

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-155

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

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 case after receiving the completed application on May 18, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 3, 2010, 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 asked the Board to correct her record to show that she was advanced to master chief yeoman (YNCM; page grade E-9), retroactive to December 1, 2007, with back pay and allowances. She further requested that her June 26, 2008 transfer enlisted employee review (EER) evaluating her performance be removed from her record, as well as any other personnel action related to the commanding officer's (CO's) withdrawal of the applicant's recommendation for advancement to E-9.

During the period under review, the applicant was assigned to Integrated Support Command (ISC) Alameda. She alleged that the CO's withdrawal of her recommendation for the applicant's advancement to master chief petty officer (E-9) only five days before she was due to be promoted was error and injustice that shocks any reasonable "sense of justice." The applicant made the following specific allegations of error and/or injustice.

1. The Coast Guard committed error and injustice by depriving the applicant of any opportunity to know and correct the alleged performance and leadership deficiencies. The applicant argues that the withdrawal of her advancement recommendation without any advance notice that her performance and leadership were deficient constitutes error and injustice warranting full relief, and that the withdrawal just days before she was to be advanced was as humiliating as it was erroneous and unjust. The applicant stated that she received only positive feedback from the CO about her performance until November 26, 2007. She asserted that the Board should find as a

matter of fact that the CO did not raise her performance concerns with the applicant or her supervisory chain, and certainly not prior to July 2007, when her chain of supervision changed.

2. The applicant asserted that her performance of duty was not so deficient as to warrant promotion withdrawal. The applicant argued that the two individuals who supervised her (their statements are summarized below) were not made aware of the alleged performance deficiencies until the applicant contacted them in regard to her BCMR application.¹ She asserted that if her supervisory chain was not aware of the alleged performance deficiencies, the Board must presume that the alleged deficiencies were not pronounced, particularly serious, or obvious, because if they had been, the supervisory chain would have been taken appropriate measures to counsel the applicant.

3. The applicant asserted that her race was a determining and improper factor in [the CO's] decision to withdraw her recommendation for the applicant's advancement to master chief. The applicant stated that it is well-established in the professional literature that racial bias exists in the workplace, including the uniformed services. The applicant stated that literature and research have concluded that racial and other forms of discrimination occur in the absence of overtly racist acts or attitudes and that modern racial discrimination is better characterized as a biased cognitive process founded on stereotypical attitudes and beliefs about minority group members rather than consciously held racist views. The applicant asserted that because overtly discriminatory acts and statements are less common today than in decades prior, the courts routinely look at statistics detailing the demographic composition of a work force in determining whether race played a role in a personnel decision. With respect to African-American representation in the highest enlisted ranks of the Coast Guard, the applicant offered that she was one of six African-Americans serving in the Coast Guard in the grade of E-8 and there was only one African-American female serving in grade E-9, while African-Americans comprised over 10% of the total Coast Guard military force. The applicant stated that she should have been the second African-American female serving in pay grade E-9. The applicant contended that "[a]lthough [the CO's] discrimination may have been unconscious nevertheless she intentionally withheld information that has negatively impacted my career."

CHRONOLOGY OF PERTINENT EVENTS AS PRESENTED BY THE APPLICANT²

In July 2004, the applicant was assigned to ISC Alameda as the supervisor, administration personnel branch.

In July 2006, she was assigned as the command senior chief.

On July 13, 2006, the CO assumed command of ISC Alameda.

¹ The statements from these individuals were members of the applicant's rating chain until the summer of 2007. References to the rating chain are to these two individuals and may be referred to as the applicant's prior rating chain in this decision. The applicant was reassigned as the SPO chief in early October 2007 and there are no statements from the new rating chain for this two-month period. The rating chain for the last two months of the reporting period apparently prepared the applicant's November 30, 2007 and June 26, 2008 EERs.

² There is support in the record for much of this chronology.

In October 2006, with the favorable endorsement of the CO, the applicant attended the command master chief four-week course.

In December 2006, the applicant received her annual EER in which the CO recommended her for advancement to E-9.

On January 19, 2007, the applicant received a favorable endorsement from the CO on her application for membership on the Commandant's Diversity Advisory Council.

In May 2007, the applicant received a favorable endorsement on her application for special assignment to a command master chief position.

In June 2007, a revised advancement list was published showing that the applicant would be advanced to E-9 by the end of 2007.

In October 2007, the applicant was selected for a 2008 command master chief assignment.

On October 9, 2007, the applicant was reassigned as supervisor of the servicing personnel office.

On November 19, 2007, the advancement list was released announcing that the applicant would be advanced to E-9 on December 1, 2007.

On November 26, 2007, the applicant met with the CO to ask her to preside at the applicant's promotion ceremony. According to the applicant, during this meeting the CO informed the applicant that she was considering withdrawing the applicant's recommendation for advancement based on concerns about the applicant's performance and leadership.

On November 27, 2007, the applicant made a written request that the CO not withdraw her recommendation for advancement.

On November 28, 2007, the CO and the applicant met and discussed her advancement. The CO expressed several concerns about the applicant's performance. According to the applicant, this was the first time she was aware that the CO had concerns about her performance.

On November 29, 2007, the CO informed the applicant in writing that she intended to withdraw her recommendation for the applicant's advancement.

On November 30, the applicant submitted a written response to the CO's withdrawal of her recommendation for advancement.

On November 30, 2007, the Coast Guard removed the applicant's name from the advancement list.

On December 10, 2007, the applicant received her periodic EER with two below-average marks of 3 in respecting others³ and monitoring work⁴ and a mark of not recommended for advancement,⁵ which she acknowledged and indicated an intention to appeal.

On December 26, 2007, the applicant filed a complaint for redress of wrongs against the CO under Article 138 of the Uniform Code of Military Justice (UCMJ).

On January 11, 2008, the applicant filed an informal appeal of her November 30, 2007 EER marks.

On February 5, 2008, the Commander, Maintenance and Logistics Command Pacific denied the applicant's Article 138 complaint for relief.

In April 2008, the CO denied the applicant's informal appeal of her EER marks.

In June 2008, the applicant transferred to Coast Guard Headquarters on permanent change of station (PCS) orders.

In November 2008, the applicant received her transfer evaluation from ISC Alameda, which did not recommend her for advancement to E-9. The applicant also received a letter of commendation from the CO for certain of her duties while at ISC Alameda.

SUMMARY OF PERTINENT DOCUMENTS

CO's Letter Withdrawing her Recommendation for the Applicant's Advancement

On November 30, 2007, the CO informed the applicant that she was withdrawing the applicant's recommendation for advancement because the applicant had not demonstrated the leadership ability to be an effective master chief. She set forth the following examples:

"a. You were aware or should have been aware of performance and service gaps relating to the SPO, but failed to take action. Examples include numerous, often very significant mistakes in transfer and retirement documents. On several occasions, you were encouraged by me to take a more active role in the SPO. Your failure to take a definitive leadership role is especially

³ On the counseling receipt in the respecting others category, the rating chain provided the following justification: "Member displayed a serious lack of judgment by dealing with her performance concerns regarding a fellow chief through a written admonishment and by jumping the chain of command by using an inappropriate means (multi-address email) to convey the concerns and issues up the chain which conveyed a disrespectful message to a fellow chief. Member acknowledged the mistake but lapse was not to be expected of an E8 of this experience level. Additionally, following some changes and restructuring within branch members efforts to carve out personal territory was divisive within the branch and not in alignment with division officer's goals and tasking."

⁴ On the counseling receipt in the monitoring work category, the rating chain wrote: "While generally kept supervisor informed, occasionally needed to be preempted for certain actions. Goal setting and prioritization lacked a strategic focus. Examples include preparation for Sailor of the Quarter materials as command senior chief and management of the "AT Risk" tracking tool."

⁵ The reasons for the applicant's not recommended mark were essentially as stated in the CO's November 30, 2007 letter withdrawing her recommendation for the applicant's advancement.

compelling when there was full knowledge that there would be a measurable leadership gap given your three immediate supervisors in the chain of command would be rotating over the summer. Your failure to act in response to this knowledge indicates a lapse in leadership could have avoided or at least mitigated many performance gaps and failures that did occur. Instead of recognizing the broader dynamic recognizing the circumstances, and taking ownership of the system, you chose to shelter behind your collateral assignment as the unit's CSC. You further added injury to the circumstances when the CSC collateral was rotated to another senior chief. You openly attacked your fellow chief assigned to the Personnel Service Branch in an e-mail addressed to myself, the executive officer, and others outlining the gaps and failures noting them as a personal failure of your fellow chief. In this attack you explicitly stated that he should not be recommended for advancement. You failed to recognize and understand the importance of a professional relationship with your co-worker, and you did not develop administrative support networks to gain the cooperation and commitment of others to develop a win-win solution. Even as of this date and with extended knowledge of the problem, our SPO's (Servicing Personnel Office) PDR compliance rate remains at approximately 50%.

"b. You have been assigned several projects, including a revision and reinvigoration of the "safe harbor" list as well as leading preparations for the upcoming MLC compliance inspection. Both tasks have required an unreasonable amount of guidance and constant oversight by your supervisors. This includes repeated and explicit direction on the former by the executive officer. As a senior chief, you are expected to exert command over your technical areas of responsibility sufficient to be able to lead and execute strategic initiatives. Begun when you were the CSC and known as the "at risk" list, the "safe harbor" list is an activity that has broad implications to both the unit's readiness as well as being attentive to the special needs of individual Coast Guard members. A failure to recognize and be attentive to this need is significant. You have been working on this project for months, and I understand that you have expressed difficulties in creating and advancing an organized network to achieve the desired outcome (current and accurate information), but this is exactly the talents expected of a master chief. Furthermore, efforts to prepare the unit for the upcoming MLC compliance inspection have been entirely lackluster and still require a strategy and plan of action to be developed and shared with other important internal stakeholders.

"c. Last in general, it is observed that when assigned tasks you have a propensity of delegating them down or passing them to peers with little guidance or follow-up. Some projects such as the Take Your Child to Work Day were successful. Others, including oversight of the first 72 Hour Program and IDP development counseling, and data tracking failed to meet unit goals. When the outcome failed to achieve the objectives, your general response was typical to identify fault or place blame in any source other than yourself or your actions. This behavior is an example of poor leadership and does not invite nor stimulate team development as an esprit de corps within your working unit or as an example to others."

Applicant's Reply to the CO's Letter Withdrawing Advancement Recommendation

On November 30, 2007, the applicant asked the CO to reconsider her decision to withdraw the applicant's advancement recommendation due to the CO's failure to communicate her expectations of the applicant. The applicant stated that she was disappointed to receive the

CO's assessment of her lack of leadership abilities too late for her to correct the discrepancies and to keep her career from being tarnished. "Your revelations were never communicated or revealed to me in such a way that I could have avoided the damaging effect this would have on my career. I was not afforded the level of respect and professionalism deserved . . . and for those reasons the organization failed me." The applicant noted the following accomplishments that were not noted in the CO's letter:

4. My assignment as the SPO Branch Chief on 9 Oct 07, I am satisfied with the progress being made. In less than two months, I have completed an audit of nearly 1200 PDRs while providing pay related services to our customers. This audit was conducted because of two reasons, to gain an accurate assessment in order to measure the progress and preparation for the MLC Compliance Insp. Nearly 90 percent of the discrepancies of the PDRs relates to the annual verification of required forms because they are due their annual verification in Nov. I am confident, once the verification process is completed, the SPO will make great strides toward significant progress.

5. I am equally proud of my role in moving the Chiefs' Mess forward. You may not be aware that prior to my assignment as your CSC there was no organized or respected Chiefs' Mess. The meetings were held quarterly with the only goal to vote on the SOQ [sailor of the quarter] and occasionally have breakfast with the CO. The participation was less than 10 percent. Since my involvement as the CSC, the Mess participation increased to over 90 percent and is actively involved and engaged with internal and external customers. We have built relations and cohesiveness with other local community services and have a new forward focus of mission accomplishment and achieving organization goals. It was through my leadership and guidance with the Chiefs' Mess that our Individual Development Plans went from non-use to achieving 95 percent completion rate of counseling of Individual Development Plans. Your comment on these efforts still resonates with me and I'm extremely proud of my accomplishments in the IDP area.

6. The reality of my efforts in preparation of the MLC compliance inspection is another area in which my focus is directed as achieving success as a team and as a unit. Success as a team is my goal. I have developed strategy and plans of action and communicated deadlines with other important internal stakeholders. As of today's date, I have received completed checklists for the following divisions and they stand ready for inspection: Financial, Motor vehicles, Postal Administration, Supply, Morale, Work-Life, and Educational Services. I'm impressed with the outstanding cooperation and teamwork from the different divisions in providing completed checklists often before the established deadline date. There is still much work to complete in the Personnel/Administration division, but we will succeed.

7. . . . I take full responsibility for the past and present challenges presented to me. I also agree that there are gaps in my leadership which you have identified, and I will continue to take a proactive approach in my development. I've made

progress on many levels and my ultimate desire is to produce results, influence others and accomplish missions. I regret not having been given clear focus, direction and the opportunity to improve my performance prior to 28 November. I'm certain I would have met and exceeded your expectations and I am certain I will meet or exceed your expectations as a master chief.

8. I respectfully request you to allow me the opportunity to advance on 1 December 2007.

Applicant's Article 138 Complaint against the CO

On December 21, 2007, the applicant filed an Article 138 complaint against the CO alleging that the CO's withdrawal of the applicant's advancement recommendation four days prior to the applicant's advancement was untimely, without proper notice, and for improper reasons.

In the Article 138, the applicant repeated some of the points she made in earlier communications with the CO (which are not repeated here). The applicant asserted that the CO led her to believe that she was relieved from the command senior chief position so that her knowledge, expertise, and leadership could be focused on the troubled personnel division, to which she was assigned as branch chief on October 9, 2007.

The applicant also stated that she was used as a scapegoat for the magnitude of problems and challenges that new senior staff faced after an unusually high turnover during the summer of 2007. She alleged that the CO unfairly blamed and criticized her for problems that long existed at the unit. In this regard, the applicant stated the following:

“(1) My position as ISC [command senior chief] was determined by the personnel and administrative officer [as] needing full time attention, mainly because of ISC Alameda large area of responsibility, customer service base, and the nature of what the [command senior chief] position entails. I held this position until my relief in August 2007, and I was never assigned leadership managerial responsibility in the administrative division contrary to what is stated in [the CO's] letter. However, I was assigned leadership responsibility of the Servicing Personnel Office (SPO) in October 2007. There was a gap between my relief and current assignment because of resistance to my new role and responsibilities within the branch. The change took place, but only after a considerable amount of time, effort, persistence, and my refusing to be assigned only to a “special project” preparing ISC Alameda for the upcoming MLC compliance inspection . . .

(2) One of the many roles of the [command senior chief] was to identify and hold others accountable to standards and practices that enable achievement of mission obligations. I identified and recommended a course of action for a member who contributed to the mismanagement of resources in the customer service center, administration and servicing personnel office which affected customer services. I chose an inappropriate method to communicate a problem, solution, and course of action in an email addressed to the member's

chain of command. I have acknowledged the mistake, and apologized for my lack of judgment in dealing with this personnel issue . . .

(3) I am being held accountable for failures beyond my control such as the leadership gap created by departures of the previous executive officer, the early transfer of the personnel division officer and the retirement of the personnel branch chief. These departures were made at the command level and without my input. I feel I am being held accountable for the impact of these senior leaders departing at the same time and to a standard of unrealistic expectation. For example, I was assigned the troubled servicing personnel office in October 2007, which included personnel performance and conduct issues. I directed an audit of 1200 personnel data records, and focused my attention on pay related issues, processes, and bringing the 1200 records into Coast Guard standards which [the CO's] letter stated was at 50% compliance rate. The noncompliance of records developed long before my assignment to the SPO; therefore, my being held accountable is unfair.

(4) I feel it is highly unusual for [the CO] to have expectations of someone three levels below her in the chain of command without communicating with them. To the best of my knowledge neither my division officer nor branch chief has indicated any such expectations.

Decision on Applicant's Article 138 Complaint

The Commander, Maintenance and Logistics Command (MLC) was the General Court-martial authority for the applicant's unit and therefore the reviewing authority (RA) for the Article 138 complaint. The RA denied the applicant's Article 138 complaint for redress on February 5, 2008. The RA concluded that the CO's actions were non-discriminatory, fair, and within her authority in withdrawing the applicant's recommendation for advancement. The RA stated that the CO developed substantial and legitimate concerns about the applicant's performance during the months leading up to November 2007. Some examples were that the applicant completely turned away from her regularly assigned duties in the servicing personnel office, even though the applicant indicated to the investigating officer that she understood that initial assignment as command senior chief was a collateral duty. The RA stated that when the CO assumed command she told the applicant to review COMDTINST 1306.1A which indicated that all undesignated command chief positions be collateral duty assignments. The RA further stated that the MLC Pacific command master chief gave the applicant a copy of the instruction when it was issued in December 2006.

The RA noted that the applicant's supervisor had contributed to confusion by expressing a belief that the command senior chief position should be full time. The RA also noted the applicant's use of the email with disparaging comments about a chief petty officer was inappropriate, and it raised legitimate concerns about whether the applicant possesses the leadership qualities necessary to advance. The RA stated that the issue with respect to the applicant's performance was clouded by the following:

5.a. The ineffectiveness of the [CO] and other members of your chain of command to communicate performance concerns to you in clear and understandable terms and in a timely fashion. These actions were inconsistent

with my strategic direction to all MLC CO's to communicate and manage expectations of performance regularly with our people in order to minimize surprises. These actions were also inconsistent with your [CO's] motto for ISC Alameda of "compassion, courage, and commitment." The poor timing of the [CO's] decision to not recommend you for advancement was very hurtful to you. The situation leaves open the question whether you could have overcome your [CO's] performance concerns if given sufficient time to correct them before the projected advancement date. Regarding this issue, I must remind you that there is no entitlement to advancement. Neither the Coast Guard nor the member is well served if the member is advanced, particularly to the highest enlisted grade, where a [CO] does not judge the member to be ready for advancement. I extend this assertion to cases where a [CO's] judgment is not shared with the member in sufficient time to allow that member an opportunity to correct the deficiency before the end of a marking period or a projected advancement date. When our leaders correctly utilize our performance review process, the process should give our people time to correct performance deficiencies. This is a crucial leadership issue to our service and one that is also very important to me. Though in your case, the process did not work optimally, this does not compel me to change my position on the central issue.

b. Your inability or unwillingness to deduce negative performance feedback during events such as your [CO's] frank discussion with you in June 2007 and the [CO's] action to replace you as the command senior chief in September 2007. This appears to be a lack of situational awareness on your part. Another noteworthy example of this is the response you sent to the executive officer after he appropriately responded to your inappropriate email cited above. In reviewing your response, it is clear that you were either unwilling or unable to accept the executive officer's criticism of your inappropriate email. This is a professional development issue that I will personally discuss with you with my encouragement that you consider it as you continue to pursue a path to advancement.

* * *

6. [T]his case is more about your performance at a required level to advance than the command's method of evaluation of your performance.

Statements from Two Members of the Applicant's rating chain (through summer 2007)

A. The applicant submitted a statement of support from CDR J, who was head of the Personnel Division and a member of the applicant's EER rating chain. CDR J stated the following:

1. I was chief of the Personnel Division, and I supported [the applicant's] recommendation to MCPO [master chief petty officer], as I still do.

2. [The applicant] should have been promoted to MCPO as scheduled on 1 December 2007, but her promotion was unfairly and untimely canceled just days before it was to take place.
3. I am shocked to learn of [the CO's] withdrawal of her recommendation of [the applicant's] advancement recommendation to MCPO and further disturbed by the bases of [the CO's decision], and the method by which she informed [the applicant] of her decision.
4. The first time I learned of the alleged performance issues that [the CO] raised in her letter of withdrawal of promotion recommendation was when [the applicant] provided me that document for the purpose of her application to this Board. Being the Chief of Personnel during that time, I was shocked when I reviewed its contents. As Chief of Personnel, I was consistently informed on all matters of performance, discipline, and administrative issues on personnel within the ISC area of responsibility.
5. Since [the applicant] worked at ISC and directly under my leadership, it was surprising to say the least, to hear of [the CO's] alleged concerns because they were never communicated to me as they should have been. [The CO's] allegations are also contradictory in nature. For example, [the CO] provided glowing endorsements on [the applicant's] application to attend the command master chief course, membership [on the] Commandant's Diversity Advisory Council, application for command master chief silver badge" special assignment and [on] her evaluations.
6. [The CO] never mentioned or gave any indication, that she was not satisfied with [the applicant's] performance, and her untimely and extreme action came as a surprise. I never questioned [the applicant's] performance, character, or leadership skills. Her performance was never a concern, and certainly not to the extent that [the CO] stated. I can emphatically state that whatever performance issues existed with [the applicant] were minor and in no way sufficient to justify the withdrawal of her promotion to master chief.
7. Furthermore, I was surprised to learn the method that [the CO] communicated her intention to withdraw her recommendation, mere days before the advancement was scheduled to take place. [The applicant's] advancement was known many months in advance, and to wait until days before her scheduled advancement to inform [the applicant] was without just cause, and quite frankly disgraceful. The administrative problems at ISC were long-standing and existed long before [the applicant's] arrival, and to place blame and responsibility solely on [the applicant] was grossly unreasonable and unfair.
8. ISC was a high demanding, fast paced and reactionary environment. Every senior member stationed there gave more than 100 percent of their time and efforts to the unit and its goals and missions. [The applicant] was no different in

her contributions and efforts to the unique and complex challenges of the unit. As a matter of fact, in addition to [the applicant's] regularly assigned job, she was my "go-to" person for special projects. [The applicant] did an outstanding job in her assignments. To repeat, I was deeply shocked and saddened to learn of [the CO's] assessment, and dismayed that [the applicant] was not afforded an opportunity to address [the CO's] concerns through corrective actions or even learn about the alleged concerns in a timely manner. For these reasons, [the applicant] is a victim of error, injustice, and quite frankly, unfair blame.

9. I appeal to the BCMR to correct [the applicant's] military record and recommend her promotion to MCPO effective 1 December 2007, as she deserved.

B. The applicant submitted a statement from her rating chain supervisor under penalty of perjury. CWO S stated that he is retired from active duty after a thirty-one year career. He stated that for the last two years of his active duty, he served as chief of the administration branch and the applicant's supervisor from the summer of 2005 until the summer of 2007. He stated that over the course of those two years, he observed the applicant's performance, collected performance-related information, provided performance feedback, and prepared two regular annual evaluations on the applicant. On each evaluation he recommended the applicant for advancement, which was approved by the chief of the Personnel Division, the executive officer, and the CO. He stated that he was surprised and saddened to hear that the CO had withdrawn her recommendation for the applicant's advancement to E-9 and that it was done just days before the applicant was to be advanced. He stated he was surprised to hear the reasons for the CO's withdrawal of the advancement recommendation because as the applicant's supervisor he had not heard them before. "I would have expected that if [the applicant's] performance was in question, I would have been told about it and I would have been tasked with documenting [the applicant's] shortcomings and coming up with some kind of performance improvement plan." According to CWO S, this never happened. CWO S stated that the office was extremely busy with a wide range of responsibility and that there were bound to be mistakes but he wasn't aware of a pattern of mistakes or complaints that was significant or could be attributed to a failure in leadership on anyone's part—let alone the applicant's." CWO S further stated the following:

The issues raised in [the CO's] letter are real issues but they were problems we had wrestled with for years. For example: the "safe harbor" or "at risk" list sometime had as many as 60 names on it. These folks were assigned to different duties all over a 67-acre facility or were inpatient or were at home recovering from medical treatment. Names were added to or removed from the list every week and just keeping up with the additions and deletions was a weekly chore, much less knowing what was actually going on with any one individual. Some of the individuals were left behind by operational units for disciplinary reasons and were disinclined to keep in touch with the personnel office. Further, some folks were left behind for medical treatment and with the advent of HIPPA the folks involved with medical treatment were also disinclined to share information with us. This is only one example but I cite it to illustrate that this long-standing problem existed years before the applicant appeared on the scene and laying responsibility for its condition on her seems unfair and unreasonable.

In addition [the Article 138 reviewing authority (RA)] letter stated confusion on the applicant's part as to her roles and responsibilities as ISC's command senior chief and Servicing Personnel Office supervisor. In my years of military experience, and having worked with many commanding officers at different levels, it is common practice for [COs] to change, move or swap the resources within their control. This flexibility allows and contributes to the effectiveness of their unit and because of ISC's complexity, high pace demands, and the nature of much of CSC's work to be "behind the scenes," the collateral position was assigned full time to the applicant. That was because many of the issues that call for CSC involvement are sensitive and must be handled with the utmost discretion, for example: discipline problems, performance problems, indebtedness, violence against spouses and children, sexual abuse, physical illness, substance abuse, etc. ISC's command cadre decided the position would be better served full time and assigned the applicant the job. As Chief of the Administration Branch, I reallocated [the applicant's] position from the SPO to the CSC full-time position by reorganizing and using additional resources that were available to me at the time, while maintaining my role as [the applicant's] direct supervisor. [The applicant] absolutely didn't turn away from her regularly assigned duties in the SPO, nor did she lack understanding of her job assignment or her chain of command.

As [the applicant's] supervisor for two years, I never observed any performance or character issues that gave me pause to think that she was not ready for promotion. She was ready, and I strongly believe that she remains ready.

In summary, I feel [the applicant] should have had notice of [the CO's] intent long before the decision was made. [The applicant] should have had an opportunity to address the [CO's] concerns long before the decision was made to withhold [her] advancement. I also feel the grounds for the CO's promotion recommendation withdrawal were not concerns specific to [the applicant's] performance and were in no manner sufficient to justify the extreme action she took against the applicant.

VIEWS OF THE COAST GUARD

On October 8, 2009, the Board received an advisory opinion from the Judge Advocate General (JAG) of the Coast Guard who did not make a firm recommendation. He did furnish the board with the following observation:

[B]ased on the . . . analysis, if the Board determines the applicant suffered an injustice regarding the CO's decision to withhold the applicant's advancement recommendation—the Coast Guard recommends granting relief. This recommendation is based on the facts, circumstances, an analysis of this particular case "only" and is not indicative of a shift in policy or purported change from

precedent. If the Board determines, based on the analysis that no injustice occurred, the Coast Guard recommends denying relief.

The JAG stated that the BCMR may correct errors and remove injustices in a serviceman's records pursuant to 10 USC § 1552(a). Error can be defined as either legal or factual. The CO withdrew her recommendation for the applicant's advancement in accordance with Article 5.C.25.d. of the Personnel Manual which states that the only review of the CO's decision to withdraw an advancement recommendation is a complaint under Article 138 of the Uniform Code of Military Justice (UCMJ). Therefore, from a policy standpoint, the applicant's CO acted within her discretion regarding the withdrawal of the applicant's advancement recommendation. However, "[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976). In this particular case, the Board may conclude that the CO's decision to withdraw her advancement recommendation before the applicant's advancement was to become effective with no prior notice of deficient performance issues and no opportunity to improve is arbitrary and shocks the sense of justice.

The JAG noted the general policy with regard to the enlisted performance review process as follows:

The rating chain will evaluate each enlisted member on the required period ending date to assess his or her actual performance since the last recorded employee review. The rating chain shall base employee reviews on how the member performed in each competency consistently throughout the period. Normally, a single, isolated event (either positive or negative) should not drastically affect the marks assigned during the employee review period. However, the rating chain must consider overall positive or negative impact of the event.

In this regard the JAG noted that the applicant's supervisor stated that he never observed any performance character issues regarding the applicant's performance. He also declared that the issues raised by the CO were problems the command wrestled with for years. The supervisor stated that no one else had the same or similar concerns about the applicant's duty performance, leadership abilities, or her readiness for promotion to the next higher grade. The supervisor also stated that the grounds for the CO's withdrawal of the advancement recommendation were not concerns specific to the applicant's performance and were in no manner sufficient to justify the extreme action taken against the applicant.

The JAG noted that the declaration from the applicant's department head (second in the rating chain) supports the applicant's position and refutes the CO's decision. The JAG noted that both the supervisor and department head recommended that the Board grant relief.

The JAG further noted that there was no documentation in the applicant's record supporting the CO's allegations. The JAG stated that the applicant's first and only notification of the CO's intent to withdraw her recommendation for the applicant's advancement was November 26, 2007—five days before the advancement was to become effective. According

to the JAG, the CO knew or should have known the applicant's advancement status since June 26, 2006 and failed to mention any performance issues.

The JAG stated that based on the record as a whole, it would appear that from September 2007 to October 2007, a few minor incidences occurred between the applicant and the CO that resulted in the CO's decision to withdraw her advancement recommendation. "Single isolated events should not drastically affect performance dimensions and runs contrary to the spirit of Article 10.B.6.a. The Board routinely looks to documented supporting evidence with rating chain concurrences to substantiate a CO's decision to withdraw an advancement recommendation."⁶

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 3, 2009, the Board received the applicant's reply to the views of the Coast Guard. She argued that the Board should accept the recommendation of the Commandant (JAG) because he is superior to PSC, speaks on behalf of the Coast Guard, and his analysis is correct.

The applicant stated that PSC adopted a very rigid and narrow view of the facts, law, and legal principles of the matter and should be disregarded. The applicant strongly disagreed with PSC that because no statute or regulation was violated, no error or injustice exists that requires correction. She stated that the intent of Congress in creating BCMRs was and remains to provide an equity-based review of applications.

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.

⁶ Attached to the advisory opinion was a memorandum from the Commander, Personnel Service Center (PSC), in which the JAG only partially adopted its facts and analysis, but asked the Board to consider the memorandum along with the advisory opinion. PSC recommended to the JAG that relief be denied for the following reasons:

- There is no statutory or policy requirement for a CO to provide advance notice of her withdrawal of a recommendation for advancement.
- The applicant's CO complied with the provisions of Article 5.C.25.d. of the Personnel Manual and correctly acted within her authority when she withdrew the applicant's recommendation for advancement to master chief on 29 November 2008.
- The CO's recommendation for advancement is not subject to appeal.
- The Coast Guard is presumptively correct, and the applicant has failed to substantiate any error or injustice with regard to her record.

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. The Board agrees that under Article 5.C.25.d. of the Personnel Manual, the CO had the authority to cancel her recommendation for the applicant's advancement if, in the CO's opinion, the applicant failed to remain eligible for advancement and was not likely to attain eligibility prior to the expiration of the current eligibility list. The CO's advancement recommendation carries a great deal of weight. However, it is not sacrosanct and is open to challenge when there is evidence that the recommendation is erroneous or unjust (abuse of discretion). In this case and under the particular circumstances presented here, the Board is not able to conclude that the CO's withdrawal of her recommendation for the applicant's advancement was an error or an injustice.

4. The JAG could have been more helpful by stating a clear recommendation as to whether injustice exists rather than simply allowing that the Board might conclude that an injustice exists in this case. Nevertheless, the Board must address the question of injustice in two steps: 1) whether there is sufficient legal or factual justification to overturn the decision of the CO and 2) whether the impact of an otherwise lawful action is a manifest injustice. The applicant and the JAG merge the two issues to conclude that the RA and the CO were wrong or unfair in their promotion recommendation because of flaws in the job performance evaluation. While job performance may well be a factor, it is not the only contributor to the evaluation of prospective ability to serve in the most senior leadership positions.

5. The CO stated that she lacked confidence in the applicant's ability to serve in the higher rank because of her failure to respond to challenges in the work place, inappropriate communications with and about co-workers, and other reasons.⁷ During the time in question, the applicant was relieved of her duties as a command senior chief and criticized by the Executive Officer for inappropriate personal attacks via email. Her response to the Executive Officer was yet another attack.⁸ While this is not a perfect situation—the RA also concluded that the CO should have counseled the applicant—it is not one which convinces us that the CO's decision would come as a shocking surprise. The RA noted that these facts suggest a very bad "situational awareness" on the part of the applicant.

6. The RA, in considering the Article 138 Complaint on the subject of the commander's promotion decision, specifically found that it was nondiscriminatory⁹, fair and within her

⁷ We also note that on November 27, 2007, the applicant made a written request that the CO not withdraw her recommendation for advancement and on November 28, 2007, the CO and applicant met and discussed her advancement. On November 30, the applicant again submitted a written response to the CO's withdrawal of her recommendation for advancement. The CO thus offered ample opportunity to clear up any misunderstanding between the applicant and the CO before the promotion date. This substantially lessens any sense of shock that might be attributed to the decision to withdraw the promotion.

⁸ We must also respectfully disagree with the JAG's conclusion that these three events are "single" or "isolated."

⁹ We note that the applicant alleges discrimination but offers no specific facts relating to her case. Moreover, the un rebutted conclusion of the RA is on record.

authority. We will not, based upon this record, overturn the clear conclusion of the RA which is closer in proximity and time to the facts in this case. The only new evidence of any value that was not available to the RA is the letters from the applicant's supervisors. Both departed their assignment prior to the pivotal events of the fall 2007. Neither addresses the critical issues raised by the CO. Finally no one has a right to promotion. It comes only because the Coast Guard (speaking through the commander) has confidence in one's ability to serve in the higher grade. That was not the case for this applicant, and the Board is not persuaded that the decision to withhold her promotion is unfair or discriminatory.

7. Having reached the conclusion that there is no factual or legal basis for a finding of injustice, we move to the question of whether an otherwise legal and factually based action is inequitable. We note that, in *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)), an Air Force Captain met a promotion board with only one OER due to the fact that it took some five years to correct an unfair discharge. The court noted that all actions (placing the Captain before the promotion board and not selecting him) were legally and factually correct. The *impact* of those actions alone was grossly unfair in that the Captain was competing with others who did not have the rather large gap in service on their records. In that case, the court directed a remedy of the result but did *not* conclude that there was an error in either considering the Captain or not selecting him. Here we must consider whether the fact that the applicant did not learn of her CO's decision until days before the promotion was to take effect was a serious injustice. Having affirmed the RA's decision not to overturn the CO's action, we should focus on whether the impact of that decision to deny promotion was so egregious as to force us to affect a remedy. While the circumstances clearly are unfortunate, they do not rise to the level of injustice. The Board must deny the applicant's request that her record be amended to reflect a promotion. The record is, however, replete with evidence of an improper performance review. While the applicant has no right to be promoted, she does have a right to a fair EER. She is entitled to proper counseling during the period of observation. The EER job performance observations differ from promotion recommendation in that job performance evaluations must be based upon true facts of past history rather than projections of future performance.

8. As the CO of the unit and the approving official for the applicant's EERs, the CO failed in her duties and committed an injustice against the applicant, as well as the applicant's rating chain, by not informing them of her concerns about the applicant's alleged leadership deficit and lackluster performance during the year in which she observed that performance. In this regard, the CO admitted in her November 29, 2007 letter that her decision to withdraw the applicant's recommendation for advancement for lack of leadership ability was based on the CO's full view of the applicant's performance over the last year. However, the CO apparently did not share these concerns with the applicant until November 26, 2007, five days before the applicant was due to be advanced to master chief on December 1, 2007. Even worse, she never mentioned any of her concerns about the applicant's performance to the applicant's supervisors who served in the rating chain for the majority of the reporting period. The applicant's supervisor, a member of her rating chain until the summer of 2007, and the Chief of the Personnel Division, also a member of the rating chain until the summer of 2007, wrote in sworn statements that they had no knowledge that the applicant's advancement recommendation had been withdrawn; nor did they have any knowledge that the CO had concerns about the applicant's performance until contacted by the applicant for statements in support of her BCMR

application. If the CO failed to communicate her concerns and/or expectations to the applicant or the applicant's rating chain, then it was reasonable for the applicant and her raters to assume that the CO was satisfied with the applicant's performance, and they had no bases for concluding otherwise. The communication requirement is key because the EER is aimed at improving performance. The applicant simply can not improve deficiencies if she does not know that they exist. The communication element is not as critical for promotion recommendations for two reasons 1) they may go to areas that a particular individual can never alter and 2) they are (as noted above) more prospective than retrospective in nature. It was an injustice to the applicant for the CO to keep her dissatisfaction a secret over the course of a full year before issuing the EER. The applicant had no notice or opportunity to change her performance to meet the CO's expectations. The Article 138 authority recognized that the CO had failed in her leadership responsibility to the applicant and the command when he wrote the following:

The ineffectiveness of the [CO] and other members of your chain of command [failed] to communicate performance concerns to you in clear and understandable terms and in a timely fashion. These actions were inconsistent with my strategic direction to all MLC CO's to communicate and manage expectations of performance regularly with our people in order to minimize surprises. These actions were also inconsistent with your [CO's] motto for ISC Alameda of "compassion, courage, and commitment." . . . The situation leaves open the question whether you could have overcome your [CO's] performance concerns if given sufficient time to correct them before the projected advancement date. . . . When our leaders correctly utilize our performance review process, the process should give our people time to correct performance deficiencies. This is a crucial leadership issue to our service and one that is also very important to me . . .

9. As noted in the advisory opinion, there are no administrative remarks in the military record documenting counseling or any shortcoming in the applicant's performance. The statements from the applicant's rating chain are more persuasive on this issue because they had daily responsibility for the applicant's performance and the opportunity to observe it just as frequently if not more than the CO.

10. The CO committed an error in evaluating the applicant's performance in her November 27, 2007 letter and the November 30, 2007 EER. The facts and circumstances presented here have convinced the Board that the June 26, 2008 EER is also unfair and should be removed. In BCMR No. 284-90, the Secretary's delegate approved the Board's final decision that directed an officer evaluation report (OER) be removed from an applicant's military record because that applicant's performance was reviewed on the basis of an erroneous understanding by his supervisor as to his assignments. In that case, the supervisor operated under the assumption that the only assignments that the applicant received were those coming from her; but actually unknown to the supervisor, the Chief Counsel was giving assignments to that applicant on a regular basis, which detracted from that officer's ability to perform the assignments given to him by the supervisor. In Docket No. 284-90, the Board concluded: "hence, the division chief's evaluation of the applicant's performance was prepared in factual error." As discussed above, the CO was evaluating the applicant based on an assumption that the applicant was the SPO chief, with collateral duty as the command senior chief, but the supervisor

was under the understanding that the command senior chief assignment was the applicant's full-time job. In this regard, the supervisor stated that he had reassigned the applicant's SPO duties to other members of his staff. It was the responsibility of the CO to resolve misunderstandings as to the applicant's job assignment, particularly if she had the opportunity to observe the applicant over the full year of the performance period. The Personnel Manual places responsibility on the CO under Article 10.B.1.b. to ensure all enlisted members under their command receive accurate, fair, objective, and timely evaluations. Also, Article 5.C.4.e. of the Personnel Manual places responsibility on the CO for the execution of the advancement program, and that the failure to properly discharge that responsibility reflects adversely on command performance. See Article 5.C.4.e. of the Personnel Manual.

11. To summarize, the Board finds that the CO did not commit an injustice against the applicant by withdrawing her recommendation for advancement. The Board finds that the CO failed in her leadership responsibility to the applicant and the applicant's rating chain by not communicating her dissatisfaction with the applicant's performance to her rating chain.¹⁰

12. The applicant's request that she be promoted should be denied. The applicant's record should be corrected to remove the EERs dated November 30, 2007 and June 26, 2008. Both EERs are products of injustice and they contain erroneous marks and comments. All of the applicant's allegations have been considered and those not discussed within the findings and conclusions are not considered to be dispositive of the issue in this case.

13. Accordingly, the applicant's request should be partially granted.

[ORDER AND SIGNATURES ON NEXT PAGE]

¹⁰ Article 10.B.4.d.3.b. of the Personnel Manual states that the supervisor "must clearly communicate goals and acceptable standards of performance to the evaluatee before and throughout the marking period." CWO S and CDR J stated that she performed her task extremely well and they had no concerns about her leadership skills.

ORDER

The application of XXXXXXXXXXXXXXX, USCG, for correction of her military record is partially granted. Her record shall be corrected as follows:

a. Remove the EER performance marks dated November 30, 2007, plus the counseling receipt and any other associated documents that may be in the military record.

b. Remove the EER performance marks dated June 26, 2008, plus the counseling receipt and any other associated documents that may be in the military record.

No other relief is granted.

Bruce D. Burkley

Francis H. Esposito

Erin McMunigal