

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-075

[REDACTED]

FINAL DECISION

[REDACTED]

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on March 4, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated December 8, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her military record by removing two officer evaluation reports (OER) for the period June 20, 2001 to May 31, 2002 (first disputed OER) and June 1, 2002 to January 10, 2003 (second disputed OER), and replacing them with reports for continuity purposes only. She further requested that if the BCMR acts after the 2005 lieutenant commander (LCDR) board meets and if selected by that board, that her LCDR date of rank be adjusted retroactively to the date she would have had, if she had been selected for promotion by the 2004 LCDR selection board. The Board interprets this portion of the applicant's request as one for the removal of her 2004 failure of selection for promotion to LCDR.

BACKGROUND

At the time the applicant received the two disputed OERs, she was assigned to duty in the [REDACTED] of a Marine Safety Office (MSO). About four months

into the first reporting period, the applicant began to experience health problems resulting in her being hospitalized twice for depression. The first hospitalization totaled eleven days and the second totaled six days. The applicant alleged that her health problems resulted from harassment by her supervisor and formed the basis for the allegedly inaccurate OERs.

First Disputed OER

In the supervisor's portion of the OER, the applicant received marks of 5 in the performance categories, except for a mark of 4 in the speaking and listening and evaluations categories.¹ The OER does not mention the applicant's medical condition. The supervisor's comments describe the applicant's performance as consistent and skillful. For example, the supervisor stated that the applicant had "respectable commun[ication] skills: mtgs w/customers left impression of confidence, integrity & commitment, able to communicate complex tech regs to industry . . . Demonstrated quality writing skills:"

In the leadership comments section of the OER, the supervisor wrote that the applicant had an "[e]xcellent concern for others" and that as the Tricare coordinator she expedited the care of an injured member and ensured that the member received quality care. The Supervisor further wrote that the applicant obtained free/valuable training for [REDACTED] and increased the size of the technical library by obtaining guides, manuals, and quick reference diagrams. He also wrote that the applicant supervised four CWOs in a highly active and diverse [REDACTED] covering a 12-state area and that she completed three high quality CWO OERs and instructed them on the OER process.

In the reporting officer's portion of the OER, the applicant received marks of 5, except for a mark of 4 in the health and well-being category. Among other details, the reporting officer wrote that the applicant aggressively pursued improvement in her personal/professional growth and attributes. He stated that the improvement of her knowledge through the completion of a college course contributed to the expeditious review of several of the unit's electrical plans. He further wrote that as "acting [Chief of the [REDACTED] during post 9/11 ops, [the applicant] quickly took over [REDACTED] completing several critical large passenger vessel renovations, Homeland Security evaluations of vessels and continuing key department improvements."

In block 9, the reporting officer compared the applicant with all other LTs he has known throughout his career. He described the applicant as a "good performer; give tough, challenging assignments" by placing her in the fourth of seven places on the

¹ OER marks range from a low of 1 to a high of 7. A 4 is considered an average mark.

comparison scale. The reporting officer recommended the applicant for promotion with her peers and stated that with the continuation of her present rate of performance and professional development, she would earn a recommendation for independent duty/Marine Safety Division supervisory position.

Second Disputed OER

On this OER, the applicant was given seven 4s and eleven 5s. The supervisor and reporting officer used words like "quality," "respectable," and "commendable" to describe the applicant's performance during the reporting period.

In block 9, the reporting officer rated the applicant as "good performer; give tough, challenging assignments" when he compared her with all other LTs the reporting officer has known throughout his career. The reporting officer did not state that the applicant was recommended for promotion in block ten, but wrote the following comments:

ROO [Reported-on officer] demonstrated responsible commitment to professional development through attendance at numerous resident training courses. As O3 Dept. Head, directed cmd's [REDACTED] efforts (including those for 3 remotely located MSD's). Coordinated efforts of various state/local agencies during high-visibility fatal accident involving a child & earned praise from seasoned state boating accident investigators. Extensive community outreach work w/First Book brought credit to CG. ROO's quals in [REDACTED] [REDACTED] proved to be a valuable cmd asset. With further qualifications/field experience ROO should develop into respectable leader.

APPLICANT'S ALLEGATIONS

The applicant alleged that the disputed OERs are flawed and should be removed from her record. Specifically she asserted that the following errors and injustices.

1. The rating chain failed to provide numerical marks that reasonably compare to the comments in the disputed OERs and failed to remark on her potential for promotion in the second disputed OER in violation of the Coast Guard Personnel Manual and the purpose of the Officer Evaluation System.

2. The low numerical marks on the applicant's two disputed OERs were based on her medical condition in violation of the Coast Guard Personnel Manual.

3. The alleged errors were prejudicial to the applicant and caused her failure of selection for promotion to LCDR. She further alleged that even if such errors were not prejudicial, the Coast Guard has the burden of proving that they were not.

The applicant submitted a brief containing several pages of arguments in support of her allegations, but she provided no corroborating proof that the supervisor harassed her or that her performance was different from that described in the disputed OERs.² (A more detailed summary of the applicant's arguments is not considered necessary because the Coast Guard, as discussed below, has recommended relief based upon a violation of the Personnel Manual by the rating chain in preparing the two disputed OERs.)

Summary of Applicant's Other OERs

As an ensign from September 22, 1995, to September 30, 1996, the applicant performance marks consisted mostly of 4s with occasional 5s. In each ensign OER, she was rated as "one of the many competent professionals who form the majority of this grade," which is the equivalent of a mark of 4 on the comparison scale.

As a lieutenant junior grade (LTJG), the applicant's performance marks consisted mostly of 5s and 6s, with an occasional 7, except for her first LTJG OER in which she received mostly 4s. On the comparison scale, the applicant was placed in blocks 6 and 5, except for the first LTJG OER, where she received a mark of 4.

As a LT, the applicant's performance marks consisted mostly of 5s and 6s, with an occasional 7. On the two disputed OERs, 5s were the highest marks assigned to the applicant, along with several 4s. Her comparison scale marks as a LT were all 5s except for the 4s on the two disputed OERs. The applicant's performance is described as "superior," "excellent," and "outstanding," except for the two disputed OERs where it is

² The applicant submitted an unsigned copy of the medical report admitting her to the hospital. In that report, the clinician recorded the history of the applicant's illness as reported by the applicant, in pertinent part as follows:

[The applicant] has been career Coast Guard and from time to time she has had some difficult periods with stresses that she has easily been able to brush off and they have lasted only a very short period of time. After September 11, 2001, there was [a] reorganization and she had a difficult officer to deal with that created some real stress for her that was more prolonged and for the first time she had a much harder time shaking off the depression . . . In the last five weeks, she has been reassigned to a fellow senior lieutenant who took away most of her responsibilities. He began to treat her in a fashion which even though she did nothing to offend him whatsoever, seemed to her to show that there was absolutely nothing she could do to please this officer . . . She felt under a great deal of criticism . . . She felt very much overwhelmed.

described as "consistent" and "respectable." Except for her first LT OER and the second disputed OER, each of the remaining five LT OERs contained an express recommendation for promotion to LCDR. The applicant was not selected for LCDR in 2004 but was selected by the 2005 selection board.

VIEWS OF THE COAST GUARD

On July 22, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief to the applicant. The JAG stated that he disagreed with the applicant's claimed basis for relief, but discovered evidence of irregularity with Coast Guard policy in the preparation of the two disputed OERs. Therefore, he asked the Board to grant relief in accordance with the comments and recommendation contained in a memorandum from the Commander, Coast Guard Personnel Command (CGPC) that was attached as Enclosure (1) to the advisory opinion.

CGPC stated that the applicant failed to submit any evidence other than her own statement that the OERs were inaccurate. CGPC further noted that the applicant's contention that the reporting officer was in violation of policy by not making a recommendation for promotion is unfounded. In this regard, CGPC stated that policy only required the reporting officer to comment on the reported-on officer's potential for greater leadership roles and responsibilities in the Coast Guard in block 10 (potential) of the OER. CGPC also noted that neither OER mentions the applicant's medical condition.

CGPC obtained a statement from each member of the rating chain. The supervisor denied that he harassed the applicant and the reviewer and reporting officer stated that they were not aware of any such alleged harassment. Both the reviewer and reporting officer wrote that the supervisor was an outstanding performer and loyal member of the Coast Guard who looked out for his subordinates. Each confirmed that the disputed OERs contained an accurate description of the applicant's performance. However, CGPC stated that the supervisor's statement revealed a violation of the Personnel Manual in the preparation of both OERs. In this regard and in recommending relief, CGPC wrote the following:

There is evidence of irregularity with CG policy in the construction of the two disputed OERS, not brought forward by the Applicant, but discovered in signed declarations by the Applicant's Supervisor and Reporting Officer. [The Personnel Manual] defines policy regarding the responsibilities of the Reporting Officer. [It] states that the Reporting Officer is responsible for ensuring that the Supervisor meets his/her officer evaluation system responsibilities and provides the Reporting Officer with the latitude of returning OERS to the Supervisor for

correction or reconsideration if the report is found inconsistent. However, the policy specifically states that "The Reporting Officer may not direct that an evaluation or comment be changed (unless the comment is prohibited under [Article 10.A.4.f. of the Personnel Manual])."

In [the Supervisor's] declaration . . . he provided as enclosures draft copies of OERs for both periods in dispute that indicated changes that [the Reporting Officer] made to his drafts. The enclosed drafts indicated changes to both the Supervisor sections . . . that the Supervisor was responsible for assigning, as well as the recommended marks and comments that [the Supervisor] provided for the Reporting Officer sections . . . that the Reporting Officer was responsible for assigning. In his declaration, [the Supervisor] states that [the Reporting Officer] instructed him to lower the Applicant's marks and made several changes to the documents on both OERs in dispute. [The Supervisor] further states that he felt at the time that the marks assigned by the [Reporting Officer] were low based on his own observations, and although he felt [the Reporting Officer] actions were overly harsh, as his direct Supervisor and [the Applicant's] Reporting Officer he had every right to change the marks. In a supplemental declaration by [the Supervisor], . . . he specifically states that [the Reporting Officer] did not seek his "concurrence or approval" in making changes to his Supervisor sections of the two disputed OERs.

This evidence of a violation of policy is further supported by [the Reporting Officer's] in his declaration . . . Referring to the Applicant's detachment of officer OER for the period 2003/01/10, the [Reporting Officer] states "As a side note, [the Supervisor's] sole responsibility was to complete the OER form since I was essentially supervising all of her work even though [the Supervisor] remained (on paper only) as her Supervisor. I ensured all OER language and marks met my standards and not [the Supervisor's]." [The Reporting Officer] is well within policy to make changes to [the Supervisor's] recommended marks and comments for the Reporting Officer sections . . . that he is responsible for assigning, but not to the Supervisor sections that were the responsibility of [the Supervisor]. Coast Guard policy does not authorize officers to serve as rating officials "on paper only". If indeed the command completely shifted the supervisory responsibilities of the Applicant from [the rating chain Supervisor] to the [Reporting Officer] due to the Applicant's reported accusations of mistreatment . . . then a rating chain exception should have been made as outlined in [the Personnel Manual]. Coast Guard policy states that the rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple

evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting . . . By mandating changes to the evaluation sections for which [the Supervisor] was responsible for assigning, [the Reporting Officer] violated policy in a manner that was prejudicial to the Applicant.

The enclosures attached to the supervisor's statement show that the reporting officer changed three of the supervisor's marks from 6 to 5 and 2 from 5 to 4 on the first disputed OER. In addition he changed the supervisor's description of the applicant's performance from "superior" to "consistent". The enclosures also show that on the second disputed OER, the reporting officer changed four of the supervisor's marks of 5 to 4 and he changed the supervisor's description of the applicant's performance from "superior" to "quality performance" and he changed the supervisor's characterization of the applicant's communication skills from "superior" to "respectable".

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 4, 2005, the BCMR received the applicant's reply to the views of the Coast Guard. She noted the Coast Guard's admission of error and recommendation for relief on a basis other than that alleged in her application. She stated that she stood by the allegations in her original application.

APPLICABLE REGULATION

Article 10.A.2.e2c of the Personnel Manual states in pertinent part that the reporting officer shall return a report for correction or reconsideration, if the supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The reporting officer may not direct that an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f. of the Personnel Manual).

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

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that the disputed OERs are in error and unjust because the comments support marks higher than those assigned, because the supervisor's harassment of her impeded her ability, and because the rating chain unjustly used her illness as a basis to lower the evaluation of her performance. The Board notes that neither OER mentions or alludes to the applicant's health problem. Moreover, she submitted no evidence, except for her own allegations, to prove that her performance was other than as described in the OERs or that the supervisor harassed her. The medical reports offered by the applicant are not helpful in proving her harassment claim because they only report what the applicant told her clinicians. In contrast, the Coast Guard obtained statements from members of the rating chain and each attested to the accuracy of the OERs. This Board has consistently held that mere allegations alone are insufficient to prove that an OER is erroneous or unjust. The applicant, who has the burden of proof, failed to prove her allegations of error.

4. Notwithstanding the above finding, the Coast Guard recommended relief based on an admission of error by the supervisor and reporting officer. In this regard, the supervisor admitted in a statement obtained by the Coast Guard that the reporting officer changed some of the marks and comments in the supervisor's portion of the OER, without consulting with the supervisor or obtaining the supervisor's approval. The reporting officer's statement corroborates the supervisor on this point. The Coast Guard stated that the supervisor's admission in this regard constituted evidence of a violation of the Personnel Manual, which states in pertinent part that "the reporting officer shall return a report for correction or reconsideration, if the supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. *The reporting officer may not direct that an evaluation mark or comment be changed* (unless the comment is prohibited under Article 10.A.4.f. of the Personnel Manual)." (Emphasis added.) See Article 10.A.2.e2c of the Personnel Manual. The Board agrees with the Coast Guard that the reporting officer committed error by changing some of the marks and comments in the supervisor's portion of the disputed OERs without consulting or discussing the matter with the supervisor or obtaining the supervisor's approval.

5. Having found error in the two disputed OERs, the Board also finds that the applicant's 2004 failure of selection for promotion should be removed. In reaching this conclusion, the Board applied the test in *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982). In *Engels*, the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors

in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"

6. With respect to the first prong, the Board agrees with the Coast Guard in its advisory opinion that the errors committed by the Coast Guard were prejudicial to the applicant because they made the applicant's record appear worse. In this regard, on the first disputed OER, the reporting officer lowered three of the supervisor's marks from 6 to 5 and two marks from 5 to 4. In addition, the reporting officer changed the supervisor's description for the applicant's performance from "superior" to "consistent." On the second disputed OER, the reporting officer changed four of the supervisor's marks from 5 to 4 and changed the description of the applicant's performance from superior performance to quality performance and the description of her communications skills from superior to respectable.

7. With respect to the second prong of the *Engels* test, the Board finds that it is likely that the applicant would have been selected for promotion with a corrected record. Except for the two disputed OERs that contained only marks of 4s and 5s and lackluster comments, the Board sees nothing in her performance record that would have likely prevented her promotion in 2004. In this regard the Board notes that the applicant's LTJG and LT performance record, except for the two disputed OERs, consisted mostly of 5s and 6s, with an occasional 7. In addition, the applicant had not received a mark of 4 on the comparison scale since her first LTJG OER in 1997. Nor has she received a mark of 4 on the comparison scale since the second disputed OER for the reporting period that ended on January 10, 2003. The lower marks in the performance categories, the average comments describing her performance, and the 4s on the comparison scale on the disputed OERs resulted in painting a picture of the applicant as an average and inconsistent performer. In fact, with the two disputed OERs removed, her record presents a picture of an above average performer. Therefore, with a corrected record, the Board finds that it is not unlikely that the applicant would have been selected for promotion in 2004.

8. Accordingly, the applicant's request should be granted.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of [REDACTED], USCG, for correction of her military record is granted. Her record shall be corrected as follows:

(1) Remove the disputed OER for the period June 20, 2001 to May 31, 2002 and replace it with a report for continuity purposes only.

(2) Remove the disputed OER for the period June 1, 2002 to January 10, 2003, and replace it with a report for continuity purposes only.

(3) Remove the applicant's 2004 failure of selection for promotion to LCDR. Since the applicant was selected for promotion by the 2005 LCDR selection, her date of rank once promoted shall be adjusted retroactively to the date she would have had if she had been selected in 2004, with back pay and allowances.

