

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-115

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

The 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 April 25, 2008, upon receipt of the application, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

The final decision, dated January 22, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in the case.

APPLICANT'S REQUEST

The applicant requested that an officer evaluation report (OER) for the period June 13, 2002 to May 31, 2003 (first disputed OER) be removed from her record and replaced with an OER for continuity purposes prepared by an alternative rating chain. She further requested that the end date for this OER be corrected to August 23, 2003.

The applicant also requested that the subsequent OER for the period June 1, 2003, to May 31, 2004, (referred to as the second disputed OER) be corrected to show 25 days of non-observed time in block 1.h instead of 109 days. This is the only correction requested by the applicant with respect to this OER.

In addition, the applicant requested the removal of her failure of selection for promotion to LCDR before the calendar year 2007 LCDR selection board. She further requested that if selected by the calendar year 2008 LCDR selection board, her date of rank once promoted should be adjusted to the date she would have had if she had been selected by the 2007 LCDR selection board, with back pay and allowances. The applicant failed of selection before the 2008 LCDR selection board. Therefore, the Board will also consider the removal of this second failure of selection together with the first.

BACKGROUND

The applicant stated that she received a direct commission into the Coast Guard as a lieutenant junior grade (LTJG) on March 27, 2000. At that time she was nearing completion of her Ph.D. in environmental Science and Public Policy. Her first assignment was at Coast Guard Headquarters, in the Office of Response Operations.

The applicant's subsequent assignment in the summer of 2002 was to MSST (Maritime Safety and Security Team) 91102, which was a new unit, as the planning officer. According to the applicant, she did not request this assignment. Prior to reporting to the MSST, she visited the command and met with the executive officer (XO), CDR R. The applicant stated that it was apparent to herself and her prospective XO that she did not have the experience and background for the planning officer billet assignment. The XO contacted the detailee and was told that the assignment was final.

According to the applicant, after she had been at the MSST for about 6 months it became clear to the XO that she and the unit could benefit from additional training. So he sent her TAD to MSO Hampton Roads for training. She was TAD to Hampton Roads from January 29, 2003, until August 2003, when she departed for MSO Morgan City to begin her new PCS assignment.

The applicant claimed that in April 2003 while TAD the XO told her that she was being transferred unexpectedly because the planning officer position at the MSST was "unbudgeted."

ALLEGATIONS

First Disputed OER¹

The applicant alleged that the first disputed OER contained errors and injustices. She specifically alleged that the comment referring to her self-image in the following sentence in block 8 "Mbr continues to work on improving own self image, composure during mentoring/counseling session appearance in uniform education in military etiquette & meeting CMDT weight standards" violated Article 10.A.4.f. of the Personnel Manual. This provision prohibits "[mention of] any medical or psychological conditions, whether factual or speculative." In addition, she argued that the comment is irrelevant because it is not an observation of her performance, and has no bearing on any of the performance dimensions contained in block 8. Therefore, she contended that the comment is a factor that adversely affected her ratings and had no business in the rating process.

¹ The first disputed OER covered the applicant's duty as the planning officer for the MSST. Block 2 of the OER described her duties as follows: "Supervisor for 2 E-7s. Responsible for the development of unit plans & organizational doctrine for the deployment of 2 Maritime Homeland Security . . . teams & 9 person support section. Liaison & coordinate [with] . . . [group] Cos, Districts, Areas, CMDT and other . . . law enforcement units to develop strategic policy for deployment of teams. Responsible for maintaining current charts, organizational listings, port security plans, & other information required for unit to deploy anywhere in CONUS [within] 12 hours." The applicant did not receive a mark lower than 4 (on a scale of 1 to a high of 7) in any of the 18 performance categories. A 4 is considered to be an average mark.

The reporting officer did not recommend the applicant for promotion in block 10 of the first disputed OER. The applicant claimed that this recommendation was based on factors discussed in the section 7, 8, and 10 comment blocks that were adverse to her rating and had no business in the rating process. She specifically alleged that the following bolded comments in block 7 were impermissible factors in the rating process:

This assignment is proving very challenging to the ROO [reported-on officer]. ROO has faced steep learning curve due to relative inexperience in the CG and switching from environmental mgt to operational security. With increased training & professional development at a larger MSO, ROO can augment capabilities of the unit and add significant professional value to the CG. ROO's progress toward completion of doctorate work in environmental science & policy exemplifies ROO's capabilities to succeed. Progressed well during 6 [month] TAD to MSO training.

The applicant also contended that the following bolded comments in block 8 were impermissible factors that had no business in the rating process:

While challenged by inexperience & assignment to unique operational unit, continues to develop initiative. As evidenced [sic] in ROO's near-completion of Ph.D. mbr had drive & intellect to succeed in tough situations but must develop similar foresight & drive in operational crafts. Above average judgment when face with decisions; delegation of responsibilities with dept ensured that proper skill set were assigned to tasks at hand maximizing effectiveness of dept while minimizing training requirements. Effectively managed AIRSTA load out exercise to validate unit air deployment capabilities; composed results in narrative which evoked a programmatic review of MSST emergency deployment requirements vs CG airframe capabilities. High ethical mbr noted for honesty. **Although not experience in CG operational community, ensured policies & programs were followed even when ROO was unsure or had concerns, mbr then took action to review & understand policies. Mbr continues to work on improving own self-image, composure during mentoring/counseling sessions, appearance in uniform, education in military etiquette, & meeting CMT weight standards.** Encourages subordinates to work out.

The applicant further alleged that the reporting officer relied on the following impermissible factors (bolded) in evaluating her potential in block 10:

[The applicant] continues to work on capturing required skill sets & knowledge base to succeed in operational MHLS program. **Mbr's comparative lack of CG experience & and assignment to a start-up unit proved to be a substantial but not insurmountable, challenge.** [The applicant] participated in extended training program at local MSO to increase operational proficiency & familiarity. **[The applicant] has made strides during this TAD period and gained some of the experience & knowledge that should have been requisite prior to**

assignment to a planning officer billet. [The applicant] is currently not recommended for promotion but, with further CG experience may.

The applicant argued that taken as a whole the above comments constituted impermissible comments on things that are entirely out of the applicant's control and yet they formed the basis for a recommendation against promotion. The applicant argued that the above comments were inappropriate and had no business in the rating process because (1) the OER is not the appropriate forum for complaining about an officer's lack of qualification or experience for the billet to which she is assigned; and (2) the comments are irrelevant to her performance and yet loomed so large in the overall message of the OER that they could not be ignored by a selection board. She stated that the reporting officer's quarrel about the applicant's qualifications was with the Personnel Command.

The applicant argued that the reporting officer based his evaluation of her block 9 comparison scale mark as a "fair officer" (the third lowest block out of 7) on his belief that the applicant should never have been assigned to the unit, a factor which was adverse to the rating that had no business being in the rating process. The applicant explained that in no less than four places on the OER did the reporting officer link her lack, or perceived lack, of experience with her assignment to the unit. She also argued because the reporting officer sought to have her "short toured," there is no reason to believe that he did not take his perception of her lack of knowledge and experience into consideration when he compared her with other LTs he has known.

The Applicant contended that because she has established errors in her OER that violated the personnel Manual and because she has established that the reporting officer considered factors adverse to the rating that had no business in the ratings process, the next question is whether the alleged error(s) caused her record to appear worse than it would in the absence of the errors. *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982). She argued that her record certainly appears better with comments like "not recommended for promotion" and "lack of experience & knowledge" removed from the disputed OER.

Finally, the applicant argued that it was an injustice for her not to have a concurrent OER covering her 231-day TAD assignment. The applicant admitted that under Article 10.A.3 of the Personnel Manual, a concurrent OER is not mandatory. However, she argued that while it was not an error under the Personnel Manual, it was an injustice because without a concurrent OER, the selection board only had half the picture of her performance, which she described as good.

The applicant also complained that end date for the first disputed OER should be August 23, 2003, the date she officially checked out of her then-parent command.

Second Disputed OER

The applicant requested that this OER be corrected to change non-observed days "other" in block 1.h. from 109 to 25, which covered the period between her departure from MSST 91101 on August 23, 2003 and the date she reported to MSO Morgan City on September 17, 2003. No other complaints were registered by the applicant about this OER.

Statements Submitted by the Applicant

1. The applicant submitted an affidavit in her own behalf. She put forth many of the allegations and facts stated in the brief from her attorney. She stated that CDR R, the XO, became her supervisor in October 2002, and that in January 2003, he told her that he had arranged a TAD assignment for her at MSO Hampton Roads. The purpose of the assignment was for the applicant to familiarize herself with the different missions of an MSO. She stated that CDR R chose a six-month period because it was the usual length of time to indoctrinate a junior officer for a first MSO tour. The applicant stated, "I was excited and relieved to have such an opportunity since I was struggling to succeed in my present position." She indicated that she was struggling in her current assignment because "(1) I had no operational experience of any kind and had served only two years in the Coast Guard, and (2) the unit, the second one of its kind in the Coast Guard lacked an operational and administrative doctrine for it to be managed effectively."

2. The applicant submitted a statement of questions that she posed to her supervisor, CDR R, and his responses. CDR R stated that he contacted the assignment officer to confirm that the applicant's background and experience was commensurate to the billet. He was told that the assignment was final and he never pressed the issue again. He denied that he requested the cancellation of the applicant's orders at any point. CDR R stated that had he known that the applicant was going to transfer that summer it is likely that he would not have sent her to the MSO for training because his unit would not have realized any benefit from the training. CDR R stated that once the applicant's PCS orders were issued he contacted her prospective command to obtain their acceptance because the applicant was not within Coast Guard weight standards at that time.

3. The applicant submitted a statement from the then-XO of the TAD command, CDR H. He stated that the purpose of the applicant's TAD assignment was the parent-command's desire to broaden her base of maritime expertise to enhance her ability to perform as the unit's operation and contingency planner. He stated that his command enjoyed a solid reputation as an informal "training port," and it was not uncommon to host one or more TAD members from other commands. He stated that the applicant was at his command for approximately 8 months. He stated that with respect to her OER, it was understood that her parent command would continue to evaluate the member and that a concurrent OER would not be completed. He stated that he gathered feedback and observations on the applicant's performance from his department heads and provided that information to CDR R. He stated that he remembered that the feedback was generally favorable.

4. The applicant submitted a statement from the Chief of Port Operations at her TAD Command, MSO Hampton Roads. He stated that the applicant was sent to his command to work on obtaining certain qualifications and experience as detailed by her XO. He stated that he never had, nor was he directed to have, direct administrative operational oversight/control of the applicant. He stated that he understood from his XO at the TAD command that the applicant would still work for and report to the XO of her parent command. He stated that from his limited

observation the applicant made good progress in obtaining the qualification and experience directed by CDR R.

5. The applicant submitted a statement from CDR W who was the XO of her new parent command. CDR W wrote that he contacted CDR R of the applicant's previous command about the decision to transfer her early from the MSST assignment. He stated that CDR R told him that the CO wanted her transferred because she was not a good fit for the MSST assignment. However, CDR W stated that based on the positive feedback he received from her TAD Command, he decided that she was acceptable for assignment to MSO Morgan City. With respect to her performance at MSO Morgan City, CDR W stated the following:

Over the course of approximately two years . . . I observe [the applicant's performance] as an Investigating Officer, Chief of Vessel Traffic Service (VTS) Berwick Bay and as the unit's collateral duty education services officer (ESO). During those 2 years . . . I was pleased with the applicant's performance. She worked diligently to complete the PQS items assigned to her by her Department Head and became a fully qualified Investigating Officer . . . She assumed the duties of the Chief of the unit's VTS and excelled at learning her new duties, managing VTS personnel and equipment and, in my opinion, raised the morale of that department. In addition, [the applicant] voluntarily took on the collateral duty of ESO at the unit. As ESO, she excelled at assisting several units members work toward and complete educational goals and was a direct contributor in the advancement of several petty officers at the unit.

6. The applicant submitted a statement from her reporting officer while assigned to MSO Morgan City. He stated that in his professional opinion the following comment in the applicant's first disputed OER was inappropriate: "[The applicant] has made strides during this TAD period & gained some of the experience & knowledge *that should have been requisite prior to assignment to a planning officer billet.*" He stated that in his opinion it is inappropriate to use the applicant's OER to indirectly criticize OPM and the assignment process. He stated that units have an opportunity to discuss the unit's personnel needs with the assignment officer prior to orders being issued.

VIEWS OF THE COAST GUARD

On September 2, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion.² The JAG recommended that the Board grant the following partial relief to the applicant with respect to the first disputed OER:

² Attached to the advisory opinion were comments from the Commander, Coast Guard Personnel Command (CGPC). However, from reading the advisory opinion signed by COMDT (CG-0946) the comments from CGPC were not included as a part of the Coast Guard's views in this case. The usual language in paragraph 1 of the advisory opinion advising the Board to accept such comments as the advisory or as a part of the advisory opinion is omitted. Therefore, CGPC comments are not discussed in the advisory opinion portion of this decision. However, the Board notes that the recommendation made by CGPC with respect to the number of day that should be counted as non-observe "other" on the first disputed OER has merit.

- a. Section 1: change the number of days listed as “not observed” in the other category from 122 to 25.
- b. Section 8: remove the phrase “own self-image” resulting in the corrected sentence reading: “Mbr continue to work on improving composure during mentoring/counseling sessions, appearance in uniform, education in military etiquette, & meeting CMDT weight standards.”
- c. Section 10: Delete the following last two sentences in this section. “[The applicant] has made strides during this TAD period and gained some of the experience & knowledge that should have been requisite prior to assignment t a planning officer billet. [The applicant] is currently not recommended for promotion but, with further CG experience may.”
- d. Remove the applicant’s failure of selection and any references to the failure of selection for promotion to [LCDR]. If applicant is selected for promotion by the first selection board to review her record after it is corrected according to this recommendation, that her date of rank should be changed to what it would have been had she been selected for promotion by the first LCDR selection board that reviewed her record.

The JAG noted that the applicant argued that the end date for the first disputed OER is erroneous because she did not officially leave her parent command until August 2003. She also argued that the OER erroneously shows that she had 122 non-observed days in block 1.h. She further argued that she should have had a concurrent OER because she was TAD more than 60 days. The JAG stated that Article 10.A.3.a.1.b.2. of the Personnel Manual allows officers not in Zone for promotion, which was the applicant’s situation at the time, to delay the end date of their reporting period to coincide with their departure from a command. The JAG also stated that Article 10.A.3.c.2 allows concurrent OERs when an officer had been TAD away from the command for more than 60 days, but again, concurrent OERs are not required.³ Therefore, the JAG argued that the Coast Guard did not commit a legal error by ending the applicant’s reporting date on May 31, 2003 and by submitting only a regular OER. The JAG stated that block 1.h of the applicant’s first disputed OER should show 25 non-observed days “other” rather than 122 as currently indicated on the OER.

With regard to the applicant’s complaint about the comments in block 7, the JAG stated that none of the comments are prohibited by the Personnel Manual and they elaborate on issues raised in other sections of the OER.

The JAG agreed with the applicant that the reference to her self image in the block 8 comment section violated Article 10.A.4.f.5. of the Personnel Manual, which states in pertinent part, that members of the rating chain shall not mention any medical or psychological conditions, whether factual or speculative. The JAG stated that the comment about “self-image” can be

³ The JAG mistakenly referred to a continuity OER when discussing a portion of the concurrent OER issue.

reasonably interpreted as a comment on a medical or psychological condition. The JAG stated that because a LCDR selection board is a best qualified board, the Coast Guard is not in a position to demonstrate the erroneous comment was harmless.

The JAG stated there is no evidence to support the applicant's claim that the reporting officer marked her as a fair performer on the block 9 comparison scale because he believed that the applicant should never have been assigned to the unit. The JAG stated that the applicant offered no evidence to support her contention, and therefore, insufficient evidence was submitted to demonstrate legal error with regard to the applicant's comparison scale mark.

The JAG concluded that the following two sentences regarding the applicant's potential in block 10 should be removed from the disputed OER: "[The applicant] has made strides during this TAD period & gained some of the experience & knowledge that should have been requisite prior to assignment to a planning officer billet. [The applicant] is currently not recommended for promotion, but with further CG experience may." The JAG stated that the two sentences recommended for removal are not in accordance with Article 10.A.4.c.9. of the Personnel Manual because they do not address the applicant's potential for greater leadership roles and responsibilities in the Coast Guard based on her conduct and performance demonstrated during the reporting period. Nor according to the JAG, do the comments address the applicant's qualification to assume duties of the next grade, her possession of special skills, or the reporting officer's recommendations for specialty assignments or advance education. The JAG also stated that a reasonable interpretation of the comments in block 10 is that the reporting officer's promotion recommendation was based upon the applicant's arrival to the unit for the planning officer assignment without the requisite experience and qualifications for the position, which would mean that the reporting officer based his promotion recommendation on an event that occurred outside of the reporting period. See Article 10.a.4.c.9. of the Personnel Manual. The JAG further stated that he could not state that these errors were harmless to the applicant's record before the LCDR selection board.

On the issue of removal of the applicant's failures of selection for promotion to CDR, the Coast Guard relied on *Engels v. United States*, 678 F. 2d. 173 (Ct. Cl. 1982), which states that before addressing a failure of selection, "an applicant must first show that the service committed a legal error." After which, the next question is whether the error is causally linked with the non-selection, i.e. whether it is harmless or prejudicial. The JAG stated that the court in *Engels*, placed the burden on the applicant to establish a prima facie case of a substantial connection between the error and the non-selection. Under *Engels*, the two standards to be applied in answering this question are. 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?" *Id.* The JAG stated that the errors identified by the Coast Guard in the applicant's record made it appear worse. The JAG further concluded that it is not unlikely that the applicant would have been promoted with a corrected record. Specifically, the JAG noted that with the recommendation against her promotion removed, the applicant's selection opportunity would have improved.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 3, 2008, the Board received the applicant reply to the views of the Coast Guard. She appreciated the relief recommended by the Coast Guard; however she still argued that the entire first disputed OER should be removed because many other of the reporting officer's comments violated the Personnel Manual.

In this regard, she argued that comments in block 7 referring to her steep learning curve due to her inexperience in the Coast Guard and her switching from environmental management to operation port security document performance that occurred outside of the reporting period and that they are irrelevant to her performance during the reporting period, not only because they refer to performance outside of the performance period but because the comments involve factors that have no business in the rating process.

With respect to comments in block 8, the applicant argued that comments referring to her inexperience or her lack of Coast Guard experience are similar to the comments that the JAG stated should be removed from block 10 because they refer to performance outside of the reporting period. She argued, as she did her basic brief, that such comments include factors adverse to the rating that had no business in the rating process. The applicant also argued that the reference to the Hurricane Plan in the disputed OER is erroneous because she did not do that work during the marking period. She stated that she was not assigned to work on this plan until mid May 2003. She noted that the reporting period ended on May 31, 2003.

The applicant disagreed with the JAG that the reporting officer's comparison scale mark rating her as a "fair performer" is entitled to the presumption of regularity, particularly when the JAG has pointed to several errors by the reporting officer in preparing the disputed OER. The applicant argued, as she did in her basic brief, that the reporting officer's mark was based on his opinion that the applicant should never have been assigned to the unit. The applicant further argued that the reporting officer's comments when read in their entirety place unwarranted emphasis on her lack of experience and qualifications for the position to which she was been assigned. Therefore, she argued these comments must have influenced his block 9 comparison scale mark.

Again, the applicant argued that she it was unjust for her not to have been given a concurrent OER for the six months that she was TAD. She stated that the regular OER does not cite any specific examples of her performance while TAD. In this regard, the applicant claims that the disputed OER does not include any discussion of her training, or the more than 120 PQS items that she completed in the areas of T-Boat Inspector, Hull Inspector, Harbor Safety Officer, Container Inspector, or her work on the Hurricane Contingency Plan. The applicant argued that the remedy for this failure to adequately document her TAD performance is the removal of the first disputed OER.

The applicant noted that the JAG recommended changing the days not observed in the first disputed OER from 122 to 25 without offering an explanation of how the 25 non-observed days were calculated. Changing the days not-observed to observed ignores the factuality of this

case and does not resolve the issue that no one in her rating chain observed or was knowledgeable of her performance while TAD.

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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in her Coast Guard military record. The Board finds that the applicant has exhausted her administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. Although the application was not filed within three years of when the alleged error or injustice was or should have been discovered, it is considered timely under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

3. The applicant was commissioned in the grade of LTJG on March 27, 2000. At the time of her commissioning, she was a Ph.D. candidate in Environmental Science and Public Policy. Her first assignment was at Coast Guard Headquarters in the Office of Response Operations, where her OERs indicate she performed well. The applicant's next assignment was as the Planning Officer for the MSST where she received the first disputed OER. The applicant and CDR R met and discussed her background for the job prior to the applicant reporting for duty. There is some disagreement as to what was said during the conversation, but both agree that after their conversation CDR R contacted the detailer and was told by the detailer that the decision to assign the applicant to the MSST was final. About six months into the assignment, the applicant was sent TAD to MSO Hampton Roads for training to help her fulfill her duties at the MSST. She remained at MSO Hampton Roads until August 2003 when she departed on PCS orders to MSO Morgan City. The second disputed OER covers her duty while assigned to the MSO Morgan City. She has alleged that the first disputed OER is erroneous and unjust and requested to have it removed from her record, as well as the removal of her failures of selection for promotion to LCDR.

4. The Board begins its analysis by presuming that the disputed OER is correct as it appears in the record. The applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁴ In this regard, the JAG has admitted to several errors in the disputed OER. First, the JAG admitted that the comment in block 8 about the applicant's effort to improve her "self-image" could be interpreted as a violation of Article 10.A.4.f. of the Personnel Manual, which prohibits "[mention of] any medical or psychological conditions, whether factual or speculative." The JAG recommended that the phrase "own self-image" be

⁴ 33 C.F.R. § 52.24(b).

deleted from the pertinent sentence. The JAG concluded that the error was not harmless before the LCDR selection board. The Board agrees with JAG's recommendation and will direct the correction.

5. Second, the JAG recommended that the last two sentences of block 10 (potential) be removed from the disputed OER. The sentences read: "[The applicant]" has made strides during this TAD period & gained some of the experience & knowledge that should have been requisite prior to assignment to a Planning Officer billet. [The applicant] is not recommended for promotion but with further CG experience may." According to the JAG, the comments are not in accordance with Article 10.A.4.c.9. of the Personnel Manual because they do not comment on or evaluate the applicant's qualification to assume duties of the next grade or any special skills. Nor do they recommend the applicant for specialty assignments or advanced education. Instead, the JAG stated that the comments could be interpreted as the reporting officer's objection to the decision to assign the applicant to the planning officer billet and, if true, would constitute basing the applicant's performance and non-promotion recommendation on an event that occurred outside of the reporting period. The Board does not agree with the JAG's interpretation of these two sentences and notes that an officer's lack of experience, training and/or knowledge is relevant to that office's readiness to perform in the higher grade or to undertake special assignments, or to participate in advanced education. However, since the JAG has recommended the removal of the two sentences and the applicant has accepted the recommendation, the Board will direct their removal from the OER.

6. Even with the error admitted by the Coast Guard in block 8, the JAG's recommendation for corrections to block 10, and the recommendation for removal of her failures of selection for promotion to LCDR, the applicant maintained her request for the removal of the entire first disputed OER. Therefore, the Board must decide whether the entire OER should be removed from her record because the reporting officer based his entire evaluation of the applicant's performance on factors adverse to the rating that had no business in the rating process or on events that occurred outside of the reporting period. The applicant suggested that the reporting officer's comments that she was challenged in the planning officer assignment because of her lack of Coast Guard and operational experience were factors adverse to her rating that had no business in the rating process. She asserted that if the CO had a problem with her assignment to the MSST as the planning officer, he should have taken the matter up with the assignment officer and should not have blamed her in the first disputed OER.

7. In *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), the court stated that in the face of the presumption of regularity, an applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense; the applicant must go further and establish the presence of factors adversely affecting the ratings that had no business being in the rating process, or a clear violation of a statute or regulation, or the misstatement of a significant hard fact. The applicant argued that the reporting officer's comments about how her lack of Coast Guard and operational experience limited her ability to perform as the planning officer for the MSST were factors adverse to her rating that had no business in the rating process. However, the applicant never provides the Board with examples of the types of adverse factors that have no business in the rating process. We find such guidance in *Guy v. United States*, 608 F.2d 867, 870 (Ct. Cl. 1979). The court stated in that case that bias and personal animosity of

rating officers against the reported-on officer are impermissible factors in the rating process. The applicant has not put forth any evidence that the reporting officer was biased against her or that he held any animosity towards her. She admitted in her statement that her discussion about her qualifications for the planning officer job was with the XO, who was her supervisor, and not with the reporting officer who was the CO. Therefore, the applicant has not shown that the reporting officer's comments about her inexperience were anything except his honest expression and opinion for why she did not excel in the job as the unit's planning officer. Moreover, discussions about an officer's inexperience or lack of operational experience are not restricted by Article 10.A.4.f. of the Personnel Manual.

8. The applicant has not shown the comments to be inaccurate; nor has she shown them to refer to events outside of the reporting period. In this regard, the Board points to the applicant's own comments in her sworn statement. She stated, "I was excited and relieved to have such [a TAD] opportunity since I was struggling to succeed in my present position. This was due to two reasons: (1) I had no operational experience of any kind and had served only two years in the Coast Guard, and (2) the unit, the second one of its kind in the Coast Guard, lacked operation and administrative doctrine for it to be managed effectively." Therefore, the applicant's own statement corroborates the accuracy of the reporting officer's comments that her performance as the unit's planning officer was hampered by her lack of Coast Guard and operational experience.

9. The fact that the applicant had been in the Coast Guard for only two years and that she had no operational experience when she was assigned as the MSST planning officer was true during the previous reporting period and continued to be true during the period of the OER under review. The difference is that her lack of experience did not limit her ability to perform in her first assignment as it was a non-operational assignment. However the reporting officer *noted* and *observed* during the current reporting period that such inexperience limited her inability to perform the functions of her then-current assignment. Such inexperience continued and was present during the reporting period and it affected the applicant's ability to do her job.⁵ The reporting officer never stated, as the applicant suggested, that the applicant should not have been assigned to the planning officer position. He simply noted that once she assumed those duties, her performance was hampered by her lack of operational knowledge and experience. Therefore the comments were not irrelevant to the evaluation of her performance, as argued by the applicant. The reporting officer's comments explain to the reader, as well as the applicant, why he evaluated her as he did and therefore serve to place her performance in the best possible light. *See King v. United States*, 19 Cl. Ct. 703 (1990)⁶ and the Decision of the Deputy General Counsel in BCMR No. 161-93.⁷ They also explain why it was necessary to send the applicant

⁵ Article 10.A.2.b.7.b. of the Personnel Manual states that for the evaluation area, the reporting officer shall review the reported-on officer's performance and qualities observed and noted during the reporting period. Next, the reporting officer shall carefully read the standards and compare the reported-on officer's performance to the level of performance described by the standards.

⁶ In *King*, the court did not find the BCNR's refusal to remove a reference to the applicant's failure of selection for promotion, normally a restricted comment in an OER, arbitrary and capricious. The BCMR determined that the manner in which the references were used in the OER was flattering and did not prejudice the applicant before the selection board.

⁷ The Secretary's Delegate overruled the Board in BCMR No. 161-093 and denied the Board's recommendation that the following bolded comments be removed from that applicant's OER. The Delegate ruled that the comments

TAD for training for approximately six months; an assignment the applicant was excited to have. Without the reporting officer's understanding of the applicant's limited Coast Guard and operational experience, the applicant could very well have received worse marks and comments in the performance dimensions of the first disputed OER.

10. The applicant has not shown the block 9 comparison scale mark describing her as a "fair performer" to be erroneous. Article 10.A.4.c.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. Subsection c. of this Article states that no specific comments are required to support the reporting officer's judgment in this section. However "a mark other than in the center three circles is strengthened considerably if there are comments in the report from which one could reasonably draw a conclusion why this particular officer has been identified as different from the majority of officers of this grade." The applicant was marked in the first of the three center blocks, a "fair performer." Since no specific comments were required to justify the reporting officer's mark on the comparison scale, the applicant's suggestion that the mark was based on the reporting officer's belief that she should never have been assigned to the unit is speculation. There is no direct evidence in the record that the CO ever stated that the applicant should never have been assigned to the MSST as planning officer. His recognition of the fact that she faced challenges in the job due to her lack of Coast Guard and operational experience is not the same as stating she should never have been assigned to the job. There is no doubt that some Coast Guard officers are assigned to positions for which they may not have the "right" background, but still perform the job to the satisfaction of their seniors. The applicant has not proved by a preponderance of the evidence that the reporting officer marked her as a "fair performer" because he believed she should never have been assigned to the MSST as the planning officer rather than upon his observation of her performance during the period.

11. Finally, the applicant argued that the comments in sections 7 and 8 of the first disputed OER are similar to the comments that the JAG recommended removing from block 10. The JAG stated that a reasonable interpretation of the two sentences recommended for removal could be that the reporting officer based his evaluation of the applicant's potential and recommendation against her promotion on his disagreement with the decision to assign the applicant to the planning officer job, and if true, would constitute basing the applicant's performance on an event that occurred outside of the reporting period. As noted earlier the Board does not agree with the JAG's interpretation of the comments and finds that they could be read as explaining the applicant's then-current inability to perform at a level expected by her superiors and why she was not recommended for positions of greater responsibility, for advanced education, for specialty assignments, or for promotion. However as also stated earlier, the Board

were not discriminatory or prejudicial and were intended to explain or mitigate adverse comments about the applicant's communication style, and in fact retention of the references to the New York City area make the OER comments appear less harsh than with them redacted: "[The applicant] is occasionally unintentionally abrasive. **He is a New Yorker born and bred, and the brusque and confrontational demeanor of this city is evident.** As a result, he sometimes makes a poor first impression but quickly overcomes that with his natural friendliness and demonstrated effectiveness. He is well liked by those who know him." "[**The applicant**] has a colloquial style; uses regional expressions of greater NY area."

will direct the removal of the two sentences in block 10 because the Coast Guard and the applicant are in agreement that they should be removed.

12. The applicant made several other ancillary arguments. She argued that she suffered an injustice when she was given an assignment for which she did not have the background for success. The applicant received a direct commission in the rank of LTJG, no doubt due to her advanced education. The applicant argued that the reporting officer blamed her for a situation beyond her control. After all, she did not request assignment to the MSST. The Board has no way of knowing how many other officers were assigned to billets for which their backgrounds were not an absolute match. How many succeeded or not. Was the expectation that the applicant would be able to do the job reasonable? Since there has been no evidence presented to the Board to answer these questions, it is not possible for the Board to conclude that the applicant suffered an injustice because she was assigned to a job for which her background was not a perfect match.

13. The applicant also complained about the end date for the first disputed OER. In this regard, the Board finds that under the Personnel Manual the submission schedule for the applicant's first disputed OER was May 31, 2003. However, the submission of the OER was delayed, which is permitted by the Personnel Manual. The question is whether the delay was an extension of the reporting period that should have been covered by MSST. The applicant stated when she was informed that she would receive PCS orders in April 2003, she and CDR R agreed that she would complete her TAD training. However, there is no indication from the applicant or in the record as to the effective date of the PCS orders. If they were effective on June 1, 2003, then the MSST was not responsible for that period because the applicant would then have belonged to another command. If the PCS orders were effective in August 2003, the MSST would have been responsible for this portion of the reporting period. The applicant has the burden of proof in this case and she has not submitted sufficient evidence as to the effective date of her PCS orders and therefore failed to establish that the MSST was her parent command on June 1, 2003. The Board must conclude that May 31, 2003 was the correct end date for the first disputed OER. Accordingly, it was appropriate for the MSO Morgan City to account for the TAD days between June 1, 2003 and the date the applicant reported to that unit in September 2003 in the second disputed OER covering the period from June 1, 2003 to May 31, 2004.

14. The JAG recommended reducing the days not observed listed as "other" in section 1.h from 122 to 25 on the first disputed OER without explanation for the calculation. The Board notes that in the memorandum from Coast Guard Personnel Command attached to the advisory opinion but not made a part of it, CGPC recommended that the "other" non-observed days be corrected to 8, which would include the first 8 days of the reporting period prior to the applicant reporting to the MSST. This calculation appears correct to the Board and it will be directed. TAD days should only be marked non-observed if not performed in the execution of an officer's normal duties. Article 10.A.4.c.1.g. of the Personnel Manual. The JAG noted that the applicant's duties at her TAD command were assigned to improve her skills for her primary job at the MSST, and therefore, her TAD performance was properly documented in the first disputed OER. It appears to the Board that the applicant's request to change the 109 "other" non observed days to 25 on the second disputed OER is not appropriate because her TAD during this period,

although documented in the second disputed OER, was not in the performance of her duties at MSO Morgan City.

15. The applicant complained that she did not receive a concurrent OER for the period that she was assigned TAD. She admits however that concurrent OERs are not mandatory. Article 10.A.3.c.2 allows for the submission of concurrent OERs when an officer has been TAD away from the command for more than 60 days, while being observed by a senior other than the reporting officer. Since the submission is discretionary, no legal error exists. Nor is the Board persuaded that an injustice was done to the applicant, specifically in light of the fact that in both the first and second disputed OERs her TAD assignment is discussed in the OER. There is evidence in the record that CDR R kept abreast of the applicant's performance while TAD and in fact developed her training plan.

16. Based upon the error admitted by the Coast Guard in the first disputed OER with respect to the comment about the applicant's self-image and the the removal of the last two sentences in section 10, one of which did not recommend the applicant for promotion, the Board agrees with the JAG that the applicant's failures of selection for promotion to LCDR should be removed. In deciding this issue, the Board applied 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?"

17. With respect to the first prong, the Coast Guard admitted, and the Board agrees, that the error, and the removal of the recommendation against the applicant's promotion made her record appear worse than it would in the absence of the error or the removed sentences. The JAG admitted that with these corrections, it is not unlikely that the applicant would have been promoted in any event. Accordingly, the applicant's failures of selection should be removed from her record.

18. All of the applicant's contentions have been reviewed. Those not discussed within the findings and conclusions are considered not to be dispositive of the case. The applicant is entitled to the partial relief recommended by the Coast Guard.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXX, USCG, for correction of her military record is granted in part. Her OER for the period from June 13, 2002, to May 31, 2003, shall be corrected as follows:

- Change the number of days listed as “not observed” in the “other” category of block 1.h. to 8.
- Delete the phrase “own self-image” from block 8, so that the corrected sentence shall read as follows: “Mbr continues to work on improving composure during mentoring/counseling sessions, appearance in uniform, education in military etiquette, & meeting CMDT weight standards.”
- Delete the following two sentences from block 10 of the OER: “[Applicant’s name] has made strides during this TAD period & gained some of the experience & knowledge that should have been requisite prior to assignment to a Planning Officer billet. [Applicant’s name] is currently not recommended for promotion, but with further CG experience, may.”

In addition, her record shall be corrected by removing her calendar year 2007 and 2008 failures of selection for promotion to LCDR. If she is selected for promotion by the first LCDR selection board to review her record after it is corrected in accordance with this order, her date of rank shall be backdated to what it would have been had she been selected for promotion by the calendar year 2007 LCDR selection board.

All other requests for relief are denied.

Bruce D. Burkley

Patrick B. Kernan

David A. Trissell