DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of Coast Guard Record of: [redacted]

BCMR Docket No. 2000-163

DECISION OF THE DEPUTY GENERAL COUNSEL
ACTING UNDER DELEGATED AUTHORITY

The Final Decision of the Board for Correction of Military Records (the Board) accurately summarizes the Applicant's Request for Relief, the Summary of the Record, the Applicant's Allegations, the Decision of the Personnel Records Review Board, the Applicant's Further Allegations, the Views of the Coast Guard, the Applicant's Response to the Views of the Coast Guard, and the Applicable Law. In addition, I agree with and therefore adopt all of the Board's Findings and Conclusions except numbered paragraphs 5 and 11. Those two paragraphs are modified as discussed below.

Paragraph 5 addresses the applicant's request to remove the two sentences in section 10 of the second (or regular) OER. The two sentences state that

> is not recommended for command cadre position at this time, but would do well in a staff position. Not recommended for promotion with her peers.

This second OER, for the period February 1, 199x, to July 23, 199x, was filled out by the same supervisor/reporting officer as the special OER. A note in this second OER indicates that it only comments on the first 27 days in February 199x because the applicant spent the rest of that period on extended temporary assigned duty (TAD). The two sentences recommending against promotion are not supported by any marks or comments in the OER.

The Board's recommended decision construes Article 10.A.4.C.9. of the Personnel Manual as not requiring that the reporting officer's assessment of an officer's potential be based "exclusively" on the Reported-on Officer's performance during the reporting period. However, that seems at clear variance with the language of the Article itself. The Article states that when a Reporting Officer comments on "the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard . .

. [t]hese comments *shall be limited to* performance or conduct *demonstrated during the reporting period*" (emphasis supplied).

The Board provides two other reasons in support of its decision to deny the applicant's request to remove the two challenged sentences from the second OER, but neither reason is convincing.

First, the Board speculates that "although the behavior criticized in the special OER is not repeated in the second disputed OER, the time periods of the OERs overlap, indicating that the reporting officer's negative comments . . . were likely based on [the applicant's] poor performance at her permanent unit during the reporting period." Board's Final Decision at 14. However, if there was indeed overlap,[1] either the Supervisor or the Reporting Officer had a duty to describe the information and observations upon which the rated performance is based. PERSMAN 10.A.4.c. And, the Supervisor, at least, is given explicit instruction "to compare the officer's performance and qualities against the standards –not . . . to the same officer in a previous reporting period." PERSMAN 10.A.4.c.4 .b. Because the Coast Guard failed to supplement the record with a copy of the underlying investigation report, it is unclear as to which of the instances of poor judgment, if any, occurred during the second OER reporting period.

Second, the Board suggests that the comments and marks are not so positive that they can be considered "clearly inconsistent with the reporting officer's comments." Board's Final Decision at 14. I disagree. The comments and marks are mundane and average, with nothing adverse; the recommendation against promotion is very negative, with nothing stated to support it. The inconsistency almost could not be clearer.

Therefore, I disapprove the Board's recommendation on this point and will grant the applicant's request to strike the challenged sentences.

The controlling case law holds that it is unnecessary to remove the failure to select when it is unlikely that the applicant would have been promoted even if the error did not exist. Engels v. United States, 678 F.2d 173, 176 (Ct. Cl. 1982). The recommendation in the special OER would have made it unlikely for the selection board to grant the applicant's promotion even if the two offending sentences in the second OER did not exist. Thus, the applicant's previous failures for promotion selection will not be removed from her record.

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[1] Given the TAD, there was a maximum window of 27 days of overlap between the two OERs.

The application to correct the military record of, is granted as follows: (1) expunge the comments in section 10 of the OER for the period February 1, 199x, to July 23, 199x. All other relief is denied.

[redacted]

DATE: July 5, 2001

Rosalind A. Knapp
Deputy General Counsel
As designated to act for the Secretary

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-163

FINAL DECISION

[redacted] **Attorney-Advisor:**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 19, 2000.[2]

This final decision, dated May 17, 2001, is signed by two of the three duly appointed members who were designated to serve as the Board in this case.

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[2] The BCMR received the application in November 1999 but the Chairman determined that the applicant had not yet exhausted her administrative remedy via the Personnel Records Review Board (PRRB) as required by 33 C.F.R. § 52.13(b). The applicant had simultaneously applied to the PRRB, but when no decision was forthcoming from that Board by July 17, 2000, the Chairman informed the applicant that her case would be docketed. The PRRB issued a decision in the case on xxxxxxxx.

APPLICANT'S REQUEST FOR RELIEF

The applicant, a xxxxxxxxxxxxxx in the Coast Guard, asked the Board to remove a special officer evaluation report (OER) from her record for the period December 1, 199x, to May 6, 199x, documenting an allegedly inappropriate relationship with a subordinate. She also asked the Board to remove two sentences from a second OER, which she received when her commanding officer (CO) was transferred from her unit and covers the period February 1 to July 23, 199x. The applicant also asked the Board to remove her two failures of selection for promotion to lieutenant and, if she is selected for promotion by the next lieutenant selection board to consider her record after it is corrected, to backdate her promotion and award her back pay and allowances.

In the event that her case is not decided by June 1, 2001, when she is scheduled to revert to enlisted status, the applicant asked that she be "*un*reverted and restored to commissioned officer status, with corresponding back pay and allowances."

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in xxxxxx and attained the rank of xxxxxxxxxx before being accepted at Officer Candidate School. She graduated as an ensign in xxxxx and was promoted to lieutenant in xxxxx. During her first two years as an officer, the applicant worked at the xxxxxxxxxxxxxx and received excellent OERs. Most of the marks she received were 5s and 6s (on a scale of 1 to 7, with 7 being best). Her rating chain highly recommended her for promotion to lieutenant.

In June 199x, the applicant began serving as the xxxxxxxx of a Coast Guard station. In the first three OERs she received at the station, most of her marks are 5s and 6s, and her CO recommended her for promotion to lieutenant. However, in March 199x, she was apparently removed from the station and sent on a temporary active duty (TAD) assignment to another for the remainder of her tour of duty.

On May 17, 199x, her rating chain submitted a special OER for the period December 1, 199x, to May 6, 199x, under the provisions of Article 10.A.3.c.(1)(d) of the Personnel Manual "to document a significant historical performance of substance and consequence which was previously unknown. This OER documents a personal relationship [the applicant] conducted with a unit xxxxxxxxx which adversely affected the good order and discipline of the unit." The applicant received marks of 2 in the performance categories Teamwork, Workplace Climate, Judgment, and Responsibility. She also was assigned a mark of 2 on the Comparison Scale. All other performance categories in the special OER were marked "N/O," which means not observed. The marks of 2 were supported by the following written comments:

- Used position as xxxxxxxx to manipulate duty assignments/rotations to provide a xxx with privileges not provided to the rest of the crew (arrive late, depart early, not doing clean-up details, not subject to recall as duty coxswain). These actions had an extremely detrimental effect on the unit's cohesiveness and work environment.

- Demonstrated extremely poor judgment: her personal vehicle was logged, 3 separate times after 2200, into the apt complex of a unit XXX with the destination section of the log indicating the XXX's apartment; Vehicle was also seen at the XXX's apartment complex by another crewman. Demonstrated poor judgment in recommending a junior enlisted mbr for a formal psychiatric evaluation without the knowledge or consent of the Commanding Officer. Mbr recommended was also involved in a relationship with the XXX. Failed to keep Commanding Officer informed of probable incidents of improper relationships among crew members, despite extensive evidence and witnesses provided by senior enlisted personnel. These incidents resulted in a loss of unit morale and were not in keeping with the concepts of good order and discipline.

- Recommend [the applicant] be relieved as xxxxxxx of Station … and reassigned elsewhere. Despite the technical expertise of [the applicant], her lack of character and self accountability make it impossible to recommend her for positions of authority. Her actions are not in keeping with the core values of Honor, Respect, and Devotion to Duty. She is specifically not recommended for promotion with her peers.

The applicant's CO served on her rating chain as both the supervisor and reporting officer. An admiral, the district commander, served as the reviewer. The special OER was validated by CGPC and entered in her record on June 3, 199x.

On June 1, 199x, the applicant submitted a FOIA request for a copy of the investigative report. In response, she received a letter acknowledging her request and stating that her request would not be processed promptly because of a backlog.[3]

On September 10, 199x, CGPC sent the applicant a letter indicating that her reply to the special OER, which had been sent in June, was never received. CGPC indicated that it had reviewed a recently faxed copy of the reply, but could not enter it in her record because of references to an investigative report. CGPC stated that such references were prohibited under Article 10.A.4.f.1. of the Personnel Manual. CGPC granted the applicant 30 days to submit a revised copy of the reply.

On September 30, 199x, the applicant submitted a revised reply to the special OER, in which she stated the following: "I am unable to rebut this report at this time because I have not seen the underlying documentation referred to in the preparation of this evaluation. The documents have been requested but have not been received in time to meet the reply deadline as per [the Personnel Manual]." The reply was initialed by her CO on October 6, 199x, and by the district commander on October 19, 199x. The Coast Guard Personnel Command (CGPC) stamped it as received on xxxxxxx, and apparently placed it in her record on xxxxxxxxx.

On July 23, 199x, the applicant's CO was transferred from the unit. Prior to leaving, he completed an OER for her in accordance with Article 10.A.3.a.2.a. The OER, which technically covers the period from February 1 to July 23, 199x, notes that it actually reflects only the 27 days that the applicant herself remained at the unit before she was sent to another unit on TAD. On this OER, the applicant received two marks of 5 and sixteen marks of 4 in the performance categories and a mark of 4 on the Comparison Scale. The comments describing her duties and work were all generally positive. However, in section 10, which is for comments about an officer's "potential," her CO wrote the following: "[The applicant] is not recommended for command cadre position at this time, but would do well in a staff position. Not recommended for promotion with her peers." This OER was signed by the reviewer on September 9, 199x, and entered in her record by CGPC on xxxxx, 199x, two days before the xxxxxx selection board met on xxxxxxxxx, 199x.

On October 26, 199x, the applicant submitted a reply to this second disputed OER. She stated that the "comments in section 10 are unsupported by and inconsistent

[3] On xxxxxxxx, the Coast Guard responded to the applicant's FOIA request by sending her 73 heavily redacted pages of a 109-page report on the investigation. Aside from the names and other identifying information of witnesses, the written statements of witnesses were apparently redacted.

with the performance of duties described in the balance of the report." On November 9, 199x, her CO forwarded her reply to the deputy group commander with an accompanying letter stating that he had reviewed the OER and that his comments in section 10 accurately reflect his judgment of her potential for greater leadership and responsibilities. The reply was initialed by the deputy group commander on November 11, 199x; received by CGPC on November 29, 199x; and entered in the applicant's record on December 1, 199x.

In September 199x, the applicant received a "concurrent" OER for her TAD assignment to another district from March 29 to August 23, 199x. She received many positive comments, nine marks of 4, seven marks of 5, two marks of 6, a Comparison Scale mark of 5, and a recommendation for promotion to lieutenant. This concurrent OER was also entered in her record on September 23, 199x.

After completing her TAD assignment, the applicant received orders to a new unit. In this new billet, she has received two strong OERs with Comparison Scale marks of 5. On the most recent OER, the reviewer stated that she had "earned [his] highest possible recommendation for immediate promotion to xxxxxxxx."

On xxxxxxxxx, the promotion year (PY) 2000 xxxxxxx selection board convened. The applicant was "passed over" for promotion. She was also passed over for promotion by the PY 2001 selection board.

APPLICANT'S ALLEGATIONS

The applicant alleged that the special OER should be removed from her record because it accuses her of a criminal offense of which she was never convicted. She also alleged that the Coast Guard "thwarted her ability to exercise her right of reply by failing to furnish her with a copy of the investigative report on which the OER rests."

The applicant alleged that after she was accused of having an improper relationship with a XXX at her unit, she received the special OER, which was based entirely on innuendo. She then asked to see whatever evidence her command had but was shown only a few heavily redacted pages of a much larger report by Coast Guard Investigative Services. She alleged that she was allowed neither to copy those pages nor to make notes, and she was given only 10 minutes to read the redacted pages she was shown. The applicant alleged that she quickly submitted a request under the Freedom of Information Act (FOIA) for a copy of the investigation on June 1, 199x, but received only an acknowledgement of her request from the Coast Guard and did not receive a copy of the investigation.[4]

[4] The applicant alleged that the Coast Guard had not responded to her FOIA request even by the time she submitted her application to the BCMR on November 22, 199x, almost six months after she submitted her FOIA request.

The applicant alleged that because she was not given sufficient access to the evidence against her, she did not know how to respond to the special OER and was unable to submit a proper reply within 14 days of receiving it, as was her right under Article 10.A.4.h. of the Personnel Manual. However, she submitted a reply to the special OER anyway on June 17, 199x, and her command mailed it to CGPC on June 20, 199x, but it was apparently mislaid. After she telephoned CGPC on September 7, 199x, to check on it, she was told that her reply was unacceptable because it referred to an ongoing investigation. The applicant alleged that CGPC was wrong to reject her reply because the prohibition against mentioning an ongoing investigation in Article 10.A.4.f.1. applies only to actual OERs, not to OER replies.

The applicant stated that CGPC then granted her another 30 days to submit a new reply. However, because she still had not received any response to her FOIA request, she could only resubmit the same reply with the words "investigation report" and "report" replaced by the words "documentation" and "document." The applicant argued that by denying her access to the report of the investigation, the Coast Guard nullified her right to reply to the special OER. She argued that until she is permitted to reply properly to the special OER after seeing the full report, the OER remains incomplete and cannot lawfully be made a part of her record and should not have been entered into it.

The applicant further alleged that the special OER was used, in effect, to convict her of an offense under the Uniform Code of Military Justice (UCMJ)—fraternization or dereliction of duty or both—without sufficient evidence and without giving her a chance to defend herself. She alleged that it was "highly improper to take action that 'sounds in' the UCMJ without having afforded [her] any of the procedural protections that are associated with the criminal process." She alleged that her command had "highjacked" the performance evaluation process to convict her without having to submit evidence or allow her to confront witnesses. She argued that the remainder of her record is free of any sign of misconduct or unprofessionalism, and that the absence of such signs "casts grave doubt" on the validity of the charges leveled against her in the special OER.

The applicant alleged that the regular OER for the period February 1 to July 23, 199x, should be removed from her record because the negative comments about her potential and qualification for promotion in that OER are unsupported by any other remarks in the OER. She alleged that the OER is therefore unfair because it is internally inconsistent. Moreover, she alleged that because 16 of the 18 possible marks in the OER are 4s, it is obvious the OER was "prepared in a perfunctory manner." In addition, she alleged that in his negative remarks about her potential, her CO was trying to "perpetuat[e] the adverse effect of [the special OER], even though there was no basis for

doing so." She argued that CGPC should have remanded the OER because of the inconsistency as part of its review under Article 10.A.4.j. of the Personnel Manual.

The unfairness of this second disputed OER, she alleged, is shown by the much higher marks and recommendations for promotion in the concurrent OER she received for her TAD assignment to another unit from March 29 to August 23, 199x.

The applicant alleged that her failures of selection for promotion to xxxxxxxx should be removed from her record because her record would have appeared much stronger if the special OER and disputed sentences in the second OER. Without them, she alleged, she would certainly have been selected for promotion since the selection rate for promotion by the 199x Board (for promotion year 2000) was 93 percent. Therefore, she argued, her case meets both prongs of the *Engels* test. She alleged that without the disputed OERs in her record, she would have been promoted because the rest of her record is strong, with marks of 5 on the Comparison Scale and recommendations for promotion from her rating chains.

The applicant further alleged that her record was incomplete when it was considered by a xxxxx selection board in 199x because the reply that she submitted in response to the second disputed OER was not in her record before the Board. She alleged that CGPC told her it was not in her record and even telephoned her command to try to expedite transmission of the reply to CGPC, but her command did not forward the reply to CGPC in time to be placed in her record before the selection board met. Therefore, she alleged, the selection board considered her record, including the negative comments in the second OER, without seeing her reply.

The applicant alleged that, under *Sanders v. United States*, 594 F.2d 804, 814 (Ct. Cl. 1979), officers have a right to have their consideration for promotion based on a record that is "substantially complete." She alleged that because her reply to the second disputed OER was not in her record before the selection board, her record cannot be considered "substantially complete" under *Weiss v. United States*, 408 F.2d 416, 419 (Ct. Cl. 1969) (holding that if a military service "place[s] before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse effect of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes."). Therefore, she alleged, under *Muse v. United States*, 21 Cl. Ct. 592, 606 (1990), her failure of selection in 1999 must be set aside not only because of the unfair comments and marks in the special OER and second disputed OER, but also because her record was incomplete before the selection board.

DECISION OF THE PERSONNEL RECORDS REVIEW BOARD

On xxxxx, the PRRB denied the applicant's request for relief. The PRRB included a captain, commander, lieutenant junior grade, and civilian employee of the Coast Guard. The decision was approved by the Deputy Director of Personnel Management, who was also a civilian.

The PRRB found that "[r]egulations governing the Officer Evaluation System (OES) do not require that a Special OER should only be submitted after an officer is found guilty of a criminal offense." The PRRB found that Article 10.A.3.c.1.d. of the Personnel Manual allows "rating chains to document conduct that is not reportable under Article 10.A.3.c.1.b." as long as it is "undisputed, supportable and relevant in the rating official's mind." The PRRB also found that the quality of the rest of the applicant's record did not prove that the challenged OERs were in error.

With respect to her OER replies, the PRRB found that her first reply was properly returned to her because, under Article 10.A.4.g.2., the restriction in Article 10.A.4.f.1. prohibiting a reference to an investigation applies to OER replies. The PRRB pointed out that the applicant was free to dispute the allegations against her but failed to do so in her replies. The PRRB found that her record could be considered "complete" before the selection board even if the OER reply was not yet entered in her record.

Regarding her allegation that the comments in section 10 of the second disputed OER are inconsistent with the other comments and marks and inconsistent with the concurrent OER, the PRRB found no error or injustice. It found that because the poor conduct documented in the special OER overlapped the time frame of the second OER, her rating chain could properly take into account that conduct when preparing section 10. The PRRB also found that the better marks in the concurrent OER merely indicate that "she took advantage of the 'fresh start' offered her to improve her performance" when she was sent on TAD.

APPLICANT'S FURTHER ALLEGATIONS

On November 8, 2000, the applicant submitted further arguments in response to the decision of the PRRB. She protested the fact that the one member of the PRRB was an officer junior to her; that another member was a civilian; and that the approving official was not an officer. She alleged that under paragraph 6.a. of COMDTINST 1070.10C, PRRB decisions must be approved by the Director of Personnel Management, not the Deputy Director. She alleged that the Deputy Director's approval was invalid because it did not indicate that he was serving as the Acting Director or that he had approved the decision "by direction."

The applicant alleged that in response to her FOIA request submitted on June 1, 199x, she received on xxxxxx, 2000, a very heavily redacted copy of the investigative report that left "many sentences, paragraphs and pages incomprehensible." She alleged

that she appealed the Coast Guard's response on April 19, 2000, but does not expect a response to her appeal soon because the backlog of appeals is "years-long." Therefore, she alleged, she submitted a further reply to the special OER indicating that she was still "unable to rebut this evaluation due to the extent of the redactions made to the released documents and withholding of numerous pages in their entirety." The applicant argued that as a result of the Coast Guard's heavy redaction of the investigative report, her "opportunity to reply to the Special OER in time for the PY2001 selection board was no better than was her opportunity to reply to it in time for the PY2000 selection board."

The applicant alleged that she had effectively been "convicted by OER" because she was never made a party to the investigation, never charged, and never taken to mast or court-martialed. She alleged that including findings of criminality in an OER without affording her procedural protections or a chance to defend herself is a "misuse of the OER process," which the Board encountered in BCMR Docket No. 251-88. She alleged that in a meeting with the Group Commander, Station Commanding Officer, and Assistant Group Operations Officer, she was told that the special OER would be prepared because there was not enough evidence to court-martial her and she could refuse to be taken to mast. She alleged that she was later told by the Assistant Group Operations Officer that the District Legal Officer had advised that the case against her be dropped because the only solid evidence, the vehicle log-in sheet from the XXX's apartment complex, was over xxx years old.

The applicant argued that the PRRB was wrong to find that her record could be considered "complete" without her OER reply because the Personnel Manual "confers a right of reply, and where that right is denied—here, by withholding documentation needed to frame a reply—an error and injustice has occurred." The applicant argued that in BCMR Docket No. 86-83(P), the BCMR had granted relief when a reporting officer had truncated the allowed period for submitting a reply and found that the "Board has long recognized the right to comment on unsatisfactory fitness reports as a right separate and apart from the entitlement to relief from an inaccurate or biased report." The applicant argued that just as the officer in that case merited relief because he or she could have made stronger arguments in the OER reply if allowed more time, she should be granted relief because she can make stronger arguments now that she has seen at least a redacted version of the investigative report. She submitted a copy of a new reply to the special OER, which states that, although she has received a response to her FOIA request,

> [t]he redactions in the document belatedly furnished to me are so pervasive as to make a mockery of my right to know even who my accusers are, much less to examine them under oath. I have never been afforded any of the procedural protections Congress has provided for personnel who are suspected of offenses. This OER basically seeks to convict me without a trial—or even mast—based on mere innuendo. In my opinion this is an abuse of the Officer Evaluation System machinery and I object to it.

The applicant asked that this reply be added to her record and that her failures of selection be removed so that she could be considered for promotion with a record containing her new reply.

The applicant alleged that the PRRB finding that the comments in section 10 of the second disputed OER are justified by the comments in the special OER is erroneous. She alleged that the disputed OER must be internally consistent and "judged on its own terms, and not by reference to some other OER."

VIEWS OF THE COAST GUARD

On February 2, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. He adopted by reference the analysis and conclusions of the PRRB.

The Chief Counsel argued that, "[t]o establish that an OER is erroneous or unjust, the applicant must prove that the challenged OER was adversely affected by a clear, material error of objective fact, factors which 'had no business being in the rating process,' or a clear and prejudicial violation of a statute or regulation." *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States,* 618 F.2d 11, 17 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96. He also argued that an applicant "must overcome a strong presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluations under the Coast Guard's Officer Evaluation System. *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). In addition, the Chief Counsel argued that under the decision of the Deputy General Counsel in BCMR Docket No. 2000-037, an applicant can only rebut this presumption with "clear, cogent, and convincing evidence to the contrary." Furthermore, he argued that the BCMR should not expunge an entire OER unless the whole report is "infected" with errors or injustice or it is impossible to sever the error or unjust part from the rest of the OER. BCMR Docket No. 151-87.

The Chief Counsel alleged that under *Frobish v. United States*, 766 F. Supp. 919, 927 (D. Kan. 1991), "[w]ords in an OER that denote an inappropriate officer-enlisted relationship are not deemed improper if accurate and true despite the absence of any criminal action." He argued that because in *Frobish* the court found that the words "fraternizing" and "fraternization" in the plaintiff's OER did not denote a criminal offense and were deemed appropriate if true, "the descriptive language use in [the applicant's special OER] does not carry the stigma of criminality and is, therefore, proper." He argued that, while an intimate relationship between an officer and enlisted member is a criminal offense under the UCMJ, it can also be defined as poor judgment and inappropriate conduct, which "can and should be documented in an OER."

The Chief Counsel alleged that the applicant was not denied the opportunity to submit a meaningful OER reply. He called her allegation that she was denied such an opportunity because she did not see a full copy of the investigative report "disingenuous" and an attempt to shift the burden of proof to the Coast Guard. He argued that because the applicant submitted no evidence that the statements in the special OER were erroneous, she has not presented a *prima facie* case that requires the Coast Guard to prove that those statements are true. He alleged that her allegation that she can only rebut the statements if she sees the full report on the investigation meritless.

The Chief Counsel pointed out that the applicant had failed to deny or to submit any evidence refuting the statements of fact or conclusions in the special OER. Therefore, he argued, the Board should assume that those statements and conclusions are true because "as one of the participants in the inappropriate conduct referred to in the Special OER, Applicant has first hand knowledge of the facts, if any, to dispute those stated in her OER." He further alleged that Article 10.A.3.c.1.d. permits a rating chain to base a special OER on the facts discovered in an investigation even if she is not named a party to it as long as the investigation itself is not mentioned in the OER. He argued that under Article 2.B.2.c. of the Administrative Investigations Manual, she was not entitled to be named a party to the investigation because it was an "informal" investigation convened.

The Chief Counsel alleged that the applicant's allegations about her FOIA request are irrelevant because the BCMR "is not the proper venue for adjudicating a complaint under FOIA or the Privacy Act." BCMR Docket No. 1999-160.

The Chief Counsel alleged that no regulations were violated in the composition of the PRRB or approval of its decision. Article 6.a. of COMDTINST 1070.10C, he argued, states only that "normally a majority of the members shall be senior to the applicant." He alleged that three of the four members of the PRRB that decided the applicant's case were senior to her. He also alleged that the Deputy Director of Personnel Management acted as a valid approving official since Article 12.a. of the instruction states only that "in most cases, the Director of Personnel Management will take final action on recommendations of the PRRB involving active duty members." He alleged that the Deputy Director, as a member of the Senior Executive Service, was "the equivalent of a military flag officer."

The Chief Counsel declined to submit an argument concerning the alleged errors and their effect on her failures of selection in "the interests of administrative efficiency."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 5, 2001, the BCMR sent the applicant a copy of the views of the Coast Guard and invited her to respond within 15 days. The BCMR received the applicant's response on February 21, 2001.

The applicant argued that the Chief Counsel's statements about her burden of proof are irrelevant because her objections are procedural. She alleged that "if the Coast Guard were right, an officer could be treated totally unfairly and still have nothing to complain about unless she could disprove the facts stated in an OER."

The applicant alleged that the Chief Counsel's reliance on the decision in *Frobish* is inappropriate because the case is from another circuit, was not subject to appellate review, and, according to Shepard's Citations and LEXIS, has not been cited by any state or federal court. She alleged that the *Frobish* court cited no authority for its decision. She also argued that, because the court's decision "reflects the limits" of judicial review of an executive agency's decision, it does not prove "what a correction board can or should do in the circumstances, given its broad charter under a remedial statute." She alleged that *Frobish* decision is inapplicable because the plaintiff in *Frobish* never sought review from Army BCMR, received a complete copy of the investigative report, resigned from the Army, expressly admitted in his OER reply that he had exercised bad judgment, and never disputed the letter of reprimand he received. Moreover, she alleged, the Army admitted in that case that an OER was "not the proper forum in which to charge an officer with fraternization."

The applicant alleged that the Coast Guard's reliance on her failure to obtain extrinsic evidence to rebut the findings of the investigation is facetious because she has been denied an unredacted copy of the report. She alleged that "[i]t is outrageous to say that all she has to do is give her own version of events, since it is perfectly obvious that the Coast Guard has taken the position (with considerable success) that mere allegations by an applicant are insufficient."

The applicant alleged that her right to the investigative report surpasses her rights under FOIA because she needs the report to be able to exercise her right to reply to the special OER. Because the Coast Guard has "truncated" her right to reply, she argued, the special OER should be removed from her record "regardless of the application of the FOIA."

APPLICABLE LAW

Coast Guard Personnel Manual (COMDTINST M1000.6A)

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor, the

reporting officer, and the reviewer. Officers with the rank of xxxxxxxxxxxx receive regular, semi-annual OERs for periods ending each xxx and xxx. Article 10.A.3.a.1. They also receive OERs whenever their reporting officer leaves their unit. Article 10.A.3.a.2.b. Concurrent OERs are prepared when members perform TAD assignments away from their permanent stations for at least 60 consecutive days. Article 10.A.3.c.2.

Article 10.A.3.c.1., dealing with special OERs, states the following:

> Special OERs. The Commandant, commanding officers, higher authority within the chain of command, and Reporting Officers may direct these reports. The circumstances for the Special OER must relate to one of the situations described in subsections a. through e. The authorizing article listed below should be cited in Section 2 of the OER along with a brief description of the circumstance which prompt the OER's submission.
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> • • •
>
> d. To document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted. This report should not normally reflect performance reportable under --> Article 10.A.3.c.1.b. The special OER should be initiated by the original rating chain unless they are unavailable or disqualified. --> Article 10.A.2.g. applies. The Reviewer must be a flag officer. The special OER normally addresses only those performance or behavior dimensions relevant to the special OER since all other dimensions will have been properly evaluated in the regular OER.

Article 10.A.4.f., which covers OER restrictions, states that members of a rating chain may not

> 1. Mention [that] the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination investigations) except as provided in --> Article 10.A.3.c. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under --> Article 10.A.4.g. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

Article 10.A.4.c.9. governs the reporting officer's comments about the reported-on officer's "potential" in section 10 of an OER. The reporting officer is directed to "comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard. These comments shall be limited to performance or conduct demonstrated during the reporting period." In addition, the reporting officer should comment on the reported-on officer's qualification to assume the duties of the next higher grade and types of assignments for which the officer shows aptitude.

Article 10.A.4.g. states an officer may submit a reply to any OER within 14 days of receiving it and have this reply filed with the OER. The purpose of the reply is to "provide an opportunity for the Reported-on Officer to express a view of performance

which may differ from that of a rating official." The article states that the restrictions in Article 10.A.4.f. apply to OER replies. It also states that an OER reply should be processed by the rating chain to arrive at CGPC with 30 of the day it is submitted and that the reported-on officer should notify CGPC if he or she does not receive a receipt for the reply within 60 days of the day it was submitted to the rating chain.

Administrative Investigations Manual (COMDTINST M5830.1)

Article 1-E-1.c. provides that "[a]n informal investigation will ordinarily be adequate in most cases, including most death cases, and many casualties of an operational nature which are of less serious consequence. Most instances requiring investigation can be adequately addressed by this type [of] investigation." [Emphasis in original.]

Article 1-D-4 requires an informal investigation to be conducted by one or more commissioned officers, who use informal procedures and interviews to report findings, opinions, and recommendations to the convening authority. Article 1-E-2.b.(2) prohibits the designation of parties during an informal investigation. However, if an investigation "involves such disputed issues of fact that a substantial risk of injustice to a person or persons would exist if they were not afforded the rights of a party during the investigation, a court of inquiry or a formal investigation should be ordered, and parties should be designated." [Emphasis in original.]

PRRB Instruction (COMDTINST 1070.10C)

Paragraph 6.a. of the PRRB Instruction states that "[n]ormally a majority of the members shall be senior to the applicant, but in cases where this is not practicable, the report of the approving authority shall so indicate."

Paragraph 12.a. of the instruction states that "[i]n most cases, the Director of Personnel Management will take final action on recommendations of the PRRB involving active duty members."

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 applicant was timely.

2. The applicant did not allege that any single statement in the special OER is untrue. No evidence in the record indicates that any of the statements in the OER are untrue. Therefore, the Board assumes that the statements regarding her conduct in the

special OER are true because, absent strong evidence to the contrary, rating officials are presumed to have acted 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).

3. The applicant alleged that the presence of the special OER in her record is nonetheless unfair because (a) she was not provided with an unredacted copy of the report of the investigation that uncovered the facts reported in the special OER to use in preparing her OER reply and (b) the effect of the comments in the special OER was to "convict" her of a criminal offense with insufficient evidence and no opportunity to defend herself or cross-examine the witnesses against her.

(a) Article 10.A.4.g. of the Personnel Manual allows OER replies so that the officer may "express a view of performance which may differ from that of a rating official." The applicant has not proved by a preponderance of the evidence that the Coast Guard deprived her of anything which she needed or to which she was entitled to express a different view of her performance than that presented in the special OER. She has not shown that knowledge of the names of her accusers, for example—which were apparently redacted from the report she was shown and later provided[5]—was necessary to deny any of the comments in the OER; to explain why her actions as described in the OER were justified by legitimate purposes; or to gather statements from other members that would contradict the comments in the OER or explain why her actions were justified by legitimate purposes. No one was in a better position than the applicant to explain or justify in an OER reply why she made certain duty assignments, why her car was logged into the XXX's apartment complex late at night, why she recommended the junior officer for a psychiatric evaluation without informing her CO, or why she failed to inform the CO about evidence of improper relationships among the crew. Therefore, the Board finds that the applicant has not proved that the Coast Guard denied her the right to reply to the special OER as prescribed by Article 10.A.4.g. because she has not shown that it prevented her from denying or justifying any of her actions or from gathering statements from other members who might explain her actions or present a different view of her performance. Nor has she proved that she was entitled to be given, rather than shown, a redacted or unredacted copy of the investigative report during the 14 days provided for drafting an OER reply.

(b) The special OER does not accuse the applicant of any crime. It describes her actions—such as her manipulation of duty assignments, visitation of a XXX's apartment late at night, failure to notify her CO of evidence of improper relationships, and recommendation of an enlisted member for psychiatric evaluation with con-

[5] Although the applicant protested the extent of redaction in the report on the investigation she was first shown and later provided, she did not submit a copy of the redacted report. Because the applicant did not deny the truth of any of the comments in the special OER, the Board was able to reach a decision on the procedural issues presented in this case without seeing the investigative report.

sulting her CO—and reasonably concludes that she showed extremely poor judgment and undermined the morale of her unit. The applicant alleged that the Coast Guard had insufficient evidence to court-martial her and so "convicted" her "by innuendo" in the special OER, which she alleged was a misuse of the Officer Evaluation System. By the applicant's logic, rating chain officials could not mention any poor performance in an OER that could conceivably be considered evidence of a crime unless they actually court-martialed the officer. If they could not mention unwise actions that suggest the existence of an inappropriate relationship, for example, they also could not mention careless storekeeping unless they had sufficient evidence to court-martial a member for theft. The Board refuses to reach such an absurd conclusion. Rating chain officials are permitted to describe an officer's injudicious actions in an OER. Moreover, even if the applicant had been acquitted of fraternization by a court-martial, her rating chain could still have prepared this same special OER under Article 10.A.3.c.1.d. of the Personnel Manual to document her actions. Under Article 8.H. of the Personnel Manual, Coast Guard officers are required to avoid creating even the appearance of favoritism or an inappropriate relationship.

4. In BMCR Docket No. 251-88, the Board removed a comment that the officer had "physically attacked" another member from an OER. However, the Board in that case found that the statement was both "highly inflammatory" and completely unexplained since no other facts concerning the background of the "attack" were provided and there was evidence in the record indicating that the comment was exaggerated. In this case, however, there is no evidence that the comments in the special OER were exaggerated; the comments include significant detail to provide context; and no inflammatory language is used, although the facts related reflect very poor judgment on the part of the applicant.

5. The applicant alleged that the comments in section 10 of the second disputed OER should be removed because they are inconsistent with the comments in the remainder of that OER and in the concurrent OER she received for the same period. Under Article 10.A.4.c.9. of the Personnel Manual, a reporting officer's comments about an officer's potential in section 10 of an OER "shall be limited to performance or conduct demonstrated during the reporting period." While this regulation prohibits a reporting officer from mentioning performance that occurred outside the reporting period, it does not state that the reporting officer's assessment of an officer's potential must be based exclusively on her performance during the reporting period. Moreover, the Board notes that, although the behavior criticized in the special OER is not repeated in the second disputed OER, the time periods of the OERs overlap, indicating that the reporting officer's negative comments in section 10 of the second disputed OER were likely based on her poor performance at her permanent unit during the reporting period. In addition, the Board notes that the applicant has not proved that the comments and marks describing her performance in the rest of that OER are so positive as to make them clearly inconsistent with the reporting officer's comments in section 10.

Likewise, the number of marks of 4 she received does not prove that the OER is invalid, but only that her CO found most aspects of her job performance during the 27 days she was observed to be consistent with the standards prescribed for a mark of 4.

6. The applicant alleged that her failures of selection for promotion to xxxxxx should be removed from her record because her reply to the second disputed OER was not in her record when the xxxxxxxxx selection board convened on xxxxxxxx, 199x. According to CGPC's validation stamps on her replies to both the special and second disputed OER, neither reply was in her record when the selection board met. Her reply to the special OER was stamped by CGPC as being entered in her record on xxxxxxxx, and her reply to the second disputed OER was stamped on December 1, 199x. Her reply to the special OER was not submitted in proper form before the selection board met because her first draft, which she submitted on June 17, 199x, mentioned the investigation, in violation of Articles 10.A.4.g. and 10.A.4.f. of the Personnel Manual. Under Article 10.A.4.g., when she did not receive a receipt from CGPC for this reply within 60 days of submitting it, she was supposed to notify CGPC. However, she apparently waited until September 7, 199x, to notify CGPC and thus did not submit a revised version of the reply to the special OER until September 30, 199x, five days after the selection board had convened. She did not submit her reply to the second disputed OER until October 26, 199x, presumably because it was not completed by her rating chain and validated by CGPC until xxxxxxx 199x.

7. The applicant alleged that it was unjust and improper for her record to go before the selection board without her OER replies. She alleged that without those replies, her record could not be considered "substantially complete," as required under *Weiss v. United States*, 408 F.2d 416 (Ct. Cl. 1969). However, the court in *Weiss*, based its decision on a Navy regulation that stated that adverse matter could not be placed in a member's record until he was given an opportunity to reply. *Id.* at 419. No regulation prohibited the Coast Guard from entering the disputed OERs in the applicant's record even though she did not submit her replies before the selection board met. Moreover, much more than an OER reply was missing from the plaintiff's record in *Weiss*; other significant exculpatory reports were also absent; and the court explained its ruling by stating that "[i]f a Service Secretary place[s] before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes." *Id.* The Board finds that the applicant's OER replies could not possibly have mitigated the adverse impact of the prejudicial information because she did not bother in those replies to contradict or justify any of the negative comments about her performance. At most, her replies would have informed the selection board that she objected to her limited procedural rights under the Personnel Manual and thought the comments in section 10 were inconsistent with the remainder of the second disputed OER. Such

statements are not the kind of "equally pertinent [documents] which might have mitigated the adverse impact of the prejudicial information" that were at issue in *Weiss*. *Id.*

8. In *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982), the Court of Claims held that the BCMR should decide whether his failures of selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" As indicated in Finding 7, the applicant's OER replies would not have provided the selection board with any view of her performance contrary to the views in the disputed OERs, and their inclusion would not have made her record appear any better. Moreover, even if the omission of her replies were considered an error or injustice, it is extremely unlikely that the applicant would have been promoted in any event given the undisputed facts described in the special OER. Therefore, the Board finds that neither part of the *Engels* test is met in the applicant's case. She has not proved that either of her failures of selection should be removed because of an error or injustice in her record that unfairly prejudiced her record before the selection boards.

9. The applicant alleged that the PRRB that considered her case was improperly composed and that the official who approved the PRRB's decision was improper. The Board agrees with the Chief Counsel that in composing the PRRB and approving that board's decision, the Coast Guard complied with the provisions in paragraphs 6.a. and 12.a. of COMDTINST 1070.10C.

10. The applicant asked the Board to replace her previous OER reply to the special OER with a new one. The proposed new reply does not present any different view of her performance. It merely indicates that she protests the extent of the Coast Guard's redaction of the investigative report under FOIA and objects to the fact that officers who receive derogatory OERs have fewer procedural protections that those facing a court-martial or mast. The Board finds that the applicant has not proved that her previous OER reply, which lacks these complaints, was entered into her record in error or constitutes an injustice. She has not proved that she is entitled to revise her reply, and no regulation provides for such revision.

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

ORDER

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

(see dissenting opinion)

[redacted]

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 2000-163

DISSENTING OPINION

I respectfully disagree with the decision of the Board in this case. Briefly, applicant requested that the Board remove a special OER from her record as well as two subsequent failures for selection for promotion to xxxxx. The special OER contains damaging allegations concerning the applicant's professional conduct which, if true, cast serious doubt on her fitness for further exercise of responsibility in the Coast Guard, let alone promotion.

The allegations in the special OER were based, at least in part, on the report of an investigation by the Coast Guard Investigative Services. The Coast Guard did not

provide her a copy of the report. She made a Freedom of Information Act (FOIA) request for the report, which the Coast Guard did not release to her in a timely fashion. When the Coast Guard belatedly provided her a copy of the report, it was heavily redacted.[6] The Board accepted the Coast Guard's position that, because the applicant did not controvert or refute the facts alleged in the special OER, the truth of the allegations should be assumed. The apparent legal basis of this conclusion is that Coast Guard personnel actions enjoy a presumption of regularity, which the applicant has the burden of rebutting.

Here is the situation: A Coast Guard personnel document makes probably career-ending comments about an officer. The Coast Guard refuses to provide – in a timely and complete fashion -- the only information that will allow the officer to refute the allegations. The report would allow her to check the accuracy of the facts alleged, learn the identity of any witnesses that her representative could interview, find any inconsistencies in the information relied upon for the special OER, etc. It is a key piece of evidence, without which she is quite unable to refute meaningfully the allegations against her.[7] The Board's decision, however, stands for the proposition that the Coast Guard's allegations against her must stand because she has not rebutted the presumption of regularity those allegations enjoy, because the Coast Guard refuses to give her the means to make such a rebuttal. Only if Joseph Heller had chosen to write about the Coast Guard, rather than the Air Corps, could there be a more classic Catch-22.

This result is so fundamentally unfair, such an open and blatant denial of the most basic requirements of due process, that it cannot be permitted to stand. The Board has a responsibility to correct injustice, and it should do so here.

To correct the manifest injustice in the Coast Guard's action, the Board should take the following action:

1. The Board should request that the Coast Guard immediately provide a full, unredacted copy of the investigative report to the applicant, giving the applicant 90 days to respond to its allegations. The Coast Guard would then consider the

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[6] The Coast Guard did not provide a copy of the report to the Board's staff, in either its original or redacted form, so the Board has not had the opportunity to review it to determine the credibility of its information or the utility of the redacted version to the applicant.

[7] It does not save the Board's position to assert that the applicant failed to controvert the allegations of the special OER. In the absence of facts with which to make the refutation, a simple denial would not have been viewed as sufficient by the Coast Guard or the Board to overcome the presumption of regularity that the Board cites. The applicant should not be penalized for failing to take an action which everyone knows would be futile.

applicant's response and recommend to the Board the corrective action, if any, that it believes to be appropriate.

2. The Board would retain jurisdiction of the case. If the applicant failed to provide a reply responding to the special OER's allegations within the 90-day period, the Board would affirm the Coast Guard's present action. If the applicant did reply within this period, the Board would then review the Coast Guard's subsequent recommendation with respect to any further action that should be taken.

3. If the Coast Guard declines the Board's request in paragraph (1), then the Board would order the removal of the special OER and the applicant's subsequent failures of selection for xxxxxxx, as the only steps that could correct the injustice to which the applicant was subjected.