

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-238



FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on September 26, 2012, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 14, 2013, 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 asked the Board to correct her record by removing her promotion year (PY) 2012 and 2013 non-selections for promotion to captain and to provide her with two additional opportunities to compete for promotion to that grade. Because she has twice failed to be selected for promotion to captain, she is slated to be involuntarily retired effective July 1, 2013.¹ The applicant alleged that her non-selections for promotion were due to an erroneous officer evaluation report (OER) for the period from May 1, 2006 to June 30, 2007 (disputed OER). She asked the Board to allow her to communicate with the next selection board to explain the circumstances under which she received the disputed OER.

The applicant asserted that the disputed OER is erroneous because it contained verbatim comments to describe her performance in section 5 (Leadership Skills) and in section 8 (Personal and Professional Qualities): The comments at issue are:

¹ 14 U.S.C. § 285(a) states that "[e]ach officer of the Regular Coast Guard serving in the grade of lieutenant commander or commander, who has failed of selection for promotion to the grade of commander or captain, respectively, for the second time shall: (1) if he has completed at least 20 years of active service or is eligible for retirement under any law on June 30 of the promotion year in which his second failure of selection occurs, be retired on that date;"

Continually demonstrated forethought & initiative to ensure D1 prepared for all contingencies. Exemplary initiative & judgment as noted by District Cmdr to set storm conditions in district after monitoring wx & unable to reach senior staff—ensured assets prepared for Nor Easter that reached hurricane force, judgment beyond reproach operational risk analysis and until safety always in forefront executing mission. Not afraid to make the unpopular decision even in face of strong pressure from sector cmdrs and unit commanding officers. Tactfully and diplomatically remained firm on asset denial decisions. Always looked for safest alternative in high risk missions from VDELS to rescue efforts; pushed back to sectors to find safer alternatives. Highly attuned to political sensitivities in AOR-facilitated strong aviation support for Marine Fishermen’s forum, ice breaking for small harbors to foster relationships w/local govts, congressional leadership, and fishing community. Liaisoned w/FEMA and state EOCs-improved interoperability & robust partnerships. Implemented quality of life initiatives w/in cc space to improve watch living conditions. Ensured watch member on [weight] program had time to maintain fitness plan.

In section 5 of the OER (which includes the performance dimensions of looking out for others, developing others, directing others, teamwork, workplace climate, and evaluations), the applicant received one 5, three 6s, and two 7s.² In section 8 of the OER (which includes the performance dimensions of initiative, judgment, responsibility professional presence, and health and well-being), the applicant received one 5 and four 6s.

The applicant stated that the subject comments were intended to support the marks in section 8 of the OER, but also ended up in section 5. As a result of this mistake, the marks in section 5 are not supported by comments related to the particular performance dimensions for “leadership skills.” She stated that none of the members of her rating chain caught the error and that the Personnel Service Center validated the erroneous OER and placed it in her record. The OER shows that it was validated on December 14, 2007. The applicant stated after she submitted her input for the OER, she was diagnosed with and treated for a very serious illness for a period of one year and was not aware that the OER had been prepared incorrectly until notified by the PY 2013 captain selection board. She stated that the OER in her record is the only existing copy and thus the error could not be corrected for that selection board. The applicant stated that given that the error was discovered by the PY 2013 selection board, it is clear that they read and considered the OER in their selection process to her disadvantage. She also argued that she was unfairly disadvantaged before the PY 2012 selection board as well since the PY 2012 selection board reviewed the same file and utilized the same erroneous OER.

VIEWS OF THE COAST GUARD

On December 5, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief, as recommended by the Commander, Personnel Service Center (PSC). PSC recommended the following corrections to the applicant’s record:

² OER marks range from a low of 1 to a high of 7.

1. Remove the results of the PY [20]13 captain selection board from the applicant's record. The applicant should be considered a candidate before the PY [20]14 captain selection board. The applicant is subject to mandatory retirement on [July 1, 2013] from her two non-selections . . .
2. Redact [section] 5's comments from the applicant OER in question.
3. Grant no other relief.

PSC stated that the comments in block 5 of the OER are in error, and the absence of comments related to the "leadership skills" performance dimensions for this section leaves the assigned marks unsupported, which is a violation of Coast Guard policy. PSC stated that the comments cannot be corrected with accurate comments because neither the supervisor nor the reviewer maintained a copy of their draft OER. PSC stated that the best way to correct the error without harming the applicant is to redact all the comments in section 5, leaving the marks as assigned without any supporting comments. PSC believed that the assigned marks in section 5 are correct and convey an accurate assessment by the supervisor.

PSC stated that the applicant may have suffered an injustice before the PY 2013 captain selection board due to the erroneous OER since that board brought the error to the attention of the applicant and asked for a correct OER. PSC, therefore, recommended removing the applicant's failure of selection before that selection board. PSC stated that it is possible, but unlikely, that the PY 2012 selection board noticed error and failed to report it. PSC argued that given the above average marks in section 5 and the fact that the PY 2012 captain selection board did not report an error in the applicant's record, there is no basis for finding that the PY 2012 board was influenced negatively by the error. PSC recommended against removing the applicant PY 2012 failure of selection.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 7 2012, the Board received the applicant's response to the views of the Coast Guard. She agreed with the Coast Guard's recommendations in her case.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.
2. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. 33 C.F.R. § 52.24(b).

3. The Coast Guard admitted that the disputed OER was erroneous because the comments supporting the marks in section 5 were copied verbatim from those in section 8, and therefore, did not address the applicant's leadership skills to which section 5 of the OER pertains. In light of PSC's recommendation, the Board finds that the OER's rating chain violated Article 10.A.4.c.4.d. of the Personnel Manual which states that the supervisor shall include comments citing specific aspects of the reported-on officer's performance and behavior for each mark that deviates from a four. In addition, the PSC personnel responsible for validating the OER failed in their duty to provide an accurate final OER during the quality review process in violation of Article 10.A.2.i.2.c. of the Personnel Manual. Accordingly, the error should be corrected by redacting the comments from section 5 of the disputed OER and leaving the assigned marks without any supporting comments, as recommended by the Coast Guard and accepted by the applicant.

4. Since the applicant's record contained an error when it was considered by the PY 2012 and 2013 selections boards, the Board must determine whether the applicant's non-selections for promotion to captain should be removed. The JAG recommended, and the applicant agreed, that her PY 2013 non-selection before the PY 2013 captain selection board should be removed from her record. By recommending that the applicant's PY 2013 failure of selection be removed, the Coast Guard is admitting that the applicant's record before that board was prejudiced by the error and that with a corrected record, it is not unlikely that she would have been selected for promotion by the PY 2013 selection board. *See Engels v. United States*, 230 Ct. Cl. 465, 470 (1982) (setting forth the standard for prejudice: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?") Therefore, the Board finds that her non-selection for promotion before the PY 2013 selection board should be removed from her record.

5. The Coast Guard recommended against removing the applicant's PY 2012 non-selection for promotion because the preponderance of the evidence did not show that the PY 2012 selection board was aware of the error. In her response to the advisory opinion, the applicant agreed with the advisory opinion. In the Board's view, it would have been appropriate to remove the applicant's PY 2012 non-selection for promotion to captain, as well as her PY 2013 non-selection. The erroneous OER was in the applicant's record before both selection boards. Therefore, it is inconsistent to find that it was prejudicial to the applicant before the PY 2013 selection board but not prejudicial to her before the PY 2012 selection board, in the absence of evidence to the contrary. Indeed, the Coast Guard's own recommendation admits that the erroneous OER prejudiced the applicant's record and potential promotion before the PY 2013 board. Thus, given that the same erroneous material was in the applicant's record before the PY 2012 selection board, it is probable that that material contributed to her non-selection by the PY 2012 board. There is no persuasive evidence in the record that the PY 2012 selection board was unaware of the erroneous OER, notwithstanding PSC's speculation that it was unlikely that the PY2012 selection board noticed the error. And, because the Coast Guard's own recommendation admits that the erroneous OER prejudiced the applicant's record and potential promotion before the PY 2013 selection board, the applicant must have been similarly prejudiced before the PY 2012 selection board that had the very same material before it. However since the

Coast Guard and the applicant have agreed on a remedy to cure the errors that occurred in this case, the Board will accept their decision and direct relief as agreed to by the parties.

6. The applicant's request to communicate with the selection board is provided by statute and the procedure for doing so is in the Personnel Manual. She does not need the Board's permission to communicate with the selection board. Also, the applicant should remain on active duty, as requested, until she has been considered by the next captain selection board with a corrected record.

7. To summarize, the Coast Guard and the applicant agreed that the OER in question was in error and should be corrected as discussed above. The parties also agreed that the PY 2013 non-selection for promotion to captain should be removed from her record and the applicant will be considered by the next captain promotion board with a corrected record. Also, the parties agreed that the applicant's PY 2012 non-selection for promotion would not be removed from her record. Because the parties mutually agreed to remove the second non-selection for captain, which is well supported by the overwhelming evidence in the record, the Board will direct the relief as agreed to by the Coast Guard and the applicant.

8. Accordingly, the applicant is entitled to partial relief.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of [REDACTED], USCG, for correction of her military record is granted, in part. The Coast Guard shall correct her record as follows:

The OER for the period from May 1, 2006 to June 30, 2007 shall be corrected by removing the comments from section 5 (leaving the comment section empty).

Her PY 2013 non-selection for promotion to captain shall be removed from her record and she shall be considered by the next captain selection board with a corrected record.

She shall not be retired on July 1, 2013, but she shall be retained on active duty until she is considered by the next selection board for promotion to the grade of captain with a corrected record.

No other relief is granted.

