

**DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 1999-077**

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**FINAL DECISION**

**ANDREWS, Xxxx-Advisor:**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on March 16, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated April 27, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this xxxxx.

**APPLICANT'S REQUEST FOR RELIEF**

The applicant, an xxxxxxxxxx in the Coast Guard, asked the Board to correct her military record by removing three officer evaluations reports (OERs), correcting marks in other disputed OERs, removing her failures of selection for promotion to xxxxxx, and returning her to active duty.

Specifically, the applicant asked that three marks of 4<sup>1</sup> in her OER for the evaluation period March 26, 199x, to January 3, 199x (OER1), be corrected to marks of 5; that three OERs covering the periods January 4 to April 4, 199x (OER2), April 5 to May 31, 199x (OER3), and December 1, 199x, to May 31, 199x (OER7), be removed and replaced with OERs marked "For Continuity Purposes Only"; that the marks on the comparison scales in all eleven of her OERs through May 31, 1998, be deleted (or, in the alternative, just the comparison scale marks in the nine OERs she received while on active duty from March 26, 199x, to March 25, 199x); that her failures of selection for promotion to xxxxxxx be removed; and that she be restored to active duty, receive back pay, and be considered for promotion by the next two xxxxxx active duty promotion list selection

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<sup>1</sup> In OERs, Coast Guard officers are evaluated on their performance in various categories, such as "Judgment" and "Using Resources," on a scale of 1 to 7, with 7 being the highest possible mark.

boards. As an alternative, she asked the Board to conduct its own comparison of records and consider promoting her to xxxxxxx or order the Coast Guard to convene a special board to do so.

If the Board does not see fit to return her to active duty, she asked that she be returned to the inactive duty drilling Reserve, from which she was separated in June 199x, and be considered for promotion by the next two xxxxxxx inactive duty promotion list selection boards.

The applicant further asked that, if she is selected for promotion by the first xxxxxx selection board to consider her record after it is corrected by the Board, her date of rank be back dated to the date of rank she would have had if she had been selected for promotion by the 199x selection board and that she be awarded the back pay and benefits she would have received had she been selected for promotion by the 199x selection board.

## **SUMMARY OF APPLICANT'S ALLEGATIONS AND MILITARY CAREER**

The applicant alleged that after she received a direct commission as a xxxxxxxx in March 199x, her command, the xxxxxxxxxx (XXX) "set [her] up for failure, poisoned the well with [her] supervisors, and ilxxxly interfered with [her] rating chain's independent performance of duty."<sup>2</sup> She alleged that the XXX negatively "prejudged"

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<sup>2</sup> The following military members and employees are referred to in this final decision:

### Coast Guard Personnel at xxx

Mr. X = Chief of the xxx at xxx, a civilian xxxxxx who supervised the applicant's work prior to her enrollment at xxx and served as the supervisor for OER1 (see statement).

Ms. X = Chief of the Xxxxxx at XXX and the supervisor for OER5 and OER6.

Ms. XX = New chief of the Xxxxxx at XXX, who served as the supervisor for OER7.

CAPT X = Chief of XXX and the reviewer for OER1 through OER7 (see statement).

CDR X = Assistant chief of XXX and the reporting officer for OER1, OER3, OER4, and OER5 (see statement).

CDR XX = New assistant chief of XXX and the reporting officer for OER6 through OER9 (see statement).

LCDR X = Chief of the XXX at XXX and the supervisor for OER3 and OER4, who allegedly maintained a hostile work environment.

LCDR XX = Chief of the Command and XXX at XXX who allegedly informed the XXXX command that XXX was concerned about her performance at XXX.

LCDR Y = Xxxxxx who allegedly was originally named as the xxxxxxxxxx to help the applicant with the XXX and XXX xxxxxs.

LT X = Junior xxxxxx who served as xxxxxxxxx for the XXX and XXX xxxxxs, who reported on the applicant's performance to XXX, and who replaced her as xxxxxxxxxx in the xxxxxs.

LT Y = Junior xxxxxx assigned to XXXX after the applicant was removed.

YN X = A yeoman and xxxxxx for the XXX and XXX xxxxxs who later worked in the Xxxxxx under Ms. XX (see statement).

Ms. Y = Volunteer xxxxxxx and then an xxxxxx who assisted the applicant with an xxxx xxxxx in the Xxxxxx under Ms. XX (see statement).

her very early in her Coast Guard career and that the resulting bias adversely affected the remainder of her service on active duty and inactive duty.

Regarding her pre-service education and training, the applicant stated that she graduated from xxxxxxxx in 198x, worked as a xxxxxxxx at a bank for three years, and graduated from xxxxxx in 199x, where she studied xxxxxxxx and received honors for a xxxxxxxxxx. After graduating from xxxxxxxx, she gained experience in xxxxxxxx while working as an associate for an xxxxxxxxxx for almost two years.

The applicant alleged that she left xxxxx in 199x to accept her commission in the Coast Guard with the understanding that she would gain xxxxxxxx in several practice areas relatively quickly. Specifically, she understood that junior xxxxxxxx at XXX were habitually assigned to the xxxxxxxxxxxx (XXXX) xxxxx for nine months to gain xxxxxxxx.<sup>3</sup>

#### *Allegations Regarding OER1 (March 26, 199x-January 3, 199x)<sup>4</sup>*

Upon receiving her direct commission and participating in a Direct Commission Officer Indoctrination class, the applicant stated, she was assigned to the XXXX of XXX in May 199x, where she advised field units regarding xxxxxxxx issues, xxxxxxxx, and requests under the xxxxxxxxxxxx. A civilian xxxxxxxx, Mr. X, was her supervisor.

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Ms. YY = A civilian xxxxxx who worked in LCDR X's office and supported the applicant's allegations concerning the hostile work environment (see statement).

#### Navy Personnel at XXXX

CAPT XX = Commanding officer of XXXX and the reporting officer for OER2.

CDR Y = Executive officer of XXXX and the supervisor for OER2.

LCDR YY = Senior xxxxxx at XXXX who supervised the applicant's work and was informed of XXX's concerns by LCDR XX (see statement). **(footnote continues on next page)**

#### **(footnote 2 continued from page 2)**

LCDR Z = Navy department head at XXXX who apparently submitted LCDR YY's and his own suggestions for OER2 to CDR Y, the supervisor for OER2.

#### Others Who Submitted Statements

LT Z = Classmate of the applicant at XXX (see statement).

LT XX = Xxxxxx and friend of the applicant who served at XXXX East in Virginia (see statement).

Xxxxx = Coast Guard xxxxx who served as xxxxx in the XXX and XXX xxxxxs and is now the xxxxxxx of the Coast Guard (see statement).

LCDR ZZ = Navy xxx who visited the applicant at the XXX (see statement).

<sup>3</sup> The Coast Guard and the Navy have a Memorandum of Understanding under which junior xxxxxxxs work at XXXX or xxx for approximately nine months, either xxxxxxx or xxxxxxxx Coast Guard and Navy members, to gain experience in xxxxxxxxxxxx.

<sup>4</sup> The rating chain for OER1 included Mr. X, chief of the Xxxxxx, as supervisor; CDR X, assistant chief of XXX, as reporting officer; and CAPT X, chief of XXX, as reviewer.

In October 199x, she received temporary active duty orders to attend a xxxxxxxx at the xxxxxxxx (XXX) for 10 weeks. She completed the course in December 199x and was certified as xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. However, the applicant alleged, she was the only student in her class at XXX to fail a xxxxxxxx, although her performance was no worse than that of other students. She alleged that one student whose “problems [were] at least as severe” as hers did not fail the xxxxxxxx.

The applicant alleged that when she received OER1, she telephoned her supervisor, Mr. X, in the XXX XXXX. She alleged that Mr. X told her that he had been instructed by the reporting officer for OER1, CDR X, to lower some of the marks he had originally assigned her in OER1. As a result, she alleged, he lowered the marks he had assigned her in blocks 3.b. (Using Resources), 3.d. (Responsiveness), and 5.a. (Looking Out for Others) from 5s to 4s. The applicant submitted a copy of a telephone message pad on which, she alleged, she noted the changes Mr. X told her he had made during the phone call. Her writing indicates that he told her he had originally assigned her marks of 5 in blocks 3.b., 3.d., and 5.a. Therefore, the applicant asked the Board to raise those three marks in OER1 from 4s to 5s. (All marks for OER1 appear in the table on page 11, below.)

The rating chain’s written comments in OER1 are quite positive but stress her need to “adapt to military life” and improve her military bearing and professionalism.

*Allegations Regarding OER2 (January 4, 199x-April 4, 199x)<sup>5</sup>*

After completing the course at XXX, the applicant was sent to XXXX in January 199x. However, she alleged, XXX “poisoned the well” for her at XXXX by informing her superiors there that she had failed the xxxxxxxx at XXX. She alleged that the chief of XXX’s Command and XXX, LCDR XX, called XXXX to check on her progress and expressed concern over her “performance at XXX.”

As evidence that she was “set up to fail” at XXXX, the applicant cited her assignment in February 199x as xxxxxxxx for “two complex ‘out-of-town’ Coast Guard xxxxxxxxxxxx. The applicant alleged that this was unfair because other junior, inexperienced xxxxs are normally assigned to serve as xxxxxxxx or xxxxxxxx before being appointed xxxxxxxx. She cited the experiences of an XXX classmate, who served as assistant xxxxxxxx in XXX, and LT Y, the xxxx who ultimately replaced her at XXXX, as examples of junior xxxxs who were assigned as xxxxxxxx to a xxxxx before being assigned as xxxxxxxx. In contrast, the applicant alleged, she was never assigned as xxxxxxxx for a xxxxx that went to xxxxx.

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<sup>5</sup> The rating chain for OER2 included CDR Y, executive officer of XXXX, as supervisor; CAPT XX, commanding officer of XXXX, as reporting officer; and CAPT X, chief of XXX, as reviewer.

Moreover, the applicant alleged, although appointed xxxxxxx for these two xxxxxx, she was not given control over them and was not even given the complete xxxxx. She alleged that she was assigned a relatively inexperienced xxxxxxxx, LT X, who attempted to sabotage her efforts at every opportunity. She stated that initially she was told that she would have an experienced xxxx, LCDR Y, as her xxxxxxxx, but was instead assigned LT X, who had worked at XXXX on the xxxxxxx side for only six months and had "little, if any experience as a xxxxxxx."

The applicant alleged that she was not given sufficient time to prepare the two xxxxxs even though they were complex and delaying the xxx dates beyond mid March 199x would not have prejudiced the government. LCDR XX told her she could not delay the xxx dates because the xxxxxs had to go to xxx as soon as possible. She alleged that the xxxxx xxxxs in both xxxxxs were quite experienced, and yet even one of them "expressed concern over the limited preparation time" for the xxxxxx. The applicant also cited as evidence that her assignment as xxx xxxxx for these xxxxxs was unfair the fact that one of her classmates at XXX served as assistant xxx xxxx for the xxxxxx and "was not expected to, nor did he play any visible role."

The applicant stated that she did not have the complete xxxxx because they were given to her assistant, LT X, who failed to show her all of them. She did not know that there were other relevant documents in the record until after she interviewed the xxxxxxxxxxx in late February 199x. Moreover, she said, she was required to research and xxxxx a xxxxxxxx to protect the xxxxxx of an xxxxxxx when she herself was not permitted to know his xxxxxxx or see his statement. The applicant further alleged that both LCDR XX and LT X avoided consulting with her on the xxxxxs, though they regularly discussed the xxxxxs with each other, and LT X was given a portable phone to take to the xxx so that she could call LCDR XX whenever necessary. The applicant stated that the only direction she received on the xxxxxs was from her supervisors at XXXX.

The applicant alleged that while she and LT X were in xxxxx for one of the xxxs, LT X called her one evening and asked her if she liked xxx work and if she thought she was good at it. When the applicant replied that it was too early to make that judgment, LT X asked her if she "could afford to wait that long." The next day, the applicant alleged, LT X called for a xxxxxxx in the xxx and initiated the applicant's removal from the xxxxx after the applicant "encountered some difficulty xxxxxxxxxxxxxxxx." Later that day, in a conference call between herself, LT X, CAPT X, LCDR XX, and CDR X, she was told that henceforth she would only observe the XXX xxxxxxx.

After the XXX and XXX xxxs ended, on March 23, 199x, the applicant alleged, CAPT X told her that she was being removed from XXXX. She alleged that CAPT X cited "reports from school" as one of the reasons for her removal and also indicated that "there were concerns" about her performance at the XXX XXXX prior to her attendance at XXX. Therefore, the applicant argued, she was removed from XXXX before she could

even demonstrate her abilities or develop her potential, which was part of the purpose of sending junior xxxxs to XXXX. Moreover, she alleged, she was removed even though LCDR YY, who directly supervised her work, thought that her work was satisfactory and no different than that of other junior xxxxs. As a result of her premature removal from XXXX, the applicant stated, she was deprived of six months of xxx experience and the chance to have a positive OER for her work there.

The applicant alleged that XXX improperly influenced her rating chain to lower her marks in OER2 (see the table below). She also alleged that the marks and comments in OER2 are unjust as a whole because of the unfair expectations and working conditions imposed upon her. Therefore, she asked the Board to remove OER2 from her record in its entirety. The low marks in OER2 are supported by the following negative comments:

A young, eager xxxx, [the applicant] has plenty of energy and desire but limited xxxxxxxx experience. With only 3 months experience as a Xxx xxxxx, several fundamental skills have not been developed yet. Occasionally had difficulty recognizing and responding appropriately to xxxxx developments .... However, of approximately 25 first tour xxxx with her level of experience, I would rate her at the bottom in terms of xxxxx expertise.

Written xxxxx were easy to understand, concise, and impeccable in grammar and format. Verbal skills are somewhat immature; in discussing matters with supervisors [the applicant's] facial expressions and body language conveyed impression of not comprehending significance of information being passed. Discussions left supervisors with sense of unease and engendered a lack of confidence.

... [The applicant] has the potential to become a competent xxxxx but she must first become proficient in the fundamentals of xxxxxx, and increase her knowledge of substantive xxxxx and the xxxxxxxx aspects of xxxxxxxx. All marks and comments on this OER are based on my understanding of USCG directives.

While enthusiastic and eager to face new challenges, [the applicant] sometimes failed to initiate appropriate actions ... and did not always grasp the significance of xxx issues and the importance of matters brought to her attention by her supervisors. Does not hesitate to work long hours but not yet proficient under the stress of xxxxxxxxx situations.

... Her below average xxxxxxxx skills, however, did not inspire confidence from her superiors and impacted on her professional image.

[The applicant] abounds with enthusiasm. However, her lack of experience in the xxxxxx profession makes it difficult to assess her full potential and leadership at this time.

The reviewer of OER2, CAPT X, appended a page of comments to it supporting the marks and comments of her supervisor and reporting officer and indicating that both officers were very familiar with the rating standards and had rated many Coast Guard xxxxs assigned to XXXX. He also specifically concurred with the assignment of the mark of 2 on the comparison scale.

The applicant submitted a reply to OER2. In the reply, she stated that it was unfair for her to be removed from XXXX after only three months. She stated that the comments in the OER show that she was caught in a "Catch-22" because she was criticized for lack of knowledge and experience but not given the chance to get it by continuing at XXXX. She also made the allegations that appear in her application to the BCMR. In addition, she stated that she received inadequate feedback on, and was unfairly surprised by, some of the criticisms in OER2.

In his endorsement forwarding her reply to the Commandant, her supervisor, Navy CDR Y, reconfirmed his evaluation, stating that the applicant was removed from XXXX because she "lacked the basic xxxxx skills to perform as a xxxxxxxx" and "would not perform at an acceptable level, even if allowed to stay for nine months." He stated that of all first-tour xxxxs he had supervised, she was the "least prepared for a xxxxxx assignment." He also indicated that she had been given "remedial instruction and guidance in xxxxxx and handling her xxxxs." CDR Y stated that "[n]o one at [XXX] ever tried to influence the substance of any OER prepared by me."

The reporting officer for OER2, CAPT XX, forwarded her reply and reiterated his determination that her skills were "lacking" and her potential was "limited."

### *Allegations Regarding OER3 (April 5, 199x-May 31, 199x)<sup>6</sup>*

The applicant alleged that CAPT X "poisoned the well" for her at her next unit, the XXX XXX, where she worked to xxxxxxxxxxxx and xxxxxxxx to the Coast Guard. She alleged that, at a March 23, 199x, meeting with her new supervisor, LCDR X, CAPT X told him that she had been a "disappointment," that he would monitor her progress, and that there would be "serious consequences" if she showed no improvement. The applicant asked to be transferred from the Command entirely, but this request was denied.

The applicant alleged that CAPT X told her she would enjoy working with LCDR X because of his "droll sense of humor." However, she alleged, LCDR X kept a poster prominently displayed on his office wall with the caption "President of the He-Man Woman Haters Club."<sup>7</sup> She alleged that LCDR X often demonstrated hostility toward her and women in general and that he excluded her from conversations. In addition, she alleged that, when he was out of the office, he never appointed her to serve as

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<sup>6</sup> The rating chain for OER3 included LCDR X, chief of the XXX, as supervisor; CDR X, assistant chief of XXX, as reporting officer; and CAPT X, chief of XXX, and reviewer.

<sup>7</sup> The "He-Man Woman Haters Club" was the name of the boys' club in the Little Rascals. Alfalfa was the club president. The modern movie "The Little Rascals" was not released until 199x.

acting branch chief. Instead, he always chose one of the less experienced officers.<sup>8</sup> She alleged that other members of the unit also showed her disrespect and that she was subject to a “hostile work environment” at the XXX.

The applicant alleged that LCDR X told her he had been instructed to watch her “under a microscope” but he intended to be “totally objective.” Therefore, he “subjected her to reporting requirements which existed for no one else in the Branch.” Initially, they met weekly, and later she was required to submit daily summaries of what she had accomplished. LCDR X also prepared an officer support form (OSF) on her work, as ordered by CAPT X, but she alleged, he never informed her of any of the deficiencies in her work reported in OER3, which covered her first eight weeks at the XXX.

The applicant also alleged that OER3 was prepared incorrectly because LCDR X assigned her marks by comparing her to other officers, whereas the rules require that he compare her to the printed standards. Moreover, she alleged, she was held to a higher standard than others because once, when she told LCDR X that she was not the author of a draft letter he was criticizing her for, he crumpled it up and threw it away rather than save it to discuss with the author, another lieutenant in the office.

The applicant also alleged that OER3 was unfair because it covered too short a period for her new rating chain to evaluate her performance properly. She alleged that the decision to evaluate her after just eight weeks violated Article 10.A.3.a.(5)(e), which states that the “welfare of the Reported-on Officer should be paramount when determining the appropriate time to submit an OER,” because it was clearly not in her interest to evaluate her work after just eight weeks. She alleged that LCDR X’s statement that she chose the shorter period was inaccurate because she did not feel that she had any say in what happened, given CAPT X’s “promise of ‘serious consequences.’”

The applicant asked the Board to remove OER3 (see the table below) in its entirety. The low marks in OER3 are supported by the following negative comments:

... A little slow, at times, in responding to short-term tasking and requests for progress reports. ...

Effectively utilized various forms and standard letters for xxxxxx purposes. Departures from standard letters, however, often required revision for clarity or insufficient proof-reading.

[The applicant’s] professional development has been steady, although somewhat behind what is normally expected of a direct commission xxxx. Works well in a highly structured environment. As [the applicant] gains more experience in the Coast Guard’s xxxxx

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<sup>8</sup> The applicant submitted copies of several e-mail messages indicating that two other xxxxxx in the office, whose dates of rank as lieutenants were several months later than hers, were appointed acting chief when LCDR X was out of the office.

program, I hope to see a maturation of her professional skills, which is required prior to assignment to the Division's more challenging junior xxxx positions.

The applicant submitted a reply to OER3 as well. The reply contains many of the same allegations included in her application to the BCMR. In his letter forwarding her OER reply to the Commandant, her supervisor, LCDR X, stated that because she had been removed from XXXX at the Navy's request, she was told her performance "would be subject to careful scrutiny." He stated that the decision to have an OER prepared after just eight weeks at the XXX was hers to make; she could have waited until the next semi-annual marking period. However, he said, she chose the shorter evaluation period because she agreed with his recommendation that "she might better recover from any comments in the Navy OER if she could quickly demonstrate good performance in this Branch." He stated that he completed an OSF so that she would know exactly what was expected of her. The assignment of the mark of 3 for "Responsiveness" in OER3, he stated, was due to her late submission of progress reports and lack of response to other specific requests. The mark of 3 for "Writing" related to "the number of times her writing required revision as compared with that of other xxxxxx I have observed."

In his letter forwarding the applicant's OER reply to the Commandant, her reporting officer, CDR X, stated that her welfare was of paramount importance in the choice of evaluation period. However, the decision was properly made at the beginning of the evaluation, and it "could not be foreseen whether her performance during the period would indeed 'advance' her welfare."

In his letter forwarding the applicant's OER reply to the Commandant, her reviewer, CAPT X, stated that the meeting between the applicant, himself, and LCDR X was intended to explain the applicant's departure from XXXX, to advise her that her performance must improve, and to make both LCDR X and the applicant understand how carefully her work was to be monitored. CAPT X stated that he also told them she should be given a "clean slate" and not prejudged based on her removal from XXXX.

The applicant continued to work in the XXX until February 199x, and then worked in the XXXX, providing xxxxx on xxxxx issues, until November 199x. She received three OERs for this work (OER4, covering June 1 to November 30, 199x; OER5, covering December 1, 199x, to May 31, 199x; and OER6, covering June 1 to November 30, 199x), which she did not dispute (see the table below), except for the comparison scale marks.<sup>9</sup>

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<sup>9</sup> The rating chain for OER4 was identical to the rating chain for OER3: LCDR X, chief of the XXX, was the supervisor; CDR X, assistant chief of XXX, was the reporting officer; and CAPT X, chief of XXX, was the reviewer. The rating chain for OER5 was the same except that Ms. X, chief of the Xxxxxx, served as the supervisor. The rating chain for OER6 included Ms. X as supervisor, CDR XX, the new assistant chief of XXX, as reporting officer; and CAPT X, as reviewer.

*Allegations Regarding OER7 (December 1, 199x-May 31, 199x)*<sup>10</sup>

In November 199x, the applicant was transferred from the XXXX to the Command and XXX. She alleged that this transfer was contrary to policy because junior xxxxs were supposed to have nine months of XXXX experience as a prerequisite to working at the branch.<sup>11</sup> She alleged that once again, the well was poisoned because the branch chief told her that he had heard derogatory things about her performance at XXXX. She stated that she asked to be returned to the XXXX, where she felt fairly treated, but this request was denied. However, she was transferred to the XXXX.

The applicant further alleged that a new chief of the XXXX, Ms. XX, who served as the supervisor for OER7, arrived with a preconceived negative opinion of her that continued and was evident in their daily interactions. As a result of this bias, the applicant alleged, OER7 contains inaccurate comments. The low marks in OER 7 (see the table below) are supported by the following negative comments:

Primary xx assignment was to xxx in xxxxxxxxxxxxxxxx. Required prompting and never competently completed this assignment despite substantial advice and guidance from supervisor. Requested transfer to another branch because uncomfortable with role of xxxxxxx xxxx. Upon assignment to XXXX, assumed control of complex XXX xxxxx. ...

Interpersonal relations generally satisfactory. However, did not carry her share of Command and XXX's xxxxx. ...

... xxxxxx letters on xxxxxxxx and xxxxxx issues for CG members generally competent; XXX motions required substantial input/correction from supervisor.

... Substantial supervisor participation required in XXX xxxxx. Decision to request reassignment after only weeks in the Command and XXX raises concern with judgment and responsibility. Reassignment accommodated with some inconvenience to other xxxxs and despite contrary policy.

[The applicant] has shown herself capable of handling a complex xxxxx in the XXX area. ... However, a Coast Guard xxxxxxx cannot escape xxxxxxxx duties. ... [Her] inability or unwillingness to take on and carry out the responsibilities of a xxxxxing xxxx significantly limits her potential as an effective Coast Guard xxxxxxx.

The applicant alleged that the comment "substantial supervisor participation required in XXX xxxxx" was inaccurate because the branch chief had little XXX experi-

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<sup>10</sup> The rating chain for OER7 included Ms. XX, the new chief of the Xxxxxx, as supervisor; CDR XX, as reporting officer; and CAPT X, as reviewer.

<sup>11</sup> The applicant submitted a copy of an e-mail message from CDR X, with the subject line "Junior Xxxxxx Intra-Office Dream Sheet." The message stated that "to the greatest extent possible every 'junior xxxxxx' will spend at least 9 months" in the various branches, including XXXX, xxxxx, xxxxx, and xxxxx. It also stated that "XXXX experience" was a prerequisite to assignment to the Command and XXX.

ence, so the applicant was obliged to seek help from commands with XXX expertise, such as the xxx school, MCLANT, and Headquarters. Moreover, she alleged, the branch chief tried to force her “to behave in an unethical manner” by withholding responsive documents from discovery. She alleged that she had to go over the chief’s head to have the documents released.

The applicant further alleged that she tried to file a reply to OER7 but that it was rejected by Headquarters because it contained criticisms of Ms. XX. She submitted a copy of her reply with her application. In it, she alleged that OER7 unfairly criticized her for transferring out of the Command and XXX because she should not have been assigned there since she did not have the prerequisite xxxxxxxx experience since she was removed from XXXX. She also alleged that the marks and comments in OER7 were inconsistent and that they did not fairly characterize her work. She also alleged that she had received little supervision and that some of the supervision she did receive was misguided.

### *Allegations Regarding Comparison Scale Marks*

The applicant alleged that because she was never permitted a fresh start but remained at the same command where the well had been poisoned throughout her Coast Guard career, she continued to receive low marks of 3 on the comparison scale on her OERs, even though her marks in the performance categories improved. She alleged that if she had been transferred to a new command where the well was not poisoned for her, she would have received higher marks on the comparison scale. Therefore, she asked the Board to remove all of the comparison scale marks on all eleven of her OERs through May 31, 1998, or at least those from March 26, 199x, through March 25, 199x (OER1 through OER9), when she left active duty (see the table below).<sup>12</sup>

The applicant was discharged from active duty in 199x after twice failing of selection for promotion to lieutenant commander. She went into the Reserves but was discharged on July 1, 199x, having again twice failed of selection for promotion to xxxx.

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<sup>12</sup> The applicant’s rating chains for OER8 through OER11 were all new except that CDR XX, the new assistant chief of XXX after CDR X left, continued to serve as her reporting officer for OER8 and OER9.

**APPLICANT'S MARKS IN 11 OERs FROM 3/26/9x THROUGH 5/31/9x**

CATEGORY <sup>a</sup>	OER 1 <sup>b</sup>	OER 2 <sup>b</sup>	OER 3 <sup>b</sup>	OER 4	OER 5	OER 6	OER 7 <sup>b</sup>	OER 8	OER 9	OER 10	OER 11
Being Prepared/Planning	4	3	4	4	5	5	3	4	4	5	5
Using Resources	4	3	4	4	5	5	4	4	4	5	6
Getting Results	4	4	4	5	5	5	3	4	4	5	5
Responsiveness <sup>c</sup>	4	3	3	4	4	5	4	5	4	5	
Work-Life Sensitivity <sup>c</sup>	4	4	4	4	5	6	6	4	5	5	
Adaptability <sup>c</sup>											5
Specialty Expertise/ Professional Competence	4	3	4	4	4	5	3	4	4	6	6
Collateral Duty <sup>c</sup>	4	4	4	4	4	4	4	5	5	4	
Working with Others/ Teamwork	5	4	5	5	5	5	4	5	5	5	5
Human Relations/ Workplace Climate	5	5	4	4	5	6	4	4	4	5	6
Looking Out for Others	4	4	4	4	6	6	6	5	5	6	6
Developing Subordinates	4	NO <sup>d</sup>	4	4	4	4	4	4	4	4	5
Directing Others	4	4	4	4	4	5	4	4	4	4	4
Evaluations	4	4	4	4	5	5	4	4	4	4	4
Speaking & Listening	4	3	4	4	5	5	4	4	4	5	5
Writing	4	4	3	4	6	6	3	5	5	5	5
Initiative	4	3	4	4	5	5	3	4	4	5	5
Judgment	4	3	4	4	4	5	4	4	4	5	5
Responsibility	4	4	4	4	4	5	3	5	4	5	5
Stamina <sup>c</sup>	4	3	4	4	5	5	4	4	4	5	
Health & Well-Being	4	4	4	4	5	5	4	5	4	5	5
Military/Professional Bearing	3	4	4	4	4	4	4	4	4	4	5
Professionalism <sup>c</sup>	3	3	4	4	4	5	4	4	4	5	
Dealing with the Public <sup>c</sup>	4	4	4	4	5	5	4	4	4	5	
<b>Average Mark in OER</b>	<b>4.0</b>	<b>3.6</b>	<b>4.0</b>	<b>4.1</b>	<b>4.7</b>	<b>5.0</b>	<b>3.9</b>	<b>5.2</b>	<b>5.1</b>	<b>4.9</b>	<b>5.1</b>
Comparison Scale <sup>e</sup>	3	2	2	3	3	3	2	3	3	4	4

<sup>a</sup> Some categories' names have changed slightly over the years. Supervisors fill in the marks for the first 16 categories, from "Being Prepared/Planning" to "Writing." Reporting officers complete the remaining blocks.

<sup>b</sup> Disputed OERs and OER marks appear shaded.

<sup>c</sup> Category nonexistent until later years, or category discontinued.

<sup>d</sup> Score given was "NO," which means there was no opportunity to observe this trait during the rating period.

<sup>e</sup> The comparison scale is not actually numbered. However, as with the performance categories, there are seven possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank known to the reporting officer. In this row, "2" means the applicant was rated to be a "good performer, but limited potential." A "3" means the applicant was rated to be an "excellent performer; recommended for increased responsibility." A "4" means the applicant was an "exceptional performer; very competent, highly respected professional."

## SUMMARY OF STATEMENTS SUBMITTED BY THE APPLICANT

### *Statement of Mr. X, the Applicant's Supervisor for OER1*

Mr. X, a civilian xxxx who served as chief of the XXXX at XXX and as the applicant's supervisor for OER1, submitted a statement on the applicant's behalf. He stated that, after he submitted his portion of OER1, "the Reporting Officer advised me to reconsider some of the marks. I complied with the direction I received, which resulted in a lower grading for [the applicant]. Due to the amount of time that has passed, I do not specifically recall which marks were involved in the changes. I do recall that keeping the evaluation as originally submitted did not appear to be an option."

### *Statement of Navy LCDR YY, Senior Xxx at XXXX*

LCDR YY stated that he supervised the work of the applicant and three other xxx xxx when she worked at XXXX from January through April 199x. He explained that XXXX has "no formal training/orientation program for new xxx xxx, relying on hands-on supervision and on-the-job experience to provide a bridge from xxxxxx to actual xxxxxx practice." XXXX, he stated, used a "five xxxxx rule," under which all new xxx xxx were supposed to be assigned experienced assistant xxx xxx to help them with their first two xxxxxxx xxxxxs, their first two contested xxxxxs, and their first "members" xxxxx. LCDR YY explained that for most XXXX xxxxxs, he was responsible for "initial xxxxx review and assignment, as well as daily supervision and follow up with other xxx xxx." However, Coast Guard xxx xxx obtained their xxxxxs and initial guidance directly from XXX.

LCDR YY stated that soon after the applicant arrived at XXXX, he received two phone calls from LCDR XX, inquiring into her progress. LCDR XX informed him that XXX was concerned about the applicant's job performance, military bearing, and performance at XXX.

In the winter of 199x, LCDR YY stated, "the volume of XXXX xxxxxs available for [the applicant] to learn on had dropped significantly." By mid February 199x, the applicant had xxxxx one xxxxx xxxxx, one contested xxxxx, and one xxxxx investigation, and her performance "was satisfactory and was consistent with her experience level at that time. However, the only complex xxxxx [the applicant] had been assigned to as an assistant [xxx xxx] in order to gain experience had been dismissed prior to xxx, and she had not yet been in xxxxx on anything other than [the xxxxxxxxxxx] xxxxx."

In February, LCDR YY stated, he was told that XXX had two xxxxxs for the applicant, and that she could get the xxxxx files from LT X, who would serve as her assistant xxx xxx. LT X had previously worked at XXXX as a xxx xxx. The applicant

soon “began to express frustration over her ability to properly prepare for the two Coast Guard xxxxs she had been assigned in xxxxx.” She was concerned about how complex the xxxxs were and the fact that LT X had retained the complete xxxxx xxx and would not release them to her. LCDR YY told her to “take as much time as she needed to work with [LT X] to prepare the xxxxs over at Coast Guard xxxxxxx.”

In March, while the two xxxs were in progress, LCDR YY stated, he received a phone call from LT X, who “expressed concern about [the applicant’s] ability to try the xxxxxxxxxxxxxxxs because [the applicant] had encountered difficulty in entering some documentary evidence and she believed that [the applicant] seemed unconcerned about the proceedings because she had gone out to lunch rather than stay to research an issue.” LT X told him she had thought her role was to be just observation and oversight but now “felt she had to intervene to correct what she believed were shortcomings in [the applicant’s] management of the xxxxs by taking control completely away from her.” He later learned that the applicant had been removed from the xxxxs, except to sit as an observer, and that XXX had decided to remove the applicant from XXXX early “because of concern over reports to them regarding the xxxxx xxxs.”

LCDR YY stated that, because he was the only xxxx directly supervising the applicant at XXXX, he prepared an initial draft for OER2 and forwarded it to the department head, LCDR Z. The department head agreed with him that the applicant was making progress and had satisfactorily performed the work assigned to her by XXXX. However, the department head was concerned that she “lacked some basic skills, such as xxx xxxxxxx, that were necessary for further development as a xxx xxxx, and that she needed additional experience and maturity to be successful.” LCDR YY stated that he also discussed the OER with XXXX’s executive officer, CDR Y, who served as the supervisor for OER2. It was apparent to LCDR YY that CDR Y had discussed the applicant’s performance with XXX and that his opinion of her performance was “somewhat more negative.” LCDR YY stated that he proposed retaining the applicant at XXXX for further training and that initially the department head and executive officer had agreed. Later, however, he heard that XXX had decided to recall her.

LCDR YY stated that, although the final version of OER2 contains many of the same comments he included in his original draft, “the overall tone and numerical marks are significantly more negative.” He stated that in reviewing the applicant’s experience at XXXX, he is “left with the overall impression that she was essentially set up to fail.” Although she had performed the work assigned to her by XXXX satisfactorily, she was recalled after only three months. While at XXXX, he stated, the applicant “researched and wrote an XXXX xxxxxxx on command xxxxxxx instructions, successfully xxxxxx the government at a complex xxxxxxx investigation, and successfully handled two xxx xxxxxxx, one of which involved responding to xxx xxxxxx.” He stated that he found it inexplicable that she was “first thrown headlong by the Coast Guard into two complex

members xxxxxs, and then abruptly removed without explanation." He suggested that the Coast Guard might have feared she would embarrass the Service, and further stated that "[n]o Navy xxxxxxxx in [the applicant's] position would have been treated in the same way."

### *Statement of Lt. M, the Applicant's Classmate at XXX*

LT Z, who attended XXX with the applicant, signed a statement indicating that she observed a xxxxx xxx at XXX in which the applicant acted as xxx xxx. The xxx xxx was supposed to begin by reciting "the convening information and pertinent information about the xxxxxx and the xxxxxx." However, in their preparations, they had skipped over this material and focused on "questioning and objection skills." Therefore, the applicant skipped them during the xxx xxx and, when told by the xxxxxx to start over, had to do so haltingly "because she was clearly plugging administrative information from the xxxxxx into the xxxxxxxx guide as she read, rather than having filled in the blanks ahead of time."

LT Z stated that the xxxxxx became very irate when the applicant explained that she had not expected to have to do that part of the xxx and called the applicant and the xxx xxx aside for private discussion. Upon resuming the xxx xxx, the applicant was "very upset and flustered." She "regained some of her composure, but was always appearing to have difficulty concentrating after the initial meeting" with the xxxxx. LT Z remembered that on at least one other occasion, the xxxxx again stopped the xxx xxx to lecture the applicant outside of the xxxxxxxx.

LT Z stated that the applicant's performance at the xxx xxx was not spectacular but "no worse than several of the others I saw while at xxxxxxxx. As far as I know, [the applicant] is the only person who failed a xxx xxx exercise in our class." She attributed the applicant's failing grade for the xxx xxx to a personality conflict between the applicant and the xxxxxxxx. LT Z further stated that she had witnessed another classmate suffer much more severe problems while acting as xxx xxx at a xxx member's xxx. The xxx had been stopped and the student xxx xxx had been lectured many times. However, LT Z stated that "[t]o the best of my knowledge, she did not fail the exercise, however, and she did pass the class."

### *Statement of LT XX*

LT XX, a Coast Guard xxxx who received her direct commission in April 199x and attended XXX in the fall of 199x, submitted a statement in which she described her experience at the XXXX in xxxxx. She stated that she spent her first two to three months at the XXXX xxxxxing "lower" level xxxxxs, involving matters such as xxxxxxxxxx xxxxxxxxxxxxxxxx. "After a steady 2-3 month diet of these xxxxxs, [she] then assumed xxxxxs xxxxx xxxxxxxx including much of the above with the addition of xxxxxx such as:



8. [CAPT X's] comments, and other circumstances surrounding the xxxxxs discussed above, suggest to me that [the applicant] was prejudged by her command.

*Statement of Ms. YY, a Xxxx Assigned to the XXX under LCDR X*

Ms. YY, a civilian xxxx who served under LCDR X, stated that she "found his character to be unprofessional and demeaning towards me as a woman." The xxxx described offensive posters displayed in LCDR X's office, including one entitled "He-Man Woman Haters Club" and another with women in bikinis. She stated that working in his office was humiliating and she felt "surrounded by male chauvinism." She stated that he ignored her complaints about the posters but finally removed them when prompted by a superior officer. She stated that he also used a sun shield for his car that showed women dressed in thongs and bikinis.

Ms. YY also stated that she did not have an opportunity to observe how LCDR X interacted with the applicant because the applicant "was assigned to a small, dark, and windowless office in another part of the building," whereas her colleagues had offices with windows located adjacent to LCDR X's office.

*Statement of LCDR ZZ, xxx, U.S. Navy*

A xxx officer for the Navy stated that she visited the applicant at the XXX in May 199x and witnessed LCDR X discussing promotions with his staff. She stated that LCDR X told two male lieutenants that they would be promoted some day and offered to give them parts of his uniform. She stated that the comments were "clearly directed at the two male lieutenants only and [LCDR X] made no attempt to include [the applicant]. I was surprised at how blatant this officer's actions appeared." She further stated that she is a long-time friend of the applicant, knows her to be "a most competent and able xxxx," and "cannot understand why this officer displayed such outright hostility toward [the applicant]."

*Statement of Yeoman X*

Yeoman X, who worked at XXX and served as the xxxx reporter for the XXX and XXX xxxs, stated that the applicant "was subjected to numerous instances of discrimination by the command." She stated that, prior to the xxxs, she asked the applicant for a copy of the xxxxxx, but was told the applicant had not received one. When she requested a xxxxxxx from LT X, her request was denied, although it was usual for xxxxxxxx to receive them in advance. The yeoman stated that the applicant "received little to no assistance" from LT X, and she feels the applicant "was set up for failure by the [XXXX] by their failure to provide her with the required documentation and assistance of her more experienced co-xxx."

Yeoman X stated that later on, soon after the applicant was assigned to the XXXX under Ms. XX, she overheard Ms. XX tell someone "Look what I'm stuck with now." She stated that she is certain this remark concerned the applicant. She also stated that Ms. XX often yelled at the applicant and treated her in a demeaning manner. In addition, the yeoman supported the applicant's claim that Ms. XX had attempted to stop the applicant from releasing a xxxxxxxxxxxxxx. The yeoman stated that other superior officers also contributed to the "general atmosphere of disrespect" toward the applicant. She stated that there was no such discrimination against the applicant when she served in the XXXX.

### *Statement of Ms. Y*

On May 32, 199x, Ms. Y, who served as a volunteer xxxxxxxx at the XXXX under Ms. XX, stated that she had worked with the applicant on an XXX xxxxx. As part of her work, she had searched files xxxxxxxxxxxx, but many of the documents she selected were rejected by Ms. XX. She stated that Ms. XX interpreted the xxxxxxxx very narrowly and that the applicant tried to get Ms. XX to release the xxxxxxxx documents. Later, after a xxxxxxx referred to one of the xxxxxxx documents that had been withheld by Ms. XX, the xxxxxxx required all the xxxxxxx to be turned over. Ms. Y stated that the Coast Guard was embarrassed.

On February 15, 199x, Ms. Y, serving as a "volunteer xxxx" at the XXXX under Ms. XX, signed a statement indicating that she and the applicant had worked very closely on the XXX xxxxx "with minimal supervision from" Ms. XX. She stated that Ms. XX requested biweekly updates on their progress and reviewed the applicant's xxx notebook to make suggestions. Ms. Y further stated that she "disagree[s] with any suggestion that [the applicant] required substantial supervision" and that "due to their disagreement," Ms. XX "actually gave [the applicant] less supervision and feedback" than she gave other xxxxs in the office.

Ms. Y later signed another statement affirming her statements of February 16, 199x, and May 23, 199x. In this third statement, she indicated that Ms. XX disliked the applicant's "style and methods" and was much more critical of the applicant than of other xxxxs in the office. She also stated that Ms. XX's feedback often came late, after a project was completed. For instance, she stated that in the XXX xxxxx, "at the last minute [Ms. XX] began questioning [the applicant's] xxxxxxx choices and suggesting things should have been done differently. It was apparent that [Ms. XX's] last minute criticisms unnerved [the applicant] and undermined her confidence." Ms. Y stated that she did not understand Ms. XX's attitude toward the applicant, who was "a knowledgeable xxxxx and diligent worker." The extra scrutiny, she stated, "simply created problems" for the applicant which neither she nor the other xxxxs in the office encountered.

## **VIEWS OF THE COAST GUARD**

### *Advisory Opinion of the Chief Counsel*

On December 23, 1999, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this xxxxx by removing OER3. He alleged that no other relief is warranted. The Chief Counsel did not elaborate on this recommendation himself but attached to his advisory opinion a memorandum prepared by the Coast Guard Personnel Command (CGPC).

### *Memorandum of the Coast Guard Personnel Command*

CGPC submitted statements signed by the chief of XXX, CAPT X, who served as the reviewer of OER1 through OER7; by CDR X, the assistant chief of XXX who served as the reporting officer for OER1, OER3, OER4, and OER5; and by CDR XX, the second assistant chief of XXX who served as the reporting officer for OER6 through OER9 (see summaries of statements below). CGPC alleged that these officers' statements "clearly indicate that Applicant was afforded opportunities to succeed and that she was not a strong performer." CGPC argued that the applicant "provides no evidence that the multitude of officials who served as OER Supervisors, Reporting Officers, and Reviewers during her assignment at [XXX] were joined in a conspiracy to doom Applicant to failure."

Regarding OER1, CGPC alleged that it was properly prepared. CGPC stated that the regulations require reporting officers to return OERs to supervisors for revision if the reporting officer finds that the marks assigned by the supervisor are inconsistent with the evaluatee's performance or are unsupported by the narrative comments. CGPC argued that the statement of the supervisor, Mr. X, concerning the return of OER1 to him by the reporting officer, CDR X, does not state that CDR X directed Mr. X to lower specific marks, which would have been impermissible under the rules. CGPC also provided a copy of the memorandum sent by the CDR X to Mr. X concerning OER1 (see below). CGPC alleged that the memorandum shows that CDR X did not improperly influence Mr. X's evaluation of the applicant.

Regarding OER2, CGPC alleged that the applicant has not proved that XXX either "poisoned the well" for her or "set her up to fail" at XXXX. CAPT X's statement, CGPC argued, shows that the applicant was sent to XXXX somewhat early in her XXX rotation to remove her from "the effect of the poor leadership abilities" of Mr. X. Thus, she could get a "fresh start" and immediately apply the xxx skills she learned at XXX at XXXX. In addition, CGPC pointed out that the supervisor for OER2, CDR Y, stated in his endorsement to her reply to the OER, that no one at XXX had ever tried to influence the substance of the OERs he prepared. CGPC also argued that it is immaterial who initiated the applicant's removal from XXXX.

CGPC further alleged that as the supervisor for OER2, CDR Y was entitled to seek input from other officers who supervised the applicant, such as LCDR YY, but was not required to use such input without exercising his own judgment if the applicant did not meet his expectations. Therefore, CGPC argued, the statement by LCDR YY concerning his input to the OER is irrelevant. Furthermore, CGPC stated, the applicant failed “to provide any evidence to show that any specific mark or comment in [OER2] was in error” or “to show that the specific circumstances surrounding [the XXX] xxxxx were reflected in [OER2].”

Regarding OER3, CGPC stated that the reporting period was unusually short, though permissible under the rules and agreed to at the time by the applicant. Moreover, CGPC stated, “it is not a generally accepted practice to shorten an OER reporting period in order to help a Reported-on Officer ‘recover.’ ... Although it is not possible to know if an extended OER reporting period [for OER3] would have provided a better measure of Applicant’s performance, Applicant had provided evidence to show that the short reporting period, while not in error, was unusually short and not in her best welfare.” Therefore, CGPC argued that OER3 should be removed from the applicant’s record.

Regarding OER7, CGPC alleged that the fact that CAPT X, the chief of XXX, permitted her to transfer out of the Command and XXX shows that “he was willing to help her succeed.” CGPC further alleged that the applicant did not prove that any of the statements in OER7 are inaccurate. CGPC argued that the statement about substantial supervision in OER7 “clearly applied to her failure to xxxxx xxxxx in a pending xxxxxxx xxxxx while she was assigned to the Command and XXX during the beginning of the reporting period,” and did not apply to her performance in the XXX xxxxx. CGPC alleged that the applicant’s XXX xxxxx work was favorably evaluated in the OER, and the supervisor’s apparent lack of expertise in this area is therefore irrelevant. CGPC argued that while it is apparent that the applicant and her supervisor “did not get along, a review of this OER reveals that the Supervisor provided generally positive and complimentary comments regarding Applicant’s performance in the XXXX.” CGPC stated that “the only less than favorable comment in the Supervisor’s section of the OER referred to [the applicant’s] initial work in the Command and XXX” rather than to her work in the XXXX under Ms. XX. Therefore, CGPC concluded, the applicant did not prove that OER7 was in error or that Ms. XX did not fairly evaluate her work.

Regarding the applicant’s comparison scale marks in all her OERs, CGPC alleged that she has not provided any justification for raising those marks or removing them. CGPC stated that the statements by her reporting officers, CDR X and CDR XX, show that “there was no ‘cloud’ created by Applicant’s original Division Chief [CAPT X].” Furthermore, CGPC alleged, the reporting officers had sufficient opportunities to judge her overall performance and they properly “compared Applicant to other officers they had known of her rank throughout their careers.”

In conclusion, CGPC recommended that only OER3 be removed from the applicant's record. CGPC further recommended that the Board not remove the applicant's failures of selection for promotion to lieutenant commander. CGPC argued that the applicant's remaining record is so poor that the applicant would not have been selected for promotion even if OER3 had not been in her record.

## **SUMMARY OF STATEMENTS SUBMITTED BY THE COAST GUARD**

### *Statement by CAPT X, Chief of XXX*

CAPT X, who served as the reviewer for OER1 through OER7, stated that while that applicant was at XXX, "someone from the School advised me that [her] performance was below standard and that she might not graduate." CAPT X stated that he discussed this with the assistant chief of XXX, CDR X, but they agreed that if she did graduate, "this information would be ignored and she would be given the same opportunities that all other direct commission xxxxs were afforded." He further alleged that all further personnel decisions and evaluations were based on her actual job performance and not on the information he received from the school.

CAPT X further stated that the applicant was "routinely assigned" to XXXX. Her "initial duties there, as was the custom for most of our xxxxs, were as a xxx xxx. After a period of time as a xxx xxx it was the usual practice that our CG xxxxs would move over to the xxxxxion side." However, he received a phone call from either the executive officer, CDR Y, or the commanding officer, CAPT XX, stating that "they were not satisfied with [the applicant's] performance and that they did not want her to xxxxxe xxxxxs for them. Since they were unwilling to provide her with experience as a xxxxxor, we agreed to terminate her rotation at XXXX." CAPT X also stated that he "was very surprised that both the comments and marks [in OER2] were so negative. This was especially true because we typically felt that XXXX OERs were 'inflated.' ... I believe , during the review process for [OER2], I attempted to ameliorate some of the initial negative comments that came from the XXXX."

Regarding the applicant's appointment as xxx xxx xxx in the XXX xxxxx, CAPT X alleged that, as a graduate of XXX, she should have been qualified to xxxxxe a xxxxxxxxxxxxxx and that he did not think the xxxxx was particularly difficult. He "believed it a good opportunity for her to succeed at what was a relatively straight forward xxx proceeding that an xxxx with her experience should be able to handle. ... I would not have made such an assignment had I thought that she was not qualified."

Regarding the remainder of her service at XXX, CAPT X stated that like all first tour xxxxs, the applicant was "rotated among several xxx specialty areas to provide training and experience." He recalled that "generally her supervisors were not pleased

with her performance. I believe she eventually did her best work in the XXXX and we may have extended her stay there longer because of that performance." CAPT X further stated that, as the reviewer for her OERs, he considered them to be "an accurate reflection of her performance as I had observed it and as it had been reported to me."

*Statement and Memorandum Submitted by CDR X, Assistant Chief of XXX*

CDR X, who served as the reporting officer for OER1, OER3, OER4, and OER5, stated that his initial impressions of the applicant had been very positive, and he had relayed that those impressions to both CAPT X and Mr. X, her first supervisor at XXX. However, he alleged, during her first few months at XXX prior to her departure for XXX, the applicant "established a reputation for having a distinctly non-military demeanor." He hoped that her experience at XXX and an accelerated rotation out of the XXXX, where her supervisor was a civilian, would improve her military bearing. Therefore, by sending her to XXXX, he "specifically intended to give her a fresh start at a new unit away from [XXX] and to give her a chance to utilize her XXX training at the [XXXX] immediately upon her return from XXX." CDR X stated that he does not remember receiving any negative reports about her performance at XXX. Nor does he "remember having any concerns about her ability to perform as a xxx xxxx and xxxxxor at the XXXX, other than her still overly casual (non-military) demeanor." CDR X further stated that, "[f]ar from trying to set up [the applicant] for failure, I believe that [CAPT X] and I went to extraordinary lengths to provide her with opportunities to excel, particularly in light of our recognition of the weaknesses of her civilian supervisor" in the XXXX.

Regarding OER1, CDR X stated that the initial draft submitted by Mr. X had "numerous administrative errors." He submitted a copy of a memorandum he sent to Mr. X explaining how the OER needed to be improved. The memorandum points out that Mr. X had used the wrong OER form, written in several incorrect dates, and failed to supply a numerical mark for block 5.d. The memorandum also states that Mr. X's written comments do not support the marks assigned in blocks 3.b., 3.d., 4.a., 4.b., and 5.a. In addition, with respect to the mark assigned in block 5.a. and corresponding comments, CDR X wrote that "[t]his is a hard mark for any staff xxxx to get more than a '4' in because they don't supervise anyone. Merely doing xxx assistance is not enough. Your use of the term 'unique' in the fifth sentence seems inappropriate." CDR X stated that, in response to this memorandum, Mr. X chose to add comments supporting the marks of 5 he had assigned the applicant in blocks 4.a. and 4.b., as required by regulation, but chose to lower the other marks of 5 he had assigned to marks of 4, rather than add comments supporting the marks of 5. CDR X alleged that the "decision on how to respond to the inconsistencies noted in my memo was left exclusively to Mr. X." He never directed Mr. X or any other supervisor to assign particular marks. Regarding the marks he assigned the applicant on the comparison scales of the disputed OERs, CDR X alleged that she "never measured up to what I believed to be an acceptable level

of performance.” He further alleged that for the OER1 reporting period, the description for a mark of 2, “good performer, but limited potential,” better described the applicant’s performance, but he gave her a “generous” mark of 3 because he recognized the “leadership weakness” of the civilian chief of the XXXX.

Regarding OER2, CDR X stated that the applicant was assigned to the xxxxx side of XXXX’s work and was assigned Coast Guard xxxxxs by CAPT X and Navy xxxxxs by XXXX staff. He stated that after she went to XXXX in early January, he heard nothing “out of the ordinary” about her performance until March, when “XXXX began to informally raise questions and concerns as to whether she had really graduated from xxx. To say the least, I found this rather shocking and quite inconsistent with my impressions of her basic xxx skills (apart from her non-military demeanor). After some discussion with the XXXX [executive officer], it turned out that the real concern dealt with her lack of ability to handle even simple xxxxx, or manage even a modest xxxxx xxx.” CDR X stated that XXXX proposed to reassign her to XXXX’s Xxx Assistance Branch because they lacked confidence in her as a xxxxxor. However, because such an assignment was outside the terms of the Memorandum of Understanding between the Coast Guard and the Navy regarding XXXX appointments, XXX removed the applicant from XXXX.

Regarding the assignment of the XXX and XXX xxxxxs to the applicant, CDR X stated that when the applicant worked at XXXX, it was “standard practice to detail the one Coast Guard xxxx in the Xxx Xxxxxion shop [at XXXX] to be the xxxxxor in any pending Coast Guard xxxxxs. I have no recollection of there being any discussion, at the time of detailing, of [the applicant’s] ability to handle any xxxxx to which se was detailed.” Later, he stated, he was “told, without any advance notice, that the Government was in danger of losing [the XXX] xxxxx because of [the applicant’s] poor performance, and that it was imperative that new xxx be detailed immediately.” As a result, he alleged, LT X went to xxxx “on very short notice” and “eventually found it necessary to essentially take over the xxxxx.”

Regarding the short evaluation period for OER3, CDR X alleged that the applicant chose the short period, and he referred to his explanation in his endorsement to the applicant’s reply to the OER (see above). Once she had elected the short evaluation period, CDR X stated, he “viewed that decision as immutable.” He also alleged that the XXX “was an ideal location to evaluate xxx abilities over a short time period” because the work is highly documented and the volume of xxxxxs is high while the complexity of xxxxxs is relatively low. Therefore, he alleged, in the XXX, an xxxx can quickly demonstrate xxxxx xxx management abilities. He alleged that although she chose the short evaluation period, “there were more than adequate opportunities for [the applicant] to perform during this short period.”

Regarding the marks he assigned the applicant on the comparison scales of the disputed OERs, CDR X stated that he kept a spreadsheet to track the marks he assigned to the xxxxs he supervised.<sup>13</sup> He stated that the spreadsheet helped him take into account various factors, such as whether it was the officer's first tour as an xxxx, the officer's rank, and whether the officer was at the end or beginning of his or her tour. CDR X stated that, in writing his statement for the BCMR, he reviewed the spreadsheet and noticed that the last comparison mark he gave the applicant (in OER5) was comparable to the mark he gave most xxxxs on their first OERs. CDR X concluded by stating that his "lasting recollection" of the applicant is that she "developed much more slowly than any other CG xxxx that I had ever known."

***Statement by CDR XX, Subsequent Assistant Chief of XXX***

CDR XX, who served as the reporting officer for OER6 through OER9, stated that his "general recollection ... is that [the applicant's] performance overall was below average for an xxxx and officer of her training and experience." He alleged that he cannot recall any unfair treatment of her and that they tried to accommodate her by transferring her out of the Command and XXX at her request, although they counseled her that it was not good for her career to refuse to take on xxxxxxxx duties.

Regarding OER7, CDR XX stated that he did not remember the specifics of any XXX xxxxx but does remember that Ms. XX "was extensively involved in an XXX xxxxx assigned to [the applicant]." He further stated that his evaluation of the applicant's performance declined over time "as it became apparent to me she performed adequately at assignments she was interested in performing but was unwilling to perform other assignments." His comparison scale marks were his "best assessment of her leadership and potential as an officer and xxxx" and were "not the result of any unfair or inappropriate influence from any other person."

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<sup>13</sup> The paragraph in CDR X's statement discussing the spreadsheet was blacked out when the Chief Counsel first forwarded it to the BCMR on December 23, 1999. However, on January 4, 2000, upon inquiry by the BCMR and the applicant, the Chief Counsel's office agreed that the language in the paragraph was not protected from discovery and forwarded a complete copy of CDR X's statement. On January 12, 2000, the applicant submitted a request under the Freedom of Information Act (FOIA) for a copy of CDR X's spreadsheet. On February 8, 2000, the Coast Guard informed the applicant that the spreadsheet was not subject to FOIA because it was "not an agency record." The Coast Guard stated that the spreadsheet was "not part of any government system of records and was not created or stored on a government owned computer system." The applicant appealed the Coast Guard's decision and asked the BCMR to "direct the Coast Guard to produce the document(s) at issue forthwith" in accordance with 33 C.F.R. § 52.82(b). The BCMR declined to do so, informing the applicant that while the Board has authority to ask the Coast Guard to submit additional information not disclosed in an application if the Board deems the information relevant to an issue in a xxxxx, the Board "has no authority to order [CDR X] to hand over his private documents." The applicant did not agree with the BCMR's statements and asked the Board to draw from the Coast Guard's refusal to produce the spreadsheet "the usual adverse inference" that the spreadsheet would support her allegations.

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

On March 31, 2000, the applicant responded to the Chief Counsel's advisory opinion. The applicant stated that, because she was separated from the Reserve on June 30, 1999, she must supplement her request for relief by asking the Board to expunge from her record all references to her involuntary separation from the Coast Guard.

In response to the Chief Counsel's arguments, the applicant stated that she is due relief because she has demonstrated "manifest injustice in the treatment accorded ... her" in accordance with 33 C.F.R. § 52.12(a). Contrary to CAPT X's statement, the applicant argued, she has proved that the information from XXX was not "ignored" but related to XXXX officers by LCDR XX and cited by CAPT X as a reason to remove her from XXXX. Moreover, the applicant alleged, CAPT X did not name the source at XXX who criticized her performance or independently verify the quality of her performance at XXX. The applicant alleged that if CAPT X had attempted to verify the quality of her performance at XXX, he might have learned that it was no worse than that of some other students, as indicated by her classmate, LT Z.

Regarding OER1, the applicant stated that CDR X's memorandum to Mr. X was "negative in tone" and "question[ed] every mark higher than a 4 which [Mr. X] intended to give [her]." Moreover, she stated, the memorandum shows that CDR X objected to the mark of 5 she received in block 5.a., "Looking Out for Others." Yet later he signed OER5, in which she received a mark of 6 in block 5.a. although she did not supervise any member during that reporting period either. Therefore, she argued, it is clear that CDR X's bias against Mr. X unfairly harmed the applicant. She further argued that the comments in OER1 are much more positive than and therefore inconsistent with the marks, proving that OER1 should be corrected.

Regarding OER2, the applicant reiterated her arguments as they appeared in her application and in her reply to that OER, emphasizing her lack of control over the xxx dates and xxxxx xxx. She also pointed to several inaccuracies in CDR X's statement concerning LT X's involvement in the XXX and XXX xxxxxs and argued that these inaccuracies show XXX's predisposition against the applicant and willingness to blame her, rather than the more experienced LT X, for the problems that arose. The applicant further argued that the record proves that she was not given sufficient experience to serve as xxx xxx in the two xxxxxs by serving as assistant xxx xxx in other xxxxxs and that LT X sabotaged her work on the two xxxxxs. She also argued that, contrary to the Coast Guard's assertion, her handling of the XXX xxxxx was referred to in OER2, which mentions a "serious xxxxxxxx xxxxx" and discusses her "xxxxxxx skills."

The applicant alleged that LCDR XX's telephone calls to XXXX "served no apparent purpose other than to invite closer scrutiny of the Applicant than of others." She argued that, had the Coast Guard not "maligned" her reputation at XXXX and had it

not assigned her as xxx xxx xxx for two complex xxxxxs with insufficient experience and an assistant who sabotaged her efforts, she would have completed her tour at XXXX and developed to her full potential as a xxx xxxx with positive OERs.

In addition, the applicant argued that the Coast Guard erred in designating CDR Y, rather than LCDR YY, to act as her supervisor for OER2. The applicant argued that Article 10A-2.d.(1)(a) requires that the supervisor be the "individual to whom the applicant answered on a daily or frequent basis and from whom the Applicant received the majority of directives and requirements." The applicant alleged that she did not receive a single directive from CDR Y or answer to him on a daily basis. The applicant pointed to CDR Y's comments "in discussing matters with supervisors" and "[d]iscussions with supervisors" as evidence that he did not consider himself to be her supervisor and that an "unidentified multitude of persons" unfairly provided input for OER2 without any accountability.

The applicant also alleged that CAPT X's and CDR X's statements contain many inaccuracies that render them generally untrustworthy. For example, she stated that she never served as xxx xxx at XXXX; she was not given "every opportunity to succeed"; she did not complete the indoctrination course on May 11, 199x, but on May 1, 199x; she did not take a week's leave after the course concluded; and LT X was not assigned as assistant xxx xxx "on very short notice" but on February 10, 199x, around the time the applicant was appointed xxx xxx xxx.

Regarding OER7, the applicant argued that those marks and comments that reflect her performance in the Command and XXX are unfair because she did not have the prerequisite experience, which she alleged included nine months at XXXX. Her assignment to the branch, she alleged shows that her superiors were not interested in helping her succeed. Other junior xxxxs in her year group, she alleged, served at least nine months at XXXX and then were immediately afterward assigned to the Command and XXX so that the xxxxxxxx experience they gained at XXXX was still "fresh."

Moreover, the applicant argued, OER7 faults her for not xxxxxxxxx in a xxxxx xxxxx even though she only served in the branch for six weeks before being transferred. She alleged that her successor in the job, who had more experience, did not xxxxx xxxxxxxin the xxxxx until two months after she left. Therefore, she argued, it was unfair to criticize her for not completing this assignment. In addition, the applicant argued that because her assignment to the branch was unfair to begin with, it was unjust for OER7 to criticize her for requesting a transfer out of the branch.

The applicant reiterated her allegation that OER7 unfairly criticized her work in the XXXX by stating that her "XXX motions required substantial input/corrections from supervisor" and "[s]ubstantial supervisor participation required in XXX xxxxx." The applicant alleged that the statement submitted by Ms. Y and her supervisor's proven

lack of knowledge in the XXX area show that she received misguided supervision in the XXXX, not that she required too much supervision.

Regarding her marks on the comparison scales of her eleven OERs, the applicant argued that they are unjust because she was not competing on a level playing field since she was prematurely removed from XXXX and not given the same professional opportunities as other junior xxxxs. Furthermore, she argued, because comparison scale marks are not required, removal of the marks "is justified, permissible, and fair."

Finally, she argued, because the disputed OERs are unjust and inaccurate, her failures of selection for promotion in the Coast Guard and the Reserve are also unjust and should be removed from her record. She stated that "it is impossible to know how she would fare before a promotion board with the adverse OERs removed without affording [her] an opportunity to be considered on a corrected record." She asked the BCMR to give her the chance to compete before future Reserve promotion boards with a corrected record.

## RELEVANT REGULATIONS

### *Selecting the Rating Chain*

Article 10-A-2.d.(1) of the Personnel Manual (COMDTINST M1000.6A) in effect in 199x states that "[t]he Supervisor [for an OER] is normally that individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of directives and requirements." It also states that civilian employees and officers of other armed services can serve as OER supervisors.

Article 10-A-2.d.(1)(d) provides that "[w]hen an officer responds to more than a single individual for different functions, the commanding officer will appoint one individual to the position of Supervisor (to whom all secondary supervisors will provide evaluation input)."

Article 10-A-2.e.(1)(a) states that "[t]he Reporting Officer is normally the supervisor of the [OER] Supervisor." However, Article 10-A-2.e.(1)(h) states that "[t]he Reporting Officer of an officer assigned to a staff or mission of another Service will be the commanding officer of the mission or the senior officer of the staff to which the Reported-on Officer is assigned."

Article 10-A-2.f.(1)(g) states that "[o]nly Coast Guard commissioned officers may serve as Reviewers."

### *Selecting a Reporting Period*

Article 10-A-3 provides that lieutenants shall receive regular, semiannual OERs at the end of each May and November. However, the officer's command may choose not to submit a semiannual OER if the officer has served at the unit for fewer than 92 days; has received an OER within the past 92 days; or will receive an OER for another reason, such as a transfer, within the next 92 days. In addition, an OER may be prepared whenever an officer is detached from a unit or when there is a change of reporting officers. The article also states that "[t]he welfare of the Reported-on Officer should be paramount when determining the appropriate time to submit the OER."

### *Preparing an Officer Support Form (OSF)*

Article 10-A-5 contains instructions for OSFs. Article 10-A-5.a. states that an OSF is "an aid to establishing a clear understanding of job expectations and to assist the Supervisor in providing constructive performance feedback and in preparing proper evaluations." A lieutenant's supervisor may use an OSF at his discretion but must use it "when a senior member of the rating chain directs its use." The OSF "[s]erves as a vehicle for clarifying the Reported-on Officer's job responsibilities and areas of the job which either the Reported-on Officer and/or Supervisor feel should receive emphasis during the reporting period." The duration of the period covered by the OSF, which is normally but need not be the same as the reporting period, is noted on the OSF when it is prepared. Article 10-A-5.d.(1)(c).

### *Duties of the Rating Chain*

Article 10-A-1.b.(1) states that "[e]ach commanding officer must ensure that accurate, fair, and objective evaluations are provided to all officers under their command."

Article 10-A-2(d)(2) states that the supervisor "[e]valuates the performance of the Reported-on Officer in the execution of his/her duties" and "[p]rovides performance feedback to the Reported-on Officer upon that officer's request during the period or at such other times as the Supervisor deems appropriate." In addition, "[a]t the request of the Reported-on Officer, or when deemed necessary, [the supervisor] discusses duties and areas of emphasis on the job with the Reported-on Officer at the beginning of the reporting period. The optional OSF worksheet, or other format specified by the Supervisor, may be used as an aid."

Article 10-A-2.e.(2)(d) states that the reporting officer must "[e]nsure[] the Supervisor fully meets responsibilities for administration of [the evaluation system]. ... If a Supervisor submits evaluations that are inconsistent with actual performance or unsubstantiated by narrative comments, the Reporting Officer shall return the report for

correction or reconsideration, counsel the Supervisor, and consider this when reporting on the performance of the Supervisor. The Reporting Officer may not direct in what manner an evaluation mark or comments is to be changed (unless the comment is prohibited ...).”

Article 10-A-2.f.(2)(a) states that the reviewer “[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.”

### *Instructions for Preparing an OER*

Article 10-A-4.d.(4) instructs supervisors to prepare blocks 3 through 7 of an OER as follows (virtually identical instructions are provided in Article 10-A-4.d.(7) for reporting officers, who complete blocks 8 through 11):

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

• • •

(d) In the “Comments” sections following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a “4.” . . . The Supervisor shall draw on his/her own observations, from those of any secondary supervisors, and from other information accumulated during the reporting period.

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

Article 10-A-4.d.(9) contains instructions for completing the comparison scale:

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. . . . No mark need be entered if there were insufficient opportunities to make a judgment. In this xxxxx the Reporting Officer should indicate so with a short statement in Section 11.

### *Replies to OERs*

Article 10-A-4.h. allows the Reported-on Officer to file a reply to any to “express a view of performance which may differ from that of a rating official.” However,

“[c]omments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member serve no purpose and are not permitted.”

## FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant asked the Board to raise certain marks in OER1 because, she alleged, the reporting officer, CDR X, improperly influenced her supervisor, Mr. X, to lower them. However, in their signed statements, the applicant's supervisor did not say that he had been directed to lower specific marks in violation of Article 10-A-2.e.(2)(d) of the Personnel Manual, and the reporting officer denied having directed the supervisor to lower specific marks. In addition, the reporting officer submitted a copy of the memorandum he apparently sent to the supervisor requiring corrections to OER1. The Board finds that the reporting officer's memorandum to the supervisor complied with both the letter and the spirit of Article 10-A-2.e.(2)(d). The supervisor responded to the memorandum by lowering certain marks, but he could have chosen to justify his higher marks with supporting comments. Therefore, the applicant has failed to prove by a preponderance of the evidence that any of the marks or comments in OER1 are inaccurate or unjust or that the reporting officer exercised improper influence over the supervisor's evaluation of her performance.

4. The applicant asked the Board to remove OER2 in its entirety based on multiple allegations detailed above. The applicant proved that a branch chief at XXX called XXXX to check on her progress and to communicate concerns about her professional capabilities raised during the previous reporting period. Although a fellow student at XXX stated that other students encountered problems in their xxx xxxs at least as severe as those of the applicant, the chief of XXX received a report from the school indicating that her performance at school was poor enough to jeopardize her graduation. Therefore, the applicant has failed to prove that the branch chief's concerns were false or groundless. Furthermore, the applicant has failed to prove that it was improper for the officer to make such calls to XXXX. Any xxxx whose professional abilities are unproved and have been called into question should expect such concerns to be communicated to her superiors and should expect extra scrutiny when transferred to a

new, responsible position. Although the applicant characterized the branch chief's communication as "poisoning the well," the Board finds that the calls fell within the bounds of responsible xxxx supervision by her command. Moreover, the applicant failed to prove that the calls from the branch chief improperly influenced her rating chain's evaluation of her professional abilities.

5. The applicant also alleged that she was "set up to fail" during the reporting period for OER2 by being assigned two complex xxxxxs with a relatively inexperienced xxxx as assistant xxx xxx who "sabotaged" the applicant's efforts. The statement of LCDR YY, a senior xxxx at XXXX who assigned her XXXX xxxxxs, indicates that the volume of XXXX xxxxxs the applicant could help xxxxxe was unusually low at the time, so she had less xxxxxorial and xxxxxxxx experience than she otherwise might have had when she was assigned the XXX and XXX xxxxxs by the Coast Guard on or about February 10, 199x. LCDR YY's statement also indicates that, perhaps because of the low volume, she was told she could "take as much time as she needed" to work the xxxxxs, although she was not permitted to defer the xxxs dates set for mid March. Thus, the record reflects that the applicant had just a month to prepare for the xxxxxs and had to do so while lacking access to some of the records and with the help of a relatively inexperienced assistant xxx xxx. However, the applicant has not proved that the obstacles she faced in xxxxxing XXX and XXX were maliciously created to sabotage her performance. In addition, the record reflects that the applicant made these difficulties known to at least one of her superiors, and she has not proved that they were unknown to her rating chain and were not taken into account when they evaluated her performance in OER2. In her reply to OER2, the applicant described the obstacles she faced during the reporting period, but the endorsements of her supervisor and reporting officer forwarding her reply to the Commandant reconfirmed their assessments of her abilities and potential.

6. The applicant also alleged that the rating chain for OER2 was improperly composed because the XXXX xxxx who assigned her work did not serve as the supervisor for OER2. While at XXXX, the applicant performed work assigned both by the Navy and by the Coast Guard. Article 10-A-2.d.(1)(d) provides that "[w]hen an officer responds to more than a single individual for different functions, the commanding officer will appoint one individual to the position of Supervisor (to whom all secondary supervisors will provide evaluation input)." Therefore, although LCDR YY may have assigned her xxxxxs on behalf of XXXX, the applicant has not proved that it was an error or unjust for CDR Y to serve as the supervisor for OER2. Moreover, the record reflects that, as one of her supervisors, CDR Y had opportunities to observe her performance and that he properly received input from others who supervised her work.

7. Although the xxxx' s statement indicates that the reviewer for OER2 was "not surprised" by the xxxx' s negative report on her performance, and the xxxx concluded that she had been "prejudged," the applicant has not proved that the rating

chain for OER2 was unfairly biased against her. The xxxx's statement indicates that the reviewer was not surprised by her poor performance in the xxxxxx. This indicates that the reviewer knew of previous instances of poor performance on her part or had heard through LT X about the problems she encountered in the xxxs; it does not prove that he was biased against her or that he unfairly evaluated her performance in OER2. Likewise, the statement of LCDR YY indicating that he evaluated the applicant's performance more favorably than did the members of her rating chain does not prove that their evaluations were in error or unjust.

8. The applicant also alleged that OER2 was unfair because she was unjustly removed from XXXX after just three months' experience. The record indicates that, despite LCDR YY's assessment of her abilities, the XXXX command was unwilling to allow the applicant to xxxxe Navy xxxxs and wanted to assign her to other duties. Under the Memorandum of Understanding between the Coast Guard and the Navy, junior Coast Guard xxxxs were assigned to XXXX to gain experience in xxxxxx xxxxs. In light of that purpose and given the Navy's determination that it would not continue to entrust her with xxxxxx work, the Board finds that the Coast Guard did not err or commit any injustice when it removed her from XXXX. Furthermore, under Article 10-A-3 of the Personnel Manual, it is appropriate to prepare an OER when a member is removed from an assignment and the reporting officer changes.

9. The applicant asked the Board to remove OER3 in its entirety because of the shortness of the reporting period, her rating chain's alleged bias against her, and an alleged "hostile work environment" created by her supervisor, LCDR X, the chief of the XXX at XXX. The Chief Counsel of the Coast Guard recommended that the Board remove OER3 from the applicant's record due to the shortness of the reporting period. Under Article 10-A-3 of the Personnel Manual, the applicant's command could have skipped the semi-annual reporting period ending on May 31, 199x, and waited until the end of the next semi-annual reporting period, November 30, 199x, to submit an OER evaluating her performance at the XXX. The record indicates that the choice of the 57-day reporting period, from April 5, 199x, to May 31, 199x, was made by the applicant at the suggestion of LCDR X. The record indicates that the choice was made based on their mutual hope that she would receive a good OER that would counteract any negative effect of OER2. In light of the nature of the work at the XXX, the Board finds that LCDR X's expectation and the initial choice of the shorter reporting period were reasonable.

10. CDR X, the reporting officer for OER3, stated that once the applicant chose the shorter reporting period, he considered the choice "immutable." However, nothing in the regulations made the choice irrevocable. The dates recorded on an OSF need not be the same as those of the reporting period. Personnel Manual, Article 10-A-5.d.(1)(c). In addition, Article 10-A-3 of the Personnel Manual requires that the evaluatee's welfare be "paramount" in the choice of the reporting period. Therefore, at the

end of May 199x, the applicant's rating chain was not required to submit a semi-annual OER covering her performance during the previous 57 days. Moreover, she was not being detached from a unit, and her reporting officer was not leaving. Given the negative nature of OER3, it clearly was not in her best interest to prepare it for inclusion in her record. Therefore, although the submission of OER3 was within the command's prerogative, the Board concludes that her command committed an injustice when it prepared OER3 based on just 57 days' observation of her performance at the XXX. OER3 should be removed from her record. In light of this finding, it is unnecessary for the Board to address the applicant's other allegations concerning OER3.

11. The applicant asked the Board to remove OER7 in its entirety because, she alleged, it was unfair for her to be assigned to the Command and XXX without nine months' experience at XXXX. The "Junior Xxxx Intra-Office Dream Sheet," which, the applicant alleged, described XXX policy regarding junior xxxx assignments, states that "to the greatest extent possible every 'junior xxxx' will spend at least 9 months" in each of the various branches. It also states that "XXXX experience" is a prerequisite to assignment to the Command and XXX. Assuming the "Dream Sheet" accurately describes office policy, the Board finds that the applicant's assignment to the Command and XXX in November and December 199x did not violate that policy. She had "XXXX experience" which is cited as a prerequisite to assignment to the Command and XXX. Although it was not possible for the Coast Guard to give her nine months of experience xxxxxx at XXXX because of the Navy's decision, it was not therefore wrong for Coast Guard to try to give her nine months of experience in the Command and XXX. Nor was it wrong for her rating chain to comment negatively upon her unwillingness to complete the assignment in OER7.

12. The applicant alleged that the comment in OER7 criticizing her failure to xxxxxxxx in a xxxxxx xxxxx during her six weeks at the Command and XXX was unfair because, after she left the branch, the xxxxxx were not xxxxx for another two months. However, the fact that the xxxxxx were not xxxxx immediately upon her leaving the branch does not prove that she was not at fault for failing to finish xxxxx them while she was there. OER7 indicates that xxxxxx the xxxxxx was her primary assignment.

13. The applicant also alleged that OER7 was unfair because her supervisor in the XXXX was biased against her and lacked sufficient xxx knowledge to evaluate her performance. The evidence suggests that her supervisor may have heard negative reports about the applicant's performance prior to her assignment to the branch and that her supervisor often vocally criticized the applicant's performance. The applicant submitted statements by a yeoman and a volunteer xxxxxx in the XXXX indicating that they thought the criticism was unfair. She also submitted evidence indicating that she and the supervisor strongly disagreed about one or more xxx decisions made by the supervisor that a xxxx determined were erroneous. However, the Board finds that the

evidence does not prove that the supervisor was prejudiced against the applicant; it merely proves that she had heard others in the command criticize the applicant's performance, that she herself thought poorly of some of the applicant's work and professional skills, and that she expressed that opinion to the applicant within others' hearing. In addition, the anecdotal evidence of two erroneous xxx determinations on the part of the supervisor does not prove that the supervisor was incompetent to evaluate the applicant's work and xxx skills.

14. The applicant also alleged that OER7 was inaccurate because of her supervisor's comment that her "XXX motions required substantial input/correction from supervisor" and her reporting officer's comment that "[s]ubstantial supervisor participation [was] required in XXX xxxxx." A volunteer xxxxx who helped the applicant prepare the XXX xxxxx stated that she strongly disagreed with this assessment of the amount of supervision required by the applicant in the XXX xxxxx. However, the Board finds that the evidence does not prove that the comments are erroneous. The Board does not find the statement of the xxxxx more credible than the judgments of the applicant's rating chain.

15. The applicant asked the Board to remove all of the comparison scale marks on her OERs through her date of discharge from the Reserve (OER1 through OER11) or through her date of release from active duty (OER1 through OER9). She alleged that all of the comparison scale marks were unfair because she was never transferred from XXX where the "well was poisoned" so that she could get a "fresh start," and because she was not given the same chance to succeed as other junior xxxxs. Although the record indicates that the applicant acquired a very poor professional reputation at XXX, she has not proved that it was inaccurate, that it prevented her reporting officers from comparing her properly in accordance with Article 10-A-4.d.(9) of the Personnel Manual at the end of each reporting period, or that she was entitled to a "fresh start" at another command. The "Junior Xxxx Intra-Office Dream Sheet" indicates that junior xxxxs were expected to remain at XXX for several years, acquiring at least nine months of experience in each of six branches, and the applicant has not proved that it was unjust for the Coast Guard to assign her in accordance with this policy. In addition, the applicant has not proved that she was denied the same chance to succeed as other junior xxxxs at XXX. Although her poor performance at XXXX and early removal obviously hampered her professional development given the importance of xxxxxxx experience to the career of a military xxxx, the applicant has not proved by a preponderance of the evidence that her removal from XXXX and lack of xxxxxxx experience were the result of any error or injustice committed by the Coast Guard (see Findings 4 through 8, above).

16. The applicant argued that the Board should draw an adverse inference from the Coast Guard's failure to produce CDR X's spreadsheet of the comparison scale marks he has assigned to the officers he has supervised. The existence of the spread-

sheet could be considered evidence that CDR X properly completed the comparison scales in the applicant's OERs by comparing her against other officers he had supervised, in accordance with Article 10-A-4.d.(9) of the Personnel Manual. However, there is no evidence in the record indicating that CDR X misunderstood or purposefully failed to comply with the instructions in Article 10-A-4.d.(9) when he completed the applicant's OERs. The Board cannot assume that CDR X failed to comply with Article 10-A-4.d.(9) merely because the Coast Guard has not produced the spreadsheet he allegedly created to help him remember his evaluatees' comparison scale marks and relative experience. In the absence of proof that CDR X either complied or failed to comply with the instructions in Article 10-A-4.d.(9), the Board presumes that he acted in good faith and in accordance with the regulation. *Arens v. United States*, 969 F.2d 1034, 1037 (199x); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

17. The content of the spreadsheet allegedly shows that CDR X assigned the applicant lower comparison scale marks than he assigned to other xxxxs with her level of experience. However, even if the spreadsheet showed the converse—that the applicant's comparison scale marks were higher than those of other xxxxs of similar experience—this would not prove that her comparison scale marks were inaccurate. Therefore, the Board finds that there is no reasonable significant adverse inference to be drawn from the Coast Guard's failure to produce CDR X's spreadsheet. Moreover, neither the existence nor the content of the spreadsheet are material to the Board's decision in this xxxxx. The applicant has failed to prove by a preponderance of the evidence that the comparison scale marks in her OERs are unfair or inaccurate assessments of her performance in comparison with the performance of other officers of the same rank known to her reporting officers.

18. The applicant made numerous allegations with respect to the actions and attitudes of her command, her rating chains, and other Coast Guard and Navy officers. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

19. The only error or injustice the applicant has proved by a preponderance of the evidence with respect to her OERs is the inclusion of OER3 in her record. The applicant alleged that the errors in her record caused her to fail of selection for xxxxx, to be released from active duty, and to be discharged from the Reserve. She asked the Board to remove her failures of selection and return her either to active duty or to the Reserve. To have her failures of selection removed from her record, the applicant must make a "prima facie showing of a substantial connection or causal nexus between the error and the promotion passover or release from active duty." *Germano v. United States*, 26 Cl. Ct. 1446, 1461 (199x), citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982). Determining whether a nexus exists requires 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?" *Engels, supra* at 176.

20. Judged by its marks, OER3 is the third worst of the eleven OERs in the applicant's record. Of the three OERs in her record with a comparison scale mark of 2, it has the highest average mark (4.0) for the performance categories. The comments in OER3 are consistent with the marks and do not alter this assessment. Although OER3 covers only 57 days of the applicant's tenure at XXX, the Board concludes that her record appears marginally better without OER3. However, given the poor OERs and very low comparison scale marks that constitute most of the rest of the applicant's record, the Board concludes that it is very unlikely that the applicant would have been promoted either while on active duty or while drilling in the Reserve even if OER3 had never been prepared. Therefore, the Board finds that the applicant's failures of selection should not be removed from her record, and she should not be returned to active duty or to the Reserve.

21. Accordingly, OER3 should be removed from the applicant's record, but the remainder of her requests should be denied.

**ORDER**

The application for correction of the military record of former XXXXXXXX, USCG, is hereby granted in part as follows:

The officer evaluation report (OER) covering the period April 5, 199x, to May 31, 199x, shall be removed from her record and replaced with an OER prepared and marked "For Continuity Purposes Only."

All other relief is denied.

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Robert C. Ashby

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John A. Kern

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David M. Wiegand