

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-137

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on May 25, 2007, upon receipt of the applicant's completed application and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated February 26, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct her military record by removing an Officer Evaluation Report (OER) for the period February 26, 2003 to September 30, 2003 (disputed OER). She also requested to be reconsidered for promotion to LT, and if selected for promotion to that grade, that she receive a retroactive date of rank, with back pay and allowances. The applicant was not selected for promotion by the calendar year 2006 or 2007 LT selection board. She was separated from active duty on June 30, 2008.

APPLICANT'S ALLEGATIONS

The applicant alleged that the disputed OER should be removed from her record because the individual who signed as her supervisor, a chief warrant officer - W2 (CWO2), was junior to her in rank. During the period covered by the disputed OER the applicant was an ensign. The applicant claimed that having a CWO sign her OER as supervisor was not in accordance with Coast Guard policy and that a CWO cannot mark an officer of higher grade.

On September 4, 2007, an advisory opinion was obtained from the Coast Guard stating that under Article 10.A.2.d. a supervisor may be junior to the reported-on officer. This provision of the Personnel Manual states that normally the supervisor will be senior to the reported-on officer. However, in *appropriate situations*, the supervisor may be designated, regardless of grade relative to the reported-on officer. The advisory stated that the applicant did not explain why she believes the supervisor should not have served as her supervisor other than being of a

lower rank. Although, the Coast Guard recommended denial of the application as it stood, it also recommended that the Chair allow the applicant an opportunity to submit additional evidence in accordance with 38 CFR § 52.43(a).

The applicant was granted an extension of time to submit additional evidence in her case. On May 23, 2008, the Board received additional evidence from the applicant consisting of her own written statement and three written statements from other officers who served with the applicant during the period covered by the disputed OER.

Applicant's Supplemental Statement

In her supplemental statement, the applicant asked that the disputed OER be removed and replaced with an OER for continuity purposes only because her supervisor was an officer of a lower rank, because her "start as a newly commissioned officer was unrealistic," because it was "impossible [for her] to have received a fair evaluation due the [unit's] impropriety, indiscretion, and partiality," because she was "unfairly persecuted for allegedly compromising a non-Coast Guard test," because she was "subjected to a hostile work climate/atmosphere throughout her entire tour," and because she was "never allowed an opportunity to recover from her first evaluation."

The applicant stated that she reported to [REDACTED] as a newly commissioned ensign just out of officer candidate school. She was assigned as an over billet within the training department. She stated that the training division was composed of 1 CWO2 and 5 enlisted members. She stated that she was not given a desk but a couch to work from, was told to read the weapons manual for her prospective assignment as the weapons officer, and was informed that the CWO2 would be her supervisor. The applicant stated that a week into her assignment the CWO2 went on sick leave for several weeks. Upon the CWO2's return, the division moved and the applicant was told that she would be sharing an office with the CWO2, but instead she was assigned to share a large room containing survival gear with a petty officer first class. The applicant contended that she was given very little direction on what she needed to do to become qualified for her weapons officer assignment. She participated in some ready for operation (RFO) drills with very little feedback from the CWO2 although she requested it. The applicant stated that the CWO2 belittled her in front of the crew when expressing her displeasure with a project that the applicant submitted.

The applicant stated that the unit expressed displeasure with her for providing the crew with reference points to study for an examination the applicant developed that the crew would take during RFO. Apparently, the CO and the CWO2 thought that the applicant had acted to compromise the test and she was criticized for it in several places in the disputed OER. The applicant stated that the exam she created was a pre-fabricated test and not an end of course exam or one that needed to be secured.

The applicant stated that after the testing incident she received assignments that had very little merit, and that the CWO2 continued to belittle her. The applicant stated that although she was senior, the CWO2 refused to salute her when they were outside and would stand to the right of the applicant when in ranks during inspections. The applicant stated that eventually she was

moved to the operations division and she was told upon reporting that she was being watched due to her past error in judgment.

The applicant alleged that she was required to work in a hostile environment. She stated that in the operations department a “me against them” mentality existed and that the operations and assistant operations officer were constantly arguing in front of enlisted members and PBS skippers. (The applicant did not request any correction to the OERs covering her assignment in the operations department.)

Supplemental Statements Submitted by the Applicant

1. The applicant submitted a statement from LT G who was assigned to the unit at the same time as the applicant. LT G stated that she reported to the operations division after graduating from officer candidate school. She indicated that she received similar treatment to that described by the applicant in that when she reported she did not have a desk and received very little direction and guidance on how to become qualified to assume her duties. She stated that she was unfairly accused of an inappropriate relationship with an enlisted member which caused her some angst. As to the applicant, LT G stated the following:

In March 2003, we would be getting a new ensign [the applicant]. On my own, I started putting things together, trying to make sure that she would not get treated as I had upon her arrival. When [the applicant] arrived, she was at first in the main group staff building in a downstairs office, but with no desk of her own. She shared a space with her boss, a chief warrant officer. Even though [the applicant] is senior in rank and was given the title of weapons officer, the CWO2 was her boss-which made no sense to me at all. This CWO2 . . . had no respect for ensigns as she had refused to salute me every time we passed each other outside and generally looked at me with disdain. I saw [the applicant] being treated the same way. She tried to learn the ins and outs of being the weapons officer but was given little to no guidance by the CWO2. [The applicant] also became a member of the training department under [the CWO2]. That department moved to another building on the base and there [the applicant] was treated as a subordinate of not only the CWO2, but now also the BMC. This was not an ideal situation at all. I’m not sure how the command expected the new officer to learn leadership of others when she had no one to lead and was being bossed around by those of lesser rank.

I was told at one point that [the applicant] and I were going to switch places about half way through our tours so we could learn more about various officer jobs . . . I was dreading the transfer down to the training and weapons department due to the way I had seen [the applicant] belittled and demeaned since her arrival . . . Sure enough I received the same “we are better than you” attitude and treatment from the BMC and CWO2. During uniform inspections, when we all stood at the flagpole by department, in rank order, [the CWO2] made a big show of standing ahead of me in the ranks. When I bought it up, I was told by the command to just

let her stand ahead of me, thereby showing all the enlisted folks in the command that ensigns mean nothing

...

In February I got a call from my detailer asking which ship I wanted to go to . . . I had to ask permission from someone 2 pay grades under me if I could depart in April in order to avoid reporting to a unit in a foreign port . . . On March 25, 2004, I was promoted to LTJG, and [the CWO2] made a comment about getting to boss around a LTJG. Although she may have meant it as a joke, it did not sit well with me. When I had my exit interviews with the XO . . . and CO, I decided to tell them everything I had been through instead of just forgetting it and moving on with my life. I didn't want anyone else to have to go through what [the applicant] and myself had. Neither of them knew anything about some of the things that were going on they said. I told them that sending an ensign to work for a CWO2 was a horrible idea and didn't work for either [the applicant] or myself. [The XO] agreed with that. The next ensign that reported . . . did not have to go work for [the CWO2], and I think his tour went much more smoothly since the command seemed to have adjusted their practices based on the way [the applicant] and I had been set up to fail from the first day we both reported.

2. The applicant submitted a statement from LT L who stated that she was assigned to the applicant's unit from July 2003 through August 2006. She stated that when she arrived she did not receive any guidance as to what her new job entailed. She stated that she was assigned a desk but no one walked her through a check in or gave her any idea of what she was supposed to be doing. She stated that she was told in an interview with the operations officer that she needed to mentor the female ensigns at the unit, specifically the applicant because of the problems the CWO2 indicated she had with the applicant.

I believe that the atmosphere of [the unit] at the time was very hostile towards the female junior officers. I was fortunate that I had been to two previous units, was comfortable standing my ground with my supervisor, and did not feel pressured to listen to his critiques. LT L further stated:

As I watched more closely, I saw that [the CWO2] often looked for reasons to gossip about her "wayward ensign" and looked forward to the opportunity to write her OER as her supervisor. [The CWO2] boasted about being "senior" to the ensigns and took every opportunity to belittle [the applicant] or set her up for failure by withholding information that would be important in carrying out her job. As a member of the training department, [the applicant] did not have a supervisor or a mentor willing to take the time to guide her toward success. [The applicant] relied on the members of her department to guide her in completing her tasks, but did not have anybody there willing to take the time to train her in both her job, and in setting an example of what she should be as an officer. Instead, her direct supervisor was looking for reasons to take note of [the applicant's] shortcomings, and rather than taking those opportunities to teach [the applicant]

the correct procedure, she would document them in the OER upon the first occurrence.

LT L stated that in December 2003, the applicant was moved from the training department to the operations department, where she eventually became the applicant's supervisor. LT L further stated:

I drafted [the applicant's] last OER at [REDACTED]. After drafting the OER, I submitted it to the operations officer for review where he was going to sign it as the supervisor. When I submitted it, I got called into a meeting with [the supervisor] and was told that there was no way the OER would be approved by the XO . . . or the CO . . . I subsequently went into a meeting with the [XO] and the [operations officer] to defend the marks and the supporting documentation I had written for those marks. In that meeting, I was told to change the marks, I cited the Personnel manual, and said that I would not change the first two pages and stated that the command was free to make changes after the supervisor's signature. [The operations officer] tried to compromise since he was the actual supervisor and lowered a couple of the marks and changed some of the comments I had written to make the XO happy, knowing that I would be frustrated about his lack of willingness to stand up for his subordinate. The XO and CO made significant changes to the last page of the OER to indicate that [the applicant] was not a great performer.

I believe that [the applicant] was not given the opportunity to succeed throughout her entire assignment at [the unit]. [The applicant] was allowed to fail from the beginning of her assignment by being assigned to the training department to work for a *newly commissioned* [CWO2] who clearly lacked the ability to be a leader and a mentor. Furthermore, [the applicant's] first supervisor in the operations department continued to rate her performance unfairly and did not give [the applicant] the opportunity to start fresh on each OER. [The applicant] is a great officer, has admirable qualities, and has learned a lot from her experiences at [the unit].

3. The applicant submitted a statement from LT V who was assigned to the applicant's unit from October 1999 through March 2005. LT V stated that there was an attitude of aggression between the operations officer and the assistant operations officer. They would debate work load, operations decisions, personnel leave requests and many other topics in front of other subordinates. LT V also stated the following:

[The applicant] told me what she had experienced while assigned to the training division and the treatment she received by [the CWO2] while under her supervision. I explained that it was my understanding that it was not a normal situation for a [junior officer] to be placed under a warrant officer. Also, it made no sense to me that a CWO2 was writing her OER. I advised her that she should address the issue through her chain of command. However, she was apprehensive to take this course due to the climate at the time.

My experience with [the applicant] has been characterized as a junior officer with excellent organizational skills coupled with a strong internal customer focus. She also makes follow through a key element to any project. She is a vital member of the community, along with keeping up with daily duties. It is my opinion that [the applicant's] first OER should be removed from her record. In addition, I feel that she should be reconsidered for promotion to Lieutenant.

Disputed OER

The applicant was assigned as the Group weapons officer during the period covered by the disputed OER. It consists of three parts: the supervisor's portion, the reporting officer's portion, and the reviewing officer's portion.

Supervisor's Portion

In Block 3 (performance of duties) of the disputed OER, the applicant received marks of 4 in planning and preparedness, using resources, and adaptability.¹ She received marks of 3 in results/effectiveness and professional competence. In the comment section, the supervisor wrote that the applicant failed to fully understand weapons procedures and policies necessitating excessive oversight throughout the period and little progress on most weapons issues. The supervisor also criticized the applicant for the compromise of an RFO test.

In Block 4 (communications), the applicant received 4s in speaking and listening and writing.

In Block 5 (leadership skills), the applicant received a mark of 5 in looking out for others. She received marks of 4 in developing others, directing others, workplace climate, and evaluations. She received a mark of 3 in teamwork. The supervisor wrote that the applicant had "[p]eriodic inability to maintain appropriate level of familiarity with enlisted personnel sometimes undermined her position as an officer." The supervisor again wrote that the applicant improperly provided copy of RFO test to unit being inspected.

Reporting Officer's Portion

In Block 8 of the reporting officer's section of the OER, the applicant received marks of 4 in initiative, professional presence, and health and well being. She received marks of 3 in judgment and responsibility. The applicant was criticized again for compromising an RFO test

¹ Article 10.A.2.b.4.b. of the Personnel Manual states that for each evaluation area, the supervisor shall review the reported-on officer's performance and qualities observed and noted during the reporting period. Next, the supervisor shall carefully read the standards and compare the reported-on officer's performance to the level of performance described by the standards. After determining which block best describes the reported on officer's performance and qualities, the supervisor shall fill in the appropriate circle on the form. Subsection e. states that comments should amplify and be consistent with the numerical evaluations, and they should identify specific strengths and weaknesses in performance. Further, comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.

which, the reporting officer stated showed a willingness to engage in less than ethical behavior despite full knowledge of the potential negative impact. The reporting officer also noted that sometimes the applicant did not follow-up in other work areas. The reporting officer stated that the applicant was developing a supervisory style based upon her ability to interact with a wide variety of individuals rather than based on her rank.

On the comparison scale in Block 9² where the reporting officer compared the applicant to others of the same grade whom he has known in his career, the applicant was marked in the second oval (of seven, with the seventh oval being the highest). A mark in the second oval means that the reporting officer rated the applicant as a “qualified officer.”

In block 10, the reporting officer evaluated and described the applicant's potential for future service as follows:³

[The applicant] has the basic skills necessary to succeed in the Coast Guard. She is maturing as an officer. She possesses a great deal of enthusiasm for any tasking. Her transfer to the Group Operations dept during the next reporting period will compliment her training and RFO experience. Likewise, she will have additional supervisory responsibilities that will enable her to refine her supervisory skills and techniques. [The applicant's] greatest challenge is developing time management and work prioritization skills. She also needs to set appropriate limits to ensure interaction without undue familiarity with junior personnel. Should be ready for promotion w/more experience.

Reviewer's Authentication

The reviewer authenticated the OER without comment by signing and dating it.

Applicant's Other OERs

The applicant's marks on her other subsequent ensign OER were fourteen 4s and four 5s. She was given a 4 on the comparison scale mark, which described her as an officer who is one of the many competent professionals who form the majority of this grade. She was recommended for promotion with her peers.

The applicant received 5 OERs in the grade of LTJG. The first two were at the unit in which she received the disputed OER. Her marks on these OERs consisted of 4s, with several 3s

² Article 10.A.2.b.8.a. of the Personnel Manual states that the reporting officer shall fill in the circle that most closely reflects the reporting officer's ranking of the reported-on officer relative to all other officers of the same grade the reporting officer has known. The provision further provides that Block 9 represents a relative ranking of the reported-on officer, not necessarily a trend of performance. Thus from period to period, an officer could improve in performance but drop a category on the comparison scale.

³ Article 10.A.2.b.9.a. of the Personnel Manual states that the reporting officer shall comment on the reported-of officer's potential for greater leadership roles and responsibilities and shall limit such comments to the performance or conduct demonstrated during the reporting period. Article 10.A.2.b.9.b. states that comments in Block 10 reflect the judgment of the reporting officer, and the reporting officer may include a recommendation for or against promotion to the next higher grade.

and 5s. On the comparison scale she was marked in the third block. In block 10 (potential) of one OER, the applicant was not recommended for promotion “due to repeated lapses in judgment and organizational skills.” The reporting officer noted that she had not progressed as would be expected after nearly a full tour at that unit. In block 10 of the other OER, the reporting officer wrote that “Upon successful completion of staff assignment, this officer could be promoted with peers.”

The last three LTJG OERs covered the applicant’s assignment to PACAREA Operation Planning. Her marks consisted mostly 5s and 6s with one 4 and two 7s. Her comparison scale marks for the OERs were 5, 5, & 6.

SUPPLEMENTARY VIEWS OF THE COAST GUARD

On December 11, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion reaffirming its recommendation that the Board deny relief to the applicant. With respect to the supplemental evidence submitted by the applicant, the JAG stated the following:

[The applicant] is basically stating she disagrees with the marks and how her chain of command arrived at them. They do not amount to a violation of the Coast Guard policy or present an instance of manifest injustice. She points to nothing in the OER that is a misstatement of fact, only that she disagrees that the performance described merited the marks she received. Those are insufficient bases to grant relief.

With regard to allegation about hostile work environment, [the applicant] describes, and provides corroborating information, an atmosphere within the command, that, taken at face value, was tense and unpleasant and a command that did not do a good job leading its junior staff officers. But [the applicant] alleges no acts that her female warrant officer supervisor or others in her chain of command took that were based on her gender, or membership in any other protected class. Nor does she allege disparate treatment. The information she provided indicates all of the junior officers were treated badly. Thus, the evidence she provided does not, in our opinion, demonstrate a hostile work environment. And again, she does not allege that anything in the OER is inaccurate, just that she does not believe the marks and the matters referred to in the OER accurately reflect her performance. This is insufficient to grant the relief she seeks.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 8, 2009, the applicant responded to the supplemental views of the Coast Guard and disagreed with them. She stated that she disagreed with the entire OER because it was written by a warrant officer. She further stated the following:

The method of how and where I was placed was not of a conventional method. I was an over billet and the command had no place to put me. The Personnel

Manual states that a “supervisor will normally be senior to the reported-on officer. However in “appropriate situations, the supervisor may be designated regardless of grade.” The Manual does not even define what is considered “appropriate” circumstances. I believe the method in which I was placed under the warrant officer was not an appropriate situation or an ideal start for a newly commissioned officer. I addressed this issue with my command, however, I was overruled.

The applicant stated that she disagreed with the advisory opinion that she did not demonstrate that she suffered a hostile work environment. The applicant stated the fact that the CWO2 refused to render salutes to her in passing or refused to stand in a subordinate’s place in ranks is evidence of a hostile work environment. She stated that the CWO2 chose to flex her power by subjecting the applicant to offensive conditions due to the fact she was supervisor.

The applicant stated that a hostile work environment exists when an employee experiences workplace harassment and fears going to work because of the offensive, intimidating, or oppressive atmosphere generated by the harasser. The applicant stated that she suffered disparate treatment at the hands of her supervisor, as she was the only junior officer in that division. The applicant disagreed with the advisory opinion’s statement that since all junior officers were treated badly there was no hostile environment. In this regard, the applicant stated that the bad treatment of all junior officer shows that there was a hostile work environment. The applicant noted that the junior officer with whom she switched places also complained about being treated poorly in the planning division. The applicant stated that she did not bring this up with the command out of fear it would make her situation worse.

The applicant stated that she was passed over twice for LT due to the low mark she received for compromising a non-standard test. She stated that the low mark she received for a minor infraction was not warranted. The applicant stated that the Personnel Manual charges the CO with ensuring that members receive accurate, fair, and objective evaluations. The applicant stated that she was never afforded a fair and objective evaluation under her supervisor for the disputed OER.

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 was an enlisted Coast Guard member who was accepted into the officer candidate program. Upon completion of that training, the applicant was commissioned as an ensign and her first tour was at Coast Guard [REDACTED] where she received the disputed OER, her first as an officer. She was assigned the job of weapons officer at this command, and a CWO2 served as her supervisor. The applicant has alleged that the disputed OER should be removed from her record because her supervisor was an officer of a lower grade, because her start as a newly commissioned officer was unrealistic, because it was impossible for

her to receive a fair evaluation due the unit's impropriety, indiscretion, and partiality, because she was unfairly persecuted for allegedly compromising a non-Coast Guard test, because she was subjected to a hostile work climate/atmosphere throughout her tour, and because she was never allowed an opportunity to recover from her first OER.

3. Article 2.a.1. of the Personnel Manual states that ensigns are senior to all warrant officers of all grades (CWO2-CWO4). A CWO2 was the applicant's supervisor for the disputed OER, which was not illegal, because Article 10.A.2.d. of the Personnel Manual states that "the supervisor will normally be senior to the reported-on officer. However, in appropriate situations, the supervisor may be designated, regardless of grade relative to the Reported-on officer." Although not illegal, it is very unusual for an officer of lower rank to be assigned as the rating chain supervisor for an officer who holds a higher rank. Few, if any cases reviewed by the Board, have involved a supervisor of lower grade evaluating an officer of higher grade. The uniqueness of such a situation is corroborated by the three officers who wrote statements on behalf of the applicant. Each one stated that in their view it was inappropriate for the CWO2 to be the supervisor of the higher ranked ensign. However, the Personnel Manual permits an officer of lower grade to be designated as the supervisor of an officer in a higher grade in "appropriate situations." There is no evidence before the Board that the CWO2 was not designated as the applicant's supervisor. Nor is there any evidence explaining the "appropriate situation" that led the CO to assign the CWO2 as the rating chain supervisor for the applicant and the Personnel Manual does not require such an explanation. In light of this finding, the Board cannot say that the Coast Guard committed a legal error in assigning the CWO2 as the applicant's rating chain supervisor.

4. The question for the Board is not whether it was legal to assign the CWO2 as the applicant's supervisor, but whether the applicant suffered under an abusive supervisor that interfered with her ability to perform better than described in the disputed OER. The Coast Guard phrased the applicant's contention as one in which she disagreed with the marks and comments of the disputed OER. However, the applicant's contention is more that she was placed in a situation in which she was doomed to fail because of a hostile work environment created in part by the command's decision to make her subordinate to an officer of lower grade who took every opportunity to embarrass or belittle the applicant. The applicant contended that the CWO2 acted in an abusive and disrespectful manner toward her.

5. Although the applicant is not alleging discrimination due to race, sex, gender, or age, she is alleging that the environment under which she was expected to perform was a hostile one. While the case law on the existence of a hostile work environment has allegations of discrimination by a member of a protected class as a necessary component, such law is still instructive on some of the other elements that are necessary to prove a hostile work environment. For this case, the Board will focus on those other elements. In *Novotny v. Reed Elsevier, et al.*, No. C-3-05-424, 2007 U.S. Dist. Lexis 66608, at * 59 (Sept. 10, 2007), *affirmed* 2008 U.S. App. LEXIS 18777 (6th Cir. 2008) the court stated that in determining the existence of a hostile work environment it must look at the frequency of the conduct, the severity of the conduct, whether the conduct is physically threatening or humiliating or whether it was a mere offensive utterance, and whether the conduct unreasonably interferes with an employee's work performance. *See also Lewis et al. v. McDade*, 54 F. Supp. 2d 1332 (GA D.C. 1999). In addition, Chapter 3.1.a. of

the Coast Guard Equal Opportunity Manual states that every member of Team Coast Guard deserves to be treated with honor, dignity and respect and to work in an environment free of discrimination or harassment.

6. The evidence submitted by the applicant is not specific as to the severity or frequency of the alleged abusive conduct. In this regard, the Board is not aware of what the CWO2 actually said or did, and how often such action occurred, i.e. whether such conduct occurred several times a day, weekly, etc. In this regard, LT G stated that the CWO2 treated ensigns, including the applicant, who were assigned to her badly, and that the CWO2 criticized the applicant in front of enlisted members or at every opportunity. LT L stated that the CWO2 “often looked for reasons to gossip about her ‘wayward ensign’ and looked forward to the opportunity to write her OER as her supervisor . . . and took every opportunity to belittle [the applicant] or set her up for failure by withholding information that would be important in carrying out her job.” However neither stated what the CWO2 actually stated in front of enlisted members or what information was actually withheld from the applicant. LT G stated that the environment at the unit was hostile to junior officers and LT L stated that the unit was hostile to female junior officers. However, they never detail the specifics of the “bad” treatment that would allow this Board to make a finding of a hostile or abusive environment under which the applicant was unreasonably expected to perform.

7. In addition, LT G stated that the CWO2 joked about her supervision of junior officers. However, LT G does not state what the jokes were or how often the CWO2 made them. Additionally, there is insufficient evidence that any of the alleged actions by the CWO2 were physically threatening or humiliating. Since no evidence was presented on what the CWO2 actually stated in her criticism of the applicant in front of enlisted members or what she stated in her jokes, the Board cannot make a determination whether such open criticism or jokes was so humiliating that it unreasonably interfered with the applicant’s performance. The CWO2’s failure to render a salute to the applicant and her behavior in taking the senior position in ranks may have been somewhat embarrassing to the applicant; but the Board does not find it so humiliating as to unreasonably interfere with the applicant’s ability to do her job. In making this finding, the Board in no way excuses the behavior of the CWO2 or the command for not doing a better job in managing this situation. However, the evidence presented by the applicant does not persuade the Board that the attitude or actions by the CWO2 or the command were so abusive that they interfered with the applicant’s ability to perform her duties.

8. The real problem with the applicant’s case is that she has not established that the marks and comments in the disputed OER are erroneous or that she performed better than that described in the OER. For instance, the applicant disagrees with the comments in the OER that she compromised an RFO examination, but she presents only her opinion that what she did was a minor issue since the test was not an end-of-course test, and therefore her OER should not have been downgraded because it. The applicant would need to get statements from others with knowledge of the situation and experience with such testing to corroborate her contention that her sharing the points and authorities for the test with the crew was not a significant issue and was overblown in the OER. Further, the applicant needed to offer evidence that certain of the marks and comments in the disputed OER are inaccurate or unjust because she performed better than described or because the environment at the unit made it impossible for her to perform at a

higher level. As it stands, the evidence is insufficient to prove that the evaluation of her performance in the disputed OER is inaccurate or unjust.

9. Even if the Board were to find that the disputed OER is erroneous or unjust and remove it from the applicant's record, the Board would not remove her failures of selection for promotion to LT. In reaching a determination on whether an applicant's failures of selection should be removed if corrective action is taken, the Board is required to answer 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?" *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

10. If the applicant had established the disputed OER to be in error, it might have caused her record to appear slightly worse before the selection board. In this regard the Board notes that her comparison scale mark on this OER was the lowest of all of such marks on her other OERs. However on the second question, the Board finds that even if there had been slight prejudice to the applicant's record by the disputed OER before the selection boards, it is unlikely that the applicant would have been promoted to LT in any event. While the comparison scale mark on the disputed OER was the lowest of all her OERs, the Board notes it was her very first OER as an officer/ensign from which she recovered on her second ensign OER. On her second ensign OER she gained a recommendation for promotion with her peers and a placement in the fourth block on the comparison scale. However, on her next two OERs in the grade of LTJG, she lost her recommendation for promotion. On the first LTJG OER she was not recommended for promotion in block 10. The reporting officer wrote on that OER that the applicant was not recommended for promotion "due to repeated lapses in judgment and organizational skills." The reporting officer noted that she had not progressed as would be expected after nearly a full tour at that unit." In her second LTJG OER, which was her fourth OER overall, the reporting officer wrote in block 10 "Upon successful completion of (up coming) staff assignment, this officer could be promoted with peers." With these recommendations against her promotion to LT, it was unlikely that the applicant would have been promoted to that grade in any event with or without the disputed OER in her record. Moreover, no evidence has been offered from senior officers with selection board experience that having a supervisor of lower grade than the reported-on officer was prejudicial before a selection board.

11. The applicant has not established by a preponderance of the evidence that the Coast Guard committed an error or injustice in the case.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXX USCG, for correction of her military record is denied.

