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

FINAL DECISION

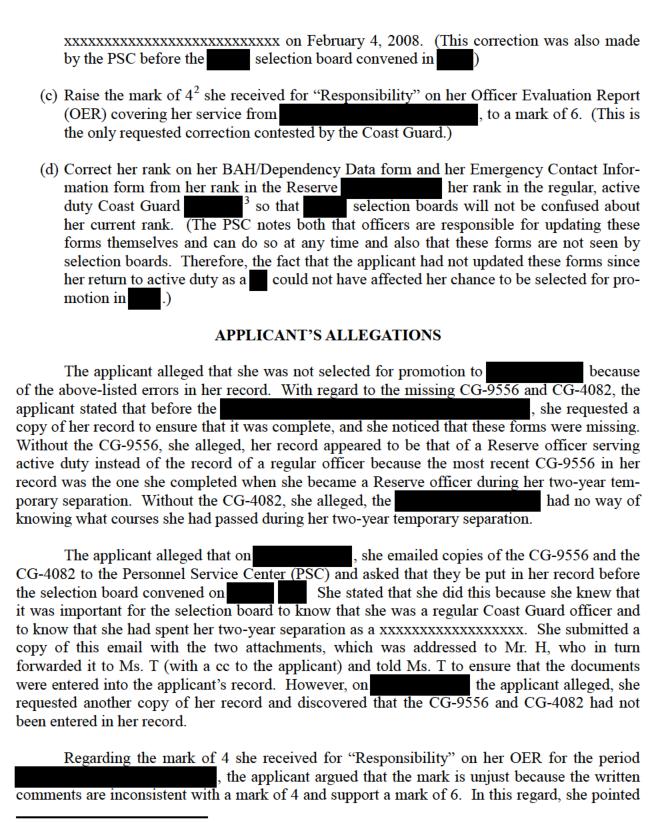
This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application September 21, 2010, and assigned it to staff member J. Andrews to prepare the decision for 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 |
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| alleged that her military record contained several prejudicial errors |
| when it was reviewed by the She asked the Board to correct the |
| alleged errors, to remove her failure of selection for promotion, and to backdate her date |
| of rank to what it would have been had she been selected for promotion in . To correct the |
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| prejudicial errors that she alleged were seen by the |
| 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 selection board convened in |
| |
| (b) Place her current Record of Professional Development (CG-4082) in her record, which |
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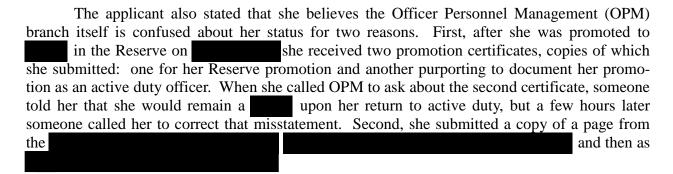
¹ The applicant asked the Board to promote her directly to as alternative relief. However, the Board's policy is not to promote officers directly but to remove their failures of selection so that they have more opportunities to be selected for promotion through regular selection boards. Moreover, because the applicant has already been selected for promotion to this request is moot.



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.

out that her reporting officer used the phrase "unwavering responsibility," which she argued meets the criteria for a mark of 6 in the category.



In light of these errors and confusion, the applicant asked the Board to correct the errors, to remove her failure of selection in and to backdate her date of rank to what it would have been had she been selected for promotion in

SUMMARY OF THE RECORD AND REGULATIONS REGARDING THE OER MARK

The written criteria for the numerical marks for "Responsibility" on an OER form appear below with the mark assigned by the applicant's reporting officer, a 4, filled in and the mark the applicant wants, a 6, highlighted in yellow:

STANDARDS FOR NUMERICAL MARKS IN "RESPONSIBILITY" ON AN OER FORM

| Respons bility Ability to act ethically, courageously, and dependably and inspire the same in others; accountability for own and subordinates' actions. | 1 | Actions demonstrated questionable ethics or lack of commitment. Tolerated indifference or failed to hold subordinates accountable. Allowed organization to absorb personnel problems rather than confronting them as required. Tended not to speak up or get involved. Provided minimal support for decisions counter to own ideas. | 3 | Held self and subordinates personally and professionally accountable. Spoke up when necessary even when expressing unpopular positions. Supported organizational policies and decisions which may have been counter to own ideas. Committed to the successful achievement of organizational goals. | 5 | Integrity and ethics beyond reproach. Always held self and subordinates to highest standards of personal and professional accountability. Did the right thing even when it was difficult. Succeeded in making even unpopular policies or decisions work. Actions demonstrated unwavering commitment to achievement of organizational goals. | 7 |
|--|---|---|---|--|---|---|---|
|--|---|---|---|--|---|---|---|

Article 10.A.4.c.7. of the Personnel Manual instructs reporting officers to assign marks and write comments in their portion of an OER form as follows:

b. For this evaluation area, the Reporting Officer shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Reporting Officer shall 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 standard best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form in ink.

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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:

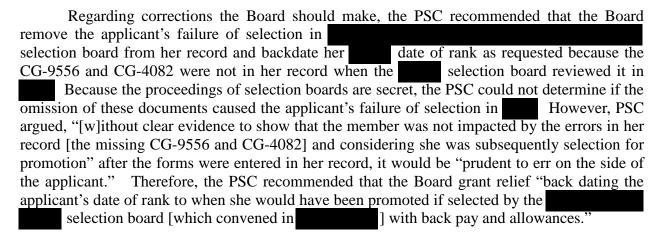
REPORTING OFFICER'S MARKS AND COMMENTS IN THE DISPUTED OER

| # | 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 | | |
| 8b | Judgment | 6 | & appropriate vis bility 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 | | |
| 8c | Responsibility | 4 | 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 | | |
| 8d | Professional Presence | 6 | 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 | | |
| 8e | Health & Well- Being | 7 | 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 xxxxxxxx. | | |
| 9 | Comparison Scale | 5 | [This mark means that in comparison to all other 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 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 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. 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 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 xxxxxxxxx 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 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." 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 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
- 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 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. 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.

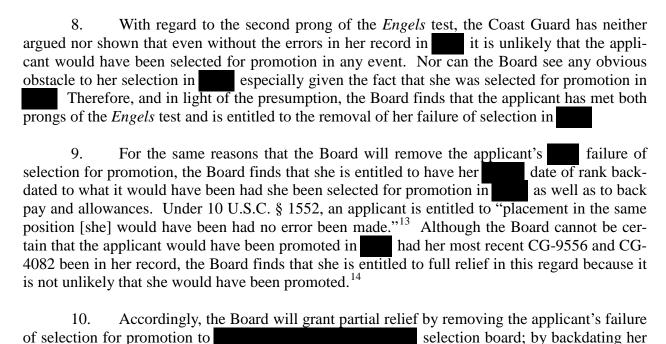
- 5. The Board finds that the reporting officer's comment—"Unwavering responsibility. Set clear goals for AOPS while on leave, fulfilled tasks to include xxx MOU, Surge Op Planning, new Surge OP AAR. Work until job is done, closely monitor inbox to ensure leave chits, memos & projects not neglected"—is 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 selection board and to backdate her 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 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

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.



[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

date of rank, after she is promoted, to what it would have been had she been selected for promo-

tion by that selection board; and by awarding her corresponding back pay and allowances.

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 Coast Guard shall remove her failure of selection for promotion by the 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 selection board and shall pay her any back pay and allowances she is due as a result of these corrections.

