

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 39-97

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on December 20, 1996, upon the BCMR's receipt of the applicant's request for correction of her military record.¹

This final decision, dated January 16, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a commander (CDR) on active duty, asked the Board to correct her record by changing an officer evaluation report (OER) for the period July 3, 1994 to March 31, 1995 (first disputed OER); by removing an OER for the period April 1, 1995 to August 25, 1995 (second disputed OER) and replacing it with a report for continuity purposes only; and by changing an OER for the period August 26, 1995 to March 31, 1996 (third disputed OER). She also asked that an achievement medal that was denied to her by the awards panel be resubmitted to the panel for further review. She also asked that she receive special out of cycle consideration for command assignment afloat or ashore. The applicant also asked for removal of her failure of selection for promotion to captain (Capt.).

The Coast Guard Personnel Records Review Board (PRRB), prior to the convening of the 1997 captain selection board, removed the disputed reviewer's comments from the third disputed OER. Only the issues raised with respect to the first and second disputed OERs are therefore before this Board.

The Coast Guard recommended that the Board deny relief to the applicant as to the remaining issues.

¹ The 10-month deadline in this case expires on February 2, 1998. It was extended because the applicant was granted two extensions of time to reply to the views of the Coast Guard.

EXCERPTS FROM RECORD AND SUBMISSIONS

Applicant's Specific Request for Relief with Respect to the First and Second Disputed OERs.

The applicant asked the Board to correct the first disputed OER in the following manner:

- (1) Change the mark in section 4b (Human Relations) from 4 to a 5;
- (2) Restore the recommendations for a command position and for assignment to a senior service school;
- (3) Delete the sixth sentence in section 9f (Personal Qualities/Comments) -- "[i]n discussing an innovative idea with Area Commander, pressed her point beyond accepted standards of military courtesy.";
- (4) Delete the first sentence in section 10d (Representing the Coast Guard/Comments) -- "[c]omments re: conversation with Area CDR apply.";
- (5) Delete the following comments from block 11 (Leadership and Potential) "... , except for the question of judgment illustrated in the incident with the Area Commander. I will recommend her for such assignment in my next report if I judge that that was an aberration."; and
- (6) Copy the first disputed OER with sections 9f, 10d, and 11 entirely whited-out and redone. If these changes cannot be made, then the first disputed OER should be removed from the record and replaced with a report for continuity purposes only.

As stated above, the applicant asked that the second disputed OER and the reply and endorsements thereto be expunged and replaced with a report for continuity purposes only. The CO wrote in block 11 of the second disputed OER that: "After observations both at sea and inport, I am not fully convinced that [the applicant's] skills in handling people are as smooth as they should be. Because of the latter, and it is a close call, I cannot in good conscience give [the applicant] an unqualified recommendation for command at sea. I can enthusiastically recommend her assignment to operational program management jobs ashore." Similar comments with respect to the applicant's "people skills" were written in other portions of the OER.

Applicant's contentions

During the periods covered by the disputed OERs, the applicant was the executive officer (XO) of a high endurance cutter (cutter). She stated that this case raises "disturbing issues concerning the afloat climate for female Coast Guard Personnel and the Coast Guard's failure to protect from adverse action those women officers who, like [the applicant], speak out when abusive situations arise."

The applicant alleged that "the disputed OERs must be corrected because they violate the Personnel Manual's standards for fairness, accuracy and objectivity, [and]

reflect improper command influence in the first [disputed] OER." [Capital lettering deleted.] She further alleged that the second disputed OER constituted reprisals against her for having called attention to an illegal, sexually charged initiation ceremony aboard the cutter.

The applicant stated that the alleged errors and injustices that caused the CO to be biased against her in the disputed OERs grew out of her handling of the events discussed below.

The applicant stated that of the 30 officers assigned to the Coast Guard cutter only three, including the applicant, were women. One of the first things the applicant did when she became XO was to conduct and document required sexual harassment training for the cutter's personnel. According to the applicant, despite this training, the culture aboard the cutter was and continued to be sexist, particularly among the chief petty officers.

An example of the alleged sexist culture happened in 1994. The applicant stated that at that time she went on a bike ride with some chief petty officers and other officers. During the ride, numerous comments of a salacious graphic and prurient nature were made in the presence of the applicant and a woman chief petty officer. The applicant stated that she discussed the matter with the Commanding officer (CO) who was also the applicant's supervisor and reporting officer for the disputed OERs. According to the applicant, the CO stated that he was aware of the existence of the behavior and thought the better way to handle the problem was to let certain personnel transfer from the ship as part of the normal rotation process. The applicant stated that the CO's decision left her with two choices: (1) address the problem without the CO's support; or (2) try to work around it and be patient. She chose the second method.

The applicant related several other alleged sexist incidents. The one that allegedly caused the CO to become biased against her happened during a July 1995 celebration of the cutter's crossing of the equator (also referred to as line crossing).

According to the applicant, the celebration included skits of inappropriate language and behavior. The applicant described one such skit, as follows:

... a [redacted] event in which the Supply Officer (Lieutenant [C]) makes suggestive comments about the lovemaking capabilities of the newly married Engineer Officer (Lieutenant [H]). This was a follow-on to a recent underway replenishment in which a gravity rig (a fuel probe that resembles a penis) failed to seat in [the] [redacted] NATO receptacle (clearly resembling a female orifice) and was the subject of immediate sexual innuendo. At the time, the EO [engineer officer] attributed the fuel probe to failure "axial misalignment," which is what the Supply Officer refers to at the newly married EO's home. These comments

including the Engineer Officer's retort (that the probe was bigger than the receptacle) were obviously in poor taste, and not something you would write home to your mother or spouse about.

The applicant stated that she was offended by the skits; the next morning she discussed them with the engineer officer and a chief boatswain's mate. The applicant stated that the CO had been present during the skits and he did nothing to indicate that he thought they were improper (this was the CO's first time crossing the equator). The applicant stated that she discussed her concerns with the CO, who spoke with the more senior members of the line crossing committee (called shellbacks). The applicant alleged that the CO was not pleased at her intervention because it had upset a number of the crew members. After her talk with the CO, she stated that the remaining program was revised to comply with Coast Guard regulations.

The applicant stated that in August 1995 there was a change of command. It was necessary for the applicant to turn her attention to planning that event and could not follow-up on the line crossing improprieties. The applicant stated that later she discussed her concerns the new CO and on January 8, 1996, the applicant sent a letter concerning the ceremony to the Area Commander without mentioning the former CO by name. She stated that she did not mention the former CO by name because of the way in which he had characterized her lack of leadership and skills in the second disputed OER.

The applicant stated that the CO was taken to admiral's mast on March 7, 1996, but the charges were dismissed. (On January 24, 1996, the area commander ordered an investigation into allegations of inappropriate crossing the line ceremony on board the cutter. It was completed on February 8, 1996, and the convening authority took final action on the investigation on March 22, 1996.) The applicant claimed that she has and continues to suffer because the CO used the disputed OERs to take retaliation against the applicant for her part in exposing the inappropriate activities on the cutter.

The applicant complained that the first disputed OER was prepared at least three times prior to final submission. It was validated and entered into the applicant's record on August 23, 1995. The applicant alleged that the initial submission of the first disputed OER recommended her for command at sea as well as study at a senior service school. She stated that the reporting officer told her that this version of the OER was returned to him by the reviewer because the marks of 7 in certain categories were not supported by the comments. The applicant stated that the reporting officer "acquiesced in this transparent exercise of command influence in violation of Article 10-A-2f.(2)(d) of the Personnel Manual,"² although he thought the marks were of 7 were supported.

² Article 10-A-2f.(2)(d) of the Personnel Manual states that the reviewer "shall return an OER to the reporting officer to correct errors, omissions, or inconsistencies between the numerical evaluation and

The applicant further claimed that the reporting officer, at the direction of the reviewer, added the following adverse comment to section 4c: "Valid civil rights complaint against [the applicant] by a CPO could not be resolved by me on the ship--settled informally by D17 [Seventeenth Coast Guard District] MCRCF [Military Civil Rights Counselor-Facilitator]." The applicant also stated that the reporting officer also addressed comments to sections 9f, 10d, and 11 concerning an interview the applicant had with the Area Commander in which the applicant allegedly exceeded "accepted standards of military courtesy." The reporting officer withdrew his recommendation for command at sea, writing in the revised report that he would revisit the issue of recommending her for command afloat if he determined that the incident with the Commander was an aberration.

The applicant alleged that the changes made to the first disputed OER were illegal, and that the comment with respect to the civil rights complaint was removed from the OER because it was inaccurate. The applicant explained that the comment that she exceeded acceptable standards of military courtesy was also inaccurate and resulted from a conversation she had with the area commander on extending the reporting officer for an additional year as CO of the cutter. Apparently the applicant thought there might have been some misunderstanding on the part of the area commander about her motives, so she called him a second time to discuss the matter. That conversation went along amicably until the applicant told the Area Commander that she was concerned about the assignment of women afloat and that Headquarters was not assigning more women to the cutter. According to the applicant, the Commander demanded to know if this was really the reason for her second telephone call. Although the applicant told the commander that this was not the reason for the second call, he evidently took offense and caused the comment about exceeding the standards of military courtesy to be placed in her OER. The applicant claimed that the comments in sections 9f, 10d and 11 were the result of command influence and a misunderstanding between herself and the Commander. The applicant claimed that she was not notified during the reporting period that she had exceeded customary limits of interofficer discourse in her conversations with the commander, and that she has been punished for speaking candidly on a matter of considerable interest to the Coast Guard.

The applicant alleged that the reporting officer was not in a position to prepare an objective and fair appraisal of the applicant performance for the period covered by the second disputed OER. The applicant asked that that OER and all attachments be removed in its entirety. She stated that an officer whose conduct is subject to official scrutiny, as the reporting officer's was, should not be permitted to submit evaluations on subordinates who had central roles in the matter at issue. The applicant stated that even though the investigation of the reporting officer did not

written comment. The reviewer may not, however, direct in what manner an evaluation mark or comment is to be changed. . . ."

commence until after the second disputed OER had been submitted, it was already apparent that the applicant took exception to the reporting officer's failure to prevent the violation of Coast Guard standards. (The second disputed OER was completed by the reporting officer on September 15, 1995, by the reviewer on September 22, 1995, and validated and entered into the record on October 1, 1995.) The applicant cited Article 10-A-2g of the Personnel Manual³ in support of her position. The applicant claimed that a situation such as this is exacerbated where as here, the rating chain position of supervisor and reporting officer are combined.

The applicant invited the Board to pay particular attention to Article 4-1-15(A)(3) of the Coast Guard Personnel Manual. It provides that :

[t]raditional initiations, such as for . . . crossing the Equator . . . are permitted but shall not include any degradation of character [or] sexual overtones . . . , and shall be conducted with the complete knowledge of and oversight by the Commanding Officer.

Statements Submitted by the Applicant

The applicant submitted a letter from the former Pacific Area Civil Rights Officer (civil rights officer). This individual stated that she provided assistance to the cutter in resolving an interpersonal conflict between the applicant and a chief petty officer (CPO). This conflict revolved around an alleged comment by the applicant that offended the CPO. The civil rights officer stated that the XO's (applicant's) comment could have been perceived as a reflection of a bias against males. The civil rights officer did not, however, find that the comment was discriminatory. This individual stated that she believed that the matter had been mishandled by the ship, in that the cutter's civil rights officer had become personally involved in the case. The civil rights officer concluded her statement in the following manner:

I have no doubt that [the applicant] has been held to a much higher standard of conduct than her male counterparts. The prospect of a male O-5 being the subject of such scrutiny on the basis of one comment is so unlikely as to strain credulity. . . .

³ Article 10-A-2g.(1) of the Personnel Manual states the following: "In instances where Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out the responsibilities of a member of the rating chain, the next senior officer in the chain of command will designate an appropriate substitute who is capable of evaluating the Reported-on Officer."

Article 10-A-2g.(2)(b) states that "'disqualified' includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation."

I have no difficulty seeing [the applicant's] situation as symptomatic of an organization that occasionally resorts to surreptitious methods of discrimination against women. . . . Based on my knowledge of the background and the climate onboard [the cutter], I believe [the applicant's] present situation represents another such injustice.

The applicant also submitted a statement from the military civil rights counselor/facilitator (civil rights counselor) for all Alaskan units. This individual stated that he was asked to help informally resolve a complaint of gender discrimination against the applicant by a CPO. The applicant was alleged to have used abusive and demeaning language toward the CPO.

The civil rights counselor stated that after speaking with the applicant and the CPO, he concluded that the incident resulted from a communication problem. The matter was informally resolved to the satisfaction of the CPO. He did not file a formal complaint.

The civil rights counselor stated that around June 1995, he received a telephone call from the applicant in which she stated that her OER contained a reference to the civil rights matter. Since the issue had been resolved informally, it should not have been placed in her record.

The civil rights counselor stated that he received a telephone call from the applicant's CO. This counselor stated he advised the CO that the matter had been resolved informally and should not be included in the applicant's OER.

The civil rights counselor concluded by stating the following:

It is my opinion that the situation was treated inappropriately from the beginning, and that the Command could have resolved the issue onboard. Circumstances which lead to the mishandling were inadequate training for the unit CRO, inadequate leadership training for the RDC, unnecessary reaction and an inappropriate approach to the resolution of the issue by the Commanding Officer, and improper inclusion of this information in the OER.

Other Evidence Submitted by the Applicant

The applicant submitted several other documents in support of her application, including copies of the disputed OERs, copy of the investigation into the alleged improper of equator crossing ceremony, and messages from the Commandant expressing his concern over the alleged improper ceremony that took place on the applicant's cutter.

Views of the Coast Guard

The Coast Guard recommended that no relief, other than that granted by the PRRB, be given to the applicant. The Service stated that the correction to the third disputed OER was made to the applicant's record before it was considered by the 1997 captain selection board. The Coast Guard stated that the applicant failed to be selected by that board. The Coast Guard argued that the applicant has failed to prove error or injustice with respect to the remaining disputed OERs, no further relief should be granted.

The Coast Guard provided a chronology of events. The most pertinent ones are set out below.

March 31, 1995: End of first reporting period.

April 1995-June 1995: CO forwarded first OER to reviewer, who returned it to the CO and informed the CO of the applicant's conduct with the area commander and of a civil rights complaint against the applicant.

June 30, 1995: The CO signed a new draft OER, which recommended the applicant for promotion, but did not recommend the applicant for a command assignment based on her interaction with the area commander. The CO lowered certain marks on the first disputed OER and agreed to obtain additional information about the alleged civil rights complaint against the applicant.

July 9, 1995 to July 12, 1995: The equator crossing ceremonies took place.

July 17, 1995: The CO signed a final version of the first disputed OER. He deleted any reference to the civil rights complaint against the applicant. The applicant did not submit a reply to this OER.

August 25, 1995: End of the second reporting period.

September 15, 1995: The CO signed the second disputed OER and highly recommended the applicant for promotion to captain. The CO stated that he could not give the applicant an unqualified recommendation for command at sea because of her leadership problems.

December 28, 1995: The applicant submitted a reply to the second disputed OER.

January 8, 1996: The CO endorsed the applicant OER reply. Also, on this date, the applicant signed a letter reporting her concerns about the crossing the equator ceremonies and forwarded the letter to the Commander, Pacific Area.

January 24, 1996: The Pacific Area Commander convened investigation into the "crossing of the equator ceremonies."

February 8, 1996: Investigation completed and forwarded for final action.

March 1, 1996: The Pacific Area Commander released an instruction (PACAREAINST 5060.1) "Responsible Conduct of Service Related Ceremonies."

March 7, 1996: The CO went before a flag mast. The allegations of dereliction against the CO were dismissed with a verbal warning.

With respect to the first disputed OER, the Coast Guard stated that the applicant acknowledged that the CO wrote his portion of that OER approximately two weeks before the "crossing the line" ceremonies occurred. The Service argued that it was not error for the Reviewer to return the OER because of its deficiencies or to provide the CO with additional information regarding the applicant's performance during the reporting period. The Coast Guard further argued that it was not error for the CO to revise the first disputed OER in light of the reviewer's comments. The Coast Guard stated that a draft OER can be revised to include the receipt of additional or supplemental information.

The Coast Guard argued that the applicant has not shown that the comments in block 11 of the first disputed OER characterizing her conversation with the area commander are either in error or unjust. The Coast Guard commented as follows:

[The] [a]pplicant acknowledges that during her first conversation with the Pacific Area Commander, he made it clear that he was disinclined to extend the Tour of [the CO] (Brief at 18). Applicant admits that she nevertheless called the Area Commander back several days later, to continue to pursue her request, and then raised other issues unrelated to her [initial] call, including a request for assignment of more female personnel to the cutter. [The] [a]pplicant was apparently aware of the Area Commander's irritation at her actions. See, e.g., Applicant's Brief at 19: "the Area Commander demanded to know if this [her opinion that headquarters should assign more women [to the cutter]] was why she had called him back" In short, the facts that the applicant relates, in support of her argument that the Area Commander "just didn't understand" her intent are not inconsistent with the matter reflected in the OER: that she had exceeded the bounds of military courtesy with the Area Commander. Applicant's subjective intent does not render the Area Commander's perceptions, or the Reporting Officer's (CO's) use of this information in her OER, an error or injustice.

The Coast Guard argued that the CO's comment on the lack of the applicant's readiness for command afloat was the CO's opinion based on his professional judgment, command experience, and first hand knowledge. The Service argued that the officer evaluation system (OES) commits such recommendations to the reporting officer's, who was the CO in this case, discretion. Article 10-4-4(d)(8) of the Personnel Manual. The Coast Guard stated as follows:

Absent a showing of actual or real error, such professional judgment should not be reversed by the Board. See, e.g. Opinion of the Deputy General Counsel in CGBCMR Dkt. No. 84-96 ("Consistent with legal precedent, absent legal error I am reluctant to second guess expressions of opinion in OERs by supervisors who are not only entitled to presumption of correctness, but are much closer to the facts than I am.. See, e.g. Grieg v. United States, 226 Ct. Cl. 258 (1981)").

The Coast Guard concluded its comments on the applicant's allegations with respect to the first disputed OER by stating the following:

[The] [a]pplicant has not shown that, having included certain marks and a recommendation for command in his initial draft of the OER, the [r]eporting [o]fficer was thereafter bound to leave that matter unchanged in the final OER, despite becoming aware of additional performance information which occurred during the reporting period. OERs are subject to change until validated by the Coast Guard Personnel Command. See [Article 10-4-4j(6), Personnel Manual]. The [CO] was not prohibited from reassessing [a]pplicant's marks or his recommendation for command. Had the additional information been positive, [a]pplicant's OER could have benefited from it. Applicant has not shown that the contested numerical marks did not accurately reflect the Commanding Officer's evaluation of her performance, or that the first OER otherwise reflects a misstatement of significant fact or a procedural violation. The first [disputed] OER is neither erroneous nor unjust.

With regard to the second disputed OER, the applicant stated that that the question is whether the reporting officer was professionally evaluating the applicant's performance as XO or was the CO acting in reprisal against the applicant for a complaint of discrimination. The Coast Guard stated that some of the skits the applicant complained about were inappropriate. However, the Coast Guard stated that the evidence did not support the applicant's allegations regarding reprisal and personal bias on the part of the CO. The Service further stated that the evidence offered by the applicant did not rebut the presumption that the CO exercised his duties as reporting officer correctly, lawfully, and in good faith.

The Coast Guard stated that the applicant has not shown that any such personal interest or conflict on the part of the CO existed at the time the second OER was completed, nor does such evidence raise a substantial question regarding the fairness and accuracy of the second disputed OER. The Service stated that the applicant has also failed to show that a substantial motive for reprisal existed on the part of the CO at the time he wrote the second disputed OER.

The Coast Guard stated that the applicant's position that the CO's decision not to recommend her for command was the result of personal animus or prejudice, is inconsistent with her earlier praise of her CO's skill and leadership in handling gender integration issues. The applicant's present position cannot be reconciled with her request to have the CO extend on board the Cutter for an additional year. In support of its position with regard to this inconsistency, the Coast Guard relied on a portion of the applicant's letter to the Area Commander, in which she wrote:

The reason I [the applicant] feel that [the CO] is crucial to this process is that he has earned the confidence of this crew to the point that they will be honest with him. Getting women to trust a male senior (or peer for that matter) well enough to be honest about their experiences and opinions takes, on average, 9 months to a year (if at all) depending on how positive or negative their experience have been.

The Coast Guard stated that the applicant did not report the line crossing improprieties to the CO's superiors until the day the CO endorsed her reply to the second disputed OER. The Service argued that the second disputed OER was not written in reprisal for her complaint regarding the equator crossing ceremony, since the applicant did not submit the complaint until after the OER was completed. The Coast Guard asserted that the CO's comments in block 11 rebut the applicant's allegation that the disputed OER is tainted by the CO's bias against her. The Coast Guard stated that the CO highly recommended the applicant for promotion and noted her strong seamanship skills. He also was clear that it was his opinion that she was not suitable for command because her skills in handling people are not as smooth as they could be.

On the issue of a nexus between the alleged error in the disputed OERs and the applicant's failure of selection before the captain selection board, the Coast Guard stated the following:

Proof of error in the first disputed OER ending March 31, 1995 alone would not be sufficient to establish the required nexus to the applicant's non-selection. The associated marks supporting the comments (a 5 assigned in judgment, military bearing and professionalism) are all above the expected high standard of a 4 and the applicant was highly recommended for promotion. However, because of the importance of leadership and command recommendations for seagoing officers and the extreme competitiveness of selection to the grade of captain, the evaluation in the

OER ending [August 25, 1995] expressing uncertainty about the applicant's interpersonal skills, leadership abilities and command afloat potential by itself made it highly unlikely that the applicant would be selected for promotion to captain. Even if a strong recommendation for afloat command were to be included in the OER ending March 31, 1995, because of the reversal of that recommendation in the OER ending [August 25, 1995], applicant's chances for selection would not significantly improve. Thus, if the Board found error in the OER ending [March 31, 1995], but not in the OER ending [August 25, 1995], applicant's record as a whole would not appear significantly stronger, and it is unlikely that she would have been promoted in any event, because of the importance of the OER ending [August 25, 1995] to her non-selection. It therefore follows that, if the Board found that all of the challenged matter in both OERs was error, it should also grant relief from her non-selection.

Statement from Applicant's CO

As part of its comments, the Coast Guard obtained and submitted a statement from the applicant's CO, the supervisor and reporting officer on the disputed OERs. The CO stated that the applicant was not a victim of anything during the time she served as his XO. He stated that the applicant had the duty to perform and had every opportunity to display her readiness to assume command afloat. The CO stated that the applicant did not measure up in this area: "I stand by my opinions of her potential to command afloat."

The CO stated that as the XO of the ship, the applicant was "primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command." The CO stated he had published shipboard regulations governing crew members' behavior. The CO stated that there had been instances prior to the equator crossing incident that the applicant had to take action to enforce adherence to the standards of conduct. The CO stated the following:

Given that backdrop, since I had given general guidance to the equatorial line crossing planning group that it should be in good taste, and since [the applicant] personally was responsible to me for the good order and discipline of the ship, I wonder why [the applicant] took no action, or insufficient action, prior to the equatorial line crossing to ensure that it was conducted in a manner which stayed within appropriate bounds.

The CO stated that the first disputed OER was returned to him by the reviewer in accordance with Article 10-A-2f.(2)(d) of the Personnel Manual. The first disputed OER was returned because two 7s in "using resources" and "getting results" were unsupported by the narrative. The CO stated that he elected to change the mark to 6 since he was satisfied that the narrative as written accurately described the applicant's performance for the period under review. In returning the OER to the

CO, the reviewer advised the CO that two relevant elements of the applicant's performance had been omitted from the first disputed OER: (1) the fact that a non-frivolous civil rights complaint had been lodged against the applicant. (2) In a conversation that the applicant had with the pacific area commander, a vice admiral, the applicant had not taken "no" for an answer, and had pressed her point with him past the bounds of military courtesy. The CO stated that upon learning that it was improper to include comments about the civil rights complaint in the OER, the comments were deleted in the revised OER.

The CO stated that the information characterizing the applicant's conversation with the area commander was not known to him at the time of the initial OER preparation. He stated that he considered the information relevant and germane to the issue of the applicant's suitability for future command afloat assignments. The CO stated that he lowered the applicant's marks in judgment, human relations, and military bearing and withdrew his earlier recommendation for assignment to command float. The CO stated that he considers the first disputed OER as it now exists to be a fair, balanced, and accurate account of the applicant's performance as his XO during that period.

The CO stated that during the period covered by the second disputed OER, the applicant was abrupt or short with crew members during briefings or in meetings she conducted. The CO stated that he and the applicant spoke about ways in which she could have smoother relations with the crew. The CO stated some members of the crew were afraid for their careers after a meeting with the XO about the inappropriate line crossing activities. The CO stated that it was the XO's job to ensure good order and discipline of the ship, but the XO should not be oppressive.

The CO stated that some of the crew members' behavior was inappropriate during the line crossing event. He believed the XO's behavior was also inappropriate. The CO stated that he considered the applicant's performance as not befitting the characteristics of an officer fit to command afloat, and he reflected as much in the second disputed OER.

The CO stated that he believed the applicant did a fantastic job in coordinating, planning and executing the everyday business of the cutter. He further stated that good afloat commanding officers also ensure that their officers and crew are well led and motivated. The CO stated that the applicant did not do nearly as well in this crucial aspect of command. For this reason, he did not recommend her for command afloat.

The CO discounted the statement from the former civil rights officer stating that she had never visited the ship or had a conversation with the CO. The CO stated that he did everything he could to resolve the conflict prior to bringing in outside assistance.

Applicant's Response to the Views of the Coast Guard

On December 31, 1997, the BCMR received the applicant's response to the views of the Coast Guard. The applicant repeated her request for an evidentiary hearing. In this regard, the applicant stated that sensitive issues "of nuance and communication, as well as unit environment, are at the heart of this case, and cannot be resolved without a hearing at which the parties can be heard and their demeanor gauged by the Board.

The applicant complained that the PRRB decision was inadequate and blamed her for not raising the line crossing improprieties sooner. The applicant also complained that the nexus analysis offered by the Coast Guard was not adequate. The applicant argued that the relief she seeks, if granted, would make her PDR stronger. The applicant stated that pursuant to Frizelle v. Slater, 111 F.3d 172 (D.C. Cir. 1997), this shifts the burden to the Coast Guard to show the applicant would have been passed over in any event. The nexus analysis offered by the Service admits that the applicant would be entitled to relief from her 1997 passover if her record were corrected as she has asked. According to the applicant, the question is whether she is also entitled to passover relief if she receives less than the full relief to which she claims to be entitled. In any event she should prevail because the burden is on the Service, and it has failed to meet that burden.

The applicant argued that since promotion to captain is on a best qualified basis, the only way to determine whether she would have been passed over, even if she were afforded full corrective relief, would be to compare her PDR, as fully corrected, with those of other officers with whom she competed in 1997 for promotion to captain. The applicant cited Porter v. United States, No. 91-1008C (Fed. Cl. Dec. 30, 1992), appeal pending, No. 97-5f007 (Fed Cir.).

The applicant submitted with her reply a sworn statement rebutting the comments in the CO's sworn statement. Pertaining to the first disputed OER, the applicant stated that neither the Coast Guard nor the CO denied that the initial submission of the first disputed OER recommended her for command. She argued that an OER that has been signed by the reporting officer is not a draft OER. She stated that what occurred in this case is an attempt to rewrite history, and it should be rejected. The applicant restated her contention that the reviewer's superiors negatively influenced the final version of the first disputed OER causing an unfair, imbalanced and incorrect evaluation of her performance.

The applicant stated that she had discussed the matter of the alleged civil rights complaint with the CO prior to the completion of the initial submission of the first disputed OER. She submitted a letter dated March 20, 1995 advising the CO that the civil rights matter had reached an informal resolution. This letter also bears the CO's signature with a handwritten date of "4/5/95." The applicant stated that failure of the CO to include this information in the initial version of the

first disputed OER was not an omission as he claimed but was directed to be included by the reviewer.

The applicant wrote several pages describing her version of the conversations with the vice admiral. The applicant stated that she did write a letter to the vice admiral and made two telephone calls to him. She stated that she only commented on the "female afloat assignment policies" after being asked by the vice admiral if there was anything further to be discussed. She indicated that all of her actions with the vice admiral, except for the discussion of the women's afloat issue, were with the knowledge of the CO.

The applicant wrote that the first disputed OER was returned to the cutter on or about June 30, 1995. She stated that the CO told her that he "felt that he didn't have any choice but to remove the two '7's" (he couldn't write any better, he said), to include a comment in § 4.c. indicating [she] had violated [the CPO's] civil rights, to comment on my discussions with the [vice admiral], and to use those discussions as a reason to remove the command and senior staff training recommendation."

Regarding the CO's comments with respect to the second disputed OER, the applicant wrote the following:

[The CO] maintains that my behavior was certainly as inappropriate as some of the crew's behavior. So much for officers who object to the kind of behavior captured on the videotape that is evidence in this case! Until [the CO] finally discussed my last OER with me in late September 1995, I had received nothing but positive remarks from him, both orally and in writing, vis-à-vis my fitness for command. The circumstances claimed in . . . his declaration simply do not explain the dramatic shift in his orientation on this matter.

* * * * *

[The CO] NEVER, EVER said he was concerned in any way about my ability to command throughout this entire reporting period. He did indicate he felt I was a little hard on or insensitive to people sometimes, but this was never in the context of being disqualified for command and I never disregarded his counsel.

* * * * *

[In his declaration, the CO] states that it was the actions in and around the line crossing event that led to his comments in the second OER. [However] given [the CO's] inability to deal with the situation presented, the OER he wrote on [the applicant] could only be biased, imbalanced, and incorrect.

The applicant asserted that she is the one being punished when she did her job, but the CO failed to do his.

With her reply, the applicant submitted two videos of the line crossing ceremonies, a copy of the Coast Guard's instruction on Sexual Harassment, COMDTINST 5350.30, several pictures taken of the line crossing ceremony, notes from her daily diary, and a copy of the decision in Porter v. United states.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. It is timely.

2. The Board concurs in the Chairman's determination that the application can be determined without a hearing. 33 CFR § 52.31.

3. The Board finds that the applicant has not provided sufficient evidence to establish that the period of performance covered by the first disputed OER was infected with bias on the part of the CO due to the applicant's involvement in reporting alleged improprieties during the line crossing ceremonies on board the cutter. The period covered by the first disputed OER ended on March 31, 1995. The line crossing ceremonies took place between July 9 and July 12, 1995. Since the line crossing incident fell outside the first reporting period it would have been improper for the rating chain to consider it in evaluating the applicant's performance. The evidence strongly suggest that the rating chain honored this requirement. The first disputed OER was initially written and submitted to the reviewer in June 1995, prior to the line crossing ceremony. The OER did not at that time mention the line crossing improprieties, since they had not occurred. Also, the reviewer returned the OER to the CO prior to the line crossing event. Neither the initial nor the final version of the disputed OER contained a reference to the line crossing event. The evidence shows that the only relationship between the first disputed OER and the line crossing ceremonies is that the final version of that OER was submitted a few days after the applicant spoke with the CO about alleged improprieties. This evidence is insufficient to show that the discussion between the CO and the applicant led the CO to be biased against the applicant in the first disputed OER.

4. The first disputed OER was returned by the reviewer to the reporting officer on or about June 30, 1995. The reviewer's actions in returning the OER, therefore, had nothing to do with the line crossing improprieties. The reviewer returned the OER because in his opinion the two marks of 7 were not substantiated

by the comments and certain aspects of the applicant's performance dealing with a civil rights complaint against her and because an alleged unpleasant conversation between the applicant and the area commander were not addressed by the CO in this OER. The Board finds that the reviewer's action in returning the OER to the CO was in compliance with Article 10-A-2f.(2)(d) of the Personnel Manual. This provision mandates that the reviewer return an OER to the reporting officer to correct errors, omissions, or inconsistencies between the numerical evaluation and the written comments. See also Seehaus v. Slater, C.A. No. 96-1597 (D.C.C Dec. 4, 1997) at 4.

5. However, the applicant alleges the reviewer did more than just return the disputed OER to the CO; he went further and directed the CO to lower grades and add unflattering comments. The evidence of record is insufficient to prove the applicant's contention. The CO, by affidavit, denied that he was pressured into making revisions on the disputed OER and defended the action of the reviewer in returning the OER to him. He indicated that his actions in revising the first disputed OER were free of command influence. In fact, he stated that he elected to lower the 7s to 6s, since the comments as initially submitted accurately reflected the applicant's performance. He admitted that at the time he submitted the initial version of the first disputed OER, he was not aware that the applicant had offended the area commander during telephone conversations that she had with the area commander. However, after learning about the applicant's behavior during that conversation, the CO thought it was relevant and germane to the issue of the applicant's suitability for future command afloat assignments and to the issues of the applicant's judgment, human relations, and military bearing. The CO lowered the applicant's grades in these areas after receipt of that information. The revised grades and additional comments reflect the CO's judgment of the applicant's performance. Unless such comments and marks are inaccurate, the CO's judgment should stand.

6. The applicant has not demonstrated that the reporting officer's and reviewer's actions resulted in a material misstatement of a significant hard fact nor were the actions contrary to law. See Germano v. United States, 26 Cl. Ct. 1445, 1460 (1992). The applicant has offered only her sworn statement that the revised marks and added comments do not accurately reflect her performance. The Board has before it an affidavit from the applicant stating that the CO told her that he did not have any choice but to lower the grades and add the disputed comments. Another affidavit came from the CO stating that the disputed OER was properly returned to him by the reviewer and that in his judgment the comments should have been added to the disputed OER to correctly record the applicant's performance for the period. No other statements have been submitted on these points. The Board finds that the applicant has not demonstrated, by a preponderance of the evidence, that the first disputed OER is inaccurate or resulted from command influence.

7. The Board finds that the OER process as outlined in the Coast Guard Personnel Manual tolerates changes to an OER until its validation and placement in

the record. The Service permits the changes by allowing each authorized member of the rating chain to correct errors, omissions, and inconsistencies between marks and comments. See Articles 10-A-2e.(2)(d), 10-A-2f.(2)(d), and 10-A-2h.(2)(e), Coast Guard Personnel Manual. Whether the initial version of the first disputed OER is considered a draft as the Coast Guard argued or a final version as the applicant argued, is irrelevant because the Personnel Manual permits an OER to be tailored at various stages so that an accurate evaluation of an officer's performance can be obtained. In this case, the OER could be and was returned for corrections by the reviewer. The Board finds no error or injustice in the rating chain revising the first disputed OER to accurately reflect the applicant's performance for the period under review.

8. The applicant has alleged that the second disputed OER should be removed because it does not accurately reflect her performance and because the CO took reprisal against her in this OER because she exposed the improprieties of the line crossing ceremonies that eventually led to an investigation of the CO/cutter and his being taken before an admiral's mast (non-judicial punishment). She further argued that the CO should have been removed from her rating chain, in accordance with Article 10-A-2g, because a substantial question existed whether he could prepare a fair and accurate evaluation on the applicant at that time.

9. The record offers no direct evidence that the CO took reprisal against the applicant in the second disputed OER for her actions with respect to alleged improprieties during the line crossing ceremony. The applicant has only presented her own statement that the CO took reprisal against her. The second disputed OER, itself, is a very complimentary report, except that it criticizes the applicant's "people skills" and it does not contain a recommendation for a command afloat assignment, which the applicant desired. Moreover, the evidence strongly suggests that the comments about the applicant's "people skills" were true. The applicant, herself, admitted that she was at times short with people. Also, the manner in which she handled the incident with the admiral and apparent miscommunications with other Coast Guard personnel support the accuracy of the statements with respect to her "people skills."

10. The applicant believes that the lack of a recommendation for command afloat resulted not only from her out-spokenness about the line crossing ceremonies, but also because of the environment of insensitivity that existed on board the cutter with respect to gender issues. The applicant has not presented any evidence that the CO treated her disrespectfully because she was a woman. She complained about the fact that he would not discuss his meeting with the senior members of the line crossing committee with the applicant. However, this lack of a discussion does not establish that the CO was insensitive to the applicant or that he took reprisal against her in the disputed OER. In fact, the CO explained that he was hesitant to discuss the matter with the applicant because some of the members of the planning

committee for the line crossing ceremony were afraid for their careers after the applicant spoke to them about her concerns.

11. The applicant has suggested that the environment aboard the cutter was so hostile that it interfered with her ability to do her job. The applicant has stated instances of alleged inappropriate behavior by certain members of the command. One such instance was the line crossing incident. Her OERs, even considering the points at issue, are very complimentary and they indicate that she was an effective XO. There is no evidence that her poor "people skills" resulted from a hostile work environment. There is evidence in the record that she was able to speak with the CO about matters that concerned her. He may not have always agreed with her or her approach but the applicant has not proved that this was a matter of gender. There is nothing to indicate that the CO's judgments would have been different, if the applicant were a male.

12. The evidence does not support the applicant's contention that the CO should have been removed from her rating chain for either the first or second disputed OERs. At the time the CO wrote the disputed OERs, there had been no complaint made against the CO and he was not under investigation. The applicant stated that even though the investigation had not commenced at the time the CO prepared the second disputed OER, he was aware of her dissatisfaction about the line crossing improprieties. However, there was no reason for the CO to suspect that the matter would be reported to his superiors, or that he would be investigated because of it. The evidence shows that the applicant had turned her attention to other matters and did not revisit this issue until after a change of command, with a different CO. The CO for the disputed OERs had suffered no harm at the time he prepared either report. The applicant's contention that the CO could not render a fair and objective appraisal of her performance because of her involvement in the line crossing incident is not supported by the evidence. The evidence suggests that the applicant decided to report the incident only after she received the second disputed OER, which she did not like.

13. In the judgment of the CO, the shortcomings in the applicant's performance were significant. The CO's criticisms of the applicant's performance have not been proven to be inaccurate nor have they been shown to be unfair. The Board will respect the judgment of the rating chain with respect to the applicant's qualification for command at sea as well as the other aspects of her performance covered by the disputed OERs.

14. The applicant has failed to prove an error or injustice with respect to the two disputed OERs. No basis exists, therefore, to consider removing the failure of selection for promotion to captain or to order a review of the Coast Guard's refusal to award the applicant an achievement medal.

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

ORDER

The application of [REDACTED]
her military record is denied.

USCG, for correction of

