

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-087

██████████ ██████████ ██████████
LT

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on April 15, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 1, 2021, 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 (LT/O-3) on active duty, asked the Board to remove a comment on her detachment Officer Evaluation Report (OER) covering her performance from June 1, 2015, to April 21, 2016, when she was a Fixed Wing Aviator at an air station. She asked the Board to remove the underlined portion of the following comment which is included in the Reporting Officer’s¹ comments regarding the applicant’s potential: “Dedicated and extremely hard-working officer who made difficult decision to pursue promising career track via early PCS to [redacted]. Positive attitude and determination will ensure successful transition.”

The applicant argued that the comment on the disputed OER was a significant factor in her three subsequent non-selections for promotion to Lieutenant Commander (LCDR). She asked the Board to remove her non-selections for promotion and convene a Special Selection Board (SSB) to consider her for selection for promotion after her OER has been corrected. If selected for promotion by the SSB, she asked that her date of rank be backdated and that she receive all due back pay and allowances.

¹ OERs are normally prepared by a “rating chain” of three superior officers, including the Supervisor, who supervises the officer on a daily basis; the Reporting Officer, who is normally the Supervisor’s Supervisor; and the OER Reviewer, who ensures the OER is consistent and substantiated.

The applicant argued that the comment in the disputed OER should be removed because it is inaccurate. She explained that she received the disputed OER upon receiving a Permanent Change of Station (PCS) order, effective April 21, 2016, to a field unit in which she would be serving as a Liaison Officer. The applicant argued that the comment in the disputed OER is inaccurate because it improperly implies that her new assignment was a change in her primary career track as a Fixed Wing Aviator. The applicant also argued that the comment is inaccurate because it alludes to an unusual departure date from the air station. She maintained that her departure date from the air station was not abnormal and that it aligned with her assignment orders. To support her allegation, the applicant provided a copy of a Standard Travel Order which shows that she was assigned to the air station from December 15, 2012, to July 1, 2016. However, the order states that the reporting and departing dates were only estimates, and that reporting and departing dates could exceed 30 days on either side of the listed dates.

The applicant also argued that the comment in the disputed OER should be removed because it violates Coast Guard policy. She argued that the comment violates Coast Guard policy because it articulates a prejudicial implied deficiency. The applicant also argued that the comment violates Coast Guard policy because it is prohibited by the Coast Guard Officer Evaluation System Procedures Manual. Specifically, the applicant stated that the manual prohibits comments that imply a non-voluntary separation.

To support her application, the applicant submitted a memorandum from CAPT M, dated February 6, 2020, in response to her request for a detailed record review following her non-selection to LCDR. CAPT M is the Officer in Charge of Marine Inspection at the field unit to which she was transferred in 2016. CAPT M argued that his thorough record review revealed that the comment in the disputed OER is misleading and could possess negative implications on the applicant's accomplishments and character. He determined that the comment is not supported by the applicant's record and should be removed from the disputed OER. First, CAPT M argued that the comment incorrectly implies that the applicant's single non-aviation tour was a new career track. He argued that while the applicant had accepted a non-aviation billet at the time of the disputed OER, she was still assignable as a pilot. Second, CAPT M argued that the comment incorrectly implies an early departure from the air station. However, CAPT M argued that it is a matter of record that the applicant's tour was complete in 2016. CAPT M concluded by stating that the applicant is one of his most valued officers who has demonstrated proven leadership, intellect, and analytical skills critical for the success of the Coast Guard.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned as an ensign on May 21, 2008. In 2012, the applicant completed flight school, became a Fixed Wing Aviator, and was assigned to an air station.

On February 10, 2016, the applicant notified the Officer Personnel Management Division of the Personnel Service Center that she was voluntarily terminating her flight status. The applicant stated that she looked forward to serving in a new career field that would utilize her aviation experience.

On February 17, 2016, CAPT L endorsed the applicant's request to voluntarily terminate her flight status. He described the applicant as a dedicated officer who had proven to be an extremely valuable member of his team. CAPT L stated that he had complete confidence that the applicant would continue to be a valuable asset and leader in the Coast Guard. He recommended the applicant for any job that would afford her the opportunity to excel in a new specialty.

On February 22, 2016, the applicant received a Standard Travel Order for a PCS. The order shows that the applicant departed the air station on April 21, 2016, and arrived at a field unit on April 29, 2016. The applicant's new position was listed as Liaison Officer and she has continued to serve in this position since that time.

On May 9, 2016, the applicant received an Administrative Remarks form that stated that her flight status and Aviation Career Incentive Pay (ACIP) entitlement had been terminated. Further, she was notified that her Aviation specialty code had been removed from Direct Access.

Disputed OER

The applicant received a detachment OER for the period of June 1, 2015, to April 21, 2016, which is the disputed OER in this case. The OER shows that the applicant received five marks of 6, twelve marks of 5, and one mark of 4.² The applicant also received a mark in the fifth spot on the Comparison Scale, denoting "Excellent performer; give toughest, most challenging leadership assignments." The Reporting Officer's comments regarding the applicant's potential state the following:

Dedicated and extremely hard-working officer who made difficult decision to pursue promising career track via early PCS to [redacted]. Positive attitude and determination will ensure successful transition. Rapidly gained expertise in classified intel realm; utilized innovation and insight to improve quality of services to aircrews & outside customers; drove superb mission execution & significant improvements to vital LE prgm. Superb potential. Ready now for most challenging, high-vis assignments including join assign/aide posn/PG prgm. Will be tremendous asset to [redacted]. Has my highest recommendation for positions of increased responsibility & promo to O4 w/very best of peer group.

Before preparing the memorandum in this case, the JAG obtained the following statements from the applicant's Supervisor, Reporting Officer, and the Reviewer regarding the disputed OER.

- On June 11, 2020, CDR M, who served as the applicant's Supervisor during the reporting period, provided a declaration under penalty of perjury. He first addressed the applicant's contention that the disputed OER inaccurately implies that her new assignment was a change in her primary career track. CDR M argued that the disputed OER is factually correct because the applicant is no longer assignable as a Coast Guard aviator. He explained that during the applicant's more than three years at the air station, she struggled to upgrade from co-pilot to First Pilot. Further, after the applicant was designated as First Pilot, she failed several check rides. CDR M stated that as a result of the applicant's continued sub-standard performance, the unit Flight Examining Board and Operations Officer were

² On an OER form (CG05310A), Coast Guard officers are rated in eighteen different performance dimensions on a scale from 1 (worst) to 7 (best). A mark of 4 means that the officer has met the expected standard of performance.

discussing the possibility of convening an Aviator Evaluation Board to consider her aviation status. Instead, the applicant voluntarily rescinded her flight status. CDR M argued that once the applicant's aviator specialty code was removed from Direct Access, she could no longer be assigned to an aviation billet. CDR M also addressed the applicant's contention that the disputed OER is inaccurate because it alludes to an unusual departure date from the air station. He argued that the disputed OER is factually correct because the applicant's departure from the air station was earlier than the normal PCS rotation and earlier than her orders specified. CDR M stated that the applicant's orders to the air station assigned her to that unit from December 15, 2012, to July 1, 2016. He stated that as a result of the applicant's early departure from the air station, her command shortened her OER reporting period.

- On June 10, 2020, CAPT P, who served as the applicant's Reporting Officer during the reporting period, provided a declaration under penalty of perjury. He stated that at the time of the disputed OER, he was the Operations Officer at the applicant's air station and was responsible for overall pilot training. He stated that in this capacity, he was very familiar with the applicant's performance, which he described as "absolutely substandard." CAPT P stated that the applicant's substandard performance started in flight school where her scores were below average, and she required additional instructional flights. He stated that the applicant's substandard performance continued during her transition course in which she again required additional flights in order to complete. CAPT P stated that when the applicant finally arrived at the air station, she had several substandard flights. In fact, he stated that a dedicated training program was developed to help the applicant improve. CAPT P stated that after substantially more practice and instruction, the applicant was able to complete the First Pilot syllabus. However, he stated that the applicant failed her standardization check and was going to lose her First Pilot designation. CAPT P stated that the applicant was notified of the possibility of an Aviator Evaluation Board. Instead, the applicant voluntarily terminated her flight status. As a result, she lost her aviation designation and flight pay. Shortly thereafter, the applicant was reassigned to duties not involving flight operations and was transferred to a different station. CAPT P argued that once the applicant terminated her flight status and it was approved by PSC-OPM, there was no returning to aviation. As such, he argued that the applicant's new assignment was absolutely a primary career track transition. CAPT P also argued that the applicant's departure from the air station was unusual. He stated that the normal progression for an aviator is to complete at least two or more tours at air stations before going out of specialty. For substandard performers, he stated that it was common practice to get a year extension to try to upgrade or face an Aviator Evaluation Board. CAPT P stated that the applicant chose to terminate her flight status instead of either of those options.
- On June 13, 2020, CAPT L, the Reviewer for the disputed OER, provided a declaration under penalty of perjury. He stated that despite efforts by the entire Standardization Team at the air station, the applicant had significant trouble in attempting to upgrade to a new aircraft. CAPT L stated that while he thought the world of the applicant, she was not capable of further progression as required of an aviator. As a result of her performance, the applicant was facing an Aviator Evaluation Board. Instead, the applicant voluntarily terminated her flight status. CAPT L stated that after the applicant was counseled on

various career track change options, she enthusiastically accepted an offer as Liaison Officer at a field unit for early PCS. After the applicant accepted the offer, CAPT L stated that he agonized over how to be fair in the disputed OER while not coming out and clearly stating that the applicant terminated her flight status in lieu of facing an Aviator Evaluation Board. He stated that had he been more direct in the disputed OER, he believed it would have been an absolute end to the applicant's future chances for promotion and potential to succeed in another officer career track. CAPT L concluded by stating that he stands by the comments in the disputed OER.

VIEWS OF THE COAST GUARD

On October 1, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant failed to show that the Coast Guard committed an error or injustice. Specifically, PSC argued that the applicant failed to substantiate the claim that the disputed OER is prejudicial. Instead, PSC argued that the applicant's rating chain carried out their responsibilities to assess the applicant's performance and value to the Coast Guard in accordance with policy.

The JAG argued that the comments in the disputed OER are factually correct. The JAG stated that the applicant voluntarily chose to rescind her flight status and requested removal of her aviation specialty code in order to pursue a non-aviation career track. The JAG argued that the shift in the applicant's career track from aviation to non-aviation can be described as a transition. The JAG also argued that the applicant's PCS to the field unit was indeed before the "normal" rotation months of June and July.

The JAG also argued that the disputed OER does not violate Coast Guard policy. Specifically, the JAG argued that the disputed OER does not violate the Coast Guard Officer Evaluation System Procedures Manual. According to Article 2.B.3. of the manual, members of the rating chain may not "mention or allude to the fact that the Reported-on Officer was not selected by a board or panel." The JAG stated that while an Aviator Evaluation Board was being considered to review the applicant's performance, she voluntarily chose to rescind her flight status. As such, the JAG argued that the applicant's performance was not the subject of a board or panel.

Finally, the JAG argued that the applicant's OER did not include information that had no business being in the rating process. The JAG stated that the purpose of an OER is to appraise an officer's performance and potential. The JAG argued that if an officer is unable to maintain the necessary qualifications of their primary duties and designation, that is a proper area of discussion and feedback to include in an OER.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 22, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

Article 2.B.3. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1A, states that members of the rating chain shall not “mention or allude to the fact that the Reported-on Officer was not selected by a board or panel, e.g., references to non-voluntary retirement or non-voluntary separation.”

Article 2.F.4. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1A, discusses Section 10 of the OER as follows:

a. Requirement. The Reporting Officer comments on the Reported-on Officer’s potential for greater leadership roles and responsibilities in the Coast Guard.

b. No specific comments are required to support the Reporting Officer’s judgment in Section 9, Comparison and Rating Scales. However, a mark other than in the center three circles is strengthened considerably if there are comments in the report from which one could reasonably draw a conclusion why this particular officer has been identified as different from the majority of officers of this grade.

c. Content of Comments. Comments in this section reflect the judgment of the Reporting Officer and may include, but are not limited to, the following:

- [1] Qualification to assume the duties of the next grade.
- [2] Specialties or types of assignment, such as command, or post-graduate education for which the Reported-on Officer is qualified or shows aptitude.
- [3] Special talents or skills (or lack of) such as military readiness and warfare skills, seamanship or airmanship, etc., as applicable.

Article 4.A.1. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, discusses officer qualifications for Coast Guard Aviators in relevant part:

g. Suspension from Flight Status

Suspension from flight status is a formal restriction of flight duties which may develop into permanent termination of flight status.

...
(2) When Suspension May Be Imposed. Suspension orders may be imposed when:

...
(c) An Officer Voluntarily Requests Termination of Flight Status. Coast Guard aviators who voluntarily request termination of their flight status shall be immediately suspended from further flight duties by their commanding officer or administrative senior and shall be directed to submit an official request to Commander (CG PSC-OPM) via the chain of command. An advance copy shall be forwarded directly to Commander (CG PSC-OPM). A report on the case by a military flight surgeon, preferably Coast Guard, and a new e-Resume, shall accompany the request. The date that the flight status was suspended shall be included in the commanding officer’s endorsement.

...
o. Reassignment Upon Termination of Flight Status

Aviators whose flight status has been terminated as a result of actions taken under Articles 4.A.1.d., 4.A.1.g., or 4.A.1.h. of this Manual will be reassigned to duty or released as required by the needs of the service at that time.

p. Restoration to Duty Involving Flying

A former Coast Guard aviator will not normally be reinstated in flight status when the removal from flight status was a result of any of the following:

- (1) Voluntary request.

Article 5.A.3a. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M10003.A, states that biennial OERs for Lieutenants are due as of the last day of May on even numbered years.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.
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
3. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely because she has remained on active duty in the interim.⁴
4. The applicant alleged that her performance evaluation for the period June 1, 2015, to April 21, 2016, should be corrected because it is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation 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 it is erroneous or unjust.⁵ 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.⁶ To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely

³ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁴ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.⁷

5. The applicant did not challenge the disputed OER by filing a reply as allowed by Article 6.A. of the Coast Guard Officer Evaluation System Procedures Manual or by applying to the PRRB within a year of receiving the OER. Her failure to avail herself of these ways to challenge the accuracy of the OER is evidence that she accepted the evaluation as fair and accurate at the time.

6. The applicant argued that the comment in the disputed OER should be removed because it is inaccurate. The disputed comment states the following: “...who made difficult decision to pursue promising career track via early PCS to [redacted]. Positive attitude and determination will ensure successful transition.” First, the applicant argued that the comment is inaccurate because it improperly implies that she changed her career track upon accepting her PCS assignment. However, the Board finds that the applicant’s PCS assignment out of an aviation billet and, especially, her voluntary termination of her flight status constituted a primary career track change. The applicant’s record shows that on February 10, 2016, she voluntarily terminated her flight status and stated that she looked forward to serving in a new career field. According to Article 4.A.1.p. of the Officer Accessions, Evaluations, and Promotions Manual, if a Coast Guard aviator voluntarily requests termination of their flight status, the member will not normally be reinstated in flight status. In this case, the applicant has not provided persuasive evidence that her flight status has been reinstated. In fact, since the applicant received a PCS order to serve as a Liaison Officer on February 22, 2016, the applicant has continued to serve in that capacity and nothing in her record indicates that she has returned to aviation. To support her allegation, the applicant submitted a memorandum from CAPT M who stated that the applicant is assignable as a pilot. However, CAPT M did not provide any documentation to support this allegation. Further, CAPT M currently serves as the Officer in Charge of Marine Inspection at the applicant’s field unit and is not a member of the aviation specialty. Instead, CDR M and CAPT P, both of whom are members of the aviation specialty, maintained that the applicant was no longer assignable as a Coast Guard aviator.

The applicant also argued that the comment is inaccurate because it alludes to an unusual departure date from the air station. To support her allegation, the applicant provided copy of a Standard Travel Order which shows that she was assigned to the air station from December 15, 2012, to July 1, 2016. While the PCS order states that the reporting and departing dates were only estimates, the applicant has not provided any evidence to support her allegation that her departure from the air station on April 21, 2016, was not early. The record shows that she was transferred approximately two and one-half months earlier than expected because she was no longer qualified to perform the duties of her billet. Therefore, the applicant has not proven by a preponderance of the evidence that the disputed OER comment is inaccurate.

7. The applicant argued that the comment in the disputed OER violates Coast Guard policy. First, the applicant argued that the comment articulates a prejudicial implied deficiency. According to Article 2.F.4. of the Coast Guard Officer Evaluation System Procedures Manual,

⁷ *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).

Section 10 of an OER should include comments that reflect the judgment of the Reporting Officer regarding the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard. In this case, the comment in the disputed OER generally speaks to the applicant's potential for greater leadership roles and responsibilities. In fact, the comment compliments the applicant's positive attitude and determination, both of which are characteristics that positively reflect the applicant's potential for greater leadership roles and responsibilities in the Coast Guard. More specifically, the manual states that the comments in this section may discuss specialties or types of assignment for which the Reported-on Officer is qualified. In this case, the Reporting Officer's comment directly pertains to the type of assignment for which the applicant is qualified by indicating that she left aviation and would be pursuing another promising career track.

The applicant also argued that the comment implies a non-voluntary separation in violation of Coast Guard policy. According to Article 2.B.3. of the Coast Guard Officer Evaluation System Procedures Manual, a member's rating chain is prohibited from mentioning or alluding to the fact that the Reported-on Officer was not selected by a board or panel. However, in this case, the applicant's rating chain did not imply that the applicant was not selected by a board or panel. In fact, there is nothing in the applicant's record to suggest that she was not selected by a board or panel at the time of the disputed OER. While the applicant's command was considering an Aviator Evaluation Board to review her performance, the applicant voluntarily terminated her flight status before a board could convene. As such, there was no board or panel for the applicant's rating chain to mention or allude to in the disputed OER. Therefore, the applicant has not proven by a preponderance of the evidence that the disputed OER violates Coast Guard policy.

8. The applicant has not proven by a preponderance of the evidence that her detachment OER covering her performance from June 1, 2015, through April 21, 2016, is 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.⁸ Accordingly, her request for relief should be denied.

9. The applicant asked that her non-selections for promotion to LCDR be removed from her record and that the Board convene an SSB to determine if she would have been promoted with a corrected record. However, the applicant has not proven by a preponderance of the evidence that the disputed OER was erroneous or unjust when it was reviewed by the selection boards. Therefore, the Board finds no grounds for directing the Coast Guard to convene an SSB.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *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 LT [REDACTED] [REDACTED] USCG, for correction of her military record is denied.

October 1, 2021

[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

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*The member concurred in the decision but was unavailable to sign. Pursuant to 33 C.F.R. 52.11(b), two members constitute a quorum.