

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2021-004**

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LT

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**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 October 6, 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 October 21, 2022, 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 correct her record by upgrading three adverse Officer Evaluation Reports (OERs) covering reporting periods from April 2017 to June 2018 and retroactively promoting her to LT for Promotion Year (PY) 2019.

The applicant, through counsel, stated that following graduation from Officer Candidate School (OCS) in November 2015, she was assigned to a Marine Safety Unit (MSU). Upon arriving at the MSU, she began working to attain Barge and T-Boat (small passenger vessel) qualifications. In May 2016, the applicant discovered she was pregnant and notified her Supervisor. While pregnant, she served as a Coast Guard Mutual Assistance Representative and attained an in-unit Command Duty Officer (CDO) qualification. Due to health and hazard conditions associated with barge inspections, the applicant shifted her focus to attaining the T-Boat Inspector competency in accordance with directives from her Supervisor, personal physician, and Safety and Environmental Health Officer. Before going on maternity leave in December 2016, the applicant attained her T-Boat Inspector qualification.

After returning from maternity leave in April 2017, the applicant was promoted to Lieutenant Junior Grade (LTJG) and transferred to the Port State Control Branch at the MSU. As a result of the transfer, the applicant reported to a new Supervisor, LT A. The applicant claimed that she previously had a friendly relationship with LT A, but that after the transfer, LT A became increasingly hostile towards her. For example, LT A criticized the applicant for a leave request

that had been approved by her predecessor. Specifically, LT A told the applicant that she had fewer qualifications and lower OER scores than her peers. The applicant also alleged that LT A inexplicably changed the priority in which she was to obtain certain qualifications. She stated that when she reported to the Port State Control Branch, she dedicated significant time to obtaining her Foreign Freight Vessel Examiner qualification. However, LT A instructed the applicant to focus on obtaining the Port State Control Examiner and Foreign Tank Vessel Examiner qualifications instead.

The applicant argued that she was not selected for promotion to Lieutenant in 2018 and thus excluded from the PY 2019 LT Active Duty Promotion List (ADPL) due to the adverse OERs she received during her tour at the MSU. The applicant noted that she was a member of a 69-officer Officer OCS graduating class that was commissioned on November 24, 2015, and out of that class, she was one of only five members who were not included in the PY2019 ADPL. The applicant argued that given the high rate of selection for promotion among her OCS class, she would have almost certainly been selected for promotion had her OERs accurately reflected her service. The applicant was selected for promotion to LT in PY2020, instead.

The applicant's first LTJG OER was dated July 31, 2017. It is the first disputed OER in this case. She argued that the OER is erroneous because the low marks conflict with both the comments and her actual performance. Specifically, her Supervisor assigned her marks of 4 in the performance dimensions of "Professional Competence" and "Responsibility." The applicant argued that the OER contains no comments that support these low marks. Instead, she argued that the comments applauded her for seeking opportunities to enhance her personal and professional skill set. For example, the comments state the following: "zealously sought opportunities to enhance personal/professional skill set; pursued graduate program on own time while attaining marine inspection quals."

The applicant's second LTJG OER was dated January 31, 2018. Similarly, she argued that the OER is erroneous because the low marks conflict with both the comments and her actual performance. Specifically, her Supervisor assigned her marks of 4 in the performance dimensions of "Professional Competence" and "Responsibility" and marks of 5 in the performance dimensions of "Initiative," "Judgment," and "Professional Presence." The applicant argued that these low marks conflict with the extremely complimentary comments. Specifically, the applicant cited the following comments: "[The applicant] adhered to the highest standards of professionalism," "brought great credit to unit," "excellent representation of the Coast Guard," and "expeditiously adapted to critical conditions."

The applicant's third and final LTJG OER was dated June 1, 2018. The applicant argued that the OER is erroneous because she received a mark of 5 in the performance dimension of "Professional Competence." The applicant argued that this mark is erroneous because she obtained two additional qualifications during the review period. The applicant noted that these were the final two qualifications required for an Apprentice Marine Inspector.

The applicant also argued that the disputed OERs are unjust. First, she argued that the disputed OERs are unjust because her Supervisor was biased against her. To support her allegation,

the applicant argued that LT A deviated from Coast Guard policy by arbitrarily giving her low marks that did not reflect her performance.

The applicant also argued that the disputed OERs are unjust as demonstrated by her accomplishments at the MSU. The applicant stated that while she was stationed at the MSU, she obtained seven competencies and attended five C-Schools. She also stated that she received several awards in recognition of her service including a Letter of Commendation, a Team Commendation, an Armed Forces Service Medal, and a Humanitarian Service Medal.

The applicant also argued that the disputed OERs are unjust because her Supervisor refused to provide her with meaningful counseling in violation of Coast Guard policy. First, the applicant contested the July 31, 2017 OER that indicates she received mid-period counseling on June 13, 2017. The applicant stated that while she met with LT A on that date, they did not discuss her performance or OER. In fact, the applicant argued that LT A ignored her request for mid-period counseling during the review period. Similarly, the applicant argued that counseling did not occur for the June 1, 2018 OER. She argued that while that OER shows that she received counseling on April 17, 2018, LT A did not attend that counseling session. Instead, the applicant argued that only the Chief Warrant Officer was present and advised her that she was doing a fine job. As a result, the applicant argued that she was not provided with any direction or guidance that would have allowed her to ascertain her level of performance, obtain feedback, and determine areas for improvement before her performance evaluations.

Finally, the applicant argued that the disputed OERs are unjust as evidenced by her subsequent OERs. She stated that after she was reassigned to a different Sector as a Facilities Inspection Supervisor, her OERs dramatically improved. In fact, the applicant alleged that she received the highest marks available in nearly all performance dimensions.

### **SUMMARY OF THE RECORD**

The applicant enlisted as a Yeoman in the Coast Guard on May 13, 2008, and served as an enlisted member for seven years. In 2015, the applicant applied for and was accepted into OCS. The applicant graduated from OCS and was commissioned as an Ensign/O-1 on November 24, 2015.

On January 8, 2016, the applicant reported to the Domestic Branch of an MSU as an Apprentice Marine Inspector. She did not submit copies of her Ensign OERs.

The applicant was on maternity leave from December 16, 2016, through April 7, 2017.

On May 24, 2017, the applicant was promoted to LTJG and transferred to the Port State Control Branch of the MSU as an apprentice marine inspector.

While serving at the Port State Control Branch of the MSU, the applicant obtained six qualifications and attended the following courses: Marine Inspection, Waterways Management, Crude Oil Washing/Inert Gas, and Chemical Tanker Safety.

*Disputed OERs**April 1, 2017 – July 31, 2017*

On September 26, 2017, the applicant received her first OER while assigned to the Port State Control Branch for the period of April 1, 2017, to July 31, 2017. The applicant indicated that she had been counseled by her Supervisor on June 13, 2017. For the section evaluating her performance of duties, on a scale from 1 (worst) to 7 (best), she received one “standard” mark of 4 for “Professional Competence,” four “above-standard” marks of 5, and two “excellent” marks of 6. The comments for this section are as follows:

Admirable attention to detail; astutely ID'd small pax vsl vital system was not constructed to reg standards; issued def requiring removal of unauthorized equip & replacement w/approved hose, quickly compelled compliance w/regs/ensured safety of 32 pax. Skillfully managed \$4K morale budget & conducted 2 audits; ensured funds were allocated IAW policy & supported 75+ mbrs, promoted esprit de corp. Simplified accountability of unit personnel/dependents during implementation of HURCON 4; updated recall list, provided ombudsman contact info to 80+ mbrs & 150 dependents, est. 6-hr comms check w/ command center; actions increased crew & family readiness. Effortless transition from domestic to foreign vsl insp; leveraged knowledge as domestic vsl inspector to bolster own training; achieved 60% completion of foreign vsl PQS – actions facilitated seamless integration into duty rotation. Eagerly pursued week-long small pax vsl training w/[another sector] to broaden grasp of reg application; participation in numerous inspections resulted in qualification as small pax vsl insp. Confident speaker, lucidly articulated ideas during brief on Int'l Maritime Org, advanced branch understanding of global reg/policy framework. Written deliverables clearly conveyed ideas.

For the section evaluating the applicant's leadership skills, she received four marks of 5 and two marks of 6. The comments for this section are as follows:

Mentored newly reported JO; created detailed guide & package for first OER submission; efforts greatly assisted mbr w/ creation of strong support form/eval. Invested ofcr; advised 4 mbrs desiring to be commissioned officers, dedicated 20+ hrs to reviewing personal narratives/resumes, provided overview of officer career paths & coached mbrs through interview; enhanced quality of packages & contributed to highly competitive pool of officer candidates. Modified duty team tasking to alleviate burden of staff shortage; effectively delegated tasking to all branch personnel, ensured continuity of ops & zero delays to commerce. Effectively orchestrated high-vis CG event attended by 200+; precisely allocated \$5K budget, collaborated w/5 nearby CG units, 4 vendors; event celebrated CG history, service, families & received high praise from senior mbrs. Fostered inclusive workplace; hosted 2 monthly observances, advocated cultural awareness & promoted diversity. Provided timely submission for own/subords evals.

For the section evaluating the applicant's personal and professional qualities, she received one “standard” mark of 4 for “Responsibility,” three marks of 5 and one mark of 6. The comments for this section are as follows:

Zealously sought opportunities to enhance personal/professional skill set; pursued graduate program on own time while attaining marine inspection quals. Flawless execution of CGMA fundraiser; educated unit on program eligibility/benefits; received \$600 in annual contributions. Adeptly directed response for collision btwn 2 pax vsls; rapidly dispatched duty teams to investigate & assess damage; consummate oversight & solid recommendations to cmd assured safety of 35+ pax & minimal impact to environ. Exhibited superior professionalism on inspections/exams; upheld regs

requirements, tactfully ID'd various defs, worked w/vsl master – calm demeanor compelled compliance. Voluntarily attended high-vis symposium for women in shipping industry as CG rep; networking & positive interactions brought great credit to CG. Dedicated to healthy lifestyle & encouraged same in others.

Finally, when compared to other officers of the same grade, the applicant received a mark for “One of the many high performing officers who form the majority of this grade” in the fourth of seven possible marks on the Comparison Scale, ranging from “Unsatisfactory” to “Best officer of this grade.” The Reporting Officer’s comments are as follows:

Recommended for promotion w/peers. Consistently worked to hone skills as Prevention Officer & JO; approached assigned tasks w/adequate dedication & enthusiasm. Successfully balanced competing demands of primary & collateral duties, greatly benefited unit ops & morale. Exhibited significant commitment to enhancing lives of others; aggressively sought opportunities to mentor subordinates & peers in/outside of workplace & ensured unit awareness of CGMA. Recommended for follow-on operational marine inspections tour. With further exposure to Prevent missions & qualification attainment, ROO will be well-suited for assignments of greater leadership & responsibility including Waterway Management Division Chief, Investigating Officer, MSD Supervisor, MSU Branch/Div Chief, Sector Branch/Div Chief &/or OCONUS billets/Activities Europe marine inspector billet.

#### *August 1, 2017 – January 31, 2018*

On February 26, 2018, the applicant received her second OER during her time at the Port State Control Branch for the period of August 1, 2017, to January 31, 2018. The applicant indicated that she had been counseled by her Supervisor on December 7, 2017. For the section evaluating her performance of duties, the applicant received one mark of 4 for “Professional Competence,” two marks of 5, and four marks of 6. The comments for this section are as follows:

Skilled planner; worked w/qualified marine inspectors (MI) prior to exams to maximize OJT, maintained steady workflow in one of nation’s busiest & dynamic port complexes, screened 500+ vsl arrivals for security & safety, prioritized & scheduled +100 exams; efforts significantly enhanced productivity & efficiency. Worked w/verifying officers & utilized training opportunities to further knowledge; earned foreign vsl examiner qual & completed 70% of tank qual; efforts directly increased branch readiness. Directed response to 500+ gallon discharge from offshore platform; managed 2 duty teams over long hours, requested CG helo overflight & satellite images from NOAA to assess pollution; oversaw investigation/product recovery; fast response min environ impact. Expeditiously adapted to critical conditions serving as 24 hour CDO for 3 consecutive days following Hurricane Harvey. Seamlessly adjusted own workload allowing for continuity of operations despite limited personnel. Continued to improve marine safety skill set; demo’d qual progression & attended inert gas system/crude oil washing course. Articulate & confident speaker; conducted 4 morale meetings to address upcoming events & fostered new ideas. Narratives/deliverables required minimal edits.

For the section evaluating her leadership skills, the applicant received one mark of 4 for “Evaluations,” one mark of 5, and four marks of 6. The comments for this section are as follows:

Compassionately served as primary Hurricane Harvey CGMA POC; exceptional knowledge & advertisement of CGMA program & accessibility after-hours facilitated the successful distribution of \$90K to +17 mbrs from various CG units. Empowered newly reported 1<sup>st</sup> tour MIs & junior POs; delegated several projects, provided clear guidance & expectations for 4 unit morale events w/\$4K budget; promoted professional development & camaraderie. Authoritatively provided precise

direction for multi-agency response to mystery sheen IVO [redacted]; deployed duty team, coord w/ VTS to review track lines & monitor vsls in close proximity to sheen; collaboration & aggressive engagement ID'd responsible party; issued civil penalty & minimized environ impact. Thoughtfully leveraged feedback from previous holiday party & designed inclusive event for active duty mbrs & family; family-friendly atmosphere & cohesion reinforced esprit de corps & CG family. Provided on-time submission of own evaluation.

For the section evaluating her personal and professional qualities, the applicant received one mark of 4 for "Responsibility," three marks of 5, and one mark of 6. The comments for this section are as follows:

Sought additional training opportunities; solidified OJT to meet qual deadlines & expectations. Oversaw [redacted] permit to proceed following machinery failure; reviewed transit/tow plan, restrictions, damage survey reports & repairs proposal; provided timely & effective brief to cmd, made sound recommendations, actions facilitated safe transit to effect repairs. Superior stewardship of \$7K unit morale funds; facilitated morale committee meetings & guided personnel through successful planning IAW CG morale policies. Excellent representation of CG; adhered to highest standards of professionalism while interacting w/ foreign mariners & local community; brought great credit to unit & bolstered CG public image. Established consistent exercise routine & motivated others to engage in fitness activities through personal example; own health & well-being greatly improved.

Finally, when compared to other officers of the same grade, the applicant received a mark for "One of the many high performing officers who form the majority of this grade" in the fourth of seven possible marks ranging from "Unsatisfactory" to "Best officer of this grade." The Reporting Officer's comments are as follows:

Recommended for promotion w/peers. Caring & compassionate officer; consistently ensured the well-being of others & worked to ensure newly reported JOs acclimated to the CG. Demonstrated qual progression & desire to expand knowledge of Prevention missions. Aggressively sought OJT. Successfully balanced execution of primary & collateral duties; astutely promoted CGMA during heighten [sic] need caused by unprecedented flooding. Improved upon & refined skills expected of JOs. Highly recommended for follow-on marine inspections tour. With continued exposure to Prevention missions & qualification attainment, ROO will be well-suited for assignments of greater leadership & responsibility including Waterways Management Division Chief, MSD Sup, MSU Branch/Division Chief, Sector Branch/Division Chief &/or OCONUS billets & Activities Europe marine inspector billet.

### ***February 1, 2018 – June 1, 2018***

On June 6, 2018, the applicant received her third and final OER for her service at the Port State Control Branch for the period of February 1, 2018, to June 1, 2018. The applicant indicated that she had been counseled by her Supervisor on April 17, 2018. For the section evaluating her performance of duties, the applicant received two marks of 5 and five marks of 6. The comments for this section are as follows:

Managed AMI duties & collateral assignments; seamlessly earned foreign tank & chemical vsl examiner qual; efforts increased branch readiness. As Morale rep, oversaw & max'd \$5K to be used in best interest of +80 personnel; submitted timely quarterly reports with no defs. Contributed to issuance of "no sail" def for [redacted] Boats, ID'd deteriorated lifesaving equipment & expired first aid kit; ensured safety of over 30K passengers annually. Continually responded to staffing shortages; voluntarily swapped duty to accommodate schedule conflicts; facilitated mission execution ensuring

safety/security of port w/minimal disruption to commerce. Received initial report of [redacted] inop emergency fire pump during night Explosive Handling Ops resulting in COTP order. Subsequent, expanded exam team mbr; ID'd inop propeller on rescue boat & lack of equip testing procedures; findings strengthened detention of substandard vsl; ensuring vsl & crew safety. Communicated w/ various crews on foreign vsls where English is second language; provided regulatory guidance to foreign mariners & industry; actions ensured exam objectives were met. Conveyed recs to senior staff on op controls; paramount in CMD decision process.

For the section evaluating her leadership skills, the applicant received one mark of 4 for "Evaluations," one mark of 5, and four marks of 6. The comments for this section are as follows:

Drafted timely informal recognition to 16 mbrs who directly contributed to successful annual family Easter event; efforts vital to enhancement & support of high performers. Vol'ed own time to provide individual & group trng resulting in three qual'ed CDOs; bolstered professional dvlpmnt & unit readiness. Directed 60 gal oil spill & fire resp involving local fire dept, EMS & duty PR for damage assessment; ensured safety & timely response, min environ impact. Participated in Chief's Call to Initiation; worked closely w/16 prospective E7's & 16 JOs; assisted in coordination of [redacted] Golf Tournament, raised \$400 benefiting local CPOA; events highly successful & IAW CG traditions. Dedicated & knowledgeable CGMA rep; assisted 5 personnel w/\$5K in school cost reimbursement & processed CGMA Loan to Grant Application approval; contributed directly to work-life balance. Participated in CG-wide Women's Retention Study group & discussed female retention w/in service; shared thoughtful insight.

For the section evaluating her personal and professional qualities, the applicant received three marks of 5 and two marks of 6. The comments for this section are as follows:

Volunteered as Musical Director for unit's Change of Command; contracted Army Band to perform brass quintet free of charge; significantly reduced cost of event. Identified inoperable e-generator shutdown on foreign freight vsl; required Chief Eng to run assessment of equip failure, reviewed maintenance records & procedures; ID'd root cause/ensured timely repairs effected prior to departure. Halted unauthorized entry into Morale Locker & gear usage; emphasized MWR policy & guidelines; behavior was resolved & unit procedures reinforced. Attended African-American History month observance, chaperoned 13 Big Brother/Big Sister middle school students at [nearby museum] to educate children on history & legacy; strengthened relationship w/ local community & bolstered CG image. Established reg exercise routine, registered for classes while motivating peers to do the same.

Finally, when compared to other officers of the same grade, the applicant received a mark for "One of the many high performing officers who form the majority of this grade" in the fourth of seven possible marks ranging from "Unsatisfactory" to "Best officer of this grade." The reporting officer's comments are as follows:

Recommended for promotion with peers. Exhibited qual progression & showcased desire to gain knowledge of Prevention field. Worked well w/ others to complete demanding MI training & sought OTJ training opportunities. Comfortable working w/ peers, sub & industry alike ensuring min disruption to commerce. Balanced collateral assignments & primary duties; dedicated CGMA rep helping unit mbrs in consummate circumstances & enthusiastic Morale Rep, executive over 10 successful events & bringing value to unit & morale. With continued exposure to Prevention missions & qualification attainment, ROO has future potential for assignments of increased leadership & responsibility including Waterway Management Division Chief, Investigation Officer, MSU Branch/Division Chief, Sector Branch/Div Chief &/or OCONUS billets such as Activities Europe marine inspector billet.

Before preparing the memorandum in this case, a judge advocate (JAG) of the Coast Guard obtained the following statements from the applicant's Reporting Officer and the Reviewer for the disputed OERs.

- On March 1, 2021, CDR H, who served as the applicant's Reporting Officer during the reporting periods, provided a declaration under penalty of perjury. CDR H affirmed that the disputed OERs accurately reflect the applicant's performance. He first addressed the applicant's assertion that LT A was hostile towards her. CDR H stated that he never observed LT A being hostile towards the applicant. He stated that LT A's instructions to the applicant were consistent with Coast Guard requirements. CDR H also addressed the applicant's assertion that she did not receive adequate counseling in accordance with Coast Guard policy. CDR H stated that the applicant failed to provide evidence to substantiate her allegation. Instead, he stated that all three disputed OERs specify a date in which the applicant received mid-term counseling. Further, CDR H argued that the applicant did not raise any concerns about lack of mid-term counseling to the command.
- On March 5, 2021, CDR O, the Reviewer for the disputed OERs, provided a declaration under penalty of perjury. She stated that as the Reviewer, she was responsible for reviewing the applicant's OERs to ensure that they were written in accordance with Coast Guard policy and to provide amplifying comments if her observations of the applicant's performance conflicted with the evaluation provided by the Supervisor and Reporting Officer. CDR O affirmed her concurrence with the Supervisor and Reporting Officer's evaluation of the applicant reflected in the disputed OERs. She indicated that she did not have any documentation or observations that would have caused her to non-concur with the evaluations. CDR O also specifically addressed the applicant's assertion that she did not receive adequate mid-term counseling. She pointed to Coast Guard policy that places responsibility on the Reported-on Officer for ensuring that mid-term counseling takes place. Further, CDR O stated that the applicant confirmed completion of mid-term counseling via her electronic signature on the OERs.

On July 6, 2018, the applicant received a Letter of Commendation for her performance of duty while serving as a Command Duty Officer and Morale Officer at the MSU from January 2016 to July 2018.

On July 20, 2018, the applicant was transferred to the Facility Inspections Branch of a different Sector.

On November 13, 2018, the results of the PY2019 LT selection board were released and the applicant was not selected for promotion.

On May 8, 2020, the applicant received the Coast Guard Achievement Medal for her service as the foundational President of the Women's Leadership Initiative, Liberty Chapter for her Sector from November 2018 to December 2019.



On November 20, 2019, the results of the PY2020 LT selection board were released and the applicant was selected for promotion. On January 10, 2020, the applicant was promoted to LT.

### VIEWS OF THE COAST GUARD

On April 15, 2021, a JAG submitted an advisory opinion in which they 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. In response to the applicant's assertion that she did not receive mid-period counseling, PSC stated that the applicant signed the counseling block portion of the disputed OERs. PSC also argued that the disputed OERs were completed by the applicant's rating chain in accordance with the applicable policy and did not contain any 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*.<sup>1</sup> The *Hary* standard requires a showing by competent evidence of (1) a misstatement of a significant hard fact; (2) clear violation of specific objective requirement of statute or regulation; or (3) factors adversely affecting the rating which had no business being in the rating process.<sup>2</sup> As to the first prong, the JAG argued that the applicant did not allege a misstatement of a significant hard fact in the disputed OERs. Instead, the applicant alleged that the disputed OERs contained discrepancies between the comments and the marks in the performance dimensions. The JAG argued that although the applicant holds a different view of her performance, the Coast Guard Officer Evaluation System Procedures Manual allows Supervisors to rely on their observations and other information when completing an OER. Further, the JAG noted that the evaluation system is not entirely objective.

As to the second prong of the *Hary* standard, the JAG argued that the applicant failed to show a clear violation of a specific objective requirement of statute or regulation. In this case, the applicant argued that her Supervisor did not provide her with mid-term counseling in violation of Coast Guard policy. The JAG contested the applicant's assertion by stating that she signed and certified each of the mid-term counseling fields on the disputed OERs. Further, the JAG stated that both declarations provided by her former rating chain indicated that counseling was in fact completed.

Finally, as to the third prong of the *Hary* standard, the JAG argued that the applicant provided no evidence to show that the disputed OERs were adversely affected by factors that had no business being in the rating process. In this case, the applicant alleged that her Supervisor was hostile towards her. The JAG offered that instead, it was more likely that the rating chain held high standards and evaluated their subordinates accordingly. Therefore, the JAG argued that the applicant cannot overcome the presumption that the Coast Guard administrators discharged their duties correctly, lawfully, and in good faith. The JAG argued that as a result, the applicant failed to establish that her OERs and non-selection for promotion require revision and has not met her

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<sup>1</sup> 223 Ct. Cl. 10, 18, 618 F.2d 704, 708 (1981).

<sup>2</sup> *Id.*

burden to establish by preponderance of the evidence that the Coast Guard committed an error or injustice.

### APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 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 1.A.1. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C, states the following regarding a Reported-on Officer in relevant part:

b. Be responsible for managing their performance and requesting mid-term counseling from their rating chain. This responsibility entails determining job expectations, obtaining sufficient performance feedback from the Supervisor during the period, and using that information to meet or exceed standards. Request an appointment with the Supervisor at the beginning and during each reporting period, if clarification of duties and areas of emphasis is needed.

c. Ensure the required mid-term counseling session takes place and is documented.

...

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 3 of the Coast Guard Officer Evaluation System Procedures Manual states the following regarding mid-term counseling in relevant part (emphasis added):

#### A. General

1. Effective and timely feedback is a critical component of successful performance evaluation and should be used in conjunction with establishing and managing goals. Officers need to know in a timely manner how they are performing, what they are doing well and areas of improvement. This feedback can come from many different sources, including rating chain members.
2. If the Reported-on Officer is unavailable or did not request and/or complete the required mid-term counseling, this must be documented on the OER.

#### B. Intent

The intent of this mandate is to support officer ownership and development, and positively influence good communications throughout the reporting period. Ideally, the Reported-on Officer should not be "surprised" with their OER at the end of period. The rating chain shall ensure each Reported-on Officer receives regular feedback, including mid-term counseling.

#### C. Roles

***The Reported-on Officer is responsible to ensure this mid-term counseling session takes place and is documented.*** Rating chain members should be available to support these requests. The counseling can be conducted by any member of the rating chain.

## D. Timing

CG PSC-OPM-3 and CG PSC-RPM-1 do not dictate when mid-term counseling should occur. There is one mid-term counseling session required per reporting period. Ideally, this would occur midway through the Reported-on Officer's period of report.

Article 4.B.11. of the Coast Guard Officer Evaluation System Procedures 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.

Article 4.E.2. of the Coast Guard Officer Evaluation System Procedures Manual states the following about how a Supervisor should prepare an OER in relevant part (emphasis added):

f. For each evaluation area, the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor must take care to compare the officer's performance and qualities against the standards – not to other officers *and not to the same officer in a previous reporting period.*

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h.

[1] In the "comments" block following each evaluation area, the Supervisor includes comments citing specific aspects of the Reported-on Officer's performance and behavior. Well-crafted comments may apply to more than one dimension. Decreased comment space will require concise yet readable supporting verbiage and allow more flexibility to comment on significant performance. The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period.

[2] A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of 1, 2, 3, and 7. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six "above standard" block.

j. Comments should amplify and be consistent with the numerical evaluations (if applicable). They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to accurately portray the officer's performance and qualities which compares reasonably with the standards defined and marked on the performance dimensions in the evaluation area.

Article 17.A. of the Coast Guard Officer Evaluation System Procedures Manual states the following 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.

## 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.<sup>3</sup>
3. The applicant asked the Board to correct her performance evaluations dated July 31, 2017, January 31, 2018, and June 1, 2018, because they are 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>
4. The applicant did not challenge the disputed OERs 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 OERs. Her failure to avail herself of these ways to challenge the accuracy of the OERs is evidence that she accepted the evaluations as accurate at the time.
5. The applicant argued that she was not selected for promotion and excluded from the PY19 ADPL due to three "adverse" OERs. According to long-standing case law<sup>7</sup> and prior

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<sup>3</sup> *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).

<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>6</sup> *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).

<sup>7</sup> *Paskert v. United States*, 20 Cl. Ct. 65, 75 (1990) (finding that "[a]fter the fact [non-selection] statements by raters contending that they scored the applicants too low on their OER's are not to be given great weight"), *citing Tanaka*

BCMR decisions,<sup>8</sup> such “retrospective reconsideration” of an officer’s performance after an officer has been non-selected for promotion is not grounds for removing or raising the marks in an OER. As the court held in *Remy v. Air Force Board for Correction of Military Records*, “[n]othing could be more inimical to the fair rating system”<sup>9</sup> than to change or remove an OER based on a *post hoc* judgment years later following non-selection for promotion.

6. The applicant argued that the first disputed OER, dated July 31, 2017, is erroneous because it contains low marks that conflict with both the comments and her actual performance. Specifically, the applicant argued that her marks of 4 in the performance dimensions of “Professional Competence” and “Responsibility,” conflict with the associated comments. In support of her argument, the applicant highlighted the following comment which is included in the personal and professional qualities section of the disputed OER: “zealously sought opportunities to enhance personal/professional skill set; pursued graduate program on own time while attaining marine inspection quals.” First, this comment could not support the mark of 4 in the performance dimension of “Professional Competence” because it is located in a different section of the OER. Further, the Board finds that although the comment is located in the same section as the performance dimension of “Responsibility,” the comment more than likely supports the mark of 5 for the performance dimension of “Initiative.” According to Article 4.E.2.h. of the Coast Guard Officer Evaluation System Procedures Manual states, a mark of 4 represents the expected standard of performance. Accordingly, additional specific performance observations are not required to support a mark of 4. Nor does the content of the comment *per se* prove that the applicant exceeded the written criteria for a mark of 4 for either “Professional Competence” or “Responsibility.”

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*v. United States*, 210 Ct. Cl. 712, 713 (1976), *cert. denied*, 430 U.S. 955 (1977) (noting that the raters who submitted letters on behalf of the plaintiff claiming that the marks they had assigned him were too low did not “point out any misstatements of fact in their original OER’s” and offered “only opinions they no longer entertained”); *Remy v. Air Force Board for Correction of Military Records*, 701 F. Supp. 1261, 1271 (E.D. Va., 1988) (noting that “[n]othing could be more inimical to the fair rating system” than allowing *post hoc* judgments years later and after an officer has been non-selected for promotion); *Voge v. United States*, 11 Cl. Ct. 510, 515 (1987), *rev’d on other grounds*, 844 F.2d 776 (1988) (“Nor is it enough to impel us to act that the rater may now say that he scored the claimant too low. In *Tanaka* ... we held that rater’s statement that his opinion has changed and that he would now rate plaintiff higher, absent any misstatements of fact in the OER, did not tender a triable issue on the accuracy of the OER”); *Chronis v. United States*, 222 Ct. Cl. 672, 673 (1980) (holding that “the retrospective statements of plaintiff’s rating officers are insufficient to prove that the AFBCMR acted arbitrarily in refusing to void the challenged OER”); *Reid v. United States*, 221 Ct. Cl. 864, 867 (“The retrospective statements of plaintiff’s rating officers are thus insufficient to prove that the board acted arbitrarily in refusing to void the challenged OER’s.”); *Savio v. United States*, 213 Ct. Cl. 737, 740 (1977) (denying relief despite “after-the-fact letters from rating officers who in retrospect state that in their opinion they rated a particular officer too low”).

<sup>8</sup> Decision of the Deputy General Counsel in BCMR Docket No. 84-96 (denying relief because the CO’s statement arguing that the marks should be raised constituted “retrospective reconsideration”); *see also* BCMR Docket Nos. 2015-136 (finding that a Supervisor’s statements supporting removal of an OER constituted “retrospective reconsideration,” which “is not grounds for removing” an OER); 2011-179 (denying relief and finding that a CO’s statement constituted “retrospective reconsideration” that did not warrant raising marks on the disputed OER); 67-96 (denying relief because three statements by the rating chain supporting the application “constituted ‘retrospective reconsideration’ induced by the applicant’s failure of selection”); 189-94 (denying relief and finding that a Supervisor’s claim that a mark should be raised because the applicant was never counseled about the deficiency constituted “retrospective reconsideration” that did not justify raising the disputed OER mark); 24-94 (finding that a Reporting Officer’s statement that “had I known then what I know now I would have marked him differently” constituted retrospective reconsideration that did not justify changing the OER).

<sup>9</sup> 701 F. Supp. 1261 (E.D. Va. 1988).

Therefore, the Board finds that the applicant failed to show by a preponderance of the evidence that the OER dated September 26, 2017, is erroneous.

7. The applicant similarly argued that the second disputed OER, dated January 31, 2018, is erroneous because it contains low marks that conflict with both the comments and her actual performance. Specifically, the applicant argued that the positive comments conflict with the marks of 4 for “Professional Competence” and “Responsibility.” However, as noted above, the comments in the disputed OER do not support marks of 4 in accordance with the Coast Guard Officer Evaluation System Procedures Manual. The applicant also argued that the marks of 5 for “Initiative,” “Judgment,” and “Professional Presence,” conflict with several comments. The applicant cited several of her Supervisor’s comments including that she “adhered to the highest standards of professionalism,” “brought great credit to [the] unit,” and was an “excellent representation of [the Coast Guard].” However, the applicant’s argument is a misapplication of Coast Guard policy. OERs are not prepared by selecting numerical marks that are consistent with the written comments. Instead, the numerical marks are selected after comparing the officer’s performance to the prescribed standards for the marks printed on the OER form, and then a comment with one or more examples of performance showing why the numerical mark was selected is added to the comment block below the mark.<sup>10</sup> Therefore, the applicant failed to show by a preponderance of the evidence that the OER dated January 31, 2018, is erroneous.

8. The applicant also argued that the third disputed OER, dated June 1, 2018, is erroneous because she received a mark of 5 in the performance dimension of “Professional Competence.” The application stated that her Supervisor only marginally improved her numerical rating for “Professional Competence” despite obtaining two additional qualifications in between review periods. However, Article 4.E.2.f. of the Coast Guard Officer Evaluation System Procedures Manual precludes Supervisors from comparing the Reported-on Officer’s performance in the reporting period with the same officer’s performance in a prior reporting period. Instead, Supervisors are required to read the written standards for each performance dimension, compare them to the officer’s observed performance during the rating period, and assign the appropriate mark based on that comparison.<sup>11</sup> Then, for each assigned mark deviating from a “standard” mark of 4, the Supervisor is required to add one or two comments “citing specific aspects” of the officer’s performance to “amplify and be consistent with” the assigned mark.<sup>12</sup> In this case, the applicant did not provide any evidence that obtaining two additional qualifications during the evaluation period entitles her to a higher mark for the performance dimension of “Professional Competence.” Therefore, the applicant failed to show by a preponderance of the evidence that the OER dated June 1, 2018, is erroneous.

9. The applicant argued that the disputed OERs are unjust because her Supervisor was biased against her. The applicant’s argument is based on her assertion that LT A criticized a leave request approved by her prior Supervisor because she was underperforming compared to her peers. However, LT A’s criticism of the applicant does not demonstrate bias against her. Instead, LT A’s statement demonstrates that she was concerned about the applicant’s performance. Criticism based on negative performance is not illegal bias. The applicant also pointed to the qualification timeline

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<sup>10</sup> OER Manual, PCSINST M1611.1A, Article 4.E.2.b. & d.

<sup>11</sup> OER Manual, PCSINST M1611.1A, Article 4.E.2.f.

<sup>12</sup> Article 4.E.2.h.1. & j. of the Coast Guard Officer Evaluation System Procedures Manual, PCSINST M1611.1C.

that LT A expected her to follow as evidence of bias. The applicant argued that LT A instructed her to shift her focus from one type of qualification – that she had already started working toward – to another. However, LT A’s instructions do not prove bias against the applicant. In fact, in his written declaration, the applicant’s Reporting Officer stated that the instructions provided by LT A with regard to the applicant’s timeline for qualifications were consistent with Coast Guard policy. Therefore, the Board finds that the applicant failed to prove by a preponderance of the evidence that members of her rating chain were biased against her.

10. The applicant argued that the disputed OERs are unjust as demonstrated by her accomplishments at the MSU. The Board disagrees. The applicant noted the awards she received in recognition of her contributions to her unit. She also noted that she obtained all of her required qualifications within a compressed timeframe due to her maternity leave. However, as previously stated, an OER is not intended to be a compilation of an officer’s accomplishments. Nevertheless, the applicant’s rating chain did take into account her accomplishments as evidenced by the comments of the disputed OERs. In the OER dated July 31, 2017, LT A commented that the applicant had achieved 60% completion of the foreign vessel qualification. In the OER dated January 31, 2018, LT A commented that the applicant had earned a foreign vessel examiner qualification and completed 70% of “tank qual.” Finally, in the OER dated June 1, 2018, LT A noted that the applicant had “seamlessly earned foreign tank & chemical vsl examiner qual.” Therefore, the Board finds that the applicant failed to show by a preponderance of the evidence that the disputed OERs are inconsistent with her accomplishments at the MSU and therefore unjust.

11. The applicant also argued that the disputed OERs are unjust because her Supervisor refused to provide her with meaningful counseling in violation of Coast Guard policy. Regarding the OER dated July 31, 2017, the applicant signed the form indicating that she received counseling from LT A on June 13, 2017. Despite her signature on the OER, the applicant argued that LT A ignored her request for mid-period counseling. The applicant acknowledged that she met with LT A on June 13, 2017, but argued that they discussed other matters and did not address her performance or OER. Regarding the OER dated January 31, 2018, the applicant signed the form indicating that she received counseling from LT A on December 7, 2017. In this case, the applicant did not put forward any argument or facts to dispute that the counseling session did in fact take place. Finally, regarding the OER dated June 1, 2018, the applicant signed the form indicating that she received counseling from LT A on April 17, 2018. Despite her signature on the OER, the applicant argued LT A did not attend her scheduled mid-period counseling session. Instead, the applicant argued that only the Chief Warrant Officer was present and advised her that she was doing a fine job.

The Board finds that the applicant failed to show that her Supervisor violated Coast Guard policy by failing to provide her with counseling. First, all three disputed OERs reflect that mid-term counseling was provided by LT A. The applicant failed to provide any evidence to the contrary. Next, according to Article 3.A.2. of the Coast Guard Officer Evaluation System Procedures Manual, if the Reported-on Officer did not receive mid-term counseling, this should have been documented on the OER. Since the Reported-on Officer is ultimately responsible for their OER, it was the applicant’s responsibility to ensure that her OER accurately reflected whether or not she received counseling. And in this case, all three disputed OERs show that she did receive mid-term counseling from LT A. Finally, according to Article 1.A.1.b. of the 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, and using that information to meet or exceed standards. If the applicant was unsure of job expectations, it was her responsibility to request an appointment with her command to determine job expectations and obtain sufficient performance feedback in order to meet or exceed standards. However, the applicant provided no evidence of communication with her reporting chain requesting such appointment. Therefore, the applicant failed to show by a preponderance of the evidence that her Supervisor violated Coast Guard policy by failing to provide her with adequate counseling during the reporting period.

12. Finally, the applicant argued that the disputed OERs are unjust because her subsequent OER marks drastically improved once she was transferred to a new unit. However, this Board has long held that the fact that an applicant received better OERs before or after the reporting period for the disputed OER is not evidence that the disputed evaluation does not accurately reflect her performance during the reporting period.<sup>13</sup>

13. The Board therefore finds that the applicant has not proven by preponderance of the evidence that the disputed OERs are erroneous or unjust. There are no grounds for correcting the disputed OERs because she has not proven by a preponderance of the evidence that they were 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.<sup>14</sup>

14. The applicant asked that her non-selection for promotion to LT 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 OERs were erroneous or unjust when they were reviewed by the selection boards. Therefore, the Board finds no grounds for directing the Coast Guard to convene an SSB.<sup>15</sup>

15. Accordingly, the applicant’s request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>13</sup> *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.”).

<sup>14</sup> *Hary*, *supra* n. 6 at 708.

<sup>15</sup> 14 U.S.C. § 263 (requiring “material error of fact or material administrative error” to grant an SSB).



**ORDER**

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

October 21, 2022

[REDACTED] Digitally signed by [REDACTED]  
Date: 2022.10.26 09:20:18 -04'00'

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[REDACTED] Digitally signed by [REDACTED]  
Date: 2022.10.26 11:17:54 -04'00'

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[REDACTED] Digitally signed by [REDACTED]  
Date: 2022.10.26 13:45:55 -04'00'

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