

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-179

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on August 25, 2004, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated April 21, 2005, is 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 raising two numerical marks on her officer evaluation report (OER) for the period July 16, 2002, to July 17, 2003, when she was serving as the program manager for the Reserve Officer Evaluation System. She also asked that the end date of the OER be corrected to May 31, 2003.

The applicant alleged that in March 2003, she received an email from the Coast Guard Personnel Command stating that an OER was due for her for the period ending May 31, 2003. Accordingly, on March 24, 2003, she submitted information for the OER to LCDR K, who was her supervisor for the evaluation period. However, LCDR K went on terminal leave on March 29, 2003, and retired on June 1, 2003, without completing her OER. She alleged that LCDR K instead prepared recommended numerical marks and comments and that he assigned her marks of 5 in the performance categories "Results/Effectiveness" and "Teamwork."¹

¹ Coast Guard officers are evaluated on a scale of 1 to 7 in a variety of performance categories, with 7 being the highest mark.

The applicant alleged that after LCDR K went on leave, she received an email from CDR S stating that her temporary rating chain would include himself as supervisor, CAPT F as reporting officer, and CAPT P as reviewer. She alleged that this change violated the Personnel Manual since LCDR K was her supervisor throughout the evaluation period and did not retire until June 1, 2003. She argued that being on terminal leave did not render LCDR K "unavailable" under the Personnel Manual. On the disputed OER, which was prepared by her new supervisor, CDR S, following the detachment of her reporting officer, CAPT F, she received marks of 4 in the categories "Results/Effectiveness" and "Teamwork."

The applicant noted that she would be "in zone" for selection for promotion to LCDR in September 2004. She asked that, if she fails of selection by that selection board but is subsequently selected for promotion after the BCMR corrects her record, her date of rank be backdated to what it would have been had she been selected for promotion by the selection board in September 2004 and that she receive corresponding backpay and allowances.

In support of her allegations, the applicant submitted a copy of the input LCDR K provided for her OER before he left the office. It contains copious observations of her performance and indicates that he would have assigned her marks of 5 in the categories "Results/Effectiveness" and "Teamwork." The applicant also submitted copies of several email messages, including the following:

- An email dated March 24, 2003, indicates that the applicant sent LCDR K input for her OER upon his request.
- An email dated April 15, 2003, notes that the applicant and twelve other lieutenants at her unit "are currently scheduled to receive a regular OER for the period ending May 31, 2003." The email also advises reporting officers to respond to the email if a regular OER would not be submitted.
- In an email dated April 29, 2003, CDR S informed CAPT F that because of LCDR K's departure, a temporary rating chain should be established for the applicant and one other lieutenant in the office; that LCDR K had provided input for their OERs; and that LCDR K's drafts were "in line with my observations."
- In another email message dated April 29, 2003, CDR S informed the applicant that for the remainder of the reporting period, her rating chain would include CDR S as supervisor, CAPT F as reporting officer, and CAPT P as reviewer.
- On May 12, 2003, CDR S reminded the applicant by email that her OER input was due as soon as she returned to the office. The subject line of this email message is "Your OER ending May 31."

- On May 23, 2003, CDR S informed the applicant by email that she would be writing the OER that weekend and needed the applicant's input. CDR S told her that the input should include "bullets of accomplishments you would like me to consider for your OER, examples of work completed."
- On May 23, 2003, the applicant forwarded CDR S the same email message with OER input that she had sent to LCDR K on March 24, 2003.

SUMMARY OF THE APPLICANT'S RECORD

On April 9, 1991, the applicant received a direct commission as a lieutenant because of her law degree. On June 30, 1998, she was discharged as a result of having twice failed of selection for promotion to lieutenant commander.

On January 4, 1999, the applicant accepted an appointment as a lieutenant (junior grade) in the Reserve and began drilling on inactive duty. On November 1, 1999, she signed an extended active duty contract and began serving as an xxxxxxxxxx consultant to the xxxxxxxxxx. On November 18, 1999, she was promoted to lieutenant. On her first OER in this position, which covered her performance through May 31, 2000, she received seven marks of 4, ten marks of 5, and one mark of 6 in the performance categories and a mark of 4 on the Comparison Scale.² In the second OER, which covered her performance through May 31, 2001, she received two marks of 4, eight marks of 5, and eight marks of 6 in the performance categories and a mark of 5 on the Comparison Scale. In the third OER she received at the xxxxxxxxxxxxxxxxxxxx, after having been promoted to serve as the xxxxxxxxxxxxxxxxxxxx program manager from June 1, 2001, to July 15, 2002, she was assigned five marks of 4, ten marks of 5, and three marks of 6 in the performance categories and a mark of 5 on the Comparison Scale. The applicant also received her first two Achievement Medals while at the xxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxx.

On July 16, 2002, the applicant began serving as the xxxxxxxxxxxxxxxxxxxxxx Program Manager. She was responsible for xxxxxxxxxxxxxxxxxxxx and providing guidance regarding xxxx timing and policies. According to the Coast Guard, a unit instruction dated March 3, 2003, shows that her promulgated rating chain included LCDR K as her supervisor, CDR S as the reporting officer, and CAPT F as the reviewer. However, because LCDR K began administrative and terminal leave on March 29, 2003, and retired on June 1, 2003, the rating chain was revised on April 29, 2003, to include CDR S as supervisor, CAPT F as reporting officer, and CAPT P as reviewer.

² The Comparison Scale is not actually numbered. However, as with the performance categories, there are seven possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank known to the reporting officer. A Comparison Scale mark in fourth place describes the officer as an "exceptional performer; very competent, highly respected professional." A mark in the fifth place means the officer was rated to be a "distinguished performer; give tough challenging, visible leadership assignments."

The OER disputed in this case covers the applicant's performance as the Reserve Officer Evaluation System Program Manager through July 17, 2003. It indicates that it was prepared upon the detachment of her reporting officer. The numerical marks include three marks of 4 in the performance categories "Results/Effectiveness," "Teamwork," and "Health and Well-Being," as well as thirteen marks of 5, two marks of 6, and a mark of 5 on the Comparison Scale. Her reporting officer, CAPT F, strongly recommended her for promotion with her peers.

On the applicant's second OER as the Reserve Officer Evaluation System Program Manager—which covers her service from July 18, 2003, through May 31, 2004 — she received one mark of 4 (for "Writing"), eleven marks of 5, six marks of 6, and a mark of 5 on the Comparison Scale. Due to transfers, her rating chain for this OER included none of the members of her rating chain for the disputed OER.

IEWS OF THE COAST GUARD

On January 12, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case because the applicant has "failed to carry her burden of production and persuasion and did not show that her OER was improperly prepared or was not a fair and accurate evaluation of her performance."

The JAG argued that the Board should apply the following standards in deciding whether to grant relief:

To establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a "clear and prejudicial violation of a statute or regulation or, alternatively, a misstatement of a significant hard fact." *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); see also *Hary v. United States*, 618 f.2d 704 (Cl. Ct. 1980). In proving his case, an applicant must overcome a strong presumption that his rating officials acted correctly, lawfully, and in good faith in making their evaluations under the Coast Guard's Officer Evaluation System." *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The JAG adopted as part of his advisory opinion a memorandum on the case from the Coast Guard Personnel Command (CGPC). CGPC stated that on April 29, 2003, it authorized CDR S to adjust the applicant's rating chain because of LCDR K's departure from the office. CGPC stated that the adjustment to the applicant's rating chain was proper under Article 10.A.2.g. of the Personnel Manual because LCDR K was "unavailable" due to his prolonged absence. CGPC noted that LCDR K properly left input for the OER with CDR S and that the applicant was notified in writing of the adjustment to her rating chain. CGPC stated that although LCDR K left input for the OER, CDR S was not required to use or include his input in the OER, as the departing

supervisor's marks and comments are strictly recommendations. CGPC argued that CDR S was under no obligation to assign the exact marks recommended by LCDR K.

Regarding the date of the end of the reporting period, CGPC stated that although under Article 10.A.3. of the Personnel Manual, May 31st usually ends the annual evaluation period for lieutenants, under Article 10.A.3.a.1.b.2., submission of the annual OER is optional if a regular OER will be submitted within 182 days of the scheduled date for the annual report. CGPC stated that a "Detachment/Change of Reporting Officer" OER is a regular OER and that one was prepared for the applicant upon the departure of her reporting officer within 182 days of May 31st.

Regarding the applicant's complaint that the alteration of the end date caused the OER not to reflect her performance in June and July 2003, CGPC argued that the emails she submitted indicate that CDR S requested her input for the OER more than once and that the applicant "had the opportunity and ... the responsibility to provide her supervisor [CDR S] with a complete listing of significant achievements or aspects of performance that occurred during the entire period." CGPC concluded that the applicant has failed to prove that her rating chain was erroneous or that they failed to fulfill their responsibilities in accordance with the Personnel Manual.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 12, 2005, the BCMR sent the applicant a copy of the Coast Guard's views and invited her to respond within 30 days. On February 11, 2005, the BCMR received the applicant's response.

The applicant argued that LCDR K was available to complete her OER during his terminal leave. She noted that during his terminal leave, he responded to various queries from the office. She alleged that it is standard practice at CGPC to contact officers who are on terminal leave, who have just retired, or who have transferred to another billet to get their signatures on OERs. The applicant also argued that LCDR K should have completed the OER because he was her immediate supervisor for nine months of the evaluation period, whereas CDR S was her supervisor for only the last four months. Moreover, she alleged, during those four months, LCDR X, who assumed LCDR K's billet on July 1, 2003, acted as her supervisor on several occasions instead of CDR S.

The applicant further argued that if the alteration of her rating chain was legitimate due to LCDR K's alleged unavailability, then the end date of her evaluation period should have been April 29, 2003, when her reporting officer changed from CDR S to CAPT F.

The applicant alleged that she had no idea that her rating chain had changed the end date of her evaluation period until she received the completed OER after it was validated by CGPC on November 25, 2003. She alleged that if she had known they had

extended the evaluation period, she would have provided additional documentation of her performance during the final months. She alleged that on May 23, 2003, CDR S asked her for the OER input she had provided to LCDR K on March 24, 2003. She noted that the subject line for this email was "Your OER ending May 31." The applicant stated that she gave CDR S a paper copy of the input she had given LCDR K on June 6, 2003, and that that was the last time CDR S asked her for OER input.

Accordingly, the applicant asked the Board to remove the disputed OER from her record. She asked that a new Detachment/Change of Reporting Officer OER be prepared for the period July 16, 2002, to April 28, 2003, with the proper rating chain that was promulgated during that period, including LCDR K as supervisor, CDR S as reporting officer, and CAPT F as reviewer. In the alternative, she asked that the marks of 4 she received for "Results/Effectiveness" and "Teamwork" be raised to 5s.

Finally, the applicant alleged that the disputed OER was a significant factor in her failure to be selected for promotion to LCDR in September 2004. Therefore, she argued, after her record is corrected, her date of rank should be backdated and she should receive backpay and allowances if she is selected for promotion by the next LCDR selection board.

RELEVANT REGULATIONS

Article 10.A.1.c.4. of the Personnel Manual provides that a rating chain includes the reported-on officer; his supervisor, who is “[n]ormally, the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements”; the reporting officer, who is “[n]ormally the Supervisor’s supervisor”; and the reviewer, who is “[n]ormally the Reporting Officer’s supervisor.”

Article 10.A.2.g.1. provides that “[i]n instances where a Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out their rating chain responsibilities, the commanding officer or the next senior officer in the chain of command shall designate an appropriate substitute who is capable of evaluating the Reported-on Officer. Other members in the rating chain may be adjusted and designated, as appropriate.” Article 10.A.2.g.2. states that “[a]s used within this subparagraph: a. ‘Unavailable’ includes illness, injury, death, prolonged absence, transfer, separation from the Service, retirement, or any other situation which prevents or substantially hinders the Supervisor, Reporting Officer, or Reviewer from properly carrying out their rating chain responsibilities.”

Article 10.A.3.a. provides the submission schedule for regular OERs. The end date of a lieutenant’s annual OER is May 31. However, Article 10.A.3.a.2.b. provides that with a detachment or change of the reporting officer, “OERs for officers on an annual submission schedule are required if more than six months (i.e., 182 days) have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later.” Article 10.A.3.a.1.b. provides that an “[a]nnual or semiannual OER submission is optional (waivers not required) if:

“(1) A regular OER (or a special OER that counts for continuity) was submitted within 182 days prior to the scheduled submission date for annual reports or 92 days for semiannual reports.

“(2) A regular OER will be submitted within the 182 days following the scheduled due date for annual reports or 92 days for semiannual reports.”

Article 10.A.2.c.2. provides that it is the responsibility of the reported-on officer to prepare the first section of an OER and submit it “to the Supervisor not later than 21 days before the end of the reporting period.” In addition, the reported-on officer “[m]ay submit to the Supervisor not later than 21 days before the end of the reporting period a listing of significant achievements or aspects of performance which occurred during the period.”

Article 10.A.2.d.a.i. provides that the supervisor completes his or her parts of the OER with numerical marks and supporting comments and “[f]orwards the OER ... and any other relevant performance information to the Reporting Officer not later than 10

days after the end of the reporting period.” In addition, a supervisor who is leaving the unit “[p]rovides the new Supervisor with a draft of OER sections (3-6) when the Supervisor changes during a reporting period.”

Article 10.A.2.e.2.e. provides that the reporting officer completes his or her parts of the OER with numerical marks and supporting comments and “[e]nsures the OER is forwarded to the Reviewer not later than 30 days after the end of the reporting period. Article 10.A.2.f.2.e. provides that the reviewer reviews the OER for accuracy and consistency and “[e]xpedites the reviewed report in a reasonable time to permit the OER Administrator to ensure the OER is received by Commander, (CGPC-opm-3) or Commander, (CGPC-rpm) 45 days after the end of the reporting period.”

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 10 U.S.C. § 1552. The application was timely.

2. The Coast Guard admits that on April 29, 2003, the applicant's rating chain was altered and that her reporting officer changed from CDR S to CAPT F. The applicant alleged that the alteration of her rating chain was improper because LCDR K was available to serve as supervisor. The record indicates that LCDR K went on terminal and administrative leave on March 29, 2003, in anticipation of his retirement on June 1, 2003. Email correspondence in the record indicates that at the time, the command intended to prepare an annual OER for the applicant with an end date of May 31, 2003. The Board finds that it was reasonable for the applicant's command to conclude that two months of administrative and terminal leave constituted a “prolonged absence” and rendered LCDR K “unavailable” under the provisions of Article 10.A.2.g. of the Personnel Manual.

3. The Coast Guard was entitled to alter the applicant's rating chain under the provisions of Article 10.A.2.g. of the Personnel Manual when LCDR K went on extended leave. However, nothing in Article 10.A.2.g. negates the requirement in Article 10.A.3.a.2.b. to prepare a Detachment/Change of Reporting Officer OER whenever a member's reporting officer changes. There may be circumstances, such as when a detaching reporting officer is disqualified by bias, that would make the preparation of a Detachment/Change of Reporting Officer OER under Article 10.A.3.a.2.b. improper and unjust. However, such was not the case for the applicant in March 2003, when her command knew that LCDR K would be going on extended leave and knew or should have known that it would alter her rating chain and reporting officer as a result of his unavailability.

4. In accordance with Article 10.A.3.a.2.b. of the Personnel Manual, a Detachment/Change of Reporting Officer OER should have been prepared when the applicant's reporting officer was changed from CDR S to CAPT F because more than 182 days had passed since the end date of the applicant's last evaluation period, which was July 15, 2002. The Coast Guard's failure to prepare an OER for the applicant when her rating chain was altered is a clear violation of the plain language of Article 10.A.3.a.2.b. However, as the JAG argued, "[t]o establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a '*clear and prejudicial* violation of a statute or regulation or, alternatively, a misstatement of a significant hard fact.'" *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992) (emphasis added). Therefore, the Board must determine whether the command's failure to prepare an OER for the applicant upon changing her reporting officer was prejudicial to her performance record.

5. Whether the failure to prepare an OER for the applicant when her reporting officer changed from CDR S to CAPT F was prejudicial to her performance record depends on which rating chain should have prepared that OER. The applicant has submitted purported OER input from LCDR K indicating that as supervisor he would have assigned her marks of 5, instead of 4, in the performance categories "Results/Effectiveness" and "Teamwork." Although LCDR K's document is not signed, the Coast Guard has not disputed its authenticity and has acknowledged that it constituted LCDR K's recommendation to CDR S regarding the applicant's OER. Therefore, if the applicant's original rating chain, as published on March 3, 2003, should have prepared the OER upon the change of reporting officer, the command's failure to prepare the OER must be deemed prejudicial in that it resulted in the applicant's receiving two marks of 4 from CDR S in those performance categories, instead of the marks of 5 LCDR K would have assigned.

6. As stated in Finding 2, it was not unreasonable for the applicant's command to determine that LCDR K was unavailable after March 29, 2003. However, the Board also notes that the command waited a full month after LCDR K left and presumably even longer after the command knew that LCDR K would be leaving on terminal and administrative leave to decide that he was "unavailable" under Article 10.A.2.g. of the Personnel Manual and to change the applicant's rating chain. If the command had timely determined prior to LCDR K's departure on extended leave that he would thereafter be "unavailable" to complete the applicant's OER and that her reporting officer would change upon his departure, the original rating chain promulgated on March 3, 2003, which included LCDR K as supervisor, would properly have been called upon to prepare the OER required pursuant to Article 10.A.3.a.2.b. of the Personnel Manual because of the change of reporting officer. LCDR K only became "unavailable" to prepare an OER for the applicant because her command waited until a month after he left the office (and presumably much longer after the command knew he

would be taking extended leave) to determine that the applicant's reporting officer would change because of LCDR K's departure.

7. The Board concludes that, but for the command's delay in determining that LCDR K would be "unavailable" during his leave and in deciding to alter the applicant's rating chain and reporting officer, she would have received a Detachment/Change of Reporting Officer OER prepared by her original rating chain, including LCDR K, prior to his departure. Although the applicant apparently has significant expertise in xxxxx policy, she could not have known prior to LCDR K's departure on leave in March that her command would decide that he was "unavailable" in April since, as she alleged, officers on terminal leave sometimes prepare OERs. Of course, the Personnel Manual does not specify when exactly a command must decide that a member of the rating chain is "unavailable" and that a new rating chain is necessary. However, in this case, the command's tardy determinations have deprived the applicant of the marks that her long-time supervisor would have assigned her. Therefore, the Board finds that the command's violation of Article 10.A.3.a.2.b. of the Personnel Manual and delay in altering her rating chain were prejudicial to her performance record in that they resulted in her receiving marks of 4 in the performance categories "Results/Effectiveness" and "Teamwork," instead of the marks of 5 LCDR K would have assigned. The applicant has therefore proved by a preponderance of the evidence that the marks are erroneous and should be raised.

8. In light of the above, the Board need not address other issues raised by the applicant, such as the lack of notice of the change in the expected end date of the OER from May 31, 2003, to July 17, 2003.

9. If the applicant had received the required OER when her reporting officer was changed from CDR S to CAPT F, under Article 10.A.3.a.(1) of the Personnel Manual, no annual OER would have been required for the period ending May 31, 2003, because that date fell within 182 days of LCDR K's departure (when the change of reporting officer should have occurred). For the same reason and pursuant to Article 10.A.3.a.2.b., no second Detachment/Change of Reporting Officer OER would have been required when her reporting officer changed again on July 17, 2003.

10. In her response to the JAG's advisory opinion, the applicant asked that the entire disputed OER be removed from her record. However, the only part of the OER that she has alleged or proved to be erroneous is the two marks of 4 in the performance categories "Results/Effectiveness" and "Teamwork." Although she complained that the OER did not cover her performance during the last months of the evaluation period, she presented no evidence whatsoever of significant performance-related information that is missing from the comments in the OER. In BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged [in its entirety] unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board

finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material." In the instant case, the Board finds that correcting the two marks of 4 to 5s is a simple and easy alteration. There is no basis in the record for expunging the entire OER.

11. The applicant alleged that the errors in her record caused her to fail of selection for promotion in September 2004 and asked the Board to expunge that failure. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if the applicant is entitled to such relief, the Board must answer the following two questions: "First, was the [applicant'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 [she] would have been [selected for promotion in September 2004] in any event?" With respect to the first question, the Board finds that having marks of 4 in two performance categories, rather than marks of 5, did at least slightly prejudice her record. With respect to the second question, however, the Board finds that it is unlikely that the applicant would have been selected for promotion even if the two marks in the disputed OER had been 5s instead of 4s. The Board notes that the applicant has earned other marks of 4 in her recent career and that the two disputed marks of 4 do not stand out in her record. Moreover, during the previous evaluation period, when the applicant was made the equal opportunity program manager after serving as an equal opportunity consultant for a year and one-half, her marks declined from mostly 5s and 6s to mostly 4s and 5s. In addition, the applicant received a mark of 5 on the Comparison Scale and a strong recommendation for promotion in the disputed OER, which greatly overshadow any slight prejudice that could have resulted from the two marks of 4. The Board finds that it is very unlikely that the outcome of the selection board would have been different had two out of eighteen performance category marks on one of the many OERs in her record been one place higher. Therefore, the Board will not order the applicant's failure of selection to be expunged.

12. Accordingly, the applicant's record should be corrected by raising her marks in the disputed OER from 4s to 5s in the performance categories "Results/Effectiveness" and "Teamwork." Although the end date of the disputed OER should have been March 28, 2003, and the supervisor's signature should have been that of LCDR K, the Board sees no reason to correct these errors as the applicant has not proved that the date and signature are *per se* prejudicial to her record.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is granted in part as follows:

The numerical marks in the performance categories "Results/Effectiveness" and "Teamwork" on her officer evaluation report (OER) for the period July 16, 2002, to July 17, 2003, shall be raised from 4s to 5s.

No other relief is granted.

Nancy L. Friedman

Adrian Sevier

Thomas H. Van Horn