

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-083

[REDACTED]

FINAL DECISION

[REDACTED] **Deputy Chair:**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Board docketed the case on April 5, 2002, upon receipt of the application.

This final decision, dated January 16, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant asked the Board to correct her date of rank as a commander (CDR) and her position on the active duty promotion list to the date and position she would have had had she been selected for promotion in xxxx. She was not selected for promotion until xxxx, when her record was reviewed by a second selection board. She also asked for the backpay and allowances she would be due with a corrected date of rank.

SUMMARY OF THE APPLICANT'S ALLEGATIONS AND RECORD

The applicant alleged that the president of the first CDR selection board to review her record, Captain X, had been irrationally biased against her since August 19xx. At the time, she was a lieutenant and had been serving as the commanding officer (CO) of a station since July 19xx. In August 19xx, the Deputy Group Commander, CDR W, was her direct supervisor; Captain X, the Group Commander, was her reporting officer; and the Captain Z, the District Chief of Search and Rescue, was her reviewer.

While serving as the station CO, the applicant received six officer evaluation reports (OERs). The first two of these, summarized as OERs 1 and 2 in the table below, were completed by her supervisor and Captain X's predecessor. They contain many

highly laudatory comments, such as “top performer,” “exceptional leadership,” and “should be seriously considered for accelerated promotion.”

In 19xx, Captain X became the Group Commander. The applicant alleged that, initially, he gave her very positive feedback about her performance. OERs 3 through 6, which appear shaded in the table below, are signed by Captain X as the reporting officer. All four OERs contain very positive comments and recommendations for promotion “with peers.” However, the applicant alleged, Captain X’s attitude toward her changed abruptly in August 19xx, when she had a conversation with him “during which she told him that she had enjoyed working for [Captain Y]” at a unit she was assigned to four years earlier. The applicant alleged that when she stated this, Captain X’s “expression and attitude immediately changed upon the mention of that officer’s name” and he ended the discussion suddenly with a sarcastic remark. She alleged that a few hours later in the evening, Captain X called her at home and ordered her to report to his office the next morning for “mentoring.”

The applicant alleged that the next morning, Captain X lectured her for several hours on why she should never have any contact with Captain Y again. She alleged that Captain X told her that “everyone in the District,” including the District Chief of Search and Rescue, “was very upset that she had enjoyed working with [Captain Y].” Captain X told her that he would be her mentor. Moreover, she alleged, “[i]n a dramatic reversal of attitude, he unexpectedly expressed an opinion that the manner in which [she] ran the station was not the way a female officer should behave.” Later, the applicant alleged, she learned that Captain X had had problems with Captain Y when Captain Y was his commanding officer during a previous assignment.

The applicant alleged that until she transferred to a new assignment ten months later, she was frequently summoned to Captain X’s office (often several times per week) for “mentoring” devoted almost exclusively to explanations of why she should not have enjoyed working for Captain Y and of how a female station CO should conduct herself. She alleged that the “unwarranted harassment” by Captain X also included

- revoking her authority to conduct investigations and dispositive legal proceedings without cause or explanation for three months;
- threatening to relieve her of her command;
- convening an unauthorized investigation of her station, without cause, and failing to advise her of its purpose;
- violating protocol by arriving at her station unannounced, without checking in, acting secretly, and leaving without ever informing the officer on duty;
- bypassing the chain of command by communicating directly with her subordinate, the station’s executive officer;
- insisting that she make appointments with his secretary to speak to him;
- secretly altering the parameters of an inspection so as to embarrass her;
- assigning her staff to perform work that conflicted with required duties; and

- accusing her of discrimination when she tried to enforce Coast Guard policy after a female member was the victim of prohibited hazing; initially refusing to convene a captain's mast for the perpetrators; and conducting a "sham" mast, during which he wondered aloud why their behavior was not accepted at her station when it was at other stations, joked with the perpetrators, and dismissed the charges.

The applicant argued that, while these incidents might seem minor taken individually, taken together during the ten-month period, they amount to harassment.

The applicant alleged that near the end of her tour, Captain X threatened to give her an adverse OER, and he prepared a draft with low marks and comments attacking her personality. (OERs 5 and 6 were completed after he allegedly became biased towards her.) However, she alleged, her reviewer, Captain Z, intervened and stopped Captain X from giving her the adverse OER. She alleged that they had a very unpleasant meeting during which Captain Z suggested that any trouble she was having might be the result of Captain X's own performance. OER 6 in the table below is the evaluation she ultimately received. She argued that an affidavit submitted by Captain Z on her behalf (see below) proves her allegations about Captain X's bias against her.

The applicant alleged that Captain X resented Captain Z's intervention and punished her by arranging for her to receive only an Achievement Medal without an operation device for her tour of duty, instead of the usual Commendation Medal received by station COs. She argued that his actions with respect to her OER and the award prove that he was ready and willing to act on his prejudice against her.

After completing her tour at the station, the applicant was assigned to an important analysis project at Headquarters from June 19xx through July 19xx, during which period she received OERs 7 through 9 in the table below. She was promoted to lieutenant commander in 19xx. In 19xx and 19xx, she attended school and received a master's degree in public administration. From September 19xx through April xxxx, she served as the chief of a branch at Headquarters, for which she received OERs 10 and 11.

In July xxxx, the applicant failed of selection for promotion to CDR with Captain X serving as president of the selection board. At the time, OERs 1 through 11 were in her record, as well as nine older OERs, and she had received three Achievement Medals (including one for her service as station CO) and two Commendation Medals, as well as several other unit awards, service medals, and letters of appreciation. After serving a year as an assistant liaison officer, she received OER 12 and a third Commendation Medal and was selected for promotion in July xxxx.

The applicant alleged that her failure of selection by Captain X and the CDR selection board in July xxxx was a statistical anomaly, given her excellent record and the fact that the opportunity for selection by that board was 66 percent. She pointed out that every other candidate who was a station CO was selected for promotion and that

another officer who had enrolled in graduate school (as she had) was selected for promotion. She argued that some factor other than her actual record must have caused her failure of selection and that the factor was Captain X's unfair and irrational bias against her. She argued that, given his bias, he should have recused himself from participating in selection board's consideration of her record.

The applicant argued that since selection board members are sworn to secrecy and the Coast Guard fails to keep statistics about the performance records of officers selected and rejected for promotion, it is impossible for her to submit evidence of what actually happened and how her record compared with those of other candidates. However, she argued, the BCMR should draw the obvious inferences from her military record and the affidavits she has submitted and find that, but for Captain X's influence as president, she would have been selected for promotion in July xxxx.

APPLICANT'S MARKS IN 12 OERs FROM 7/19/xx THROUGH 4/30/xx

CATEGORY^a	OER 1	OER 2	OER 3	OER 4	OER 5	OER 6	OER 7	OER 8	OER 9	OER 10	OER 11	AVE 1-11	OER 12^b
Prep. & Planning	X	X	X	X	X	X	X	X	X	X	X	X	X
Using Resources	X	X	X	X	X	X	X	X	X	X	X	X	X
Getting Results	X	X	X	X	X	X	X	X	X	X	X	X	X
Responsiveness/ Adaptability	X	X	X	X	X	X	X	X	X	X	X	X	X
Work-Life Sensitivity ^e	X	X	X	X	X	X	X	X				X	
Expertise/ Competence	X	X	X	X	X	X	X	X	X	X	X	X	X
Collateral Duty ^e	X	X	X	X	X	X	X	X				X	
Teamwork	X	X	X	X	X	X	X	X	X	X	X	X	X
Human Rels. & Workpl. Climate	X	X	X	X	X	X	X	X	X	X	X	X	X
Looking Out for Others	X	X	X	X	X	X	X	X	X	X	X	X	X
Developing Others	X	X	X	X	X	X	X	X	X	X	X	X	X
Directing Others	X	X	X	X	X	X	X	X	X	X	X	X	X
Evaluations	X	X	X	X	X	X	X	X	X	X	X	X	X
Speaking & Listening	X	X	X	X	X	X	X	X	X	X	X	X	X
Writing	X	X	X	X	X	X	X	X	X	X	X	X	X

Initiative ^d	X	X	X	X	X	X	X	X	X	X	X	X	X
Judgment	X	X	X	X	X	X	X	X	X	X	X	X	X
Responsibility	X	X	X	X	X	X	X	X	X	X	X	X	X
Stamina ^e	X	X	X	X	X	X	X	X				X	
Health	X	X	X	X	X	X	X	X	X	X	X	X	X
Military Bearing ^e	X	X	X	X	X	X	X	X				X	
Professionalism/ Prof. Presence	X	X	X	X	X	X	X	X	x	x	x	X	x
Dealing w/ Public ^e	X	X	X	X	X	X	X	X				X	
Average of OER	5.5	5.8	5.9	6.0	5.8	5.7	5.4	5.6	5.9	5.9	6.2	5.8	5.5
Comparison Scale ^f	5	5	5	5	5	5	5	5	5	5	5		5

^a Some categories' names have changed slightly over the years.

^b OER received in xxxx, after the applicant failed of selection for promotion to CDR and before she was selected.

^c Rounded average score for category in OER1 through OER11.

^d Marks above the break are assigned by the supervisor. Marks below it are assigned by the reporting officer.

^e Category discontinued in later years.

^f The Comparison Scale is not actually numbered. In this row, "5" means the applicant was rated to be an "excellent performer; give toughest, most challenging leadership assignments." A "6" would mean the applicant was "strongly recommended for accelerated promotion."

SUMMARIES OF AFFIDAVITS*Affidavit of Captain Z, District Chief of Search and Rescue*

In support of her allegations, the applicant submitted an affidavit by Captain Z, who was the District Chief of Search and Rescue and the applicant's reviewer while Captain X was her reporting officer. Captain Z stated that in 19xx he "became aware of a situation developing" between the applicant and Captain X. Captain Z stated that, when he reviewed a draft OER the applicant was to receive as station CO, he noted that there were inconsistencies between the marks and comments and that some of the comments were inappropriate. He stated that he had counseled Captain X on his responsibilities with respect to the applicant on at least two occasions. He alleged that he told Captain X that the content of the draft OER he had prepared for the applicant "seemed to be unsupported and the tenor of the narrative comments might be setting him up for some criticism, including appropriate numerical scores and comments in his own upcoming OER." He alleged that Captain X seemed to receive the message he intended to convey and altered the OER. Captain Z stated that the meeting between himself and Captain X was very unusual and memorable and that he is "sure that its nature would cause [Captain X] to remember it, as well."

Captain Z further stated that at the end of the applicant's tour, Captain X awarded her an Achievement Medal, rather than the Commendation Medal other station COs received, even though her performance and accomplishments were equal to those of other station COs.

Finally, Captain Z stated that he was surprised and disappointed that the applicant failed of selection in xxxx. He stated that, knowing the excellence of her record and the situation that existed between her and Captain X, he is "concerned that some irregularity occurred in her consideration for selection by that Board."

Affidavit of CWO Z

The applicant submitted an affidavit from a chief warrant officer, CWO Z, who worked in the District Search and Rescue Office for Captain Z. CWO Z stated that in 19xx he became aware that Captain X was dissatisfied with the applicant's policies and management of her station and was threatening to relieve her of command. He stated that Captain Z met with Captain X and "took him to task." He alleged that Captain Z told him that he had informed Captain X that the problems developing at the applicant's station were likely due to Captain X's own failures and that he would ensure that the applicant was not the only one blamed for them. CWO Z alleged that Captain X was "very unhappy" after the meeting. He stated that given that situation and that applicant's failure of selection, he "cannot help but be concerned about the fairness of her failure of selection." He suggested that Captain X should have recused himself from the selection board's deliberations with respect to her record.

VIEWS OF THE COAST GUARD

On September 25, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The Chief Counsel argued that "[a]bsent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); *Muse v. United States*, 21 Cl. Ct. 592, 601 (1990). Moreover, he pointed out, under 14 U.S.C. § 254, selection board members are sworn "to perform their duties without partiality or prejudice." The Chief Counsel argued that the applicant has failed overcome the presumption of regularity because she has failed to submit any "clear and convincing evidence of improper prejudice or conduct on the part of the President" of the selection board in July xxxx.

The Chief Counsel argued that the "anecdotal comments" of Captain Z and CWO Z do not substantiate her allegations. He stated that neither affiant was privy to the deliberations of the selection board or to the records of the other candidates who were selected for promotion in xxxx. Therefore, he argued, their statements amount to irrelevant speculation. He alleged that, while the applicant and Captain x may have had a difficult relationship in 19xx and 19xx, she has "failed to show how the difficult command relationship affected the impartiality of the President of the Board [Captain X] or other members."

The Chief Counsel enclosed with his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the xxxx CDR selection board comprised Captain X as president and another captain and five commanders as members. CGPC stated that the selection board's precept provided that the members "may not predicate judgments on rumor or hearsay." Because under 14 U.S.C. § 261(d) selection board members are sworn to secrecy, they could not divulge why the applicant was not selected.

CGPC further stated that with 144 officers "in the zone" for promotion to CDR in xxxx and 119 open slots, the stated "opportunity for selection" that year was 83 percent. However, because 20 percent of the 121 officers who were eligible for promotion but considered "above the zone" because they had failed of selection once already, only 66 percent of the "in the zone" candidates were actually selected. CGPC also stated that, in addition to OER marks, the selection board members are advised to consider the candidates' "performance, professionalism, leadership and education." CGPC stated that an "officer can have an excellent record and still fail of selection for promotion as a result of the competition involved."

CGPC pointed out that, under the precept, any decision by the board regarding a candidate had to be agreed upon by at least two-thirds of the members. Therefore, "it must be presumed that no one member would introduce prejudice into the selection process, or that any prejudice inappropriately introduced would be agreed upon by two-thirds of the members."

Regarding the medal the applicant received, CGPC stated that, when Captain X recommended an Achievement Medal for the applicant in 19xx, Captain Z could have forwarded it to the District Commander with his own recommendation that the award be upgraded to a Commendation Medal. Furthermore, CGPC stated that the addition of an operational device to an Achievement Medal is only appropriate when "the major achievements used to justify the particular award are operational vice administrative, and the individual participated 'hands on' in the operational achievements." CGPC stated that operational devices are "often not awarded to officers who have commanded shore units such as a station."

Regarding the applicant's OERs prepared by Captain X, CGPC pointed out that they are very good, that she did not appeal them, and that Captain Z did not attach a page of his own comments, as was his prerogative if he disagreed with Captain X's assessments. CGPC also pointed out that the applicant never filed a complaint against Captain X for harassment.

Finally, CGPC opined that the applicant may have failed of selection because her record is not strong in the areas of professionalism and leadership. CGPC explained that after her assignment as station CO, she had "staff jobs," and that her "career track has had neither the breadth or the growth within specialty required by the Precept that would improve her competitiveness against her peers in the operations ashore specialty." In her fifteen years as an officer (she had prior enlisted service), she spent ten at Headquarters or in graduate school and "only five of those [years] at operational units."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 30, 2002, the Chairman forwarded a copy of the Chief Counsel's advisory opinion to the applicant and invited her to respond within fifteen days. The applicant was granted an extension and submitted a response on November 7, 2002.

The applicant argued that because the deliberations of selection boards are secret, officers such as her who have been unfairly denied a promotion because of prejudice can only present circumstantial evidence of that prejudice and ask the Board to draw a logical conclusion. Moreover, she argued, the conclusion that Captain X's prejudice caused her failure of selection is supported by the fact that in xxxx she was selected for promotion when she was already "above the zone," when the chances for promotion are much lower. She submitted a copy of ALPERSCOM 078/02, which shows that only 13 percent of the "above the zone" officers were promoted in xxxx.

The applicant further argued that the conclusion that Captain X's prejudice caused her failure of selection is strongly supported by the fact that she was selected for promotion "based on essentially the same record" in that the additional OER she received before the board met in xxxx is "substantially the same" as her previous OERs and the staff liaison billet she held in the interim was not a high-profile or particularly career-enhancing assignment. She alleged that when she requested her current assignment "for geographic and tour-length reasons only," no one else requested it and, since she began the assignment, only one officer has inquired about it, and he was interested in it only because of its geographic location as well. The applicant argued that her selection for promotion in xxxx without additional operational or leadership experience refutes CGPC's speculative statements about why she failed of selection in xxxx.

Therefore, the applicant concluded, her assignment and performance between the xxxx and xxxx selection boards cannot have made the difference in the outcomes of those boards. She alleged that the only significant difference in circumstances between xxxx and xxxx was the fact that Captain X was not on the board in xxxx. She argued that this Board should logically conclude that Captain X's prejudice caused her failure of selection in xxxx. In addition, she pointed out that, if in xxxx, the regular selection board members were tied 3-3 about whether to select her, Captain X would have been called upon to break the tie, and out of prejudice, he would have rejected her.

APPLICABLE LAW

According to 14 U.S.C. § 254, every member of a selection board must swear an oath that "he will, without prejudice or partiality, ... perform the duties imposed upon him." Under 14 U.S.C. § 261(d), "[e]xcept as required by this section, the proceedings of a selection board shall not be disclosed to any person not a member of the board."

According to 14 U.S.C. § 260, each selection board must submit a written report, signed by all members, containing the names of the officers recommended for promotion. The report also must certify that the officers recommended for promotion are the best qualified.

Article 14.A.4.i. of the Personnel Manual prescribes: "Except for its Report of the Board, the board members shall not disclose proceedings or deliberations to any person not a member of the board (14 U.S.C. 261)."

The selection board precept, issued on July 24, xxxx, instructed the board to select the best 119 candidates, out of 144 "in the zone" officers and 121 "above the zone" officers, on the basis of their performance, professionalism, leadership, and education. The precept also advised board members that the Coast Guard needs "technologically oriented" officers with professional growth in their specialties, "leadership and competencies commensurate with the next rank," and "the ability to form effective

partnerships within and without the service.” Paragraph 7 of the precept states the following:

At the end, all members must be able to say that the officers recommended for promotion are in the opinion of at least two-thirds of the members of the Board, the best qualified to carry out the duties and responsibilities of the grade for which they are selected. ... [M]embers should be reminded that in the process of their evaluation they must confine themselves to facts of record and may not predicate judgments on rumor or hearsay.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant made many allegations about the reason and degree to which Captain X was biased against her. However, the affidavits she submitted indicate only that, during her last year as station CO, some problem arose that caused Captain X to want to relieve her of command and give her an adverse OER and that he was stopped from doing so by Captain Z in a memorable and heated counseling session. Captain Z's affidavit indicates that he stopped Captain X from including inconsistent and inappropriate comments in her OER. Captain Z did not state that Captain X had harassed her or was irrationally biased against her because of her comment about Captain Y or for any other reason. Nor did CWO Z state that Captain X harassed her or was irrationally biased against her, although he did state that Captain Z told him that the problem between the applicant and Captain X was likely due to Captain X's own failures. At most, the affidavits indicate that Captain X strongly disapproved of the applicant's performance and/or attitude, that he drafted an OER with inappropriate comments for her, and that Captain Z disagreed with him to some extent about his assessment of the applicant.

4. The applicant alleged that she should have received a Commendation Medal for her service as station CO and that her failure to receive one is evidence of Captain X's unjust bias. In his affidavit, Captain Z stated that some officers whose performance and accomplishments were equal to those of the applicant received Commendation Medals. However, the Board finds that Captain Z's retrospective reflection on

this matter does not prove that Captain X's determination that her performance merited an Achievement Medal without an operational device was erroneous or unjust. As CGPC pointed out, if Captain Z had felt strongly about the matter at the time, he could have recommended her for the Commendation Medal.

5. Absent strong evidence to the contrary, the Board presumes that Coast Guard officers perform their duties as selection board members correctly, lawfully, and in good faith. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Furthermore, the Board notes that Congress has purposefully protected selection boards' deliberations from scrutiny and challenge by making them secret under 14 U.S.C. § 261(d). To merit relief, an applicant must submit at least some clear and persuasive evidence that an error or injustice exists in her record, and she must prove the existence of the error or injustice by a preponderance of the evidence.

6. The applicant has presented clear and convincing evidence that Captain X was dissatisfied with her performance and/or attitude in 19xx and 19xx. However, the only evidence in the record supporting her allegation that his dissatisfaction was wrong, biased, or irrational is the fact that Captain Z decided to stop him from giving her an adverse OER with comments he considered inappropriate. While their counseling session may have been memorable, the applicant's and affiants' statements about what effect it may have had on the selection board's proceedings five years later are purely speculative. There is no evidence in the record that, in xxxx, Captain X harbored any irrational bias or animosity toward the applicant, that he communicated it to the other members of the selection board, or that it affected the outcome of the board's deliberations.

7. The applicant alleged that the fact that she was selected for promotion in xxxx with a similar record is also evidence that Captain X's presidency of the board in xxxx caused her failure of selection. While it is true that the OER she received in the interim between the two selection boards cannot be considered to have substantially improved her record, she did receive a third Commendation Medal in the interim. Moreover, the candidates considered by the xxxx selection board were different from the candidates considered in xxxx. Therefore, the Board cannot find that her selection for promotion by the xxxx board based on a similar but not identical record proves that her failure of selection by the xxxx board was caused by some unjust bias on the part of that board's president, Captain X.

8. While her excellent record indicates that the applicant was very well qualified for promotion to CDR in xxxx, nothing in her record proves that she was more fit for promotion than the 119 lieutenant commanders who were chosen. Moreover, the factors taken into consideration by a selection board are not limited to OER marks and comments but are myriad, as indicated in the selection board's precept and Article 14.A.3. of the Personnel Manual. Although the applicant has proved that Captain X

was dissatisfied with her performance and/or attitude in 19xx and 19xx to an extent Captain Z found unreasonable, the Board cannot find, on the basis of the application and the record before it, that the selection board erred in performing its duties when it did not select her for promotion.

9. The preponderance of the evidence in the record indicates the applicant's record was properly considered by the xxxx selection board and, absent convincing evidence of bad faith, prejudice, or irregularity in those proceedings, the Board has no grounds for substituting its judgment for that of a duly convened selection board of experienced Coast Guard officers.

10. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED] USCG, for correction of her military record is denied.

