

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

---

Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2008-071**

**XXXXXXXXXXXXXX  
XXXXXXXXXXXXXX**

---

**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on February 15, 2008, upon receipt of the applicant's completed application and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated November 6, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to correct her military record by removing an Officer Evaluation Report (OER) for the period October 1, 2004, to July 31, 2005 (disputed OER). She also requested promotion to the rank of lieutenant (LT) retroactive to the date of promotion she would have had if she had been selected by the calendar year 2006 LT selection board, with back pay and allowances. The applicant was not selected for promotion by the calendar year 2006 or 2007 LT selection boards.<sup>1</sup> She was released from active duty on June 30, 2008.

**APPLICANT'S ALLEGATIONS**

The applicant alleged that the officers who signed as members of her rating chain for the disputed OER were not designated and published as members of her OER rating chain by the commanding officer (CO), which constituted an error under the Personnel Manual.

The applicant also alleged that the disputed OER did not accurately reflect the caliber of her performance during the period. She argued that the below average marks of 3 are not supported by the OER comments.<sup>2</sup> She stated that she disagreed with the OER content but did

---

<sup>1</sup> The 2006 ADPL LT selection board met on September 25, 2006. The 2007 ADPL LT selection board met on September 24, 2007.

<sup>2</sup> OER marks range from a low of 1 to a high of 7. A 4 is considered to be an average mark as it represents the expected standard of performance. Article 10.A.4.c.4.g. of the Personnel Manual.

not contest it at the time of receipt because she was told by her then-supervisor and other command officers that it would not affect her career. She notes however that in calendar years 2006 and 2007 she was not selected for promotion to LT, which she attributes to the disputed OER.

## **Disputed OER**

The applicant was assigned as a Marine Inspector during the period covered by the disputed OER. It consists of three parts: the supervisor's portion, the reporting officer's portion, and the reviewing officer's portion.

### *Supervisor's Portion*

In Block 3 (performance of duties) of the disputed OER, the applicant received marks of 4 in planning and preparedness, using resources, results/effectiveness, adaptability and professional competence.<sup>3</sup> In the comments section, the supervisor described the applicant as efficient, adaptable, obtaining typical results, and displaying average professional competence.

In Block 4 (communications), the applicant received 4s in speaking and listening and writing.

In Block 5 (leadership skills), the applicant received 4s in looking out for others, developing others, directing others, teamwork, and evaluations. She received a mark of 3 in workplace climate. The officer who signed as the supervisor wrote that the applicant was "[m]oderately tolerant of differing opinions; took responsibility for & able to express regret after being counseled on improper actions; all involved confident that situation was adequately resolved."

### *Reporting Officer's Portion*

In Block 8 of the reporting officer's section of the OER, the applicant received marks of 4 in initiative, responsibility, professional presence, and health and well being, and a mark of 3 in judgment. With respect to her judgment, the officer signing as reporting officer made the following comment: "Exhibited sound judgment; offered supporting reasoning in decisions regarding the compliance of vessels w/US & International safety & security regulations."

---

<sup>3</sup> Article 10.A.2.b.4.b. of the Personnel Manual states that for each evaluation area, the supervisor shall review the reported-on officer's performance and qualities observed and noted during the reporting period. Next, the supervisor shall carefully read the standards and compare the reported-on officer's performance to the level of performance described by the standards. After determining which block best describes the reported on officer's performance and qualities, the supervisor shall fill in the appropriate circle on the form. Subsection e. states that comments should amplify and be consistent with the numerical evaluations, and they should identify specific strengths and weaknesses in performance. Further, 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.

On the comparison scale in Block 9<sup>4</sup> where the reporting officer compared the applicant to others of the same grade whom he has known in his career, the applicant was marked in the third oval (of seven, with the seventh oval being the highest). A mark in the third oval means that the reporting officer rated the applicant between that of a “qualified officer” (second oval) and that of “one of the many competent professionals who form the majority of this grade” (fourth oval).

In block 10, the reporting officer evaluated and described the applicant's potential for future service as follows:<sup>5</sup>

[The applicant] is making progress to become a well-rounded, [junior officer], shows potential to acquire/develop leadership traits; possesses determination & commitment to achieving. Usually reliable to quickly adapt to the many situations of a qual[ified] MI; possesses skills & traits desirable of a CG officer. Has taken on additional tasking/projects successfully w/some oversight; quick to perform; offers encouragement & assistance in attaining own/others personal and professional goals. [Recommended] for positions of leadership within the Marine Safety field to challenge growth abilities & continued instruction to assist in acquiring MI [qualifications]. With continued progress, recommended for promotion w/peers.

#### *Reviewer's Authentication*

The reviewer's authentication section is dated December 12, 2006, but it appears not to contain the reviewer's signature.

#### *Applicant's other OERs*

The applicant's marks on her two ensign OERs were about evenly split between 4s and 5s. She received two marks of 6 on her last ensign OER. She was given a 4 on the comparison scale mark on her first ensign OER, and a 5 on the comparison scale on her second ensign OER.

The disputed OER was her first as a LTJG and contained the lowest marks of any of her OERs at this rank. Her other five LTJG OERs consisted mostly 4s and 5s with some 6s. Her comparison scale marks for the five other LTJG OERs were 4, 4, 4, 5, & 4.

---

<sup>4</sup> Article 10.A.2.b.8.a. of the Personnel Manual states that the 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. The provision further provides that Block 9 represents a relative ranking of the reported-on officer, not necessarily a trend of performance. Thus from period to period, an officer could improve in performance but drop a category on the comparison scale.

<sup>5</sup> Article 10.A.2.b.9.a. of the Personnel Manual states that the reporting officer shall comment on the reported-of officer's potential for greater leadership roles and responsibilities and shall limit such comments to the performance or conduct demonstrated during the reporting period. Article 10.A.2.b.9.b. states that comments in Block 10 reflect the judgment of the reporting officer, and the reporting officer may include a recommendation for or against promotion to the next higher grade.

## SUMMARY OF THE RECORD

The applicant was commissioned an Ensign in the Coast Guard Reserve on June 23, 2003. She executed an active duty agreement on August 4, 2003 and began serving on active duty that date. Under the agreement, the applicant's period of active duty terminated on August 3, 2006. On June 20, 2006, she and the Coast Guard agreed to extend her active duty agreement for approximately one year and eleven months from August 4, 2006 through June 30, 2007.<sup>6</sup> During this period, the applicant was considered but not selected for promotion to LT by the calendar year 2006 and 2007 active duty promotion list (ADPL)<sup>7</sup> selection boards. She was released from active duty on June 30, 2008. The date of her release from active duty coincided with the termination date of her active duty contract. The DD Form 214 obtained from her electronic record states that she was honorably released from active duty due to the "maximum time in service or grade" with an LGB (non-selection, permanent promotion) separation code. The applicant was subsequently selected for promotion by the inactive duty promotion list (IDPL)<sup>8</sup> board that met in September 2008.

## VIEWS OF THE COAST GUARD

On June 18, 2008, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board grant relief to the applicant. The JAG recommended that the Board correct the applicant's record as follows:

- a. Replace the disputed [OER] for the period 1 October 2004 to 31 March 2005 with an OER for Continuity Purposes Only in accordance with [Article 10.A.3.5.c. of the Personnel Manual]."
- b. Expunge both non-selections by the Promotion Years [calendar years 2006 and 2007 LT] Selections Boards, and allow [the] applicant to compete before the [calendar year 2008] LT selection board. If selected, she should be granted back date of rank, pay and allowances as if she were selected by the [calendar year 2006] Board.

The JAG adopted the facts and analysis provided by the Commander, Coast Guard Personnel Command (CGPC) that were attached as Enclosure (1) to the advisory opinion and

---

<sup>6</sup> Under the active duty agreement of June 20, 2006, the term of service was stated as follows:

- (a) Officer shall remain on active duty for a term of service of approximately one-year(s) and eleven months(s) commencing on the fourth day of August 2006, and terminating on the thirtieth day of June 2008 both dates inclusive, unless the Coast Guard agrees to a request by the Officer to be released from the active duty obligation, or the Officer is involuntarily released as provided [for in this agreement].

The agreement also stated that neither the Coast Guard nor the applicant was obligated to enter into a new agreement after the expiration of the term of service agreed to in the agreement.

<sup>7</sup> The ADPL is a single list of officers of the Coast Guard, regular and reserve, on active duty, not otherwise excluded. Article 5.A.2. of the Personnel Manual.

<sup>8</sup> The IDPL is a single list of officers in the Coast Guard Reserve in an active status. Article 7.A.3. of the Reserve Policy Manual.

asked the Board to accept CGPC's comments as the Coast Guard's advisory opinion. CGPC stated the following:

[I]t is the [CO's] responsibility to ensure accurate, fair and objective evaluations of officers under their command . . . Also, it is the CO's responsibility to designate and publish the unit's rating chains. Any deviation from the established rating chain must be processed in accordance with the Coast Guard Personnel Manual, Chapter 10.A. Based on the record, it is clear that an error exists with respect to the rating chain in the applicant's disputed OER.

During the period of the disputed OER, the applicant answered to her designated supervisor, LT [B] and not LT [V] who assumed the role after the end of the reporting period. Based on the executive officer's declaration, LT [V] should not have signed the applicant's disputed OER as the supervisor. [The CO] states, "I cannot explain why LT [V] who was [the applicant's] supervisor after the end of the reporting period, signed her OER. This is supported by the CO who states, "Neither of the actual supervisors from the period in question signed the OER." [The CO] also states "I believe that the correct rating chain was involved in counseling the officer during the period in question, but that the officers signing the OER as supervisor and reporting officer were not appropriate or in accordance with OER guidance and policy. These statements support the conclusion that both the supervisor and reporting officer were incorrect for the applicant's disputed OER. Since LT [B] transferred to the Response Department during the middle of the reporting period; it was his responsibility to provide the new supervisor with a draft OER and the applicant's rating chain should have been adjusted. This did not occur in the applicant's case and ultimately, the wrong rating chain signed the disputed OER.

In summary, the rating chain did not carry out its responsibilities in accordance with the Coast Guard Personnel Manual. The record supports expunging it from the applicant's official record.

CGPC obtained statements from the executive officer and the CO, both of whom admitted that the supervisor who signed the applicant's disputed OER was not a designated member of her rating chain. In his statement, the reviewer also stated that the XO should not have signed the OER as the reporting officer.

#### *The Executive Officer's (XO's) Statement*

In addition to admitting that the supervisor who signed the disputed OER was not a proper member of the applicant's rating chain, the reporting officer, who was also the XO, stated that the applicant's contention concerning the imbalance between the comments and marks is partially true. He stated that the comments in the OER do not provide enough support for the two 3s in the workplace climate and judgment dimensions, but he noted that after subsequent consultation with officers aware of the applicant's performance and based upon his own recollections he stood by the marks. The XO stated that during the reporting period, the

applicant was counseled by LT B for inappropriate professional demeanor with mariners during her assigned duties as a vessel inspector and for her failure to meet the supervisor's deadlines. The XO stated that the mark of 3 on the comparison scale in block 9 was justified.

### *The CO's Statement*

The CO who was also the reviewer for the disputed OER admitted that the supervisor who signed the disputed OER was not a proper member of the applicant's rating chain. Moreover, the reviewer admitted that a LT M should have signed as the applicant's reporting officer rather than the XO. The CO further stated:

[The applicant] was assigned a mark of 3 in Workplace Climate and Judgment performance dimensions. Whether the low marks "accurately" reflect her performance cannot be ascertained. The workplace climate supporting verbiage does reflect that counseling was conducted for improper actions. However, it isn't made clear what the improper actions were or how those actions affected the work place. The 3 assigned in judgment is even less supported, as the verbiage leads with "exhibited sound judgment", and cites positive actions and impacts. Therefore, I concur with the allegation that both marks of 3 were not proper in that they are not properly supported by verbiage in the OER. [The applicant] was marked "one left of center" or "3" on the Block 9 Comparison Scale. As the marks of 3 are not supported by the verbiage, it follows that this low comparison scale mark is also not supported.

[The applicant] stated that the Reviewer's signature was stamped (not hand written) on the OER. . . . If in fact the OER is stamped, I would like to comment that this was not a normal or authorized practice . . . I do have a memory of a discussion with LT M earlier in the period regarding his concerns with [the applicant's] performance and potential OER impacts . . . I do not have a memory of reviewing this particular OER.

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

On June 26, 2008, the applicant responded to the views of the Coast Guard and agreed with the recommended relief. She emphasized the following:

As a direct result of being passed over twice, I am being involuntarily released from active duty. My RELAD date is 30 June 2008, at which time I will be a selected reservist. However, upon approval of my [BCMR] appeal, I respectfully request that I be reinstated to active duty and permitted to compete before the calendar year 2008 LT selection board with a corrected record, as stipulated in the Coast Guard's Advisory Opinion . . .

## 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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The Coast Guard recommends, and the Board agrees, that the disputed OER should be removed from the applicant's record and replaced with a report for "continuity purposes only" because the officers who signed as supervisor and reporting officer on the disputed OER were not designated members of the applicant's rating chain. Article 10.A.2.b.2. of the Personnel Manual states that commanding officers are to designate and publish the command's rating chains. The reviewer for the disputed OER, who was also the CO, confirmed that the officers who signed as the supervisor and reporting officer on the disputed OER were not designated members of the applicant's rating chain. The significance of the error is sufficient to justify the removal of the disputed OER from the applicant's record, and the Board will direct that it be removed and replaced with an OER for continuity purposes only. In light of this finding it is not necessary for the Board to address the applicant's other basis for removal of the disputed OER.

3. The Coast Guard also recommends, and the Board agrees, that the applicant's calendar year 2006 and 2007 failures of selection for promotion to LT should be removed from her record due to the erroneous OER. In deciding whether to remove a failure, the Board must determine whether a nexus exists between the error and the applicant's failures to be selected for promotion on the ADPL. To make this determination, the Board applies the standard in *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982). In *Engels*, the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering 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 [the applicant] would have been promoted in any event?" With respect to the first question, the Board finds that the applicant's record appears worse with the disputed OER than it would have without it, particularly in light of the fact that the applicant had several below average marks on the disputed OER, including a below average mark on the comparison scale. On the second question, the Board finds that it is not unlikely that the applicant would have been promoted with a corrected record, particularly since all of her other OERs have average to above average marks, no below average marks on the comparison scale, and clear affirmative recommendations for promotion to the next higher grade. Therefore, the applicant's calendar year 2006 and 2007 failures of selection for promotion to LT should be removed from her record.<sup>9</sup>

---

<sup>9</sup> The applicant requested to be promoted to LT retroactively. However, this Board does not promote but leaves that decision up to the Coast Guard which is better suited to determine whether an officer is among the best qualified for promotion. The removal of her failures will allow the applicant to compete before the ADPL board with a corrected record and is the relief normally granted by the Board in such situations.

4. The applicant is a Reserve officer who was serving on active duty under an active duty agreement with a June 30, 2008 termination date. She was on the ADPL when she competed for and failed of selection for promotion to LT. After twice failing of selection for promotion to LT on the ADPL, she was released from active duty on June 30, 2008 back into the Reserve. Under the law and regulation, a LTJG on the ADPL who fails twice for promotion to the next grade is normally released or discharged from active duty. However, the date of the applicant's release is the same date on which her active duty agreement terminated. Although the Coast Guard was under no obligation to further extend the applicant's active duty contract past June 30, 2008, it had to be aware that releasing her on June 30, 2008, after recommending correction of her record to include the removal of her ADPL failures, would entail more extensive corrective measures than if she had been allowed to remain on active duty. The fact the Coast Guard was not required to offer the applicant an extension of her active duty agreement after June 30, 2008 does not cure the errors and injustices she suffered while serving on active duty. This situation is further complicated by the fact that the applicant was selected by the LT IDPL board that met in September 2008. Therefore, the question is how to fashion a remedy to cure the errors suffered by the applicant while on the ADPL that would make her whole under the circumstances of this case.<sup>10</sup>

5. Often the Board reinstates an applicant to active duty whose discharge was based on having twice failed of selection for promotion due to an erroneous record. Since the applicant's active duty failures were based on an erroneous record, she is entitled to two additional opportunities to compete on the ADPL with a corrected record. As stated above, the situation is complicated by the fact that after her release from active duty, the applicant was considered and selected for promotion by the most recent LT IDPL selection board. If she is promoted to LT from the IDPL list, she could not compete for the same grade before an ADPL board. In light of the above, the applicant should be offered the following options:

(a) The option of immediately accepting her promotion from the 2008 IDPL LT selection board. If she chooses to be promoted from the 2008 LT IDPL promotion list she is not entitled to return to active duty, to any back pay and allowances, or to an adjustment of her LT date of rank.

(b) The opportunity to decline her promotion to LT from the IDPL list (which promotion shall be held in abeyance by not removing her name from that list),<sup>11</sup> and to return to active duty on the ADPL as a LTJG retroactive to July 1, 2008, without a break in service, for the minimum period necessary to allow her to have two opportunities to be considered by the ADPL LT

---

<sup>10</sup> The Court stated in *Sanders v. United States*, 219 Ct. Cl. 285, 301 (1979), citing *Debow v. United States*, 193 Ct. Cl. 499, 434 F.2d 1333 (1970), cert. denied, 404 U.S. 846 (1971) that where an applicant has convinced a correction board to correct his record, it must not grant him "half-a-loaf" of relief. He must be made "whole." *Ray v. United States*, 197 Ct. Cl. 1, 453 F.2d 754 (1972). Further, the *Sanders* court restated the principle that military corrections boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.

<sup>11</sup> In docket no. 2002-153, the Coast Guard informed the Board that that applicant could be advanced from a promotion list even though he declined the promotion two years earlier because his name was never actually removed from that list.

selection board. If selected by the first ADPL LT board to consider her based on a corrected record, her date of rank would be adjusted to the date she would have had if she had been selected by the 2006 ADPL selection board. If selected by the second LT ADPL selection board, her date of rank shall not be adjusted and shall be the date of rank she is entitled to as a result of that selection board. If the applicant accepts this offer and returns to active duty, she would be paid back pay and allowances, subject to appropriate set-offs. If she twice fails of selection for promotion before the LT ADPL selection board after reinstatement to active duty, she shall be promoted to lieutenant from the calendar year 2008 IDPL list and she shall have the IDPL LT date of rank she would have received had she been timely promoted from the 2008 IDPL promotion list. If she selects this option, she shall return to active duty within 90 days of the date of this decision.

(c) The option of accepting her LT IDPL promotion and returning to active duty on an active duty contract for the length of time necessary for her to compete before the first ADPL LCDR selection board. If she is selected by that Board for promotion, she would be provided with the opportunity to apply for integration into the regular Coast Guard. Under this option, the active duty contract would be prospective and not retroactive.<sup>12</sup>

6. Accordingly, relief should be granted as discussed above.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

---

<sup>12</sup> After the applicant was selected for promotion by the IDPL LT selection board, the Board consulted with the Coast Guard on how best to correct the applicant's record. The options for relief discussed in this decision were developed as a result of that consultation. Subsequently, the Board informed the applicant of the options for relief that would be available for correcting of her record. The applicant indicated that she would make a choice after receiving the final decision.

## **ORDER**

The application of XXXXXXXXXXXX USCGR, for correction of her military record is granted as follows:

The OER for the period October 1, 2004, to July 31, 2005, shall be removed from her record and replaced with a report prepared for continuity purposes only.

Her calendar year 2006 and 2007 ADPL failures of selection for promotion to lieutenant shall be removed from her record.

She shall be offered the following three options and allowed to choose one within 30 days of the date of this final decision:

(a) She may accept her promotion from the calendar year 2008 LT IDPL selection board. Under this option there is no entitlement to return to active duty, no adjustment to her date of rank, and no back pay.

(b) She may be reinstated to active duty retroactive to July 1, 2008, as a lieutenant junior grade, without a break in service, for the minimum period necessary to allow her two additional opportunities to be considered by the ADPL LT selection board. If selected by the first LT ADPL selection board to consider her for promotion based on a corrected record, her date of rank shall be adjusted to the date she would have had if she had been selected in calendar year 2006 and she shall receive corresponding back pay and allowances. If selected by the second LT ADPL selection board, her date of rank shall not be adjusted and shall be the date of rank she is entitled to as a result of that selection board. If she accepts this offer and returns to active duty, she must decline her promotion from the IDPL LT selection board (but her name shall not be removed from that list) and she shall be paid back pay and allowances, subject to appropriate set-offs, retroactive to July 1, 2008. If she twice fails of selection for promotion before the LT ADPL selection board after reinstatement to active duty, she shall be promoted to lieutenant from the calendar year 2008 IDPL list and she shall have the IDPL LT date of rank she would have received had she been timely promoted from the 2008 IDPL promotion list. If she selects this option, she shall return to active duty within 90 days of the date of this decision.

(c) She may accept her LT IDPL promotion and return to active duty on an extended active duty contract for the length of time necessary for her to compete before the first ADPL LCDR selection board. If she is selected by that selection board for promotion to LCDR, she shall be provided with the opportunity to apply for integration into the regular Coast Guard. Under this

option, the active duty contract shall be prospective and not retroactive. If she selects this option, her extended active duty contract shall begin within 60 to 90 days of the date of this final decision.

No further relief is granted under this order.

---

Evan R. Franke

---

Jordan S. Fried

---

Robert S. Johnson, Jr.