stated that he would not have tolerated any command or management decision to “downgrade” the applicant because she was a new mother. He stated that if the applicant had not been a solid junior officer in planning with promotion potential, she would not have been assigned to what he considered a critical position. In rebutting the statements from her rating chain, the applicant argues that their statements are hearsay and constitutes only their opinions but no proof. She further argued that the Coast Guard did not obtain a statement from the officer who told her a plan was devised to move her to the Preparedness staff, from the officer who told her that she was reassigned to allow her to adjust to being a new mother, or from the officer who told her it was a good time to have a baby. First, with respect to her contention about hearsay statements, the Board notes that it is not bound by the rules of evidence and that each statement from the rating chain members is signed under penalty of perjury and are therefore deemed credible and reliable. Second, the statements from the rating chain corroborate each other with regard to the need of the Coast Guard to establish the AMS committee to carry out a congressional mandate. Third, the reporting officer for the first disputed OER and the reviewer for the second disputed OER are corroborative of each other

that the applicant was assigned to the AMS committee because of her skills and talents matched those needed by the Coast Guard for the AMS project. Fourth, the applicant has the burden of proof and it is her responsibility to obtain the evidence she deems necessary to prove her case. She provided no corroboration for her contentions that she was told by other officers that a plan was devised to move her to the Preparedness staff, that such an assignment would allow her to adjust to becoming a new mother, or that it was a good time to have a baby. In light of the evidence on this issue, the applicant has failed to persuade the Board by a preponderance of the evidence that she was assigned to the Preparedness staff for reasons other than those based on the legitimate needs of the Service.

10. The applicant's claim that she was denied equal protection, as well as traditional concepts of fairness and equity, is likewise without merit. In order to prove a denial of equal protection, the applicant must show (1) that she was a member of a protected class; (2) that she was similarly situated to members of the unprotected class; (3) that she was treated differently from members of the unprotected class; and (4) that her rating chain acted with discriminatory intent in assigning her to the preparedness staff. See *Attebery v. Department of State Police, et al*, 224 F. Supp. 2d 1208 (IL DC 2002). The applicant has failed to prove that she was treated differently from similarly situated male officers. She has put forth no evidence that male officers at her command who returned from extended leave periods, whether for paternity purposes or otherwise, were always placed back into the jobs they held prior to executing that leave. Nor has she shown that her assignment to the preparedness staff was due to discriminatory intent. As discussed earlier, she was assigned to the Preparedness staff based on service need and because her skills and talents matched those necessary for the successful completion of that project.

11. In her response to the advisory opinion, the applicant alleged that the Coast Guard lacks a policy with respect to backfilling for women who become pregnant and must temporarily leave the work place. The applicant appears to be particularly concerned about accounting for maternity leave as non-observed time and the negative impact that that non-observed time may have before a selection board. She noted that the Coast Guard has safeguards for members assigned to duty under instruction who receive non-observed OERs. However, in making this comparison, the applicant misses an important point, which is that members assigned to duty under instruction are under permanent change of duty orders assigned to a particular school as full-time students. A member who is allotted maternity leave or some other type authorized leave still occupies a specific command billet. The Board is not aware of any regulation that permits double billeting of a position due to a short-term temporary leave status. Therefore, the accounting for such leave is appropriate in block 1.h. (days not observed or other) of an OER. Additionally, the applicant has not presented any evidence, except for her own allegation, that accounting for maternity leave as non-observed time on an OER is prejudicial before a selection board.

12. The applicant raised a new issue in her reply to the advisory opinion, which is the supervisor for the second disputed OER should not have been in her rating chain because she outranked him by two years. While Article 10.A.2.d. of the Personnel Manual states that the supervisor will normally be senior to the reported-on officer, it provides that in appropriate situations, the supervisor may be designated, regardless of grade relative to the reported-on

officer. There is no evidence in the record that the CO did not designate the supervisor as the applicant's supervisor. The applicant stated that she was told by the CO that the supervisor for the second disputed OER would not serve as her supervisor. However, she provided no additional proof or corroboration that the supervisor should not have been her supervisor. Insufficient evidence has been submitted to prove an error or injustice in this regard.

13. The Coast Guard noted that under the Personnel Manual the applicant's CO lacked the authority to internally reassign the applicant from her duty as "Assistant Surface Forces Management Branch Chief/Command Control & Communications" officer to the Preparedness Staff. While admitting this administrative error, the JAG argued that there is no evidence to suggest that this "reassignment" had any direct negative impact on the Applicant's OERs or was detrimental from a career management perspective. The applicant did not raise this issue in her basic brief, nor did she provide comment or argument on it in her reply to the advisory opinion. Her silence on this point can be taken as her agreement with the JAG that the error in this regard was harmless.

14. Regardless of the applicant's failure to submit argument and evidence on the issue of the connection between her CO's administrative error in reassigning her to the Preparedness Staff and her PY 2005 and 2006 failures of selection, the Board will address it. In deciding this issue, the Board applies the standard in *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982). In *Engels*, the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering 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 [the applicant] would have been promoted in any event?"

15. The Board agrees with the Coast Guard that the CO's administrative error that internally reassigned the applicant did not make her record appear worse than it would have in the absence of the error. There is nothing in the OERs to suggest that the applicant's Preparedness Staff's AMS committee assignment or her subsequent assignment as SDO were adverse or negative assignments, or that they were assignments of a level beneath that of a LT. The marks and comments on the disputed OERs are not below average and are similar to other marks and comments in the applicant's record. For that matter, as reasoned by one member of the applicant's rating chain, the change in assignments could be read as enhancing the applicant's career. It occurred immediately after September 11, 2001, based on a congressional mandate to devise a plan to secure the area's ports. As that member of the rating chain stated, what could be more important than securing the nation's ports from a terrorist attacks. The applicant offered only her own statement that the selection boards considered the assignment to the Preparedness Staff and as SDO to be less challenging and competitive when compared to those of her peers. The applicant's conclusion in this regard is contradicted by the supervisor for the first disputed OER, who stated that the other two LTs assigned to the Preparedness Staff have been promoted to LCDR and one of them was selected for the graduate school program. The supervisor for the second disputed OER stated that he was an SDO and that he was selected to LCDR with the SDO assignment in his record. Also, as noted earlier, the block 5 comment section of the first disputed OER noted that the applicant led "25+ Infrastructure Sub-committee

[members] for 8 month period” and in the SDO assignment she supervised a number of officers, enlisted members and civilians.

16. Since the applicant has failed to demonstrate any prejudice to her record by the unauthorized internal assignment to the Preparedness Staff’s AMS committee or her assignment as SDO, under *Engels* the burden has not shifted to the Coast Guard to show that it is unlikely that she would have been promoted in any event.

17. The applicant has failed to prove an error or injustice in her record that requires any corrective action by the Board.

18. In light of the above, the applicant’s request for relief should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

Philip B. Busch

Diane Donley

Jeff M. Neurauter