

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2006-036**

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**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. The Chair docketed the case on January 5, 2006, upon receipt of the applicant's completed application.

This final decision, dated August 9, 2006, 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 removing her officer evaluation report (OER) for the period June 1, 2000, to May 31, 2001. The disputed OER contains several marks of 4 (on a scale of 1 to 7, with 7 being best) and a mark in the fourth spot on the comparison scale. While serving in the same billet, the applicant had previously received OERs with only one mark of 4 (for "Evaluations") and marks in the fifth spot on the comparison scale from her prior reporting officer, who was the District Chief of Staff. The disputed OER contains the following written comments by CAPT X, the new District Chief of Staff, who acted as her reporting officer (RO):

- Block 7: "... Demonstrated some improvement during period accepting direction, meeting imposed deadlines and recognizing externally established priorities."
  
- Block 8: "... Attention to detail in carrying out tasking and following procedures improved during period. Consistently sought out additional responsibilities and opportunities (president of local officer assn/community service/VIP visit coord), but sometimes at expense of primary tasking."

- Block 10: “Innovative, intelligent, hard-working and dedicated professional that holds great potential and could excel at tough, challenging assignments. ... [B]ut strong self-motivation and direction interfere with meeting deadlines and priorities established by superiors. Would benefit from assignment to a MSO to broaden career possibilities. If energy/expertise can be effectively directed I believe [the applicant] is capable of succeeding in the most difficult and challenging assignments. Recommended for consideration with peers.”

The applicant stated that the disputed OER should be removed from her record because CAPT X, who was a Reserve officer serving on short-term active duty, was never designated as a member of her rating chain. She alleged that he arrived at the command on February 28, 2001, and so observed her performance for only the last three months of the year-long evaluation period. The applicant alleged that the prior Chief of Staff, her properly designated RO, left the command on December 1, 2000, without preparing an OER, which she alleged was required by regulation.<sup>1</sup> She argued that if he had done so, the disputed OER would probably not have been prepared.<sup>2</sup>

The applicant further alleged that she was unaware during the evaluation period that CAPT X would serve as her RO. She stated that if she had known CAPT X was to be her RO, she would have solicited and adopted his priorities. She pointed out that her failure to adopt his priorities was the primary subject of CAPT X’s criticism in the disputed OER. However, she alleged, she was told that CAPT X would only be working on special projects and she rarely interacted with him, so she continued to work according to the priorities set by her prior RO.

The applicant stated that when she received the disputed OER, she was very surprised by the negative comments and asked for feedback from her supervisor. However, he had retired and either would not or could not explain the comments to her. When she asked CAPT X, he told her that he had received no input for the OER from her prior, properly designated RO or from her other chain of command (she was serving in a “shared billet”). The applicant alleged that she verified his answer by asking her prior RO and her other chain of command, and they all told her that they had not

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<sup>1</sup> Article 10.A.3.a. of the Personnel Manual 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.”

<sup>2</sup> Article 10.A.3.a.1.b. of the Personnel Manual 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.”

been asked to provide any input for her OER.<sup>3</sup> Moreover, she alleged, her prior RO told her that he had offered to provide input but that CAPT X had declined to accept it.

The applicant submitted a copy of an organizational chart of her billet, which she designed and which shows that, as a Human Resources Manager and Reserve Program Administrator, she was tasked by and answered to both the District Chief of Staff and the Integrated Support Command.

The applicant also made allegations about inconsistencies in the numerical marks and comments of the disputed OER and about the actions and attitudes of members of her rating chain. They are not summarized here because the Coast Guard has recommended removing the disputed OER for reasons unrelated to these other allegations.

### **VIEWS OF THE COAST GUARD**

On June 5, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case by replacing the disputed OER with one prepared "for continuity purposes only." The JAG based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), which the JAG adopted.

CGPC stated that the officer's orders and pay records show that CAPT X began working at the applicant's command on November 9, 2000, and continued working there through the end of the reporting period. In addition, the prior RO left the command on November 14, 2000, rather than December 1, 2000, as the applicant alleged. Therefore, because fewer than 182 days had passed since the end date of the applicant's prior evaluation period, no OER was required as a result of the designated RO's departure.

CGPC stated that the applicant's "claim that she was never informed of who her new Reporting Officer was seems unlikely" since she herself provided a copy of an organizational chart showing that CAPT X was the Chief of Staff and her supervisor's supervisor.<sup>4</sup> However, CGPC stated, CAPT X has admitted that he was never designated in writing as the applicant's RO during the evaluation period.

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<sup>3</sup> Article 10.A.2.e.2.g. of the Personnel Manual states, "If the Reporting Officer changes and a complete OER is not submitted, the departing Reporting Officer shall provide the new Reporting Officer a draft of the applicable OER sections. The draft may be handwritten and shall include marks and comments (bullet statements are acceptable) for the period of observation, prepared and signed by the departing Reporting Officer."

<sup>4</sup> 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."

CGPC stated that the applicant is correct in alleging that the designated RO provided no input to CAPT X for the applicant's OER. CGPC stated that his failure to do so violated Coast Guard policy under Article 10.A.2.e.2.g. of the Personnel Manual. However, CGPC stated, the applicant's claim that the departing RO offered to provide input and was rebuffed is false and that her inclusion of this claim in her application "is troubling and calls into question [her] credibility." In support of these claims, CGPC submitted signed declarations by the applicant's supervisor, CAPT X, and prior designated RO.

CGPC argued that although most of the applicant's claims are unfounded, the disputed OER should be removed from her record because the prior RO failed to provide input for the OER in accordance with Article 10.A.2.e.2.g. of the Personnel Manual. CGPC stated that his failure to do so was "potentially prejudicial" to the applicant. CGPC's arguments about the applicant's other allegations are not included in this summary as they are not germane to the Board's findings and conclusions.

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

On July 2, 2006, the BCMR received the applicant's response to the Coast Guard's advisory opinion. The applicant stated that she agreed with the Coast Guard's recommendation, but also asked that the Board order the Coast Guard to promote her to lieutenant commander (LCDR).

The applicant stated that the disputed OER was present in her record when it was reviewed by the LCDR selection board in the summer of 2005. She was not selected for promotion by that board. Therefore, she argued, her failure of selection should be removed from her record and her date of rank should be backdated.

The applicant further alleged that in the summer of 2004 her record was erroneously "placed on the reserve program administrator (RPA) register vice active duty register list" even though she had already returned to active duty from sabbatical. She alleged that she was not informed of the error until the LCDR selection board had already met. Since she was not considered by the 2004 LCDR selection board and the Coast Guard does not convene special selection boards, she had to wait to be considered for promotion until 2005. The applicant alleged that if she had been selected for promotion in 2004, she would have been promoted to LCDR on December 1, 2005. Therefore, she asked the Board to promote her to LCDR with a date of rank of December 1, 2005.

### **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.<sup>5</sup>

2. Article 10.A.1.b.1. of the Personnel Manual provides that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” The applicant alleged that the disputed OER is erroneous and unjust and asked the Board to remove it from her record. To establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a “clear and prejudicial violation of a statute or regulation.”<sup>6</sup> The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.<sup>7</sup> Absent evidence to the contrary, the Board presumes that the OER was prepared “correctly, lawfully, and in good faith.”<sup>8</sup> With these standards in mind, the Board has carefully considered all of the evidence presented regarding the OER disputed in this case and draws the following conclusions with respect to the evidence:

3. The Coast Guard has admitted that the officer who served as the District Chief of Staff and the applicant’s RO from June 1 through November 14, 2000, failed to leave input for her next OER when he left the command. CGPC stated that this failure constituted a violation of Article 10.A.2.e.2.g. of the Personnel Manual, which states that “[i]f the Reporting Officer changes and a complete OER is not submitted, the departing Reporting Officer shall provide the new Reporting Officer a draft of the applicable OER sections.” On this basis of this violation, CGPC stated that the disputed OER should be removed from the applicant’s record because the lack of input from the departing RO was “potentially prejudicial” to the applicant.

4. The Board agrees with the Coast Guard that the disputed OER should be removed from the applicant’s record because the departing RO’s failure to provide input for the disputed OER violated Article 10.A.2.e.2.g. of the Personnel Manual. Since the applicant’s prior OERs, which were prepared by the departing RO, contained significantly higher marks and better comments than the disputed OER, the Board finds that the violation of Article 10.A.2.e.2.g. was most likely prejudicial to her record. Therefore, the disputed OER should be removed because the preponderance of the evidence in the

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<sup>5</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940 “tolls the BCMR’s limitations period during a servicemember’s period of active duty”).

<sup>6</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 f.2d 704 (Cl. Ct. 1980); CGBCMR Dkt. No. 86-96.

<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

record indicates that it was adversely affected by “clear and prejudicial violation of a statute or regulation.”<sup>9</sup>

5. In her response to the advisory opinion, the applicant put forth two new requests: that the Board remove her 2005 failure of selection for promotion to LCDR, and that the Board promote her to LCDR with a date of rank retroactive to December 1, 2005. The requested retroactive date of rank is based on new allegations about an administrative error that prevented her from consideration by the LCDR selection board that convened in 2004. She alleged that December 1, 2005, is the LCDR date of rank she would have had but for the Coast Guard’s administrative error. Because the applicant failed to include these new requests and allegations in her original application, the Coast Guard has not had a chance to address them. Therefore, the Board will render no findings with respect to these new requests and allegations, but will permit the applicant to submit a new application to the Board for the resolution of these new matters. In the alternative, the applicant may submit a letter to the Board requesting that the new issues raised in her response to the advisory opinion be considered a new application.

6. Accordingly, the applicant’s record should be corrected by removing the disputed OER.

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<sup>9</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 f.2d 704 (Cl. Ct. 1980); CGBCMR Dkt. No. 86-96.

**ORDER**

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

Her officer evaluation report for the period June 1, 2000, through May 31, 2001, shall be removed from her record and replaced with a report for continuity purposes only.

No other relief is granted.

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Stephen H. Barber

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Dorothy J. Ulmer

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Eric J. Young