

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-120

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 March 30, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 29, 2007, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant commander (LCDR) in the Coast Guard Reserve, asked the Board to remove from her record the officer evaluation report (OER) covering her performance as a lieutenant on active duty in the regular Coast Guard from June 1, 2002, through May 31, 2003, when she was a controller at a District Command Center. In the OER, the applicant received one mark of 4 in the category "Planning and Preparedness," fourteen marks of 5, two marks of 6, and one mark of 7 in the other performance categories, and a mark of 4 on the comparison scale.¹

The applicant alleged that the Supervisor, LT D, who prepared the first section of the disputed OER, had only eight weeks' more seniority than her and was very competitive toward her. Moreover, LT D was competing against the applicant for promotion before the same LCDR selection board that year. The applicant stated that because they were competing for promotion that year, it was inappropriate for LT D to be on her rating chain.²

¹ Coast Guard officers are rated in numerous categories of performance on a scale of 1 to 7, with 7 being best. Although the comparison scale is not numbered, there are seven possible spots on the scale. A mark in the 4th spot on the comparison scale means that the applicant's Reporting Officer considered her to be a "good performer" ready for "tough, challenging assignments," when comparing her to all other lieutenants he had known.

² Officers are evaluated by a "rating chain," which normally includes a Supervisor, who is normally the person to whom the Reported-on Officer reports on a daily basis and who completes the first 13 numerical marks in an OER and their supporting comments; a Reporting Officer, who is normally the Supervisor's Supervisor and who completes the remaining marks and comments in an OER; and the Reviewer, who is normally the Reporting Officer's

The applicant stated that LT D gave her a mediocre mark of 4 in the performance category “Planning and Preparedness” because of “an isolated incident where I had overlooked the formality of a brief that was to be given. I adapted and gave an informal brief instead, but was disciplined for these actions. [LT D] said there were some other reasons for the mark, but did not provide specifics.” Therefore, the applicant alleged, she was not assigned a numerical mark in this category because of her overall performance or the trend of her performance but because of a single incident, which is discouraged under Article 10.B.6. of the Personnel Manual.

The applicant also alleged that the numerical marks are erroneously inconsistent with the laudatory written comments in the disputed OER. She noted that in block 3 of the OER, she is said to have used “exceptional forethought” and the word “excellent” is used three times in the written comments but, instead of receiving excellent numerical marks, she received one 4 and four 5s in the corresponding categories. The applicant also alleged that the fact that she received the highest score (96%) of any of the watchstanders at the Command Center on the Standardization Team written test shows that she was highly prepared and should have received at least a mark of 5 for “Planning and Preparedness.”

The applicant further stated that the Reviewer for the OER, the Chief of Search and Rescue, told her that the mark of 4 she received on the comparison scale was based on the mark of 4 that LT D assigned her for “Planning and Preparedness.” She alleged that he told her that “he never marked right of center [on the comparison scale] if an officer received a mark o 4 in any category.”

The applicant also alleged that, whereas all other lieutenants at their command had the Chief of Operations serve as their Reviewer, the lieutenants like her who served as watchstanders at the Command Center had the Chief of Search and Rescue designated as their Reviewer. The applicant noted that this practice was changed the following year after she failed of selection.

The applicant alleged that as a result of the low marks in the disputed OER, she failed of selection twice for promotion to LCDR in 2003 and 2004 and so was released from active duty in 2005. At that time, she felt demoralized because of what had happened with the disputed OER and subsequent failures of selection. However, she has since been promoted to LCDR in the Reserve, is looking forward to a great career in the Reserve, and wants to be competitive for future promotions. Therefore, she asked that the disputed OER be removed from her record.

SUMMARY OF THE RECORD

On September 20, 2003, the applicant was appointed an ensign in the Reserve. She served on continuous active duty and was promoted to lieutenant junior grade on March 24, 1995. From April 1995 through December 1996, the applicant attended flight training to become a pilot. Upon graduation from formal training, she began serving as a helicopter copilot with collateral duties as an operations duty officer and an assistant personnel officer. On her OERs, she mostly received marks of 4 for her operational expertise as a pilot, but higher marks of 5, 6,

Supervisor, who reviews the OER for consistency, and who need not have observed the Reported-on Officer’s performance. Personnel Manual, Articles 10.A.2.a., 10.A.2.d.1.a., 10.A.2.e.1.a., and 10.A.2.f.1.a.

and 7 in other performance categories. Although she did not qualify as a first pilot, on her final OER as a copilot in 2000, she received a mark of 5 on the comparison scale, which indicated that she was an “excellent performer.” On March 24, 1998, the applicant was promoted to lieutenant, and on April 7, 1998, she was integrated into the regular Coast Guard. Her marks in three OERs that she received as a lieutenant and copilot appear in the table below as OER 1 through OER 3.

In April 2000, the applicant began serving as a controller and command duty officer at a District Command Center. As such, she coordinated all search and rescue (SAR) operations in a 3.8 million square mile region. For her first three OERs in this position (OER 4 through OER 6 in the table below), her Supervisor was the Senior Controller, LT D; her Reporting Officer was the assistant chief of the SAR Branch, LCDR W; and her Reviewer was the chief of the SAR Branch, CDR N. OER 6 in the table (shaded) is the disputed OER.

APPLICANT’S OER MARKS AS A LIEUTENANT FROM 2/1/98 THROUGH 6/30/05

CATEGORY^a	OER 1	OER 2	OER 3	OER 4	OER 5	OER 6	OER 7	OER 8	AVE^b
Planning & Preparedness	5	5	5	5	6	4	6	6	5.4
Using Resources	5	5	6	5	5	5	5	6	5.3
Results/Effectiveness	6	6	6	5	5	5	6	6	5.7
Adaptability	5	6	6	5	5	5	5	5	5.3
Professional Competence	5	4	4	4	5	5	6	6	4.9
Speaking & Listening	6	6	6	5	5	5	6	6	5.7
Writing	5	5	5	5	5	5	6	6	5.3
Looking Out for Others	5	5	6	5	6	6	7	7	5.9
Developing Subordinates	5	6	6	6	6	5	6	6	5.9
Directing Others	5	5	5	5	5	5	6	6	5.3
Teamwork	5	5	5	5	5	5	6	6	5.3
Workplace Climate	4	5	5	4	5	5	4	5	4.6
Evaluations	5	4	5	5	5	5	5	4	4.7
Initiative	6	6	6	5	5	5	5	6	5.6
Judgment	4	5	5	5	5	5	5	6	5.0
Responsibility	5	5	5	5	5	5	6	6	5.3
Professional Presence	5	5	6	6	7	6	7	6	6.0
Health & Well-Being	6	7	7	7	7	7	6	7	6.7
Average Mark in OER	5.1	5.3	5.5	5.1	5.4	5.2	5.7	5.9	5.4
Comparison Scale^c	4	4	5	4	5	4	5	5	4.6

^a Supervisors fill in the marks for the first 13 categories, and Reporting Officers complete the remaining marks.

^b Averages are rounded and do not include marks from shaded column.

^c The comparison scale is not numbered. However, as with the performance categories, there are 7 possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank whom the Reporting Officer has known. A mark in the 4th spot describes the officer as a “good performer; give tough, challenging assignments,” while a mark in the 5th spot on the scale means that the officer is an “excellent performer; give toughest, most challenging leadership assignments.”

LT D wrote the following comments to support the numerical marks she assigned for the categories “Planning and Preparedness,” “Using Resources,” “Results/Effectiveness,” “Adaptability,” and “Professional Competence” in the disputed OER:

Astutely responded to challenging MEDEVAC cases including the coord. of civilian helo to land & conduct long range MEDEVAC of CG mbr from WAGB operating in the Arctic & outside of range of CG helo, unprecedented approach saved mbr life. Successfully coord. internat’l MED-EVAC of CG mbr, Canadian helo safely hoisted patient, one life saved. Excellent forethought to use Nat’l Guard long range helo w/ pararescue jumpers to medically assist patient aboard foreign freighter 600 miles offshore, excellent use of resources resulted in timely medical treatment of patient. Overcame poor comms, scant info & language barrier during search for overdue Eskimo walrus hunters, quickly launched resources & located hunters safe on remote island in Bering Sea. Excellent response launching helo 200+ miles to investigate lost comms & possible vsl in distress; helo found sole operator on fishing vessel unconscious w/ broken hip unable to assist himself or operate the vessel; 1 life saved. Quickly adapted to several key CC technology changes including electronic SARSAT system, MISLE, ALMIS & on-line force tracking website. Skillfully prosecuted 3 foreign F/V maritime boundary line incursions, led WHEC’s through initial actions, ensured proper case packages. Rec’d highest CC STAN Team score on written test (96%) of all controllers (14 tested). Acquired 3 credits towards Master’s Aviation Safety & Human Factors (gpa 4.0).

LT D wrote the following comments to support the numerical marks for the categories “Speaking and Listening” and “Writing” in the disputed OER:

Gives clear, succinct Ops briefs to (d) & Sr. Staff. Fielded radio, print & TV media during several sensitive cases; projected positive CG image. Gave superb SAR brief at AK CG & Cruise ship industry tabletop exercise (100+ participants), broadened industry’s knowledge of AK CG mass rescue ops, rec’d BZ from COTP. Outstanding educational presentation at FAA Seaplane Safety Symposium, broadened 400+ pilots knowledge of CG SAR response. Drafted 11 successful Flag ltrs w/ little or no editing req’d. CC evac plan (EAP) approved as D17INST.

LT D wrote the following comments to support the numerical marks for the categories “Looking Out for Others,” “Developing Others,” “Directing Others,” “Teamwork,” “Workplace Climate,” and “Evaluations” in the disputed OER:

Volunteered & attended CISM course, certified as Peer counselor, mbr of D17 CISM “team”. Routinely swapped or stood by for other watchstanders enrolled in local university, significantly contributing to their educational success. Networked for family w/ minimal info to locate fisherman whose wife was dying, astute investigative efforts located him in Dutch Hbr in time to talk w/ wife before her death. Avid PIE participant, volunteered weekly in elementary class. Coord. class educational field trip to CAP, local EMS, and airport. As CG liaison to SAR orgs and key supporter of newly formed grass root SE AK SAR advisory group, promoted candid dialogue among SAR professionals & volunteers thru-out SEAK. Verbally counseled 3 PO’s on attitude & work performance; all markedly improved. Partnered with local SAR assets (mountain rescue, fire dept, state troopers, & CG air sta) during search for missing Ensign from cutter. Team approach to case quickly located mbr severely hypothermic & injured on remote mountain ledge, efforts saved CG mbr life. Led 2 Asst. CDO’s in prosecuting challenging operational missions; 200 SAR missions resulting in 73 lives saved and 194 lives assisted. Submitted timely accurate input for 8 sets of enlisted marks. Excellent OES documentation, well organized, thorough and on time.

LCDR W, the applicant’s Reporting Officer, wrote the following comments in support of the remaining marks in the disputed OER, which he assigned:

Concur w/ Supervisor's comments & evaluation. [The applicant] continues to be a solid performer as CDO and received consistent praise from units on her coordination and support during cases. She has shown great initiative as the Command Center SAR liaison; dedicated an incredible amount of time to the success of volunteer organizations. Her active leadership in the local Civil Air Patrol Squadron is noteworthy. A regular attendee of the staff leadership forum, she led one class and co-facilitated an out-of-the-box discussion on taking risks as a leader.

Following a false alarm SAR response to a vessel previously scuttled and drifting in SE passage, made recommendation to MSO to work w/ state to revisit policy on vessel scuttling in state waters; MSO noted need for better tracking measures & policy is currently under revision. Improved level of care on CG Medevac's by coord. air ambulance nurses to accompany C-130 on flts where commercial aircraft unable to assist. Appointed Aviation Safety Counselor for AK Region by FAA. Certified to fly squadron missions for local Civil Air Patrol (CAP) & counter drug missions. Provided monthly training for 40+ members as CAP unit Safety Officer. Active in church outreach as correspondent to missionaries and cooking monthly meals for local homeless shelter. Qualified Ski Patrol volunteer; conducted weekly safety patrols at local ski slope. Epitome of health and well-being; trained at elite level; competed on 10-person relay team in 100-mi running race; ran 13 mi leg; represented CG in ½ Marathon. Participated in annual Chief's Fitness Challenge on CC Team; actively encouraged co-workers to establish workout programs, go hiking, quit smoking during Great American Smoke-out, and eat healthy.

[The applicant] is a highly valued member of the Command Center team as a seasoned Controller. Strong performance in all CC missions. An accomplished staff officer as evident by her excellent writing ability & collateral duty performance. A dedicated community volunteer extremely active in many local organizations that reflects positively on the CG. An excellent choice for liaison assignments. Genuine concern for others makes her an ideal candidate for Work Life Supervisor. [She] is recommended for challenging assignments such as MHS, Intel, or any operational staff position. [She] is recommended and fully qualified for promotion w/peers to LCDR.

For her next OER as a controller (OER 7 above), the applicant's Supervisor was LCDR W, the assistant chief of the SAR Branch; her Reporting Officer was CDR K, the branch chief; and the Reviewer was CAPT S, chief of the Operations Division. For her final year as a controller, the applicant also served as an operational analyst for the Bi-National Planning Group of the Northern Command. Her Supervisor (for OER 8) was LCDR T, chief of the Awareness & Warning Branch; her Reporting Officer was CAPT C, co-director of the Bi-National Planning Group; and the Reviewer was RADM B, deputy director of operations for the Northern Command (J-3).

The applicant was not selected for promotion to LCDR in 2003, when the disputed OER (OER 6) was the most recent in her record, and or in 2004, when OER 7 was the most recent in her record. Therefore, having failed twice of selection for promotion, she was honorably discharged on June 30, 2005, with more than 12 years of active service. On July 1, 2005, the applicant was reappointed a lieutenant in the Reserve. She has since been promoted to LCDR.

VIEWS OF THE COAST GUARD

On July 31, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board deny relief in this case. The JAG adopted the findings and analysis of the case provided in a memorandum prepared by CGPC, which the JAG forwarded as the Coast Guard's advisory opinion.

CGPC stated that there is no basis for the applicant's allegation that LT D should have been disqualified as her Supervisor. CGPC stated that LT D's date of rank was January 16,

1998, while the applicant's was March 24, 1998. CGPC stated that LT D was senior to the applicant, as required by the Personnel Manual, and "due to her training and experience was selected by the Chief of the District Seventeen Office of Search and Rescue to be the Senior Controller within the Command Center." CGPC stated that LT D served as the Supervisor for all of the controllers' OERs and that the entire rating chain was properly designated in accordance with policy. CGPC further stated that the rating chain was altered the following year not because the prior rating chain was unfair, as the applicant alleged, but because a lieutenant who was junior to the applicant was chosen to serve as the Senior Controller.

CGPC stated that the mark of 4 that LT D assigned to the applicant for "Planning and Preparedness" was reviewed by the Reporting Officer and Reviewer, who found no inconsistencies, and that there was adequate support in the written comments for the mark. CGPC further stated that the applicant failed to submit evidence to support her allegations about the mark of 4 on the comparison scale. CGPC concluded that "there is no evidence of bias or prejudice against the Applicant. The rating chain carried out its responsibilities and submitted the applicant's OER in accordance with the Coast Guard Personnel Manual. They were in the best position to observe the applicant's performance and provided a fair, accurate, and objective OER." In support of these allegations, CGPC submitted three statements signed by the members of the rating chain for the disputed OER, which are summarized below.

Declaration of LT D (now LCDR D), Supervisor for OER 4, OER 5, and the Disputed OER 6

Regarding the mark of 4 for "Planning and Preparedness," LT D stated that it "accurately reflected her performance at the time." LT D stated that, while the briefs on other days were informal, every Tuesday at the Command Center, there was to be

a formal operational brief in the secure conference room, which included a large PowerPoint presentation, briefed by the off-going Command Center watchstander. The "formal" brief included all divisions and branch chiefs and basically constituted the District's formal staff meeting with a two star Admiral. Almost all of the Command Center watchstanders prepared the majority of the PowerPoint presentation the night before during slow periods of the watch. This practice allowed them to "fine tune" the presentation in the morning prior to the formal briefing time. It also enabled them to "be prepared" in case a difficult mission/case presented itself early in the morning. [The applicant] did not follow this practice, but began preparing the detailed PowerPoint about an hour before the brief. [She] routinely found herself rushed getting the information formatted "just in time" for the formal brief, often appearing frazzled in front of the District Commander. I verbally counseled her several times about this practice, highly recommending she prepare the majority of the brief the night before. She disregarded this advice and, as predicted, did not get the PowerPoint presentation done for the "formal brief" one Tuesday, which reflected poorly on the Command Center and herself. She also downplayed the incident as "no big deal." She was formally counseled by me for this event. As the Senior Controller, I took the brunt of the critical remarks by several senior staff members concerning the incident. Even after the event, she still continued her trend and continued to come across as frazzled in front of the Admiral. This trend placed an unreasonable burden on the other Command Center watchstander (enlisted member) by having him help her gather information or do portions of the PowerPoint for her, or he'd be left to handle the SAR mission by himself while she was focused on preparing the brief. Her lack of planning during the morning was often a rub with the other watchstanders, who complained to me frequently. No amount of counseling, mentoring, or coaxing encouraged her to change her method. Because she was very competent in some areas of "Planning and Preparedness" but lacked in other areas, I balanced this incident with the mark of a "4," which I believe accurately portrayed her performance during the marking period.

Regarding the allegation that she assigned the applicant low marks because they were competing for promotion to LCDR at the same time, LT D stated that she

was 8 weeks senior to [the applicant] and had 6 more years of service than her as I was prior enlisted. Due to my additional service time, I felt as though I was more experienced and routinely tried to mentor her in “best management practices.” [The applicant] was a good officer, but did not take constructive criticism well. Her reference to me being competitive with her for O4 is baseless. Because of my prior service time, I was already tenured for a 20 year retirement whether or not I was selected for LCDR. Further, I received orders to [another station] as the Commanding Officer three months before the OER in question was written and assumed command of [that station] on July 2003. Finally, [the applicant] and I had different career paths; I was operations ashore and she was an aviator. I would have liked to see her succeed in the Coast Guard; she is an intelligent and competent officer in a number of ways. Nevertheless, it is my opinion that her difficulties in the aviation field prior to reporting in to the Command Center is what precluded her from being selected for LCDR by the active duty [selection] board, not this OER.

Declaration of LCDR W (now LCDR A), Reporting Officer for OERs 4, 5, and 6

LCDR W stated that, as the assistant chief of the SAR Branch, she was LT D’s direct Supervisor and the applicant’s Reporting Officer. Regarding the mark of 4 for “Planning and Preparedness” in the disputed OER, LCDR W stated that during the reporting period, LT D informed her that the applicant

had failed to prepare the weekly formal brief after coming on watch as controller that morning. Because her watch fell on the morning of the weekly formal brief, it was [the applicant’s] responsibility to prepare that brief and present it to senior staff. [The applicant] had just returned from personal leave and this was her first watch duty following the personal leave period. To my knowledge, as best I can recall, this was the second incident where [she] had failed to prepare herself for the 24-hour period of her assigned watch duty. I believe the prior incident also occurred on her first watch following a period of personal leave. I do not recall the subject of that prior incident, only that it was related to improper preparation for the 24-hour watch period. Following this second incident (subject incident of evaluation), [LT D] informed me of the verbal counseling session she had conducted with [the applicant]. [LT D] stated that she verbally counseled [the applicant] on the subject of properly preparing for watch duty and taking the necessary time prior to relieving the watch to become familiar with real time events, previous day events, and scheduled events for the 24-hour period of her assigned watch duty. [LT D] stated that she had reminded [the applicant] of the prior incident of failing to properly prepare for the 24-hour watch duty. [LT D] told me that she discussed with [the applicant] specific ways to help prepare for a 24-hour watch duty following a personal leave period. She used examples practiced by other controllers, such as coming in the night before to read all relevant information for the period since her last watch duty. I recall that [LT D] did inform me during the period of time that she as Supervisor was preparing [the applicant’s] annual Officer Evaluation Report (OER), that she intended to give [her] a mark of “four” for Planning and Preparedness due to the repeated incidents where [she] had not properly prepared for her 24-hour duty following a personal leave period. I did not observe any indication of a conflict of interest.

Following this second incident and the counseling session, [the applicant] improved her performance in this area. There was not a repeat/related incident following the verbal counseling session between [LT D and the applicant]. She received a mark of “six” in Planning and Preparedness on her next annual evaluation.

Declaration of CDR N (now CAPT N), the Reviewer of OERs 4, 5, and 6

CDR N stated that, as chief of the SAR Branch, he indirectly supervised the applicant from July 2000 through July 2003. He “was directly involved in monitoring her performance while she was on duty since all SAR case briefings and other significant events were briefed to me by the Command Center watch.” Regarding the applicant’s complaint about the composition of her rating chain, he stated that the content of an OER is much more important than who signs it and that he himself was promoted to captain—the same rank as the Chief of Operations, whom the applicant alleged should have been her Reviewer—during the evaluation period for the disputed OER and signed it as a captain. CDR N stated that all of the controllers had the same rating chain with the Senior Controller, LT D, serving as Supervisor.

CDR N stated that upon LT D’s departure from the District Command Center, another lieutenant, who was junior to the applicant, was appointed to be the Senior Controller. The less senior lieutenant was appointed to that position, instead of the applicant, because of that lieutenant’s “superior knowledge, skills and abilities as a SAR controller. I made this decision with full knowledge of [the applicant’s] abilities at the time which, I believe, are accurately documented in the OER in question.”

Regarding the applicant’s mark of 4 for “Planning and Preparedness,” CDR N stated that it was not based on an isolated incident as the applicant

had a tendency during this OER period to be surprised by things during her watches. This indicated to me a less than superb ability planning ahead and being prepared for whatever a case may bring. The mark of 4 represents good solid performance in this area, not superb skills, and accurately represents her performance during this OER period. ... The frequency of her being caught off guard by events was higher than that of her peers, all of whom I had the opportunity to directly interact with and observe on a wide variety of cases and situations.

Regarding the mark of 4 on the comparison scale, CDR N stated the following:

I do not recall ever making the statement attributed to me [by the applicant] since I do not set “always” or “never” rules for myself regarding evaluations. Additionally, [the comparison scale] represents a comparison of this officer to all other lieutenants I have known, not a summary or average of the numerical marks on this particular OER. Compared to all the lieutenants I had known at that point in my career, I can clearly and unequivocally stated that [the applicant] was a good performer, not an excellent performer, and marked accordingly on the comparison scale. My action in not selecting her to be the Senior Controller clearly reflects that assessment of her performance. I do think it is important to note that [the applicant] was given a 7 in the health and well being dimension of this OER. She clearly put emphasis and energy into this particular aspect of her work, much more so than she applied to her other duties. She was counseled on this disparity by her chain of command several times.

APPLICANT’S RESPONSE TO THE COAST GUARD’S VIEWS

On August 2, 2007, the Chair sent a copy of the views of the Coast Guard to the applicant and invited her to respond within thirty days. No response was received.

APPLICABLE REGULATIONS

Article 10.A.2.d.1.a. of the Personnel Manual states the Supervisor for an OER 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.” Article 10.A.2.d.1.c. states that the Supervisor for an OER “will normally be senior to the Reported-on Officer. However, in appropriate situations, the Supervisor may be designated, regardless of grade relative to the Reported-on Officer.”

Article 10.A.2.e.1.c. states that a “Reporting Officer will normally be senior to the Reported-on Officer. Except for commanding officers, at least two year groups should normally separate these rating chain positions if they are of the same grade. Commander (CGPC-opm) or Commander (CGPC-rpm) will handle exceptions to this policy on a case-by-case basis.”

Article 10.A.2.g.2.b. states that a rating chain member shall be disqualified from carrying out her responsibilities and a substitute shall be designated when the rating chain member has been relieved for cause or is an interested party to an investigation or court of inquiry or in “any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.”

Article 10.A.2.g.2.c. states that if a commanding officer does not take action to disqualify a rating chain member and designate a substitute, “it is incumbent on the Reported-on Officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the Reported-on Officer during the reporting period or within 30 days after the end of the reporting period.”

Article 10.A.4.c.4. provides the following instructions for Supervisors completing their section of an OER (similar instructions are provided for Reporting Officers in Article 10.A.4.c.7.):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer’s performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer’s performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer’s performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

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d. In the “comments” block following each evaluation area, 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. The Supervisor shall draw on his or her observations, those of any secondary Supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.

Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

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g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six standard block.

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a Reporting Officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.”

Article 10.A.4.g. allows an officer to submit a written OER Reply within fourteen days of receiving an OER in order to “express a view of performance which may differ from that of a rating official.” The OER Reply must be “performance-oriented” and may not address interpersonal relations or include “a personal opinion of the abilities or qualities of a rating chain member.” An OER Reply is forwarded to CGPC through the rating chain, whose endorsements may include comments about the OER Reply.

On an OER form, the written standards for the numerical marks under “Planning and Preparedness” appear as follows:

<p><u>Planning and Preparedness</u></p> <p>Ability to anticipate, determine goals, identify relevant information, set priorities and deadlines, and develop strategies</p>	<p>1</p> <p>Got caught by the unexpected; appeared to be controlled by events. Set vague or unrealistic goals. Used unreasonable criteria to set priorities and deadlines. Rarely had plan of action. Failed to focus on relevant information.</p> <p style="text-align: center;">○</p>	<p>3</p> <p>Consistently prepared. Set high but realistic goals. Used sound criteria to set priorities and deadlines. Used quality tools and processes to develop action plans. Identified key information. Kept supervisors and stakeholders informed.</p> <p style="text-align: center;">○ ●</p>	<p>5</p> <p>Exceptional preparation. Always looked beyond immediate events or problems. Skillfully balanced competing demands. Developed strategies with contingency plans. Assessed all aspects of problems, including underlying issues and impact.</p> <p style="text-align: center;">○</p>	<p>7</p> <p style="text-align: center;">○</p>
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For “Using Results,” the written standard for a mark of 4 is “Effectively managed a variety of activities with available resources ...,” while the standard for a mark of 6 is “Unusually skilled at bringing scarce resources to bear on the most critical of competing demands. ...”

For “Results/Effectiveness,” the standard for a mark of 4 is “Got the job done in all routine situations and in many unusual ones ...,” while the standard for a mark of 6 is “Maintained optimal balance among quality, quantity, and timeliness of work. ...”

For “Adaptability,” the standard for a mark of 4 is “Receptive to change, new information, and technology ...,” while the standard for a mark of 6 is “Rapidly assessed and adjusted to changing conditions, new information and technology. ...”

For “Professional Competence,” the standard for a mark of 4 is “Competent and credible authority on specialty or operational issues ...,” while the standard for a mark of 6 is “Superior expertise; advice and actions showed great breadth and depth of knowledge.”

PRIOR SIMILAR CASES

BCMR Docket No. 220-91

In BCMR Docket No. 220-91, the applicant was the Executive Officer of his unit and his Commanding Officer (CO) served as both the Supervisor and Reporting Officer for his OER. The applicant and his CO were both commanders and competed for selection for captain the same year that the disputed OER was entered in the applicant's record. The CO was selected for promotion, but the applicant was not. The OER Reviewer was located 700 miles away and had little to no opportunity to observe the applicant's performance. The disputed OER, which contained low marks of 3 and very negative comments, contrasted greatly with the applicant's other OERs, in which he received mostly marks of 6 in the performance categories and on the comparison scale. The Reviewer admitted that a few weeks before the end of the evaluation period, he became aware of a significant "rift" between the applicant and the CO but decided to let "the transfer and OER processes 'run their course.'"

The applicant in Docket No. 220-91 proved the existence of some significant, detrimental factual errors in the OER prepared by the CO and alleged that the CO should have been disqualified from his rating chain under Article 10.A.2.g.2. of the Personnel Manual because they were competing against each other for promotion to captain. The Coast Guard recommended denial of relief based on the lack of any violation of the Personnel Manual, which allows a CO to serve as both a Supervisor and Reporting Officer for an OER and to serve as a Reporting Officer even if he or she is not more than two years senior to the Reported-on Officer.

The Board noted the errors in the disputed OER and the "marked difference" between it and the applicant's other OERs and found that the CO's position as both Supervisor and Reporting Officer, though not an error or injustice *per se*, deprived the applicant of the "'check and balance' customarily present in the evaluation process—that of having possibly undeserved marks or comments subject to review and correction by another officer who is also familiar with the actual performance of the Reported-on Officer." The Board also found that "the fact that the [CO] was in the same promotion pool as the applicant created a special need [for the Reviewer] to ensure that the OER process resulted in a fully objective evaluation." However, the Reviewer had merely accepted the CO's view of the applicant's performance and had failed to confirm it by seeking input from other sources even though he knew of a "rift" between them.

The Board concluded that "[t]aken together, these factors vitiate the usual presumption of administrative regularity, and, on balance, indicate that the applicant suffered an injustice. See BCMR No.6-89. The disputed OER in its entirety, as well as related documents, must be removed from the applicant's record." The Board removed the disputed OER and the applicant's failures of selection from his record and ordered the Coast Guard to offer to return him to active duty with no break in service if the applicant had already been separated from active duty because of his two failures of selection. The delegate of the Secretary approved the recommended decision of the Board in Docket No. 220-91.

BCMR Docket No. 151-92

In BCMR Docket No. 151-92, the applicant and his Supervisor were both commanders, and they competed for selection for captain the same year that the disputed OER was entered in the applicant's record. The applicant alleged that this Supervisor should have been disqualified from his rating chain. He further alleged that the head of his division, to whom he also reported, was not but should have been consulted about his marks and that many of the marks and comments were "inaccurate or seriously misleading." The Coast Guard recommended that the Board deny relief based on an alleged lack of evidence of error in the disputed OER.

The Board, however, found that several of the Supervisor's criticisms were invalid or misleading and that the Supervisor had not counseled the applicant about his alleged performance problems. The Board further found that, as in Docket No. 220-91, there was no assurance of an objective evaluation in this case. The Board stated that the "appearance of a conflict of interest between the applicant and Supervisor and the uncorroborated statements [by the Supervisor] quoted in the preceding finding create a prima facie case for the grant of relief," which the Coast Guard did not rebut by submitting any signed statements from the rating chain. Therefore, the Board recommended that the disputed OER and the applicant's failures of selection be removed from his record.

The delegate of the Secretary concurred in most of the Board's findings and in the recommended relief. She noted additional inconsistencies and errors in the disputed OER, noted that the numerical marks and comparison scale mark of 3 therein were significantly lower than the applicant's prior marks, and found the following:

The fact that the Supervisor was in the same promotion pool as the applicant, and in fact had already been passed over [once], could have created a motive for him to be unduly harsh in his assessment of the applicant. Despite the appropriateness of taking additional measures to ensure objectivity under the circumstances, the Coast Guard failed to ensure that input from his Supervisor for a portion of the evaluation period was obtained, overlooked inconsistencies within the OER itself, and let stand evidently unfounded or unfair comments in the OER. Taken together, these factors indicate that [the] OER fails to reflect a reasonably accurate picture of the Reported-on Officer's performance and potential, constituting error on the part of the Coast Guard. Cf. BCMR No. 220-91.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.³

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

³ *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").

3. 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 marks of 4 she received on the disputed OER were an erroneous result of her Supervisor’s desire to make her less competitive than the Supervisor for promotion to LCDR. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by (a) a “misstatement of significant hard fact,” (b) a “clear and prejudicial violation of a statute or regulation,” or (c) factors that “had no business being in the rating process.”⁴ The Board begins its analysis in every case 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.⁵ Absent evidence to the contrary, the Board presumes that the applicant’s Supervisor and Reporting Officer prepared the disputed OER “correctly, lawfully, and in good faith”⁶—i.e., that the Supervisor did not allow the fact that she and the applicant were competing for promotion to LCDR that summer to affect her preparation of the OER and that both the Supervisor and Reporting Officer prepared the OER in accordance with their best professional judgment of the applicant’s performance during the evaluation period.

4. The applicant has failed to prove the existence of a “misstatement of significant hard fact” in the disputed OER. She has not submitted evidence that contradicts any of the written comments. Although as she alleged, the written comments could have supported higher marks, the language used in the disputed OER is not so laudatory as to make the corresponding marks inconsistent. Moreover, as Article 10.A.4.c.4. of the Personnel Manual states, a Supervisor is not supposed to write comments first and then assign numerical marks that reflect the comments, but to assign numerical marks first, by comparing the Reported-on Officer’s performance to the written standards on the OER form, and then to prepare comments that explain any deviation from a mark of 4, which is the “expected standard of performance.” Given the instructions in Article 10.A.4.c.4. and the written standards on the OER form, the Board finds that the Supervisor’s use of the words “excellent” and “exceptional” in describing certain examples of the applicant’s performance reasonably explains the assignment of marks of 5 in most of the categories in block 3 and does not prove that the Supervisor erred in failing to assign marks of 6 in those categories. Nor does the applicant’s high score on the Standardization Team written test convince the Board that her overall performance in the “Planning and Preparedness” category exceeded the standard for a mark of 4 during the evaluation period.

5. The applicant alleged that the mark of 4 she received for “Planning and Preparedness” was erroneously based upon a single incident rather than her overall performance in that category. The rating chain’s declarations indicate that her lack of preparedness on one important occasion was a significant factor in the assignment of the mark. However, the declarations also describe other examples of insufficient or eleventh-hour planning and preparation by the applicant. The Supervisor stated that she balanced these incidents against the fact that the applicant was “very competent in some areas of ‘Planning and Preparedness’” when she assigned the mark

⁴ *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

of 4. The applicant has not proved by a preponderance of the evidence that the mark of 4 was based erroneously or unfairly on a single incident.

6. The applicant alleged that her Reviewer told her that the mark of 4 on the comparison scale in the disputed OER was based solely on the mark of 4 she received for “Planning and Preparedness.” However, the Reviewer has denied making this comment, and the comparison scale on an OER is completed by the Reporting Officer, not the Reviewer. The Board notes that the applicant received higher marks in some categories on her subsequent OER as a controller, which was prepared by a different Supervisor, but that officer indicated in his declaration that the applicant’s performance had improved by the next evaluation period. Moreover, the applicant failed to take advantage of the opportunity to file an OER Reply, under Article 10.A.4.g., which may be considered evidence that she accepted the accuracy of the disputed OER at the time she received it. The Board finds that the applicant has not proved by a preponderance of the evidence that the mark of 4 on the comparison scale or any of the numerical marks in the disputed OER was erroneous or unjust.

7. The applicant has failed to prove that the disputed OER was adversely affected by a “clear and prejudicial violation of a statute or regulation.” She has not shown that she was entitled to a different rating chain under the regulations. Her Supervisor was senior to her, in accordance with Article 10.A.2.d.1.c. of the Personnel Manual. In addition, as the Senior Controller, the Supervisor was apparently a person to whom the applicant answered on a daily or frequent basis. The record indicates that the Chief and Assistant Chief of the SAR Branch, who served as the Reviewer and Reporting Officer, respectively, also had opportunities to observe and assess her performance as a controller and watchstander. Furthermore, as in BCMR Docket Nos. 220-91 and 151-92, the Board does not find that being in the same promotion pool as the applicant *per se* disqualified the Supervisor from her rating chain under Article 10.A.2.g.2.b. The mere fact that they were both competing for promotion to LCDR that summer did not raise a *substantial* question as to whether the applicant received a fair and accurate OER. The Board notes that there is no evidence that applicant timely challenged LT D’s service as her Supervisor through her commanding officer or his superior as allowed under Article 10.A.2.g.2.c.

8. As stated in BCMR Docket Nos. 220-91 and 151-92, having a Reported-on Officer and a rating official in the same promotion pool “create[s] a special need to ensure that the OER process resulted in a fully objective evaluation.” The competition for promotion presents at least the possibility that the rating official’s preparation of the OER will be affected by a perceived conflict of interest, a factor “had no business being in the rating process.”⁷ Unlike the applicants in Docket Nos. 220-91 and 151-92, however, the applicant in this case has not proved the existence of any factual errors in the disputed OER, which would be a sign of conflict-of-interest-based prejudice, and the marks in the disputed OER are not significantly lower than others she received as a lieutenant and controller. In addition, unlike the applicant in Docket No. 220-91, the applicant in this case had three different officers, all of whom observed her work, serve on her rating chain. Thus, she was not deprived of the “‘check and balance’ customarily present in the evaluation process.” Unlike the applicant in Docket No. 151-92, the applicant in this case was counseled on her lack of preparation during the evaluation period. The declarations of the Reporting Officer and Reviewer indicate that they agreed with the Supervisor’s assessment

⁷ *Germano*, at 1460.

of the applicant's performance during the evaluation period and therefore chose a lieutenant who was junior to the applicant to serve as the Senior Controller when LT D left. Moreover, the Reporting Officer stated in his declaration that he did not see "any indication of a conflict of interest" between the Supervisor and the applicant." Therefore, the record before the Board provides assurance that the applicant received an objective OER, and the Board finds no grounds for concluding that the disputed OER was adversely affected by a factor "had no business being in the rating process."

9. Accordingly, the applicant's request should be denied because she has not proved by a preponderance of the evidence that the disputed OER was adversely affected by (a) a "mis-statement of significant hard fact," (b) a "clear and prejudicial violation of a statute or regulation," or (c) factors that "had no business being in the rating process."⁸

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁸ *Id.*

