DEPARTMENT OF HOMELAND SECURITY BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of the Coast Guard Record of:

BCMR Docket No. 2012-227

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on September 6, 2012, and subsequently prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 7, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant (O-3) on active duty at the time of application, asked the Board to remove her 2009 annual officer evaluation report (OER1, Attachment A) from her record and replace it with a Continuity OER, to raise the assigned numerical marks in two subsequent annual OERs for 2010 and 2011 (OER2 and OER3, Attachments B and C), to remove her failures of selection for promotion to lieutenant commander (LCDR), to promote her to LCDR as of the date she would have been promoted had she been selected by the board that convened on and to award her back pay and allowances. She also asked the Board to void her separation and return her to active duty if she has been separated from active duty by the time the Board's decision is issued.

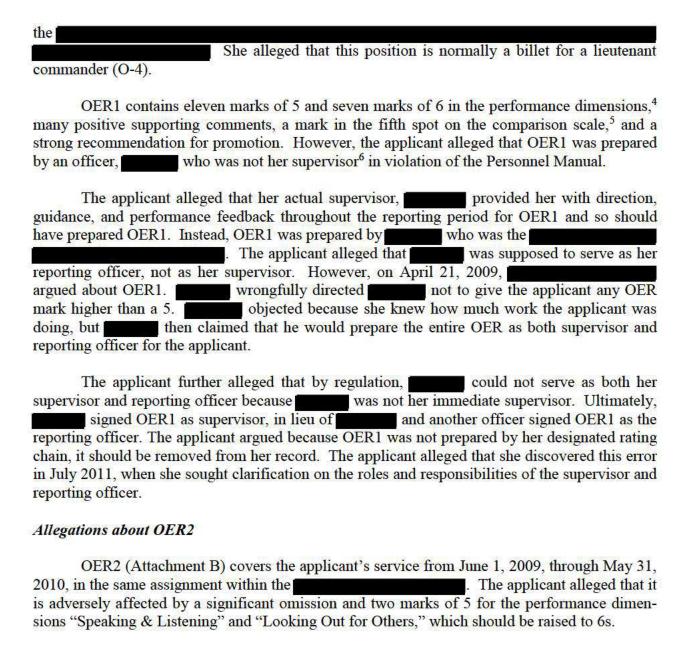
Allegations about OER1

OER1 (Attachment A) covers the applicant's service from May 31, 2008, to May 31, 2009, when she was assigned to be the

¹ The applicant was discharged from active duty on selection for promotion.

² A Continuity OER is one that contains a description of the officer's assigned duties but no numerical marks or other comments. Personnel Manual, Article 10.A.3.

³ Pursuant to 14 U.S.C. § 283(a), a lieutenant with fewer than 18 years of active duty must be discharged by the June 30th following the second annual selection board that fails to select the lieutenant for promotion to lieutenant commander, unless the lieutenant is selected for retention for a specific period pursuant to § 283(b).



⁴ Coast Guard officers are evaluated in 18 different performance categories, such as "Teamwork" and "Judgment," on a scale of 1 (worst) to 7 (best). A middle mark of 4 means that the officer's performance met the expected high standards of all Coast Guard officers for that category.

⁵ On an OER comparison scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his or her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of "performance unsatisfactory for grade or billet" for a mark in the first spot on the scale to a high of "BEST OFFICER of this grade" for a mark in the seventh spot. A mark in the fifth spot on the scale denotes the officer as an "Excellent performer; give toughest, most challenging leadership assignments."

⁶ A Coast Guard officer is normally evaluated by a "rating chain" of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally the supervisor's supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations. The system provides for "multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting." Personnel Manual, Article 10.A.2.a.

Regarding the significant omission, the applicant alleged that either the Description of Duties in block 2 or the reporting officer's comments in block 7 should mention the fact that she was assigned to an O-4 billet even though she was still an O-3. She alleged that it should have been mentioned to provide perspective on her job performance since she was doing work normally assigned to a more experienced, higher ranking officer.

Regarding the mark of 5 she received for "Speaking & Listening," the applicant alleged that it is erroneously low, inconsistent with her performance, and failed to take into account all of the accomplishments she provided in her OER input. The mark of 5 is supported by the comment, "Outstanding speaker & facilitator; promoted USCG

She complained that the comment "makes it appear as if my only contribution to the program was limited to my involvement with the "and fails to mention presentations she made to industry, various working groups, the Admiral, and a university. She alleged that her input for this performance dimension "met all the requirements for a [mark of 6]." She asked the Board to raise this mark to a 6.7

Regarding the mark of 5 she received for "Looking Out for Others," her supervisor told her she did not receive a mark of 6 because although she did "a lot, the rating chain did not see [her] unit involvement." She pointed out that, as noted in her input for OER2, she was co-chair of the Morale Committee and so responsible for all of the unit's morale events. Her supervisor told her "he must have missed this" but would remember and give her a mark of 6 on her next OER. She asked why the mark of 5 could not be corrected on OER2, and he told her that it was because the reporting officer had left. Therefore, the applicant argued, her rating chain failed to use her OER input properly. Moreover, she alleged, the supporting comments in block 5 of OER2 do mention her leadership of the Morale Committee and so support a mark of 6 for this performance dimension.⁸

Allegations about OER3

OER3 (Attachment C) covers the applicant's service in the same position from June 1, 2010, through May 31, 2011. The applicant alleged that it is adversely affected by the omission of the fact that she was assigned to an O-4 billet as an O-3 and by four erroneously low marks for the performance dimensions "Professional Competence," "Writing," "Looking Out for Others," and "Directing Others." The applicant alleged that she had requested and received mid-point counseling, at which time she was told that she was "tracking" for 6s. She alleged that she should have been informed when her performance began to fail to meet the written standards for 6s.

⁷ On an OER form, the supervisor and reporting officer assign numerical marks by comparing the officer's observed performance against the written standards provided for marks of 2, 4, and 6 on the form. The written standard for a mark of 6 for "Speaking and Listening" is "Clearly articulated and promoted ideas before a wide range of audiences; accomplished speaker in both formal and extemporaneous situations. Adept at presenting complex or sensitive issues. Active listener; remarkable ability to listen with open mind and identify key issues."

⁸ On an OER form, the written standard for a mark of 6 for "Looking Out for Others" is "Always accessible. Enhanced overall quality of life. Actively contributed to achieving balance among unit requirements, professional and personal responsibilities. Strong advocate for subordinates; ensured appropriate and timely recognition, both formal and informal."

Regarding the mark of 5 for "Professional Competence," the applicant alleged that because she had received 5s for this performance dimension on OER1 and OER2, receiving another mark of 5 for this dimension in OER3 made it appear, erroneously, as if she had not learn ork and improved her competence at all during her three years in her position. She also alleged that her reporting officer, improperly lowered her supervisor's mark in this category from a 6 to a 5. The applicant submitted the bulleted OER input that she provided to her rating chain and alleged that the input shows how her performance met the written requirements for a mark of 6.9 She also complained that her supervisor's supporting comments did not paint a succinct picture of her performance in this category.

The applicant noted that in response to her application to response Records Review Board (PRRB) for correction of OER3, the reporting officer, had claimed that she did not receive a mark of 6 for "Professional Competence" because she was "generally not considered the go to person that possesses expended great breath or depth of knowledge in marine by issues"; she did not lead any projects; and she failed to recognize that comments submitted by an industry safety association for one rulemaking she was working on also applied to another rulemaking she was working on. I alleged that her lack of expertise had caused extra work for others. The applicant alleged that these were not the reasons her supervisor told her she failed to receive a mark of 6 and that is always and for too whenever her supervisor was out of the office. She also alleged was "the lead for the one several projects" since she represented the office on several committees, led a working group to modify a form, and an alternative group, although had removed her as lead of the modify a form, and an alternative group, although although so characters of her handling of the regulatory comments and detailed her actions and responsibilities. She alleged that her performance met the written standards for a mark of 6 for "Professional Competence."

Regarding the mark of 5 for "Writing" on OER3, the applicant alleged that her rating chair to make use of her bulleted OER input in assigning the mark and that the comments do not paint a succinct picture of her performance, as required by the regulations. She provided the bulleted list of the writing she performed during the reporting period. She alleged that during her OER counseling, she was told that the anding officer had given everyone a 5 in that category, but she later learned this was not true. She also alleged that statement to the PRRB that her writing did not warrant a mark of 6 because she had not shown the "ability to clearly and persuasively express complex or controversial issues" is false.

egarding the mark of 6 she received for "Looking Out for Others" on OER3, the applicant alleged that it should be raised to a 7. She stated that she had mentored seven junior and petty officers, helped several junior officers prepare their resumes and OERs, and provided substantial, ongoing support and counseling to a suicidal chief warrant officer undergoing court-

⁹ On an OER form, the written standard for a mark of 6 for "Professional Competence" is "Superior expertise; advice and actions showed great breadth and depth of knowledge. Remarkable grasp of complex issues, concepts, and situations. Rapidly developed professional growth beyond expectations. Vigorously conveyed knowledge, directly resulting in increased workplace productivity. Insightful knowledge of own role, customer needs, and value of work."

martial. The applicant stated that she should have received a 7 because her efforts exceeded the standards for a mark of 6 in this category. She stated that she had spent large quantities of her own time on weekends and evenings helping the chief warrant officer with her preparations for court-martial and ensuring that she did not commit suicide. However, during her OER counseling, refused to raise the mark to a 7 or to explain why the applicant's extraordinary effort did not warrant a mark of 7.

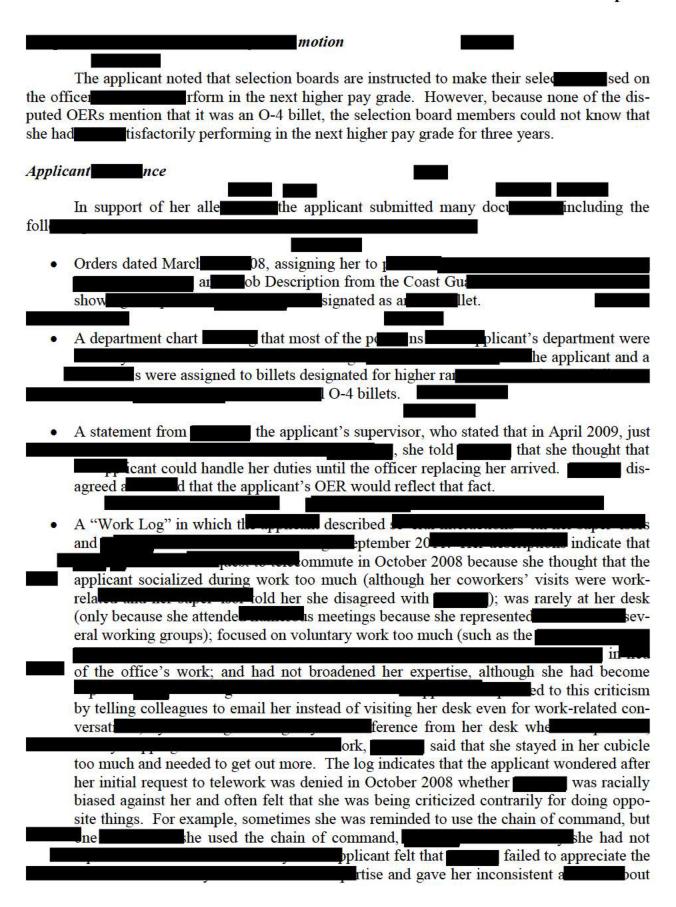
Regarding the mark of 5 for "Directing Others" in OER3, the applicant alleged that it is unjustly low, that her rating chain failed to make use of her OER input, and that the supporting comments fail to paint a succinct or accurate picture of her performance. She explained in detail why she believes the guidance she provided to field units and industry meets the written standard for a mark of 6 in this performance dimension. She noted that had told the PRRB that, while she mentored junior officers, she was not a supervisor at here was no evidence that she was an inspirational leader that motivates others to achieve results that are not normally attainable. The applicant alleged that comment was false because she mentored a who was selected to attend Officer Candidate School, which has a very low selection rate, and she provided direction to many others in various capacities even though she was no one's direct supervisor for OER purposes.

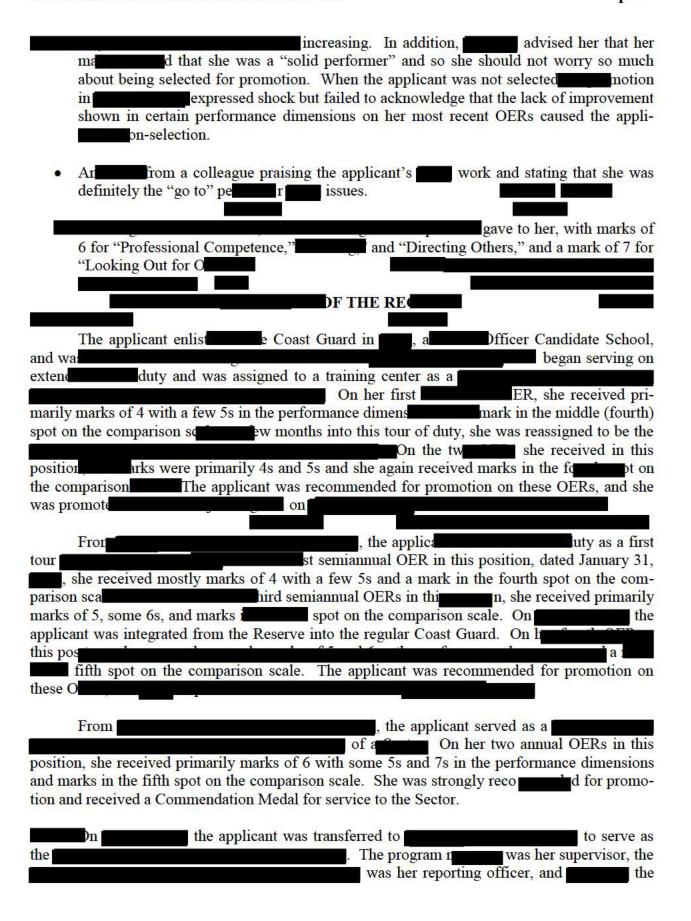
Allegations about Undue Influence

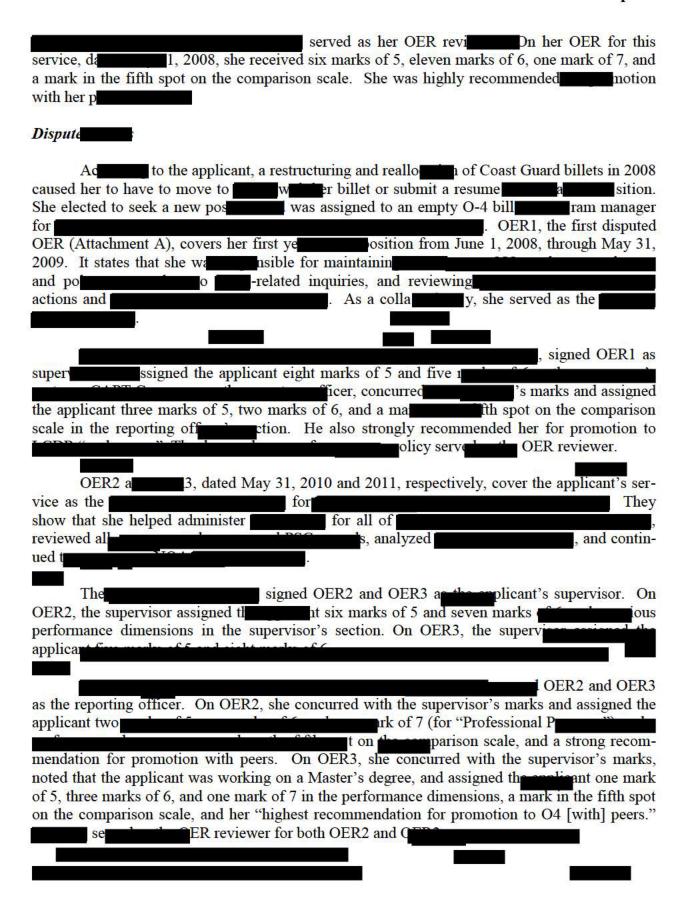
The applicant alleged that violated policy by dire her marks. She alleged that after being told at the mid-point that she was on track for 6s, she was very disappointed when her supervisor showed her with marks of 5 in some critical a ssed her disappointment with the same and officer, and then told her that to receive higher marks she would have to submit more OER input that would justify higher marks. However, after she submitted more OER input to justify higher marks, told her that her marks would not be raised. **The state of the state o** because she had not assisted another officer with e-crimes, but no one had ever suggested she do told her she would not raise the applicant's marks despite the extra OER input that the applicant submitted but later told the PRRB that the applicant could receive higher marks if she submitted input justifying higher marks. She later had another conversation with her supervisor about the OER, and he told her that was the boss and that "at the end of the day," he had to do what the boss wanted. When she showed her supervisor cy stating that a reporting officer cannot direct a supervisor to assign particular marks, her supervisor said he was unaware of that provision. The applicant alleged that the numerical marks assigned by her supervisor on both OER2 and OER3 were improperly lowered by either her reporting officer or the OER reviewer, contrary to policy.

¹⁰ See note 6 above (written standard for a mark of 6 in "Looking Out for Others" on an OER form).

On an OER form, the written standard for a mark of 6 for "Directing Others" is "An inspirational leader who motivated others to achieve results not normally attainable. Won people over rather than imposing will. Clearly articulated vision; empowered subordinates to set goals and objectives to accomplish tasks. Modified leadership styles to best meet challenging situations."







According to the applicant, recommended that she receive a Commendation Medal for her service in the in the spring of but she was awarded a (lower) Achievement Medal instead following review by the Medals and Awards Board. , a LCDR selection board convened, and 290 of 387 eligible LTs were selected for promotion to LCDR. The applicant was not on the list of those selected. (It is not clear from the record whether she submitted a letter to the selection board.) The applicant continued serving in the same position in the She received her Master's degree in which is not disputed, her supervisor On her next annual OER, dated assigned her two marks of 5, ten marks of 6, and one mark of 7 (for "Developing Others") in the performance dimensions. served as her reporting officer and assigned her four marks of 6, one mark of 7 (for "Initiative"), and another mark in the fifth spot on the comparison scale. He also gave her his "highest recommended [sic] for promotion to O4 [with] best of peers." The served as the OER reviewer.

The applicant could have but did not file an OER Replies for inclusion in her record with

Decision of the PRRB

the OERs.

On April 23, 2012, the PRRB issued a decision denying the applicant's request to have the four disputed numerical marks in OER3 increased. In reaching this decision the PRRB found that the applicant's evidence regarding the numerical marks and her allegations about undue influence did not overcome the presumption of regularity.

Regarding the allegation of undue influence, the PRRB found that under Article 10.A.2.e.2.c. of the Personnel Manual, while the reporting officer and OER reviewer may not direct a supervisor to assign particular marks, they are required by OES policy to return draft OERs for correction or reconsideration if they believe the evaluation is inconsistent with actual performance or if the assigned marks are unsubstantiated by supporting OER comments. The PRRB found that declarations submitted by the rating chain, which are summarized below, show that while the OER was returned to the supervisor, he was not directed to assign particular marks to the applicant.

Regarding the assigned marks and comments in OER3, the PRRB found that the applicant's evidence did not prove that the disputed marks were erroneous, that the comments met OES requirements by being consistent with the marks and painting a succinct picture of her performance in each performance dimension, and that the record showed that her rating chain had evaluated her correctly in accordance with policy and had based their evaluation on all available information, including her OER input, and the totality of her performance.

¹² By December 2011 when the applicant submitted her application to the PRRB, it no longer had jurisdiction over OER1 or OER2 because its jurisdiction over military records ends one year after the document is entered in the member's record.

Regarding the applicant's allegation that she was not selected for promotion in because her OERs did not show her performance improving in certain critical categories, such as "Professional Competence," the Board disagreed and noted that aside from the guidance in the selection board precept, each selection board sets its own criteria for selecting officers for promotion. Therefore, all that can be known for certain from her non-selection in is that she was one of 98 officers who were not ranked highest according to the selection board's criteria.
In applicant, 268 of 398 eligible LTs were selected for promotion to LCDR, but the applicant was not on the list of those selected. (It is not clear from the record whether she submitted a letter to the selection board.) Therefore and because she has less than 18 years of service, she is scheduled to be mandatorily discharged on 13
VIEWS OF THE COAST GUARD
On February 8, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum submitted by Commander, Coast Guard Personnel Service Center (CG-PSC).
With regard to OER1, CG-PSC alleged that was the applicant's designated supervisor for OER purposes at the end of the reporting period for which OER1 was submitted For OER2 and OER3, was the applicant's reporting officer, and a subordinate LCDR served as the applicant's supervisor.
Based upon declarations signed by the rating chains for the three disputed OERs, which

are summarized below, CG-PSC argued that the rating chain members carried out their duties under the Officer Evaluation System (OES) in accordance with policy. In this regard, CG-PSC noted that there is no requirement that the grade of the billet be shown on an OER form even though officers are sometimes assigned to billets in the next lower or next higher grade.

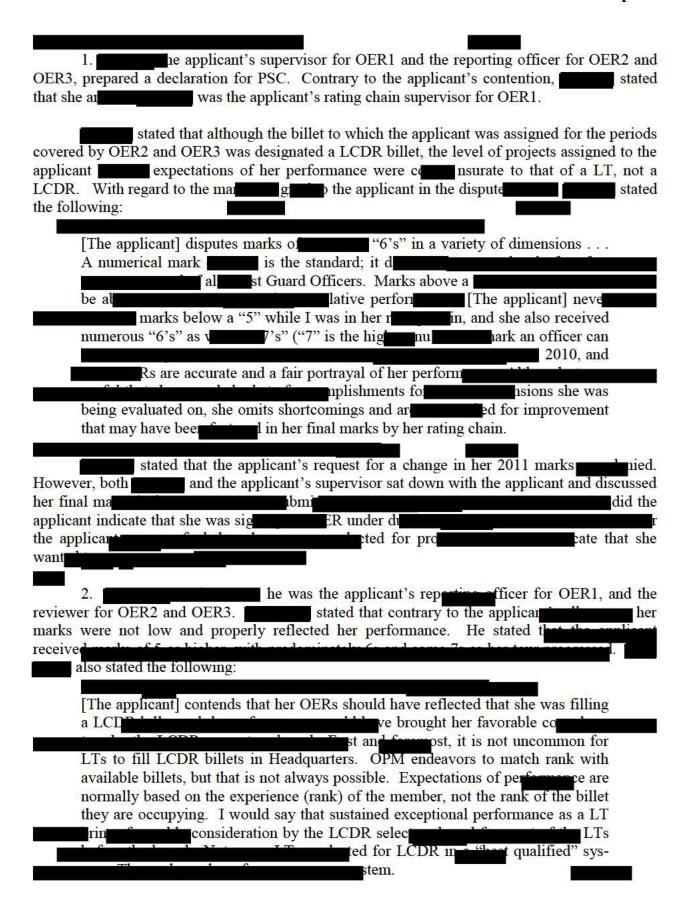
CG-PSC noted that the applicant had questioned whether was racially biased against her, and so submitted evidence with her declaration showing that she gave the applicant the same high ratings that she has given other lieutenants during her career.

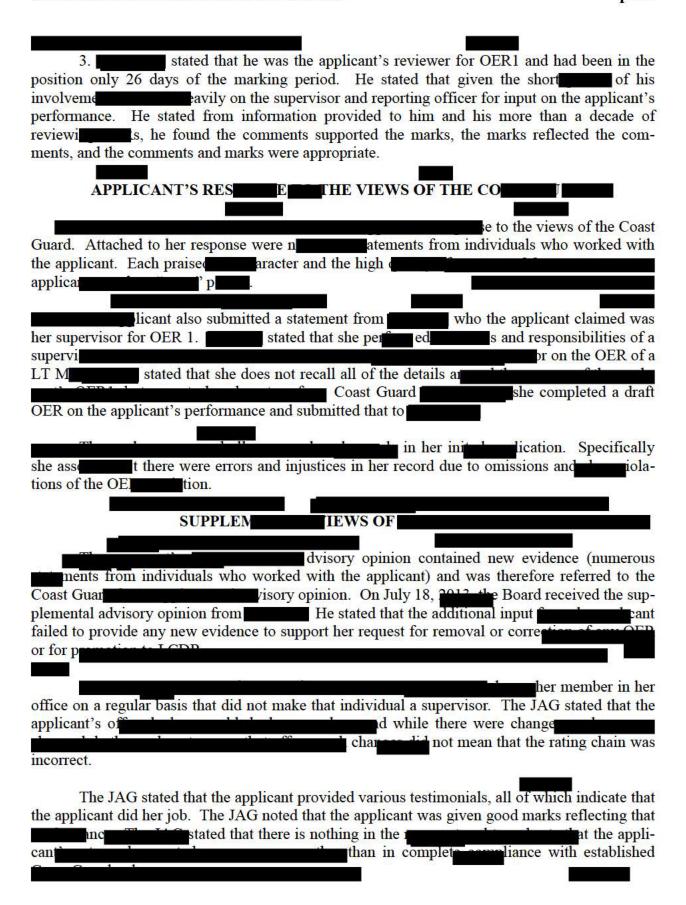
CG-PSC argued that the disputed OERs were prepared in accordance with OES policy and that the applicant has failed to submit evidence that proves they are erroneous or unjust. CG-PSC stated that the evidence the applicant submitted does not prove that the rating chain for OER1 was erroneous or that she was entitled to the higher marks she requested or to different OER comments. Therefore, CG-PSC argued, there are no grounds for making any changes to the disputed OERs, for removing her non-selections for promotion to LCDR, for directly promoting her to LCDR, or for retaining her on active duty past

Rating Chain Statements

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^{13 14} U.S.C. § 283(a).

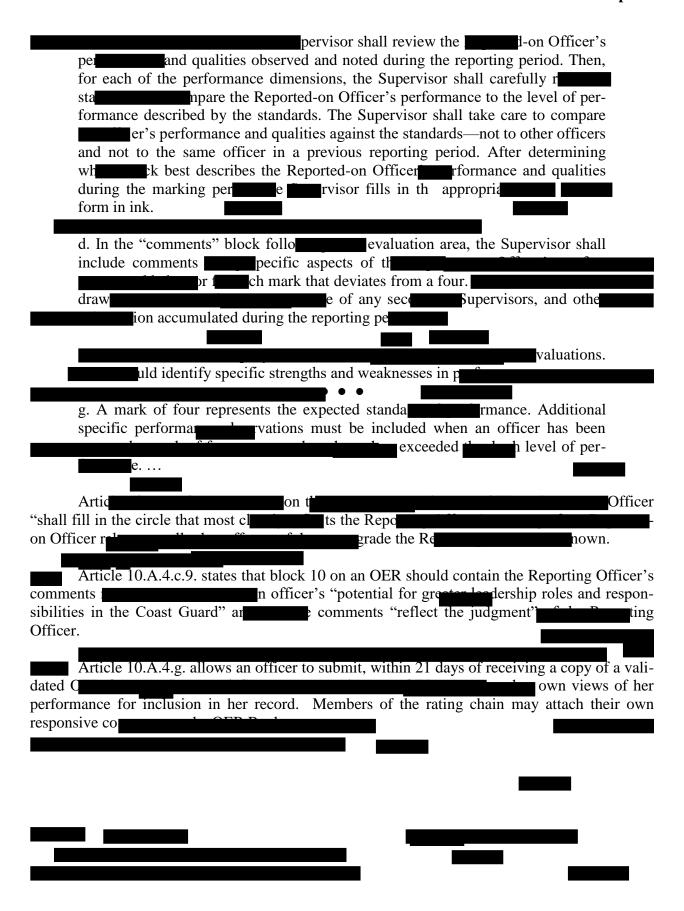




REPLY TO SUPPLEMENTAL VIEWS OF THE COAST GUARD APPI 013, the Board received the applicant's response to the supplemental views of the Coast Guard. She stated that the primary issue with regard to OER1 is that CDR W did not any supervisory responsibilities as required by Article 10.A.2.d.2. of the Personnel, which list the duties and responsibilities of the rating chain supervisor. The second issue is that since did not perform the roles and responsibilities of a supervisor, she should never have signed OER1 as the super Slauserted that she was told that visor and she should report to The applicant further asserted that she ant contended that she did not receive any direction or tasking from between the supervisor and the re not a violation of the su and OER3, t the reporting officer that the comment s pports the recommended marks, it is a violation for the summer to solicit observations f reporting officer that are bservations should unknow not be art of the consideration for the assignment of mar DER3 provided obserorting officer for vations that were unfounded and baseless causing the superstand bwer her marks for the two OERs. The applicant control of that because the reporting officer for OER2 and OER3 provided that were in the disputed OERs, the application of not have an independent review by all parties involved in preparing the OFR as required by Art A.2.a. of the Personnel Manual. The applicant reasserted her claim that the reporting flue sign or to change certain marks on the OE the reportin sition that she is not suggesting or arguing that her s on the disputed OERs were not good ones, but rather that she did not receive the marks that she deserged The applicant also continued to argue that her OERs shows contained a notation that she was p and responsibilities of a LCDR. APPLICABLE REGULATIONS

Article 10.A.T.b.1. of the Personnel Manual in effect in 2007 states that COs "must ensure accurate for the provided to all officers under the provided to a

Article 10.A.4.c.4. provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completant first 10.A.4.c.7.):



FINDINGS AND CONCLUSIONS

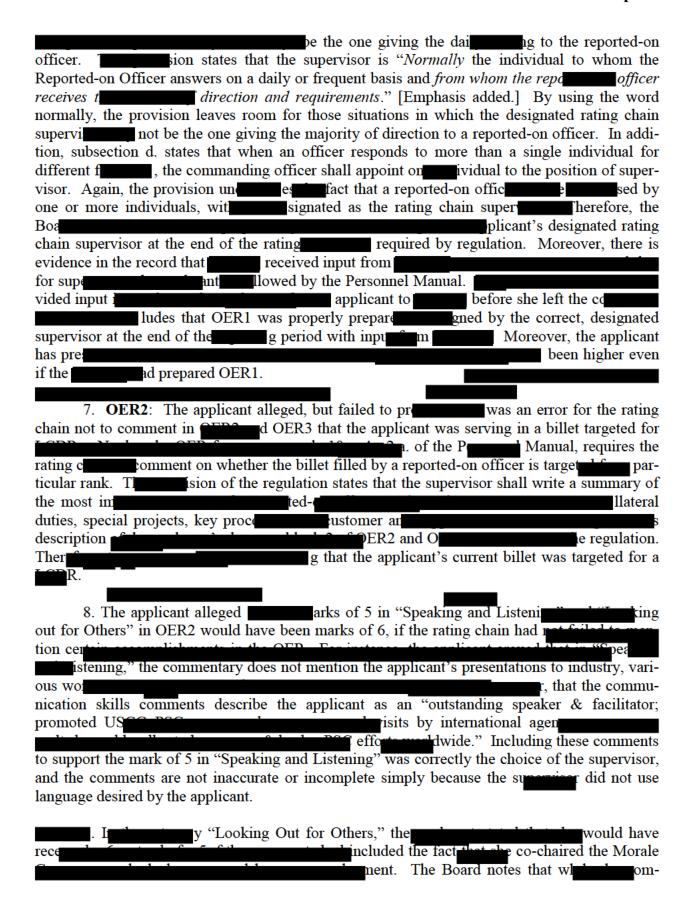
The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, and applicable law:

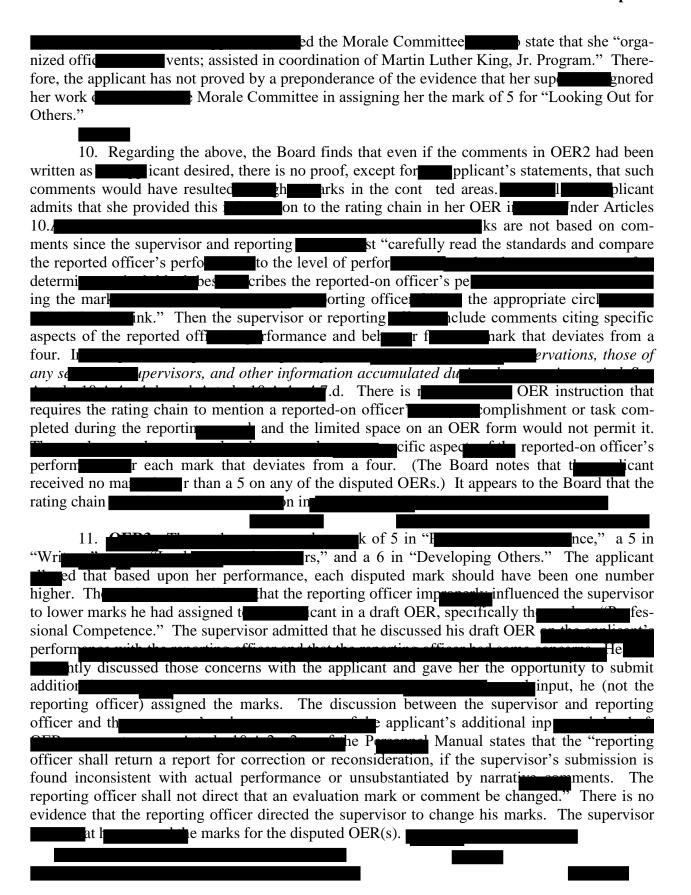
- 1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.
- 2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
- 3. The applicant alleged that three of her OERs are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust. Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations. To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation. 16
- 4. The applicant alleged that the three disputed OERs are erroneous or unjust because the supervisor who signed OER1 was not her supervisor, because OER2 and OER3 contain inaccurate comments and marks, and because the reporting officer for OER2 and OER3 unduly influenced the supervisor to lower the marks that he would have assigned to the applicant in OER3. For the reasons discussed below, the Board finds that the applicant has not proven by a preponderance of the evidence that the disputed OERs are erroneous or unjust.
- 5. **OER1**: The applicant's allegation that was not her supervisor for the period covered by OER1 because she received her daily tasking from is without merit. Article 10.A.2.b.2.c. gives the commanding officer the responsibility for designating and publishing the rating chain. The command's published rating chain for the period covered by OER1 shows that was the applicant's designated rating chain supervisor. There is nothing from the CO designating as the applicant's rating chain supervisor in the record.
- 6. It is clear from the evidence that had some responsibility for supervising the applicant. However, Article 10.A.2.d.1.a. of the Personnel Manual recognizes that a designated

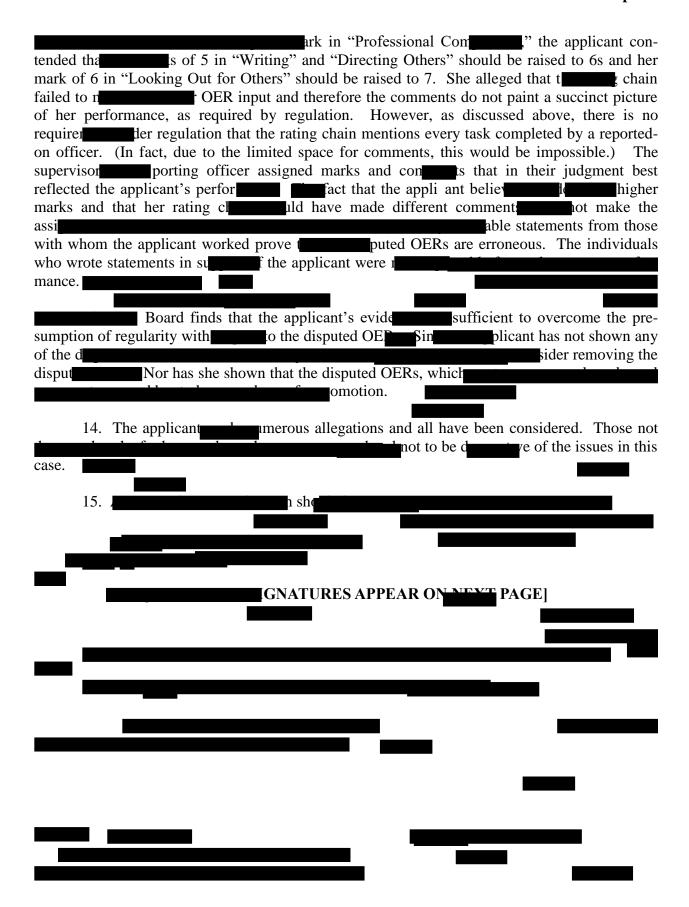
¹⁴ 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R.§ 52.24(b)).

¹⁵ Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁶ Hary v. United States, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in Lindsay v. United States, 295 F.3d 1252, 1259 (Fed. Cir. 2002).







ORDER

The application of military record is denied.

January 7, 2014 Date

