

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-132

██████████ ██████████ ██████████
LCDR

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 August 14, 2020, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 8, 2023, 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 Commander (LCDR/O-4) on active duty, asked the Board to correct her record by removing her Officer Evaluation Report (OER)¹ for the period June 1, 2016, to May 4, 2017, and replacing it with a Continuity OER² for the same reporting period. At the time the applicant applied to the Board for relief, she was projected to be “in zone” for selection for promotion to Commander (CDR/O-5) by the Promotion Year (PY) 2022 Commander Selection Board, which convened in 2021. Therefore, the applicant asked that if she was not selected for promotion in 2021, the Board expunge the non-selection result from her record. She also asked

¹ On a standard OER form, CG-5310A, the Supervisor evaluates a Coast Guard officer in 18 performance categories on a scale from 1 (worst) to 7 (best). A mark of 4 denotes the “standard” level of performance expected of all officers. The Supervisor also adds comments citing examples of performance that support the numerical marks. The officer’s Reporting Officer (usually the Supervisor’s Supervisor) then indicates whether he or she concurs with the Supervisor’s marks and comments, adds his or her own comments, and assigns the officer marks on a Comparison Scale and a Promotion Scale. The OER Reviewer has the option of concurring with the OER as submitted or adding comments to provide a significantly different perspective.

² A Continuity OER, CG-5310G, may be submitted in cases where an OER is required by Coast Guard policy but full documentation is impractical, impossible to obtain, or does not meet OES goals. Article 5.A.6. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A. An OER for continuity purposes may be required by Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) to implement judicial and administrative adjudications. Article 5.A.6.c. of the Coast Guard Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A. A Continuity OER includes a description of the officer’s duties but no evaluation marks or comments.

that if she was selected for promotion in 2022, the Board impose the date of rank and position on the Active Duty Promotion List (ADPL) that she would have held had she been selected for promotion in 2021 with corresponding back pay and allowances in alignment with her position on the ADPL.

The applicant explained that, in the spring of 2015 when she was still a lieutenant (O-3), she was slated by the O-1 to O-3 detailer in the Officer Personnel Management Branch (OPM) at Coast Guard Headquarters to fill a Senior Investigating Officer (SIO) billet at Sector S. The SIO serves as the Chief of the Investigations Division within the Prevention Department at Sector S, and the billet was becoming vacant during the upcoming summer transfer season in June and July 2015.

The applicant further explained that in the spring of 2015, approximately halfway through her pregnancy, she discussed the new assignment with the detailer and informed him that she was pregnant. Her baby was due at the end of July and she was allotted three days of leave for the birth itself, six weeks of maternity leave, and ten days to move to her new unit. To receive continuity of medical care, she needed to remain at her prior unit through the birth of her child, and so it was decided that she would not report for duty at Sector S until after her maternity leave ended. (She ultimately reported for duty at Sector S on October 1, 2015.)

The applicant stated that previously, when the detailer was making this assignment, the Head of the Prevention Department Head (PDH) at Sector S had been briefed on the applicant's past performance and had accepted the applicant's assignment to the SIO position. However, that PDH was transferring out of Sector S in the summer of 2015, before the applicant arrived, and the new PDH was LCDR S, who was fleeting up from being the Chief of the Inspections Division. When the detailer discussed her delayed arrival with LCDR S, LCDR S advised the detailer that he was unwilling to accept a delay in the arrival of the new SIO.

The applicant stated that when she reported to Sector S on October 1, 2015, she was assigned to serve as the Port State Control Branch Chief, instead of the SIO. Although both the Port State Control Branch (PSCO) Chief and SIO assignments were designated as O-3 billets, the applicant alleged that the two billets are not equivalent in terms of responsibility because the PSCO Branch Chief reported to the Chief of the Inspections Division, whereas the Chief of the Investigations Division reported directly to the PDH. To help explain this issue, the applicant submitted an organizational chart for the Prevention Department, which shows that the Prevention Department consists of three divisions—the Investigations Division, the Waterways Management Division, and the Inspections Division—and that the Inspections Division has three branches, one of which is the Port State Control Branch.

The applicant argued that the new PDH, LCDR S, who was second in her chain of command for the duration of her assignment at Sector S, "arbitrarily" prevented her from filling the SIO position because he "was not settled with [her] resulting report date due to [her] pregnancy." The applicant also asserted that LCDR S "made his frustrations known to [her] peer group at the unit at the time." She noted that her Supervisor from her immediately preceding assignment "verified via phone conversations with the detailer of [her] slated assignment as SIO

and separately with the [PDH] that [her] assignment as SIO was refused by the [new PDH] due to [her] pregnancy-related report date.”

The applicant also claimed that during a phone conversation, the new PDH justified his decision to decline the applicant’s assignment as SIO because of the gap her delayed arrival would create and noted that “he did not allow personnel outside of the Investigations shop to stand Investigations Officer (IO) duty.” This gave the applicant the impression that her delayed arrival at the unit would leave the Investigations Division short-staffed because there would be only one Chief Warrant Officer (CWO) to stand IO duty from July 31, 2015, to October 1, 2015. However, she later learned that there were three CWOs and one Lieutenant assigned to the Sector who were qualified to stand IO duty during the summer of 2015, and this was confirmed by the outgoing SIO, who departed the unit in 2015.

The applicant also argued that the LCDR S’s decision to decline her assignment as the SIO was the result of bias against her because she was pregnant. She claimed that “pregnancy-related initiatives” the Coast Guard has undertaken since 2016 demonstrated that changes were needed to ensure both minimal impact on the pregnant member’s career and minimal impact on unit operations. The applicant argued that recent changes in Coast Guard policy are “a positive solution,” but they demonstrate how the disputed OER was adversely affected by her pregnancy and maternity leave in comparison to the experiences of her peers who have taken maternity leave since the initiatives began and needed to assume slated assignments while pregnant or immediately postpartum.

Finally, the applicant argued that the way in which the LCDR S prevented her from assuming the SIO position supports her argument that the decision was made based solely on LCDR S’s bias against her as a pregnant member. The applicant claimed that had LCDR S’s decision “been strictly due to the needs of the service and the associated operational readiness of Sector [redacted]’s Prevention Department,” the unit would not have accepted the applicant’s temporary unavailability and LCDR S would have formally requested a resolution through OPM pursuant to Coast Guard policy.³

The applicant received two regular, annual OERs while assigned to Sector S. The first OER, which is not disputed, covers the reporting period from June 1, 2015, to May 31, 2016. (This period includes the end of her prior duty assignment and her maternity leave before she reported to Sector S on October 15, 2015.) The applicant disputed the second OER from her Sector S command, dated May 4, 2017, because she claimed it assessed her performance “lower than the previous [2016] OER.” The applicant argued that her 2016 OER was a more accurate reflection of her service record, “in part because it also accounted for work that [she] completed while at Sector [her prior unit], and because [she] was not balancing [her] duties with the stressors associated with [her] seeking failed avenues of relief” during the reporting period for her 2017 OER. The applicant

³ The applicant cited Article 7 of the Pregnancy in the Coast Guard Manual, COMDTINST 1000.9 (“Pregnancy could affect a command’s operational readiness by temporarily limiting a service member’s ability and availability to perform all assigned tasks. Commands that are uniquely challenged to meet mission because of the impact of an assigned service member’s pregnancy should initiate contact with Commander (CG PSC-OPM), Commander (CG PSC-EPM) or Commander (CG OSC-RPM). All service members are expected to balance the demands of a service career with their family responsibilities.”).

pointed to the discouragement she received from “Civil Rights resources” when she discussed raising her concerns about unfair treatment with her command. She claimed they also discouraged her from pursuing a discrimination claim. In fact, the applicant asserted that she was sexually harassed by an Employee Assistance Program (EAP) counselor. She argued that these “various forms of identified cultural stressors” may have negatively impacted her potential and performance on her 2017 OER.

The applicant also argued that her performance during her second evaluation period at Sector S supported a higher mark on the Comparison Scale in Block 5.b, and stronger comments from the Reporting Officer, LCDR S, in Block 5.d. Specifically, she noted that she had been selected by a six-member board and “awarded as a member of the national team Gold Sener Award for Investigative Excellence for IO casework.” In addition, she was selected for promotion to lieutenant commander (O-4) by a seven-member panel and was selected as the Coast Guard’s number one choice for Investigations Industry Training through a record review by a seven-member panel. Finally, she also emphasized her role in improving the Mother’s Room at the Sector and “championing the personnel under [her] supervision for formal recognition and unique professional development opportunities.” The applicant argued that,

A national level award, selection for promotion to the next rank, being the first ranked selectee to represent the organization with industry for a 1-year timeframe through a selection panel and taking active steps to improve the workplace for others are not indicative of a person in the organization of “average” [competency] as indicated in Block 5.b. (Comparison Scale) or someone ready to assume lateral assignments to the original slated position in the member’s current assignment as stated in Block 5.d. (Reporting Officer Comments) of [her] 2016-2017 OER.

The applicant asserted that her 2017 OER is an unfair and unjust representation of her service during the marking period because of the stress she experienced because of her attempts to find avenues for relief, combined with the PDH’s bias against her due to her pregnancy-related report date, which adversely affected the PDH’s ability to accurately assess the applicant’s potential. The applicant argued that her performance exceeded expectations for the duties assigned to her. She asked the Board to grant the relief she requested in order to provide “a more accurate review of [her] record for future assignments and promotion boards.”

In support of her application, the application included several written statements from the following Coast Guard officers and officials pertaining to the specifics of her assignment, as well as her performance and work ethic.

- The applicant’s Obstetrics and Gynecology physician, Dr. L, provided a letter to confirm that the applicant was under her care in 2015 for the duration of the applicant’s pregnancy. Dr. L stated that it is her “standard advice that patients do not fly after the 37th week of pregnancy (3rd trimester) ... [due to] health considerations and in the best interest of both the expectant mother and child.” Dr. L attested to the applicant’s third trimester beginning on or about May 7, 2015.
- LCDR B, who was the Coast Guard Detailer for Prevention officers from 2014 to 2015, stated that he recalls proposing the applicant for the SIO position at Sector S, but at the time, “there was a potential swap of billets between that unit and Sector [redacted]. The

billet assigned to [the applicant] was double encumbered due to the pending status of that IO billet, but I do not possess any records of that assignment.”

- The former PDH at Sector S from June 2012 to May 2015 attested that during the 2015 assignment cycle, she was notified of the proposed incoming officers who would assume the duties and responsibilities of SIO and Chief of the Inspections Division, which were both “critical to the Sector.” She stated that she was briefed on the proposal for the applicant to fill the SIO position, and she concurred with the proposed assignment based on the applicant’s “performance and previous assignments.” However, she transferred from Sector S before the applicant reported for duty.
- The applicant’s former Supervisor at her previous unit, the SIO of Sector N, stated that he supervised the applicant, who was an assistant SIO (ASIO) at Sector N, from the summer of 2014 until she departed in 2015. He stated that the applicant “thrived as ASIO and proved herself as a reliable, competent officer and assistant supervisor ready for future promotion and increased responsibilities.” He also noted that in March 2015, the detailer notified the applicant of her upcoming assignment as the SIO of Sector S in March 2015 and that he “was receiving pushback from the unit that she could accept the SIO position if she reported early but could not accept the position if she delayed her report date to accommodate her child’s delivery.” The former Supervisor spoke with the detailer, who confirmed that he was sending the applicant to Sector S as the SIO. However, the former Supervisor also spoke to the incoming PDH at Sector S “who confirmed that [the applicant] would not be the SIO.” (Emphasis added.)
- LCDR D, who was the SIO and Chief of the Investigations Division at Sector S from July 2012 to July 2015, stated the following.
 - As the SIO, LCDR D had tried to request additional support for the Investigations Division from two Chief Warrant Officers in the Inspections Division who were also qualified to stand marine investigations duty. At the time, the Chief of Inspections Division was LCDR S, who later fleeted up to assume the PDH position in July 2015 and who had declined the applicant’s transfer to the SIO position. According to LCDR D, LCDR S “did not want inspectors under his supervision at [Sector S] conducting any portion of Marine Casualty Investigations.”⁴
 - LCDR D also attested that when he transferred out of Sector S, the SIO billet was slated to become a full-time civilian billet. “However, due to the constant on-call (duty) nature of the billet, calculated to be approximately 20 hours per week of afterhours work, Sector [S] worked to swap the civilian billet with an active duty lieutenant inspections billet from [another Sector].”
 - LCDR D also stated that in the Spring of 2015, he had conversations with two lieutenants—the applicant and LT H—both of whom believed they were going to be assuming his position as the SIO at Sector S. LT H told him that she was also pregnant, and she and her member husband were returning from an overseas tour of duty and needed to be collocated. LCDR D told both the applicant and LT H to

⁴ In essence, LCDR H is saying that LCDR S did not want officers involved in inspecting vessels to certify their seaworthiness to also be involved in investigating vessel casualties/accidents.

contact the detailer to resolve the confusion. Ultimately, LCDR D stated, it was LT H who relieved him as SIO in July 2015.

- LCDR B, who served as the Assistant Chief of the Inspections Division at Sector S from mid-2012 to mid-2015, stated that he departed for his next assignment before the applicant reported for duty at Sector S. LCDR B stated that he worked directly for LCDR S for two years and shared an office with him. As a result, LCDR B often overheard LCDR S's phone calls or was the first person to discuss issues with LCDR S immediately after a call concluded. LCDR B recalled a conversation he had with LCDR S following a phone call with the applicant. LCDR B stated that "reporting dates were brought up as well as [the applicant's] pregnancy." LCDR B recalled that "LCDR S was frustrated that [the applicant] would not be reporting to the unit until late fall. The prevention unit at the time, which he was slated to take over, was losing all of its junior officers and he was concerned about potential gaps in billets."
- A Coast Guard civilian employee, Mr. H, who was responsible for managing the billets for all Coast Guard shore forces, provided a database print-out of the billeted positions for Sector S from 2015 to 2017. He noted that the billet "MARINE INSP/PSCO-JRNYMAN" was double encumbered for the 2015-2016 assignment year in that both the applicant and LT H were technically assigned to that billet during that timeframe. According to Mr. H, "[t]ypically, when a billet is double encumbered, it is done so to facilitate the detailer's assignment process and another billet in the Coast Guard is gapped while two individuals are in the same billet." Mr. H also noted that the billet "SENIOR INV OFFICER" was reprogrammed from another sector to Sector S on January 15, 2015 and remained vacant until 2016. Mr. H stated that in 2016, LT H was moved to that billet for the remainder of her assignment at Sector S. The applicant, according to Mr. H, remained in the Journeyman billet for the remainder of her assignment at Sector S. Mr. H also attested that "[t]hese types of internal personnel moves are conducted by the detailer through consultation with the unit."
- CDR J stated that in November 2016, the applicant contacted her to seek her advice "regarding her situation/a command concern at [Sector S]." At the time, CDR J led a regional chapter of the Women's Leadership Initiative (WLI), was a member of the WLI National Governance Committee, and had recently led a symposium focused on barriers to the retention of women in the Coast Guard. CDR J stated that she has a limited recollection of the conversation, but that she "did recommend to her that she try first to work with her command to find a way forward that would address her concerns, steering away from a divisive approach of threats to report..." According to CDR J, she has heard of reprisals for reporting or threatening to report discrimination and "was trying to steer" the applicant in a direction that would be successful but that was also least likely to result in reprisal. However, CDR J stated that today, her advice to the applicant would be different as the organization is moving forward to reject reprisal. CDR J stated that she supported the applicant's application to the BCMR because CDR J has seen "deliberate organizational changes that have begun to shift the culture of the [Coast Guard] – to such a degree at this point that [she thought] the refusal of assignment [the applicant] endured 5 years ago would not even have been discussed today, or at the very least, would have been stopped in its tracks." CDR J argued that the applicant entered her assignment "already feeling left behind and denied an opportunity that she earned through the assignment process." CDR J

also asserted that it was no surprise that the applicant's OER "suffered while working with this cloud hanging over her..." Finally, CDR J attested to the applicant's professionalism and noted that the applicant had reached out for help and advice to "salvage the situation and her career."

In addition to the written statements, the applicant also included excerpts from the January 6, 2017, report prepared by The George Washington University titled "Duty to People: Retaining Coast Guard Women" and excerpts from a 2019 RAND Corporation report titled "Improving Gender Diversity in the U.S. Coast Guard: Identifying Barriers to Female Retention." The applicant also provided a copy of the Commandant's Guiding Principles 2018-2022 and copies of ALCOAST 124/19 and 057/20, which addressed surge staffing augmentations to support parental leave and a yearly progress report from the personnel readiness task force, respectively. Finally, the applicant submitted copies of other records that are included in the Summary of Record below.

SUMMARY OF THE RECORD

The applicant graduated from the U.S. Coast Guard Academy and received her commission on May 17, 2006. On April 6, 2007, she was awarded the Coast Guard Special Operations Service Ribbon on April 6, 2007, for her participation from January 5 to March 6, 2007, in a Coast Guard campaign supporting the war on drugs. The applicant was promoted to Lieutenant Junior Grade (LTJG/O-2) on November 17, 2007. She was promoted to LT (O-3) on May 17, 2010. On April 15, 2011, the applicant received a Coast Guard Achievement Medal for superior performance as a District Training Officer from June 2008 to June 2011. The applicant received a Coast Guard Meritorious Unit Commendation as part of Sector N's response to a hurricane from August 23 to November 30, 2012.

Between May 17, 2006, to May 31, 2015, the applicant received annual OERs that consistently reflected marks for above-average to excellent performance. The applicant was also consistently recommended for promotion and recognized for her commitment to her duties and professional attitude.

On March 3, 2015, while serving as the ASIO of Sector N, the applicant was issued orders to effect a permanent change of station to Sector S. Her new billet was denoted as "MARINE INSP/PSCO-JRNYMAN" and her estimated report date to the Inspections Division was October 1, 2015.

On July 1, 2015, the applicant received a Coast Guard Commendation Medal for outstanding achievement while serving as the ASIO in the Prevention Department at Sector N from August 2011 to September 2015.

The applicant gave birth to her first child in early August 2015. She reported for duty as the Chief of Port State Control and Sector S on October 1, 2015.

On December 22, 2015, the Chief of the Inspections Division at Sector S, LCDR K, emailed the applicant and LT H, who was the SIO. LCDR K informed LT H that the applicant had "offered to augment the duty IO rotation as she just came off an IO tour [at Sector N], enjoys IO

work, and there is not a current need for her to stand duty with the [Port State Control] shop.” LCDR K clarified that the applicant would still be required to perform her “Branch Chief duties” and support the Port State Control shop’s inspection schedule when needed. LCDR K also instructed the applicant to incorporate herself into a duty rotation within the IO shop. LT H replied on December 24, 2015, and indicated that she would talk to the applicant when LT H returned from leave.

The applicant’s first OER from Sector S, dated May 31, 2016, shows that it covered the last three months of her assignment as the ASIO at Sector N and the first six months of her assignment at Sector S as “MARINE INSP/PSCO-JRNYMAN” from September 19, 2015, to May 31, 2016. She received twelve excellent marks of 6 and six superior marks of 7 in the various performance dimensions. The Reporting Officer, LCDR S, marked her as an “Excellent performer; give toughest, most challenging leadership assignments” on the Comparison Scale, in the fifth of seven possible marks ranging from “Performance unsatisfactory for grade or billet” to “Best officer of this grade.” Although the OER form did not include a Promotion Scale, the Reporting Officer stated that the applicant “earned [his] highest recommendation for promotion with best of peers.”

In August 2016, the applicant was selected for promotion to LCDR/O-4.

Disputed OER

The applicant’s OER for the period June 1, 2016, to May 4, 2017, covers her performance as “MARINE INSP/PSCO JOURNYMAN” at Sector S and is the disputed OER in this case. She received two above-average marks of 5, twelve excellent marks of 6, and four superior marks of 7. The applicant’s Reporting Officer, LCDR S, marked her as “One of the many high performing officers who form the majority of this grade” on the Comparison Scale, in the fifth of seven possible marks ranging from “Unsatisfactory” to “Best officer of this grade.” On the Promotion Scale, the Reporting Officer marked “Already selected to next pay grade.”

In the Reporting Officer Comments section, the Reporting Officer stated,

Well deserving of recent selection to Industry Training and recommended for promotion. Quick learner who has a distinct aptitude for marine safety mission; adapted to influx of new operations introduced into port including explosive material loadouts & first ever rail to vessel transfer of Liquefied Petroleum Gas. Excellent ability to build strong relationships & work with U.S./International industry partners. Thinks clearly while assessing risk; delivers sound recommendations to cmd using profound judgment. Admirable commitment to development & recognition of peers. Ready for challenging assignments including Inspection Div Chief & Senior Investigation Officer. Strong candidate for Maritime Transportation post graduate program. ROO demonstrated strong diplomatic, persuasive interpersonal skills during challenging situations with industry & agency partners.

On November 1, 2016, the applicant contacted two of the authors of the publication that would eventually be published on January 6, 2017, titled “Duty to People Retaining Coast Guard Women” via email. The applicant stated that completing the survey they created had made her “stop and think about [her] post-delivery experience that [she] had not really put together until [she] was filling out the comments section.” The applicant stated,

I had a baby last August (Due date was 30 July 15, I originally had an additional week of leave between maternity leave and transfer) and as soon as I completed my maternity leave, I transferred with a late report date of 01 Oct with no extra leave taken between maternity leave and PCS transfer time. I had been told by the detailer when I got the call the previous March that I was going to be in a job at the unit, but I was denied that assignment by the unit because of my delayed report date due to pregnancy and reported filling a different position...There were additional factors that complicated the situation, but I felt like I was being treated like I was the first woman in the Coast Guard to have a baby and transfer, and no one knew what to do with my situation.

The applicant asked if the project that the authors were working on had “any room for recommendations or discussion regarding third trimester pregnancy during transfer season and delayed reporting dates” or if they were aware of any other avenues available for the applicant to suggest policy changes. She also noted that she had not yet discussed her concerns with her command. However, the applicant stated that she wanted to approach the conversation with her command in a “manner of getting their input of what could be done in the future as opposed to the “worst case filing a civil rights complaint for denying [her] a job due to [her] pregnancy.”

On November 2, 2016, the applicant emailed a point of contact in the Coast Guard Civil Rights Directorate, Ms. N, to follow up on a conversation they had on October 28, 2016, and request points of contact Ms. N had for additional women’s policy resources. Ms. N responded the following day with the information requested and noted that the applicant “did not want to enter the Equal Opportunity (EO) process.” Ms. N described the EO process generally, and directed the applicant to Chapter 4 of the Coast Guard Civil Rights Manual, COMDINST M5350.4C. Ms. N also provided the applicant with CDR J’s contact information.

According to her application, the applicant spoke with CDR J by telephone on November 7, 2016, to discuss how the applicant should raise concerns about the impact the applicant’s pregnancy had on her assignment with her command. In an email dated the following day, November 8, 2016, CDR J stated that she hoped the applicant would be able to “come to some sort of agreement” with her command that would address her concerns. CDR J also attached a copy of the white paper titled “Improving Gender Diversity in the U.S. Coast Guard Identifying Barriers to Female Retention.” The applicant responded to CDR J on the same date and thanked her for forwarding the white paper and for CDR J’s “time and thoughts.” The applicant stated that she was going to “heed” CDR J’s advice.

On July 10, 2017, the applicant received a Coast Guard Meritorious Team Commendation Medal as a member of the Port State Control Examination Team from July 21-22, 2016.

Subsequent Assignments/OERs

The applicant was selected for Investigations Industry Training by the Industry Training Consolidated Postgraduate/Advanced Education Selection Panel on November 1, 2016. She attended the training immediately following her short-turn assignment at Sector S. The applicant received a Duty Under Instruction (DUINS) OER for the corresponding reporting period May 5, 2017, to June 26, 2018. The OER reflects that the applicant received a passing grade in all of her courses. The Program Manager stated that the applicant “[r]eceived well deserved promotion to LCDR. Highly recommended for positions of increased responsibility including MSU [Marine Safety Unit] CO & PDH.”

The applicant was promoted to LCDR (O-4) on July 1, 2017.

The applicant received her first OER at her new unit for reporting period June 27, 2018, to April 30, 2019. She received two above-average marks of 5, five excellent marks of 6, and eleven superior marks of 7. The applicant's Reporting Officer marked her as "One of few distinguished officers" on the Comparison Scale, in the sixth of seven possible marks ranging from "Unsatisfactory" to "Best officer of this grade." On the Promotion Scale, the Reporting Officer marked "Promote w/top 20% of peers." The Reporting Officer stated that the applicant was a "great candidate for diversity of leadership positions including MSU CO or XO, Sector PDH, CID [Chief of Inspections Division] or SIO positions."

The applicant received an OER for the reporting period May 1, 2019, to April 30, 2020, for her performance as Marine Casualty Program Team Lead. She received three excellent marks of 6 and fifteen superior marks of 7. The applicant's Reporting Officer marked her as "One of few distinguished officers" on the Comparison Scale, in the sixth of seven possible marks ranging from "Unsatisfactory" to "Best officer of this grade." On the Promotion Scale, the Reporting Officer marked "In-zone reorder" and noted in the comment section that the applicant was highly recommended for promotion to CDR and in-zone reordering. The Reporting Officer also stated that the applicant was an "[i]deal candidate for follow-on senior Prevention positions with greater authority & responsibility including positions as MSU CO/XO & Sector PDH."

On October 6, 2019, the applicant filed a complaint with a State Board of Behavioral Sciences concerning unprofessional behavior she was subjected to by a Licensed Marriage and Family Therapist. In her complaint, the applicant stated that she had sought counseling through the Coast Guard Employee Assistance Program and met with the therapist on February 2, 2017. The applicant claimed that during the counseling session, the therapist was "extremely unprofessional, particularly, he suggested adultery as a coping strategy." The therapist also allegedly told her that "some people are miserable for decades and that since [the applicant] only had been in a toxic work environment for a year that it was actually not that bad." The applicant also alleged that the therapist told her he could not help her as a counselor, but that he could help her "as a friend." Finally, the applicant stated that she believed the therapist mocked her by saluting her when she entered his office in uniform.

In a letter dated October 30, 2019, the State Board of Behavioral Sciences notified the applicant that they had reviewed the complaint she filed against the Marriage and Family Therapist. The letter stated that the Board of Behavioral Sciences sympathized with the behaviors she encountered, but "it was determined in this instance, while the behaviors may have been unprofessional, the actions did not rise to the level of gross negligence required for enforcement actions..."

VIEWS OF THE COAST GUARD

On February 25, 2021, 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).

First, PSC and the JAG pointed out that the applicant did not file a Reported-on Officer Reply to her 2017 OER, as authorized by Coast Guard policy, and did not submit an application to the Personnel Records Review Board (PRRB) to request a correction. In addition, she did not request an exception to have LCDR S or another officer removed from her rating chain. PSC concluded that the applicant's rating chain completed the disputed OER in accordance with the applicable Coast Guard policy and that the OER did not contain prohibited comments.

The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for correction of an OER outlined in *Hary v. United States*.⁵ The *Hary* standard requires a showing by competent evidence of (1) a misstatement of a significant hard fact; (2) a clear violation of specific objective requirement of statute or regulation; or (3) factors adversely affecting the ratings which had no business being in the rating process.⁶ As to the first prong, the JAG argued that the applicant did not allege a misstatement of significant hard fact in the disputed OER or provide any evidence of such. The JAG stated that while the applicant alleged bias on the Comparison Scale and in the Reporting Officer's comments, she did not point to "specific, factual error." The JAG asserted that the "judicial system has recognized that the evaluation system is not a clinically objective one."⁷ The JAG also noted that Coast Guard policy permits the Supervisor to draw on "observations" and "other information" and the Reporting Officer to provide "judgment."⁸ Therefore, the JAG argued that the Reporting Officer's judgment on the applicant's potential and his recommendations for the applicant's future positions were within the discretion afforded him by policy.

The JAG also argued that there is no clear violation of a specific objective requirement of a statute or regulation to establish that the disputed OER was erroneous or unjust. The JAG argued that as previously stated, "subjective observations and judgments are a part of the evaluation process and in keeping with the guidelines described by OES Procedures Manual and Officer Accessions Manual." The JAG also noted that the OER was validated by CG PSC-OPM-3 and did not contain prohibited remarks.

Finally, the JAG argued that the applicant placed the most emphasis on the third prong of the *Hary* test in the form of allegations against the PDH, LCDR S, of bias or discrimination. The JAG argued that the applicant's "assertions remain allegations and are insufficient to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correct, lawfully, and in good faith."⁹ The JAG also noted that while the applicant showed that she "established communications with the CG Civil Rights Directorate," she did not pursue a discrimination investigation that would have shed light on what might have occurred in her workplace. The JAG also alleged that the harm alleged by the applicant, the deprivation of the SIO position, "was repeatedly offered and voluntarily declined by the Applicant." The JAG asserted that this fact was corroborated by the unit's SIO at the time, LT H, in a telephone conversation between LT H and Coast Guard Legal on February 16, 2021. The JAG claimed that the applicant

⁵ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980)

⁶ *Id.*

⁷ The JAG quoted *Muse v. United States*, 21 Ct. Cl. 592, 605 (1990) ("Perfect objectivity in the rating process cannot be expected or even hoped for.") (quoting *Guy v. United States*, 222 Ct. Cl. 427, 433 (1979)).

⁸ Articles 3.e.2. and 4.E.2.h.1., Coast Guard Officer Evaluation System Procedures Manual.

⁹ Citing *Muse*, *supra* n. 4, at 600. (internal citations omitted).

declined to assume the SIO position on the basis that her assignment as the Port State Control Branch Chief “offered greater personnel management responsibility.” Therefore, the JAG argued, the applicant “failed to demonstrate the existence of exterior factors adversely affecting the rating process...” Because no *Hary* factor was been offended, the JAG argued, the applicant did not overcome the presumption that Coast Guard administrators discharged their duties correctly, lawfully, and in good faith.

In support of the advisory opinion, the JAG attached a November 17, 2020, Declaration signed by LCDR S, who was the PDH and the applicant’s Reporting Officer, under penalty of perjury. LCDR S has since retired from the Coast Guard as a CDR and is working as a civilian Security Specialist at Sector S. LCDR S recalled that when he assumed the duties of PDH in May 2015, the SIO billet was in the process of being converted back to an active duty LT position from a civilian position. As a result, LCDR S stated, that he was informed by the detailer that two incoming LTs, the SIO and Port State Control and Facilities Branch Chief, would be placed in the same billet until the SIO billet was converted. LCDR S attested that he spoke to both the applicant and LT H about their “qualifications, professional goals, leadership concerns, and the open billets.” He noted that LT H was pregnant at the time and asked to arrive at Sector S in June 2015 so she could work until September 2015, when she would go on maternity leave. LCDR S recalled that the applicant was also pregnant and that she wanted to remain at Sector N until she delivered her baby and then report to Sector S in late September 2015. LCDR S stated that because “the current SIO was departing in May and the Chief Warrant Officer in June, I informed both LTs that [LT H] would be going to the SIO position so she could cover the division over the summer with the incoming CWO in June too, and [the applicant] would be Chief, PSCO.”

LCDR S also attested that he informed the applicant and LT H that if the applicant wanted to switch to SIO during her tour, she could “work that out” with LT H. According to LCDR S, LT H offered to switch positions with the applicant after their first year, but the applicant declined the offer. LCDR S also stated that upon selection to LCDR, the applicant told him that she had previously spoken with the detailer about applying for Industry Training and an early transfer. The applicant was given a positive command endorsement for the early transfer in order to make her eligible to attend Industry Training.

LCDR S attested that the applicant was not discriminated against based on her pregnancy. First, LCDR S stated that the applicant’s evaluations were “based on her input and performance as observed by the chain of command during each marking period.” LCDR S also stated that the applicant was evaluated according to the standards indicated on the OER forms, and she was provided mid-period counseling by her Supervisor at which time she was advised of her strengths as well as areas needing improvement. LCDR S also attested that the applicant received counseling on several occasions during her last marking period in 2017 from her Supervisor and from LCDR S himself because she was “feeling overwhelmed at work and we intervened to help.” LCDR S stated that the applicant was provided with solutions to alleviate her workload. Finally, LCDR S noted that LT H was also pregnant at the time she assumed the SIO position. He explained that the “needs of the unit and the personal needs of the incoming personnel were the determining factors of who went to that billet.”

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 16, 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

Chapter 1.A.1. of the Coast Guard Officer Evaluation System Procedures Manual (OER Manual), PSCINST M1611.1C, states the following regarding the responsibilities of the Reported-on Officer in relevant part:

k. Assume ultimate responsibility for managing their own performance, notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough, and that OERs and associated documentation are timely and accurate.

Chapter 1.A.3.b. of the OER manual states the following regarding the responsibilities of the Reporting Officer in relevant part (emphasis added):

[1]. Evaluate the Reported-on Officer based on direct observation, the Officer Support Form (OSF), Form CG-5308, other information provided by the Supervisor, and other reliable reports and records.

[2]. Prepare Reporting Officer section of the OER and describe the overall potential of the Reported-on Officer for promotion and special assignment such as command.

[3]. Ensure the Supervisor fully meets responsibilities for administration of the [Officer Evaluation System]. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments (if applicable). The Reporting Officer shall not **direct** that an evaluation mark or comment be changed, unless the comment is prohibited under Article 5.I. of reference (a) and Article 4.B. of the Manual.

Chapter 4.B.11. of the OER manual states the following regarding comments that a member's rating chain is **prohibited** from including in relevant part:

Discuss Reported-on Officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.E.7. and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of this Manual.

Chapter 4.F. of the OER manual states the following regarding Reporting Officer comments in relevant part:

3. Section 5, Reporting Officer Comments

a. This section provides an opportunity for the Reporting Officer to comment on the Supervisor's evaluation. Reporting Officers are encouraged to cite other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period. By doing so, the Reporting Officer gives a more complete picture of the Reported-on Officer's capabilities.

...

d. No specific comments are required to support the Reporting Officer's judgment for the Comparison, Promotion, and Rating Scales.

e. 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.

Chapter 17.A. of the OER manual states the following regarding Reported-on Officer replies to OERs in relevant part:

1. The Reported-on Officer may reply to any OER. Replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. A Reported-on Officer OER reply does not constitute a request to correct their record.

2. Content of Replies. Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 5.I. of Reference (a) and Article 4.B. of this Manual apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.

...

4. Timeline for Submission of Replies to Supervisor. Replies must be submitted to the Supervisor within 21 days from receipt of the validated OER from CG PSC-BOPS-C-MR, Military Records Section. Replies based upon receipt of local copies will not be accepted.

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. 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.¹⁰

3. The applicant alleged that her OER dated May 4, 2017, should be removed and replaced with a Continuity OER 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.¹¹ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly,

¹⁰ *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).

¹¹ 33 C.F.R. § 52.24(b).

lawfully, and in good faith” in preparing their evaluations.¹² 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 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.¹³

4. The applicant did not challenge the disputed OER by filing a reply as allowed by Article 17.A.1. of the Coast Guard 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 accurate at the time.

5. The applicant argued that the disputed OER was erroneous and unjust due to the bias and discrimination she was subjected to by her Reporting Officer, LCDR S. She claimed that LCDR S “arbitrarily” prevented her from filling the SIO position due to bias against her because her pregnancy and maternity leave delayed her report date. The applicant also claimed that LCDR S’s justification for his decision—avoiding being short-staffed in the Investigations Division—was false because there were three other officers assigned to the Sector in the summer of 2015 who were qualified IOs and could have filled in. However, LCDR S attested, under penalty of perjury, that the Investigations unit would in fact experience a gap in personnel due to the applicant’s delayed reporting date because the prior SIO departed in May 2015 and the CWO departed in June 2015. LCDR S also attested that “[t]he needs of the unit and the personal needs of the incoming personnel were the determining factors” for who would ultimately fill the SIO position. The applicant did not provide any evidence to suggest that it was improper for LCDR S to prioritize the needs of the unit and incoming personnel or that doing so was unwarranted. Additionally, the officer who assumed the SIO position at Sector S in the Summer of 2015, LT H, was also pregnant at the time but available to report for duty in July. Accordingly, the applicant has failed to prove by a preponderance of the evidence that LCDR S harbored any bias or malice against her or that she was denied the SIO position based on her pregnancy.

Furthermore, the applicant reported for duty at Sector S on October 1, 2015. The disputed OER covered reporting period June 1, 2016, to May 4, 2017. The applicant did not contest the OER she received for June 1, 2015, to May 31, 2016, and claimed in her application that the earlier OER was a more accurate reflection of her performance. The applicant has not provided any evidence that would suggest that the circumstances surrounding her late arrival to the unit and her assignment to the PSCO billet instead of the SIO billet had a clear, adverse impact on the disputed OER.

6. As previously mentioned, the applicant argued that the disputed, 2017 OER was erroneous because her 2016 OER was a more accurate reflection of her service record. However, this Board has long held that the fact that an applicant has received better OERs before or after the

¹² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹³ *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).

reporting period for the disputed OER is not evidence that the disputed evaluation does not accurately reflect her performance during the reporting period.¹⁴

7. The applicant also appeared to admit that her performance was not as good between June 1, 2016, and May 4, 2017, by arguing that the disputed OER might have been impacted by the discouragement she received from “Civil Rights resources.” Specifically, the applicant claimed she was discouraged from filing an EEO complaint and was sexually harassed by the therapist she met with through the EAP. She argued that these “various forms of identified cultural stressors” may have negatively impacted her potential and performance as evaluated on her 2017 OER. However, the applicant’s argument, on its face, is speculative, vague, and unpersuasive.

Furthermore, according to Article 1.A.1.b. of the OER manual, the Reported-on Officer is ultimately responsible for managing their performance. This responsibility includes “determining job expectations, obtaining sufficient performance feedback from the Supervisor during the period, and using that information to meet or exceed standards.”¹⁵ LCDR S attested that the applicant was counseled multiple times during the reporting period by her Supervisor and by LCDR S himself and provided with solutions to improve her performance in certain areas.

8. The applicant also argued that her performance during the reporting period for the 2017 OER supported a higher mark on the Comparison Scale in Block 5.b, and stronger comments from the Reporting Officer, LCDR S, in Block 5.d. However, the applicant’s argument is a misapplication of Coast Guard policy. Coast Guard policy expressly recognizes that block 5 marks represent a *relative ranking* of the Reported-on Officer compared to all other officers of the same grade whom the Reporting Officer has known throughout his career.¹⁶ The OER manual also provides that the Reporting Officer is not required to provide “specific comments” to support his “judgment” for the Comparison, Promotion, and Rating Scales.¹⁷ Here, LCDR S attested that the applicant’s evaluation was based on her OER input and performance as observed by the chain of command during the marking period. LCDR S also stated that the applicant was evaluated according to the written standards printed on the OER form. Therefore, the applicant has failed to prove by a preponderance of the evidence that the disputed OER is erroneous or unjust because the marks and comments assigned in block 5 assigned by LCDR S are less laudatory than the applicant believes they should have been.

9. The applicant also argued that developments in Coast Guard policy concerning pregnant service members supported her request to expunge the disputed OER. However, the applicant did not provide any evidence that would suggest that the marks or comments the applicant received on the disputed OER would have been any different had the organizational changes occurred prior to completion of her evaluation.

¹⁴ *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) (“[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.”).

¹⁵ Chapter 1.A.1. of the OER manual.

¹⁶ Chapter 13.D.5.b. of the OER manual.

¹⁷ Chapter 4.F.3.d. of the OER manual.

10. The Board therefore finds that the applicant has not proven by preponderance of the evidence that the disputed OER is erroneous or unjust. There are no grounds for removing or correcting the disputed OER because she has not proven by a preponderance of the evidence that it was adversely affected by a “misstatement of a significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.¹⁸

11. In the event that the applicant was not selected for promotion to CDR as of the date of the Board’s decision, she asked the Board to convene a Special Selection Board (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 or her other records contained a material error when it was reviewed by the selection board. Therefore, the Board finds no grounds for directing the Coast Guard to convene an SSB.¹⁹

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁸ *Hary, supra* n. 11 at 708. 1. The Board also notes that the applicant did not request correction of the disputed OER but its removal. In BCMR Docket No. 151-87, the Board found that an OER should “not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” In this case, the applicant has not provided any evidence that the entire report was adversely by prejudice or animus. Therefore, the Board finds that the disputed OER should remain unchanged.

¹⁹ 14 U.S.C. § 263 (requiring “material error of fact or material administrative error” to grant an SSB).

ORDER

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

June 8, 2023

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
[REDACTED] [REDACTED] Date: 2023.06.20 13:49:13 -04'00'

[REDACTED] [REDACTED] Digitally signed by [REDACTED]
[REDACTED] [REDACTED] Date: 2023.07.07 09:41:19 -04'00'

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