


DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 113-97

FINAL DECISION

 Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on April 29, 1997, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated May 28, 1998, 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 was a lieutenant (LT; pay grade O-3) in the Coast Guard Reserve. She asked for the following corrections to her record:

- a) That all references to her failure of selection for promotion to Lieutenant Commander be removed;
- b) That all references to her failure to be extended on active duty be removed;
- c) That the OERs for the periods:
 - (1) July 2, 1994 to November 30, 1994; and
 - (2) December 1, 1994 to May 31, 1995be removed and OERs 'for continuity purposes only' be substituted;
- d) That any references to her medical condition (Clinical Depression) be removed from all but her medical records;
- e) That, if separated from active duty at the time the BCMR takes action on her request, she be offered an opportunity to return to active duty;

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- f) That she be permitted to be considered by the next two Lieutenant Commander Selection Boards which are convened following the BCMR's action, as a Lieutenant within the promotion zone;
- g) That, if she subsequently returns to active duty, she be given longevity credit and pay for the period of her separation;
- h) That, if she subsequently returns to active duty, her consideration by a selection board be delayed until she receives one, additional regularly scheduled OER;
- i) That, if selected by the first Lieutenant Commander Selection Board to consider her following the BCMR's action, she be given the position and the date of rank which would have resulted had she been selected for promotion by the Lieutenant Commander Selection Board which met in 1995; and
- j) That, if selected by the first Lieutenant Commander Selection Board to consider her following the BCMR's action, she be given back pay and allowances retroactive to the resulting date of rank.

The applicant asserted that during the period of the disputed OERs, she was suffering from a medical condition that was disclosed to her supervisor (LCDR Y) and her reporting officer (Ms. W). She stated that they "unfairly criticized her" on her OERs, "without taking her medical condition into account."

The applicant entered the Coast Guard after completing law school as a civilian. She was a "direct commission officer" upon her entry into the service on August 1, 1990. After completing her first assignment in [REDACTED] the applicant was transferred to the [REDACTED]. She stated that following that transfer, she was diagnosed as "suffering from Clinical Depression by doctors on the Coast Guard's medical staff." The applicant then "disclosed her medical condition to her Supervisor and Reporting Officer for the challenged rating periods." She stated that "[d]espite verbal reassurances, she was unfairly criticized on her OERs by her raters." She asserted that the two OERs for the period between "July 2, 1994 and May 31, 1995, which contained inaccurate narrative comments and numerical scores, [were] tainted by the failure of [her] rating chain to take her medical condition into account when evaluating her performance."

In June, 1995, the applicant was reassigned to the [REDACTED]. She stated that with "proper medical treatment and raters who took her medical condition into account, her performance evaluations improved." She stated, however, that the "two (2) unfair OERS which did not take her medical condition into account affected her career."

The applicant stated that she was not selected for lieutenant commander (LCDR) by the 1995 LCDR selection board. She stated that she was also considered by the Reserve Extension Board in 1996, and she was not selected for extension on active duty. At the time of her submission of her application for correction, she was scheduled for separation from active duty.

The applicant asserted in her claim that she "lost a number of things as a result of the failure of her supervisor and reporting officer to take her treatable medical condition into account when rating her performance." She stated that she "lost her self-respect as an excellent [redacted] . . . [she] lost her promotion opportunity to LCDR, [she] lost the additional pay and allowances [she] would have received as a LCDR . . .," and she could potentially lose her career. She stated that she "deserves an opportunity to continue her career and to be recalled to active duty. . . ." She asserted that neither LCDR Y nor Ms. W were "able to separate her medical symptoms from her abilities," which is required by Coast Guard policy and provisions of the Coast Guard Personnel Manual.

SUMMARY OF APPLICANT'S SUBMISSIONS

Applicant's Affidavit

In support of her request for correction, the applicant submitted a sworn statement chronicling her performance while at [redacted] and her own perception of her performance. She also submitted affidavits from former coworkers and supervisors, and a copy of her physician's medical records taken during the period of the disputed OERs.

In her affidavit, the applicant described a positive experience during her tour of duty in [redacted]. She also stated that she had never been diagnosed with a disqualifying medical or psychological condition prior to her entry into the Coast Guard.

The applicant stated that at [redacted] she provided [redacted]. She stated that at [redacted] she was required to provide [redacted]. She stated that in addition to the change in job responsibilities, she suffered from stress related to the sale of her home, the cross-country move, her divorce, and the reduction of her family's income. She asserted that the high visibility position of providing [redacted] [redacted] was demanding and the [redacted] office was severely understaffed.

The applicant stated that in September, 1994, she began to "experience symptoms of recurring physical ailments and deep fatigue." She stated that she did not realize that her condition was affecting her performance. In November 1994, she began to suffer from insomnia and nightmares. She also stated that the insomnia, combined with her

fatigue, caused her to cancel appointments and social engagements frequently. It also affected her job performance.

The applicant stated that her first marking period at [REDACTED] ended on November 30, 1994, and that the OER she received was "the worst [she] ever had." She stated that "at the time [she] was confused about the decline in [her] professional and personal situation and [she] had not yet received a formal diagnosis of [her] condition." She stated that she did not believe that her supervisors "were open to recognizing [her] [REDACTED] abilities."

The applicant stated that on January 20, 1995, she met with her supervisor and reporting officer for a counseling session on their feedback regarding an [REDACTED] training session she directed for some Admirals. She stated that the supervisor and reporting officer's remarks were "very critical and [her] supervisor also sent her some negative performance feedback via e-mail on January 21, 1995." She stated that on January 25, 1995, her supervisor and reporting officer "forced" her to start a "detailed, written work log. . . ." She stated that she felt that her situation was worsening, and therefore asked her counselor¹ to refer her to a civilian psychiatrist. She stated that the civilian psychiatrist confirmed that she was suffering from "severe clinical depression with anxiety." The civilian psychiatrist prescribed medication to treat her condition, and also required counseling sessions with the applicant's regular counselor, medication, exercise, and stress reduction. She also was prescribed 10-days of sick leave to rest.

She stated that when she returned from the sick leave, she was removed from most projects and her duties were reduced. She stated that she kept LCDR Y and Ms. W "completely informed of her medical condition and treatment." She stated that the stress of "the constant scrutiny and of making a . . . work log was counter-productive to [her] situation." Her reduced work production was not an issue of time management, but was result of a medical condition. She asked her supervisor and reporting officer if she could discontinue the log, but her request was denied.

The applicant stated that in April, 1995, she sought a position in another Coast Guard office, and applied for transfer to the [REDACTED]. She asserted that after her transfer to the [REDACTED] her performance, and general well-being improved. However, she was not selected for promotion by the 1995 LCDR selection board. Additionally, her request for extension on active duty was also rejected, and she was therefore slated for discharge. In August, 1997, the applicant was discharged by reason of a medical disability.

¹ The applicant has not specified the nature of this counselor's relationship with her, and therefore, the Board will assume that the counselor was a therapist.

Affidavits from Witnesses

The applicant submitted six affidavits from witnesses regarding her experience as an attorney at [REDACTED]

LCDR G

LCDR G is one of the applicant's former co-workers at [REDACTED]. He stated that he did not work with the applicant on any projects, but that he did "observe her on an almost daily basis." He stated that the applicant "seemed to be under a great deal of stress" and that she "regularly complained of a limited ability to function at levels comparable to her past performance or at a level satisfactory to her supervisors."

LCDR G stated that he knew of the applicant's medical condition, but was unaware of whether the applicant's supervisor knew about her condition. He asserted that [REDACTED] was "beset by an unyielding avalanche of work and chronic personnel shortages." The "lack of a full staff added dramatically to the level of tension in the office."

LCDR T

LCDR T is a friend of the applicant who observed her "away from her job." The applicant and LCDR T would carpool together. LCDR T stated that she in September, 1994, the applicant was showing "symptoms of exhaustion and depression," and that she "seemed to be under a great deal of stress."

CAPT K

CAPT K is one of the applicant's former supervisors from [REDACTED]. She stated that the applicant was "an excellent [REDACTED] and Coast Guard officer." She stated that she was transferred to Coast Guard Headquarters in 1992, and she was able to interact with the applicant after she was transferred to [REDACTED] at Coast Guard Headquarters in 1994. CAPT K stated that she knew the applicant was "somewhat unhappy with her ... OER," but she did not know why she was unhappy.

CAPT K stated that she became aware of the applicant's medical condition in 1995. CAPT K spoke with Ms. W about the applicant's condition in April, 1995. She stated that Ms. W was aware of the applicant's condition at that time.

CAPT W

CAPT W is another of the applicant's supervisors from [REDACTED]. He stated that he considered the applicant's work "excellent, surpassing [his] expectations for a [REDACTED] new to the Coast Guard." He stated that in 1995, he learned of the applicant's

medical condition and advised her to discuss her condition with Ms. W and her supervisor. CAPT W also spoke with Ms. W about the advice he had given the applicant. He stated that Ms. W "seemed to generally agree with [his] assessment, and she encouraged [him] to continue to act as a sympathetic listener for [the applicant]."

CDR C

CDR C is the applicant's ex-husband. He stated that since 1994, he has had opportunity to observe the applicant regularly. He stated that she seemed to be "under a great deal of stress" at her new job.

LCDR C

LCDR C is one of the applicant's former co-workers from [REDACTED]. He stated that from October 1994 through March 1995, he observed the applicant's performance directly because he worked with her on a project. He stated that the applicant's "performance was excellent throughout the phases of the project" but that she "did complain of severe stress and a limited ability to function in her primary job assignment."

Views of the Coast Guard

On March 16, 1998, the Chief Counsel of the Coast Guard recommended denial of the applicant's request for relief.

The Chief Counsel stated that the applicant's assertion that "she was being pressured by her supervisors at a time that she was experiencing symptoms of depression [does] not render her OERs erroneous or unjust." He stated that "[w]hile symptoms of adjustment reaction and clinical depression . . . present special challenges to both the Reported-On officer and her supervisors, Applicant has not shown that the actions of her supervisors constituted error or injustice, much less that any such actions invalidated the challenged OERs."

The Chief Counsel referred to the "sworn declaration" of the applicant's former supervisor, LCDR Y, in which he relayed the events of the applicant's performance while at [REDACTED]. The Chief Counsel asserted that the "supervisor's most fundamental duty is to accomplish assigned work through assigned personnel." He stated that the applicant was given "extensive counseling regarding her assignments and ways in which to reduce distractions from her assigned duties." He stated that the applicant's duties were limited appropriately, and that she was "properly held accountable for the work she was assigned."

The Chief Counsel asserted that Change 21 to the Personnel Manual² was not effective until the end of the evaluation period, and therefore did not apply to the applicant's situation. He also stated, "Applicant's supervisors went beyond the actions that would have been required if these guidelines had applied." When the policy did go into effect in March, 1995, it was in the middle of the applicant's final evaluation period and would not have been applied to her final OER because it was effective at the beginning of the next marking period.

Additionally, the policy has limited application; it applies "to situations where an officer's *opportunity* to perform is limited by medical or other competent authority, or by physical impossibility." (Emphasis in Original). The Chief Counsel stated, for example, that "a pilot who is grounded or an [officer of the deck] who is removed from the watch rotation due to a broken arm may not be adversely evaluated for failing to perform duties that they are prevented from performing; the policy requires that the officer's duties be adjusted so that they will not be evaluated on duties that they are restricted from performing." (Emphasis in Original). Therefore, "while the applicant's medical condition apparently made it more difficult for her to perform at an optimum level, her *opportunity* to perform duties was not restricted until after she informed her supervisors of her condition, and they restructured her duties." (Emphasis in Original).

The policy is intended to apply in cases where military members are only temporarily unable to perform their duties. The Chief Counsel stated that the policy would prevent a limited member from receiving poor evaluation marks. It would not require the command of such member to "rearrange duties for officers merely because their performance in assigned duties is likely to be negatively affected by the condition." Such an approach would "improperly interfere with unit efficiency, increase the workload among peers and ultimately detract from mission performance."

The Chief Counsel stated that "[c]ommands may alter duties to compensate for the effects of medical conditions, as they did in [the applicant's] case, but they are not required to do so." Commands can also take into account the conditions limiting a member's performance when grading the member in evaluations. However, "[n]othing in the OES [Officer Evaluation System] regulations, . . . changes the fundamental principal that the officer's performance must be evaluated with respect to the duties assigned, and against the established criteria."

The applicant's supervisors evaluated and treated her under the premise that the policy did apply to her condition and therefore restructured her duties and gave her a limited workload. The Chief Counsel stated that "[a]side from the brief period she was placed on sick leave, Applicant was apparently considered medically fit for duty

² Change 21 to the Personnel Manual amended Article 10-A-2b(2)(i) and 10-B-6a(3) of the Coast Guard Personnel Manual. The change established "guidelines for evaluating military personnel who have a limited opportunity to perform" due to illness, injury, pregnancy, etc.

throughout the contested reporting periods." The Chief Counsel asserted that the applicant's rating officials "did not act contrary to medical authority."

The Chief Counsel also asserted that neither of the disputed OERs was an adverse evaluation. He stated that "[b]y all conventional standards, the [July 2, 1994 - November 30, 1994] OER is an excellent report with an unequivocal recommendation for promotion." The applicant's marks in both disputed OERs "show that Applicant met or exceeded the performance standards for every dimension observed." The OES requires rating officials to evaluate observed performance, and not perceived "abilities," which is what the applicant asserted her rating officials did not consider. The applicant's performance documented on the disputed OERs was a "consequence of [her] *performance* in her properly assigned duties, not 'strictly as a consequence' of her condition." (Emphasis in Original). The Chief Counsel asserted that the applicant's rating officials were under no obligation to give the applicant "inflated evaluations of performance because of her medical condition." He stated that "[u]nder the circumstances related by LCDR Y and Ms. W, the challenged evaluations were an accommodation of Applicant's medical conditions that went far beyond any to which she might have been entitled under the 'limited opportunity to perform' guidelines."

The Chief Counsel pointed out that the applicant failed to submit an OER reply to the disputed OERs in her record. If she had so disagreed with the evaluations and the marks she had received, her option was to submit a reply to the OER to refute the marks she received and explain the reason for her disagreement with those marks. The Coast Guard stated that "[i]n failing to reply to either OER, Applicant missed timely opportunities to include differing views of performance Applicant's inaction may retrospectively be interpreted as tacit indication of agreement with the characterizations of her performance as originally provided."

The Chief Counsel also asserted that the applicant had not established a nexus between the errors that allegedly appear in her OERs and her failures of selection. He asserted that in order for the applicant to "establish entitlement to correction of non-selections, an applicant must first prove that such errors made her record as a whole appear substantially worse before the selection board, and second, she must make a prima facie showing that, if the errors had not occurred, it is not unlikely that she would have been selected for promotion." Engels v. United States, 230 Ct. Cl. 464,470 (1982).

Ultimately, the Chief Counsel stated that the applicant is not "entitled to restoration to active duty, because **she was not separated for non-selection.**" (Emphasis in Original). He stated that at the time of her application, the applicant was serving on active duty, but was being evaluated under the Coast Guard Physical Disability Evaluation System (PDES). He stated that the PDES recommended that the applicant be separated by reason of a physical disability rating of 10%. The applicant accepted those findings of May 19, 1997, and was therefore discharged from the Coast Guard on July 28, 1997, with severance pay, by reason of a physical disability. She was

not separated due to non-selection for promotion to LCDR. The Chief Counsel asserted that the applicant had not argued that her discharge by reason of a disability was erroneous, and therefore, there is no basis for the Board to void her separation from the service.

Affidavit of LCDR Y (Supervisor)

LCDR Y stated that he was the applicant's "first-line" supervisor from August 1994 through May 1995. He stated that when the applicant joined [REDACTED] in August 1994, her position was not "backlogged."

LCDR Y stated that the applicant's OER for the period ending November 30, 1994 was her first OER in [REDACTED] and he "assigned her scores ranging from 4 to 6 (on a 7-point scale)." He stated that "all of [his] written comments were favorable." The applicant performed well in the area of interpersonal relations, and she "outwardly displayed remarkable enthusiasm and a 'can do' attitude." He stated, however, that the applicant's performance concerned him in the area of the "soundness of her [REDACTED] research and the quality of her writing." He stated that she also "appeared to be deficient in terms of planning ahead and prioritizing her work." LCDR Y stated that because she was "new to both [REDACTED] and Headquarters and in recognition of the changes in her personal life, [he] gave her the benefit of the doubt and assigned her scores that were higher than her actual performance."

LCDR Y asserted that he informed the applicant of the "inflated nature" of her first OER in an e-mail message to her, which he included in his declaration. In the e-mail message, LCDR Y stated that he knew the applicant was unsatisfied with the OER, but that he "believe[d] it was . . . fair [and that he] overlooked several non-positive things in a desire to give [the applicant] the benefit of the doubt." He continued, stating that the "most disappointing aspect of [the applicant's] performance, which [he] overlooked, was the draft . . . digest to the Commandant in which the [REDACTED] would have provided was incorrect and evidenced a lack of basic research."

LCDR Y asserted that the applicant at no time "advise[d] [him] that her performance during [that marking] period was affected by any illness or other medical condition that limited her ability to perform." He stated that "even if [the applicant] had been affected during [that] period by a medical condition, of which we were unaware, the policy established by Change 21 to the Personnel Manual was not in effect until March 9, 1995."

LCDR Y stated that he "generally recall[s] that during the Fall of 1994 [the applicant] was outgoing, enthusiastic, and had a very positive attitude," but that he and Ms. W were concerned about the growing backlog. He stated that on January 9, 1995, he and Ms. W met with the applicant in a "performance feedback session and to discuss her work list." He stated that they agreed in that meeting that he and the applicant

"would meet weekly to review her work assignments and progress, adjusting her priorities as necessary." He stated that the applicant did not advise him or Ms. W at that meeting that she was suffering from an illness or that she had been diagnosed with a medical condition that was limiting her ability to perform.

LCDR Y stated that at subsequent meetings with the applicant on January 17, 20, and 26, 1995, wherein they discussed the applicant's performance deficiencies and workload, the applicant did not inform Ms. W or himself that "her performance was affected by any illness or other medical condition that limited her ability to perform."

He stated that on January 31, 1995, Ms. W advised him that the applicant told her "she was not fit for duty due to a 'situational adjustment reaction'." He stated that this was the first time he became aware that the applicant had a medical problem. He was informed by Ms. W that the applicant was to take ten days of sick leave to "deal with personal problems and personal stress." She stated that Ms. W also "directed [him] to identify [the applicant's] pending projects, pare down her workload and distribute a substantial portion of her backlogged projects to the other [redacted] attorneys."

LCDR Y and Ms. W then organized a "worklog" system through which they could monitor the time management of the [redacted] in the office. LCDR Y stated that after he and Ms. W developed the management plan, he distributed a memo to the two [redacted] he supervised, "providing them with specific guidance regarding worklogs and OER submissions." He stated that the "worklogs served multiple purposes: as a management tool, they allowed both [him] and the [redacted] to monitor how they spent their time, and they could serve as the basis from which the individual [redacted] could enter their [work hours into the computer]." LCDR Y stated that on February 10, 1995, he sent the applicant an e-mail message advising her that her workload had been reduced, and welcoming any suggestions she may have had regarding the new system. He stated that she made no suggestions and did not request any specific accommodation.

LCDR Y also recommended techniques to the applicant for her to employ in order to maintain focus on her work. These techniques included returning phone calls only during a certain time of the day, shutting her door, and seeing [redacted] only during specific hours. He stated that the applicant did not implement the suggested techniques. In April 1995, Ms. W directed LCDR Y to advise the applicant that she "should not accept 'walk-ins' or telephone/e-mail requests for [redacted] but should refer them to [Ms. W or himself] for assignment within the division." LCDR Y stated that he and Ms. W "remained concerned with the quality control of [redacted] in the [redacted]." He stated that they had "little confidence in the quality of the [redacted] that [the applicant] would render." He stated that they limited her authority to provide oral or e-mail [redacted] because they wanted "protect those agency officials and [redacted] who might rely on unsound [redacted] to their detriment." He asserted that the applicant was not "professionally isolated."

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On April 3, 1995, the applicant informed LCDR Y and Ms. W that her doctors had found her fit for full duty. She wanted her workload increased. LCDR Y stated that Ms. W did not wish to increase the applicant's workload until she could see that the applicant's "basic level of performance improved. . . ."

LCDR Y was out of the office between April 24, 1995 and May 22, 1995. He stated that when he returned, he learned that the applicant requested a transfer. He did not oppose the transfer. He completed a draft of the applicant's last OER at [REDACTED] in June 1995, and gave it to Ms. W to review. She, in turn, showed LCDR Y Change 21 to the Personnel Manual. He stated that after discussing the provisions of Change 21 with Ms. W, he made several changes to his drafts of the applicant's OER. He stated that he raised two marks of 3 to 4, and deleted the following comments from the Performance of Duties section:

- a) Overall performance somewhat below expectations for a [REDACTED] with her experience.
- b) work in this area responsive to and supportive of [REDACTED] but devoted disproportionate time to project, negatively impacting other work such as . . . [REDACTED] which are backlogged."
- c) generally obtained favorable results but not in timely manner or without close supervision
- d) supervisor has limited confidence in [REDACTED] work product as illustrated by drafts

LCDR Y deleted a comment from the Leadership Skills section that stated "Information not submitted in a timely manner for either mid-period conference or end-of-period OER." He also deleted a commend from the Communication Skills section that stated "Writing skills weak . . . written work usually requires significant editing & corrections . . . open to constructive suggestions to improve skills."

The final draft of that OER was signed by LCDR Y on June 16, 1995. He stated that "[w]hile [he] believe[d] that her actual performance was substantially lower than the marks that she received, [he] raised the marks in light of [Change] 21" He stated that higher marks than what she received were "not warranted."

LCDR Y insisted that the applicant did not keep him "completely informed" about her medical condition and treatment, as she asserted in her affidavit. He stated that he was not aware of the applicant's illness until January 31, 1995, and then, he had been informed by Chief W, not by the applicant.

LCDR Y stated that in the period of time in which he supervised the applicant, his "action and decision were based on consultations with, or specific directions from, [his] supervisor, [Ms. W]."

Affidavit of Ms. W (Reporting Officer)

Ms. W stated that her goal was to promote performance improvement in the applicant. She asserted that she and LCDR Y made every effort to keep the applicant apprised of the good and bad points about her performance.

She asserted that she did not learn of the applicant's illness until January 31, 1995, when the applicant presented her with a "leave form from the clinic finding her not fit for duty until 9 February when she was to return to the clinic for further evaluation." She stated that this was the first time the applicant had "raised the fact that she was having medical problems."

The applicant approached Ms. W again in April 1995, and asked her to contact her doctors about her condition. The applicant told Ms. W that she had a "medical condition [that] was interfering with her performance and that she was concerned about her inability to perform." Ms. W contacted the applicant's doctors and counselor on April 10, 1995.

On the same day, the applicant's counselor contacted Ms. W and informed her that the applicant was suffering from depression. The counselor told Ms. W that the applicant's prognosis was "good to excellent" and that the limitations on her "ability to perform [her work would be reflected] as an inability to focus and concentrate, needed reduction in the amount of work, and that [the applicant] needed encouragement." On April 28, 1995, the applicant's secondary doctor contacted Ms. W and informed her that the applicant's depression was acute and that her prognosis was difficult to ascertain, although it was expected to improve within 18 months. Finally, on May 1, 1995, the applicant's primary doctor called Ms. W to discuss the applicant's condition. The doctor recommended that the applicant be transferred to a new assignment because she "needed the least stress possible."

On May 2, 1995, Ms. W spoke with the Deputy Director at Coast Guard [redacted] and discussed the applicant's condition and the possibility of her being transferred to [redacted]. After this discussion, she proposed the applicant's reassignment to the [redacted]. The applicant was reassigned in early June, 1995.

Ms. W stated that the applicant's last OER, for the marking period ending May 31, 1995, was presented to her in draft form by LCDR Y on June 14, 1995. She stated that LCDR Y had given the applicant mostly marks of 4 (on a scale of 1 to 7) with some marks of 3 as well. She stated that the narrative of the applicant's draft OER

contained "many negative remarks." She stated that on June 15, 1995, she discussed the draft OER with the [REDACTED] who advised her of the existence of Change 21 to the Personnel Manual. She stated that in light of that new information, LCDR Y upgraded the applicant's marks and amended the narratives on the entire OER. Ms. W stated that she, too, considered Change 21 when she added her comments to the OER. She asserted that she believes the OER, in its final form, portrayed the applicant's performance as being better than it really was.

Applicant's Response to the Views of the Coast Guard

On March 20, 1998, the Board sent the applicant a copy of the Coast Guard's views. She was encouraged to respond. On April 2, 1998, the applicant requested an extension of time in which to respond. The Board granted the extension and advised the applicant that her response was due by April 20, 1998.

On April 20, 1998, the applicant submitted her response. She stated that the Coast Guard incorrectly suggests that she was aware of her illness prior to January 31, 1995. She stated that her condition was not diagnosed until January 30, 1995. She stated that her doctor gave her medication, counseling, stress reduction and exercise as treatment for her condition.

The applicant insisted that she did not realize how severe her condition was. She stated that she had little or no self-confidence. She stated that she recognized that the work she had completed up to the point of her mid-period review was either not completed or not well done, but she stated it "was a small step forward for [her] to even make a list of partial accomplishments." She stated that despite her attempts, neither LCDR Y nor Ms. W "felt that what [she] said or did was adequate." She also stated that the "unrealistic performance demands set by [her] supervisors aggravated [her] condition because [the demands] were unable to be met by a person with severe clinical depression."

The applicant stated that the Coast Guard's response "makes it clear that they do not understand what is Depression and its ramifications." She stated that "[d]uring depression, the brain becomes limited in its functions because of changes in brain chemistry. These limitations are just as real as a broken arm or leg . . . [but the limitations] may not be immediately visible like a broken arm but can be seen by diminished performance."

The applicant stated that she "continue[s] to pursue [her] original aggressive approach to treatment and [she has] been able to avoid hospitalization or a severe relapse." She stated that she is able to manage "what may be a lifelong illness."

SUMMARY OF MILITARY RECORD

Disputed OERs

The applicant's OERs for July 2, 1994 through November 30, 1994, and for December 1, 1994 through May 31, 1995, depict good marks (she received only one mark lower than a 4 on a scale of 1 to 7) and favorable comments to support those marks. In fact, the only mark of 3 that the applicant ever received while at [REDACTED] was in block 12 of the OER for the period ending May 31, 1995. Examples of the narrative in the disputed OER for the period ending November 30, 1994 are as follows:

Block 4.c. Interpersonal Relations

Works well with juniors and seniors alike..treats all with a courteous and friendly manner..positive "can do" attitude..able to present her opinions tactfully and diplomatically. . . .

Block 6.c. Communications Skills

An articulate speaker who is comfortable before large audiences

Block 11. Leadership and Potential

[The applicant] has been assigned to a position in [REDACTED] that involves constant interaction with senior officers and employees on matters that are often very sensitive. To date, she has performed well and has demonstrated the judgment and initiative that [would be expected] from a leader.

Examples from the narrative of the disputed OER for the period ending May 31, 1995 are as follows:

Block 3.h. Performance of Duties

[P]ositive impact upon CG. . sensitive to work-life issues. . displayed commitment to CG through career advice to [REDACTED]
[REDACTED]

Block 4.c. Interpersonal Relations

Easy to get along with . . . friendly and courteous . . . works well with juniors and seniors alike . . .

Block 6.c. Communications Skills

An effective and persuasive speaker. . . comfortable before large and small audiences, senior officers and senior civilian employees

The draft of the OER for the period ending May 31, 1995, completed by LCDR Y but later amended, was much more critical of the applicant's skills. It portrayed the applicant's performance capabilities in a much more negative light. Also, the applicant would have received two marks of 3 if the draft OER had been submitted instead of the revised OER. Examples of the negative language in the narrative from the draft OER are as follows:

Block 3.h. Performance of Duties

Second OER since reporting to [REDACTED] Overall performance somewhat below expectations for [REDACTED] with her experience. . . . Often employs last minute approach to projects, supervisor has limited confidence in [REDACTED] as illustrated by drafts

Block 5.c. Leadership Skills

Information not submitted in a timely manner for either mid-period conference or end-of-period OER.

Block 6.c. Communications Skills

Writing skills weak . . written work usually requires significant editing and correction . . open to constructive suggestions to improve skills.

RELEVANT REGULATIONS

Article 10-A-1.b of the Coast Guard Personnel Manual (COMDTINST M1000.6A) describes the policy of the Officer Evaluation System (OES). It states the following, in part:

b. Policy.

(1) Each commanding officer [reporting officer] must ensure that accurate, fair and objective evaluations are provided to all officers under their command. . . .

(2) There is only one person responsible for managing the performance of an individual officer . . . and that is the officer himself or herself. He or she is ultimately responsible for finding out what is

expected on the job, for obtaining sufficient feedback or counseling, and for using that information in adjusting as necessary to meet or exceed standards.

Article 10-A-2 of the Personnel Manual addresses the responsibilities of the officer's rating chain in evaluating an officer's performance and completing OERs. Prior to the introduction of Change 21 to Article 10-A-2.b, that section addressed the responsibilities of the commanding officer in evaluating the reported-on officer. There was no provision in that section for evaluation of officers with a "limited opportunity to perform."

On March 9, 1995, Change 21 was introduced and it added subsection (i) to the existing provisions of Article 10-A-2.b(2). The subsection (i) was added as an additional responsibility of commanding officers in evaluating reported-on officers. It states the following, in part:

(i) For officers with limited opportunity to perform (e.g., illness, injury, pregnancy), the following guidelines apply:

1. Periodically, officers may experience circumstances due to a temporary condition, which may result in a limited opportunity to perform. These circumstances may involve specific performance restrictions (e.g., those imposed by a medical authority), which may require restriction or reassignment of duties. While no preferential treatment shall be given, commanding officers shall ensure that these individuals do not receive adverse evaluations strictly as a consequence of these circumstances.

2. The commanding officer, in consultation with the health care provider, must establish a 'reasonable expectation of performance' given the individual's current circumstances. In particular, the commanding officer must determine whether or not an individual requires reassignment to a different work environment and/or restrictions on performing specific types of tasks. Additionally, reduced work hours may be necessary. . . .

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 section 1552 of title 10, United States Code. The application was timely.

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

3. The applicant alleges error on the part of her reporting officer (Ms. W) and supervisor (LCDR Y) in their failure to recognize her illness when grading her performance during her service at [REDACTED] at Coast Guard Headquarters. She asked the Board to remove two OERs from her military record, in addition to other relief.

4. The Board has found no error in the applicant's record to justify removal of the two disputed OERs.

Both OERs are glowing representations of an impressive performance by the applicant. The first disputed OER had absolutely no negative comments in the narratives and the marks that the applicant received do not suggest an inadequate performance. According to Article 10-A-4.d(7)(d) of the Personnel Manual, the comments sections of the OERs must provide supporting comments for any marks that "deviate from a 4." On the first disputed OER, the applicant received only marks of 4 and 5 - very good marks for an OER of an officer in her first marking period at a new station. Additionally, the applicant was recommended for promotion by the Reviewer of the OER. This OER was neither negative nor derogatory.

The second disputed OER also lacks negative comments about the applicant's performance. The Reviewer, her reporting officer, and her supervisor all recommended her for "promotion with her peers and for positions of increased responsibility." The applicant also received a Letter of Commendation from the Commandant for her contribution to an important assignment at [REDACTED] which was recognized in block 4.c of the second disputed OER. The only mark below a 4 on the second disputed OER is the mark of three she received in block 12, and the accompanying comments make no negative comments with regard to the applicant's performance.³

5. The applicant stated that the disputed OERs are erroneous because Ms. W and LCDR Y did not take her medical condition into consideration when they evaluated her performance. However, by her own admission, the applicant did not know what her medical condition was until January 30, 1995, and both Ms. W and LCDR Y stated in their sworn affidavits that they knew nothing of the applicant's diagnosis until she requested two weeks leave at the behest of her doctor.

Even with this knowledge, Ms. W and LCDR Y were under no obligation to consider the applicant in light of the provisions of Change 21 because it was not in effect

³ Block 12 (Comparison Scale and Distribution) is where the reporting officer compares the evaluated officer with others of the same grade. The applicant's mark of 3 designated her an "excellent performer; recommended for increased responsibility." This is not a negative or derogatory OER mark.

until March 9, 1995. Ms. W and LCDR Y had discretion as to how to limit the applicant's responsibilities and accommodate her needs during her recovery period. It is evident from Ms. W's affidavit that she discussed the applicant's condition with LCDR Y at length. It is also evident that they both made a concerted effort to accommodate the applicant's illness by reducing her workload and devising means through which she could better manage her workload in order to relieve stress. According to the statements of Ms. W and LCDR Y, the applicant was resistant to the suggested changes to her system of workload management. The applicant herself stated that she resented the worklog requirement, but at the same time, she was lethargic because of her illness and was unable to get her work done.

6. The Board finds that the provisions of Change 21 do not apply in the applicant's case. The circumstances leading to a limited opportunity to perform would involve specific performance restrictions imposed by a medical authority. The applicant only submitted copies of her doctor's examination notes, but nothing else to show that she was not fit for duty when she returned from the two weeks of leave in February 1995. There are no medical records included with the applicant's military record to show that she was not fit for full duty, or that she was prescribed limited duties by any of her doctors. Therefore, the Board only has the detailed affidavits of Ms. W and LCDR Y, both of whom say that the applicant's doctors recommended two weeks leave in January 1995, but that after that, the applicant could return to work. Ms. W stated that she spoke with the applicant's three doctors, all of whom confirmed the diagnosis of depression, but none of whom recommended or ordered limitation of the applicant's duties. The applicant never presented Ms. W or LCDR Y with doctors' orders limiting her workload or putting her on restricted duty. As such, the provisions of Change 21 were not applicable to the applicant's case. There was no imposed restriction on the applicant in her work. The applicant's perceived limitations or restrictions cannot be attributed to fault or inaction by Ms. W or LCDR Y.

7. In fact, the Board finds that LCDR Y and Ms. W acted beyond what was necessary in their attempt to accommodate the applicant's condition. The worklog they required the applicant to keep was not an unreasonable request. As a manager of an office, Ms. W had a responsibility to see that work she oversaw was completed in a timely fashion. She and LCDR Y devised a means by which the deficiency in the applicant's work could be monitored and improved in a non-aggressive and even-handed manner. The work log could be equated with keeping track of [REDACTED]

The applicant was not singled out by being required to keep a work log. There was no evidence of hostility from Ms. W or LCDR Y in their attempts at monitoring the applicant's output.

8. The applicant did not submit replies to the OERs. An OER reply is a means through which a record can be made of an officer's disagreement with the evaluation

marks he or she received. By submitting an OER reply, the applicant could have recorded her dispute with her marks and her disagreement with her raters.

9. The applicant alleged that she was wrongfully discharged and that had she not received the disputed OERs, she would have been selected for promotion to LCDR. The Board finds that this argument is without merit.

To succeed in her action to have the disputed OERs removed from her military record, the applicant must make a "prima facie showing of a substantial connection or causal nexus between the error and [her claimed injury]." Germano v. United States, 26 Cl. Ct. 1446, 1461 (1992), citing Engels v. United States, 678 F. 2d 173, 176 (Ct. Cl. 1982). Establishing a nexus requires meeting two standards: 1) 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; and 2) even if there was prejudice, is it unlikely that the applicant would have been promoted in any event? Engels, supra.

10. The applicant has failed to establish a nexus between her failure of selection and the alleged errors in the disputed OERs. Even if the Board found that Ms. W and LCDR Y erred in failing to apply the provisions of Change 21 to the applicant's second disputed OER, there would still be no nexus between her failure of selection and the error, because the disputed OERs, even with the alleged errors, are very promising, positive reports.

There is not a great difference between her previous OER marks and the marks of the disputed OERs. There are no negative comments or remarks anywhere in the applicant's record that would suggest substandard performance. The applicant has not shown that the disputed OERs are inaccurate assessments of her performance. The affidavits she submitted from witnesses only attest to her mental condition while working at [REDACTED]. They do not support her argument that the disputed OERs are erroneous. Accordingly, it would seem that the applicant would not have been selected for promotion regardless of whether the disputed OERs were or were not in her record.

11. There is no evidence in the record, or in the applicant's submissions, that Ms. W or LCDR Y improperly considered or failed to consider her illness when they evaluated her performance. They did not abuse their discretion in imposing time management techniques on the applicant in an attempt to reduce her work-related stress. There is also no evidence of error or injustice in the disputed OERs.

12. Accordingly, the application and all other requested relief should be denied.

ORDER

The application for correction of the military record of
USCGR, is denied.

