

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-249

XXXXXXXXXXXXXX
XXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on September 8, 2009, following receipt of the application and notification that the applicant had exhausted her administrative remedies, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 16, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant (LT) in the regular Coast Guard, asked the Board to remove a written comment from her officer evaluation report (OER) for the period June 1, 2007, through May 31, 2008, when she was assigned as the Operations Officer of a Vessel Traffic Service (VTS) in Sector Xxxxxx. The comment states that she was “[c]ounselled this period concerning an inappropriate relationship with another member of the VTS staff, otherwise abided by all CG core values.” The applicant also asked the Board to remove from her record her failures of selection for promotion to lieutenant commander (LCDR) and to remove her possible separation and reinstate her on active duty if she has been separated from active duty for twice failing of selection for promotion before the Board’s decision is issued.

The applicant alleged that during the evaluation period for the OER, she “engaged in a brief personal romantic relationship” with a lieutenant junior grade (LTJG X) who was serving as the Watch Supervisor for the VTS. She admitted that she felt affection for LTJG X and that during a trip to Tennessee, he had “embraced her from behind in an affectionate and loving way.” She also admitted that he had hugged and kissed her when he picked her up at the airport upon her return from SAR School, which she had attended from October 15 to November 6, 2007, and that they had exchanged emails in which they discussed their feelings for each other. The applicant alleged that these incidents and a little “harmless flirting” were “the sum and substance of the relationship between [her and LTJG X] while they were both assigned to Sector Xxxxxx. The applicant alleged that the relationship did not last long and that they ended it while she was

away at SAR School because “the time was not right” since LTJG X was “going through a divorce,” and she was “getting over her ex-boyfriend,” who had been her fiancé and who had continued to live with her until October 2007. The applicant also stated that after she and LTJG X were transferred to different offices within Coast Guard Headquarters and LTJG X’s advancement and divorce came through, they resumed their romantic relationship and remain together.

The applicant alleged that while she was away at SAR School, her ex-fiancé, who had not accepted her decision to end their relationship, somehow retrieved emails and photographs from her computer and sent them to her command, which then conducted an investigation into her relationship with LTJG X. As a result of the investigation, during which she freely admitted to her romantic relationship with LTJG X, she received a letter from the Sector Commander stating that he was disturbed about her “‘unacceptable relationship’ with [LTJG X] who you occasional[ly] supervise and [who] is legally married.” The applicant alleged that this letter is erroneous because her relationship with LTJG X was not “unacceptable” under Coast Guard regulations, because she did not supervise the applicant, even occasionally, and because LTJG X was separated and only *technically* married. Nevertheless, the Sector Commander told her that her conduct would also be reflected on her OER. When she was shown a draft copy of the OER, it included the comment, “Counselled in this period concerning a potentially unacceptable romantic relationship with another member of VTS staff, otherwise abided by all CG core values.” However, the OER was rejected by the Personnel Command because of the word “potentially,” and in the final version of the OER, that word was removed from the comment and the adjective “unacceptable” was changed to “inappropriate.”

The applicant argued that the disputed OER comment should be removed from her record for several reasons. First, she argued that the written comment—“Counseled in this period concerning an inappropriate romantic relationship with another member of VTS staff, otherwise abided by all CG core values”—is legally and factually erroneous and renders the OER unjust. The applicant alleged that the word “inappropriate” is erroneous because she never supervised LTJG X, “not even occasionally,” so there was no question of jeopardized impartiality; because neither was in a position to affect the other’s career, assignments, benefits, or privileges; because LTJG X was separated from his wife and awaiting divorce; because they were of similar rank (LTJG X had already been selected for promotion to LT) and position; because they were assigned to a shore unit of more than 60 people, rather than a vessel or small unit; and because their relationship did not disrupt their work environment. Therefore, the applicant argued, her relationship with LTJG X was not unacceptable or inappropriate under the definitions and descriptions of types of relationships in Article 8.H. of the Personnel Manual. Nor was it an adulterous relationship under Article 134 of the UCMJ or a prohibited relationship under Article 92 of the UCMJ. In fact, she alleged, her relationship with LTJG X fell into a category of allowable romantic relationships under Article 8.H. of the Personnel Manual because they were of similar rank and position, they worked at a large shore unit of more than 60 people, and she was not his supervisor.

In support of her allegations, the applicant submitted a copy of the Sector’s published rating chain, which shows that the Operations Director, Mr. X, was both her supervisor and LTJG X’s supervisor. In addition, she alleged, when LTJG X specifically asked Mr. X if the applicant was his supervisor, Mr. X said, “No.” She submitted a statement from LTJG X about this conversation with Mr. X. The applicant alleged that she was not responsible for appraising

LTJG X's performance, provided no input for his evaluations, and did not assign work to him or oversee his work. She stated that as the VTS Operations Officer, she provided administrative support to Mr. X and to the VTS watch, processed leave requests, and supervised civilian employees and enlisted members. She denied supervising any junior officers or appraising their performance for their OERs at the VTS. She alleged that a statement on her 2007 OER that she supervised three junior officers "was corrected in the 2008 OER." Likewise, the applicant alleged that the statement in the OER that she oversaw the watchstanding & qualification of three junior officers and 23 enlisted members was erroneous because "the only people I ever actually supervised, even occasionally, were the [civilian employees]." She argued that "'oversight' is not the same as 'supervision.'" The applicant stated that as the Operations Officer, she was responsible for ensuring that the watchstanders had the tools and training they required, but she "did not, however, pass judgment on the qualify of their work or the adequacy of their training."

Moreover, the applicant argued, the investigator concluded that she and LTJG X had a supervisor/subordinate relationship without actually investigating that topic. Instead, the investigator focused on whether they had committed adultery, which was not the case since LTJG X had separated from his wife by moving out of their family home in October 2007. The applicant alleged that the command's conclusions about the appropriateness of their relationship were also flawed because they relied on a rule that prohibits romantic relationships outside of marriage between officers and enlisted members, which did not apply to two officers, and found that LTJG X was married, even though he was separated, simply because the State of Texas does not recognize legal marital separation. The applicant noted in this regard that even her rating chain did not believe the relationship was unacceptable because they originally called it a "potentially unacceptable" relationship.

Second, the applicant alleged that the OER is unjust because it is based on information that was sent to the command by her ex-fiancé, who was stalking her, and who was able to learn private information from the Coast Guard's PeopleSoft database. The applicant explained that her ex-fiancé, a civilian, did not like her decision to end of their relationship and began stalking and threatening her. She complained to the local police and received legal advice through the Coast Guard to obtain a restraining order. However, while she was away at SAR School, her ex-fiancé retrieved photographs and emails from her personal computer and sent them to her command on December 17, 2007, to try to ruin her career. In addition, because the ex-fiancé told the investigator that her "dream sheet" of desired future assignments matched that of LTJG X, it is clear that someone at the Sector invaded her privacy by accessing the PeopleSoft database for an authorized purpose and giving the information to her ex-fiancé. Therefore, she argued, it was unjust for her command to use the information provided by her stalker against her in her OER. She also complained that the command failed to initiate an investigation into this misuse of the PeopleSoft database and invasion of her privacy or "to appropriately respond to incidents of workplace violence."¹ Instead, the command referred her to the Employee Assistance Program.

Third, the applicant alleged that the OER comment is unjust because the Sector command knew that she did not supervise LTJG X. She pointed to the published rating chain and to Mr. X's statement that she was not LTJG X's supervisor as evidence of this error. She noted that

¹ This is the only mention of alleged workplace violence in the application and it is not explained.

neither Mr. X, their supervisor, nor CDR X, their reporting officer, was interviewed by the investigator to determine whether the applicant supervised LTJG X.

Fourth, the applicant alleged, she and LTJG X were entitled to rely on Mr. X's verbal assertion that she was not LTJG X's supervisor and on the published rating chain. She argued that they should have been able to rely on Mr. X's "advice" and should not have been punished for engaging in a relationship that they could not know would be considered inappropriate.

Fifth, the applicant alleged that the OER was a result of gender-based discrimination because while the command changed the comment about the relationship in her OER after the Personnel Command rejected it, the command chose not to change the identical comment in LTJG X's OER because of the "wiggle room" provided by the word "potentially." The applicant alleged that if the relationship was unacceptable for her, it was also unacceptable for LTJG X. Citing *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004)(cert. denied, 544 U.S. 923 (2005)), she argued that their slightly different ranks cannot explain or justify their unequal treatment in their OERs because subordinates have the same liberty interests under the Constitution as superiors. She argued that the command knew that leaving the word "potentially" in LTJG X's OER would allow him to be promoted and to continue his career, whereas the revised comment in her OER would cause her to fail of selection for promotion.

The applicant stated that when the Personnel Command rejected the original draft of the OER because of the word "potentially," her rating chain was entitled to change the wording of both her and LTJG X's OERs or to remove the comment from both OERs, but the rating chain was not entitled to treat her differently because of her gender. The applicant further noted that the evidence indicates that the Deputy Sector Commander, who was not a member of her rating chain, had significant, if not improper, influence over the wording. She argued that there was no gender-neutral reason for changing her OER but not LTJG X's.

Sixth, the applicant alleged that any denials of gender discrimination or other claims by her chain of command should be considered suspect because the command interfered with her attempt to gather statements from witnesses. She submitted an email from her reporting officer, CDR X, who refused to make a written statement for her but said he would do so in response to an official request from the Personnel Records Review Board (PRRB), the BCMR, or the Personnel Command. However, before refusing to provide her with a written statement, he had told her that the command told him that he had to change the comment containing the word "potentially" and that if he did not do so, the reviewer would add a comment page to the OER, which would likely be more detrimental to the applicant's record. Therefore, he changed the comment. The applicant's attorney stated that she was told by the command that although CDR X *could* speak to her, he did not want to speak to her. However, on November 3, 2008, CDR X advised the Legal Office in an email to "contact [the applicant's attorney], per above, so she understands that my direct contact with her is not authorized." Therefore, she argued, if he did not want to talk to her, it was because he thought he was not authorized to do so.

The applicant alleged that although Mr. X provided her with a written statement, the next day he sent her attorney an email telling her to direct any further inquiries through the District Legal Office. She alleged that the Deputy Sector Commander sent Mr. X an email directing him not to respond to her request for another statement because the District Legal Office "will do all

the talking for us.” Thus, she argued, the Deputy Sector Commander interfered in the applicant’s attempt to gather witness statements and ensured that only the District Legal Office would respond to her inquiries. The applicant’s attorney argued that such conduct is prohibited under Article 134 of the UCMJ, which prohibits “wrongful interference with an adverse administrative proceeding.” In this regard, she stated, while the BCMR application was initiated by the applicant and cannot cause the applicant’s discharge, the failure of her BCMR application could result in an administrative discharge for failure of selection for promotion. Citing *United States v. Denaro*, 62 M.J. 663 (C.G.C.C.A. 2006), she argued that even though the administrative proceeding that could result in discharge was a possible “downstream effect” of the Deputy Sector Commander’s interference with her investigation for her BCMR application, that downstream administrative proceeding was still being interfered with upstream for the purposes of Article 134 of the UCMJ. The applicant’s attorney further argued that the Deputy Sector Commander’s interference with her investigation may have violated 18 U.S.C. § 1512(b), which prohibits witness tampering, and 18 U.S.C. § 1505, which prohibits the obstruction of federal agency proceedings.

The applicant stated that under 33 C.F.R. § 52.24, she bears the burden of proving her case, and to do so she must have access to the evidence free from the interference of the Deputy Sector Commander or anyone else. Otherwise, the Deputy Sector Commander could “convert the BCMR process into a sham proceeding by unilaterally deciding that [the applicant] has no right to gather evidence from percipient witnesses who may be under his command, particularly when it is *his own actions* that are the subject of the inquiry.” She stated that the Deputy Sector Commander’s actions were the subject of her inquiry because he intentionally included an inaccurate statement in the counseling letter, which provided an erroneous basis for the comment in the OER, and he then interfered with her reporting officer’s preparation of the OER and discriminated against her based on her gender.

The applicant alleged that in drafting the counseling letter and OER comment, her chain of command judged her conduct by their own sense of morality and not by either the spirit or the letter of Coast Guard policy and regulation. Even if the Board finds that the OER comment is not erroneous, she argued that it should grant relief anyway as a matter of equity because by using their information against her, the Coast Guard participated in her victimization by her stalker ex-fiancé and whoever gave him information from the PeopleSoft database.

SUMMARY OF THE RECORD

On May 8, 1998, the applicant, who had about three years of enlisted service, was commissioned an ensign in the Coast Guard Reserve upon graduating from Officer Candidate School. She was promoted to LTJG on November 8, 1999; integrated in the regular Coast Guard on April 22, 2002; and was promoted to LT on November 8, 2002. During these years, the applicant served as a deck watch officer on a high endurance cutter, a special projects officer at an Integrated Support Command, an intelligence watch officer on a joint interagency task force, an administrative assistant and assistant future operations planner at a district office of law enforcement, and an assistant in the international division of the district office of law enforcement. On most of the ten OERs she received in her first five years as an officer, the applicant received good marks and laudatory comments. However, her final OER as a deck watch officer, dated March 31, 1999, states that she had not developed competency in her primary duties, had “admitted dis-

tain for shipboard duty,” and had been temporarily assigned ashore due to unnamed “recent events.” However, she was recommended for promotion because the reporting officer thought she would succeed in a support or administrative specialty ashore.

On November 30, 2003, the applicant left active duty, presumably under the temporary separation program. She received a master’s degree in accounting in May 2004.

On September 30, 2005, the applicant returned to active duty as the Operations Officer for the VTS in Sector Xxxxxx. As the Operations Officer, she was “[r]esponsible for all aspects of traffic management, ... exercised VTS/COTP authority for 73 mi[le] AOR ... Directly supervised 2 JOs, 3 GS-12s, 14 GS-11s. Oversaw watchstanding & qualifications of [28 enlisted members]. Collateral duties: ... Command Security Officer.” On her first OER in this position, she received very good marks and her reporting officer’s “[h]ighest recommendation for continued promotion with peers.” The supporting comments included the following:

- “Exceptional training regime resulted in qualified watch that screened over 8400 ...”
- “Extremely resourceful Ops Off/Watch Sup. Managed 16 groundings ...”
- “Maintained continuous liaison between waterways management division & Situational Controller during incident management efforts. Provided timely assistance & cogent recommendations & when needed, adjusted watch, net result – enhanced team cooperation.”
- “Directed watches during incident management activities, calm demeanor & clear direction facilitated effective initial response to 65 incidents in the port.”
- “Maintained solid presence with the night sections; this personal attention paid to night watches has led to greater understanding of issues and concerns of overnight crews.”
- “Ensured VTS watch carried out in a professional manner through training & augmentation when necessary. Assigned personnel to hurricane watch bills. Did not hesitate in making tough decisions regarding who would stay to close down the traffic center, who would evacuate & who would re-man the watch after passage.
- “Excellent leadership of 50 member crew, management of 24x7 watches controlling over 260,000 vessel transits yearly.”

On her second OER in as the Operations Officer at the VTS, the applicant received excellent marks and many laudatory comments, including the following:

- “During a nine-day period of near blackout fog, helped to facilitate over 450 ship arrivals.”
- “Provided assistance, advice and recommendations to enhance team cooperation within maturing Sector Xxxxxx organization.”
- “Adjusted VTS watch-bills to balance team strengths and enhance teamwork. Resolved several difficult conflicts, continues to build a solid, cohesive team. In short – the model VTS Ops Officer.”
- “Expert coordination of very senior watch crews showcased both informal & formal leadership in effective handling [of] issues/resolving problems.”
- “Oriented towards a pro-active & preventive approach to traffic mgmnt, lead team during 16 vsl interventions, ...”

- “Demonstrated significant expertise & capability in managing diverse crew during 24x7 by 365 day watch organization. Promote immediately.”

The disputed OER in this case is the third the applicant received as the VTS Operations Officer. The description of duties in block 2 states that she was “[r]esponsible for all aspects of traffic management, ... exercises vessel traffic service (VTS) and COTP authority for 73 NM AOR with 600+ daily vessel transits ... daily interaction with regional CG commands, maritime industry, and other fed/state/local agencies to ensure vessel/facility safety & security. Directly supervises 3 GS-12s & 14 GS-11s. Oversees watchstanding & qualification of 3 JOs, [and 23 enlisted members]. Collateral duties: ... Security Officer.” The applicant received excellent marks in the disputed OER, which were supported by many laudatory comments, including the following:

- “Thorough & significant prep sustained continued successful operation of VTS.”
- “Maintained near continuous liaison with industry stakeholders, ...”
- “Oversaw VTS watch teams conduct 27 interventions ...”
- “Demonstrated remarkable understanding of complex issues ...”
- “Consistently led VTS team in facilitating safe & efficient movement of traffic during 195 waterway incidents.”
- “Highly effective communicator in highly visible position.”
- “Encouraged and achieved an excellent level of cross-training within VTS watch teams.”
- “[L]ed in fostering an environment of mutual trust and confidence both within VTS watch organization and with our maritime users & stakeholders.”
- “Effectively directed and orchestrated the efforts of VTS watch personnel and sustained the vital atmosphere of teamwork necessary to operations.”
- “Meticulously supervised VTS watch during normal & emergency operations; facilitated 600+ vsl transits/day, carefully implemented traffic measures to mitigate risk ...”
- “Superb candidate for assignment to greater leadership roles ...”
- “Recommended for promotion w/ peers.”

The reporting officer’s section of this OER also contains the disputed comment, “Counselled this period concerning an inappropriate relationship with another member of the VTS staff, otherwise abided by all CG core values.”

On June 2, 2008, Mr. X sent the part of the disputed OER that he prepared as supervisor to CDR X, the reporting officer. He noted that he had “copied into your section the language we used for the other party in the late unpleasantness. Propose to treat both parties equally as regards documentation.” (The applicant submitted a copy of the reporting officer’s page of the draft OER. Mr. X had entered recommended numerical marks, which were not the same marks that CDR X ultimately assigned, but the only recommended comment Mr. X included on the page stated, “Counselled this period concerning a potentially unacceptable romantic relationship with another member of the VTS staff, otherwise abided by all CG core values.”

On July 17, 2008, the Personnel Command sent the applicant’s reporting officer and reviewer an email stating that the disputed comment as originally written with the phrase “potentially unacceptable” was too vague and had to be reworded or removed. On July 18, 2008, CDR

X sent an email to the Deputy Sector Commander asking if they should change LTJG X's January 2008 OER because it contained the same wording that the Personnel Command had rejected in the applicant's OER. The Deputy Sector Commander replied, "I actually prefer the comment that we had originally. It says 'potentially' and that seems to give more wiggle room. The comment on [the applicant's] OER is very black and white." The OER reviewer returned the OER with the final, revised comment to the Personnel Command the same day.

The applicant was not selected for promotion by the LCDR selection boards that convened in 2008 and 2009 and has not been offered continuation. Therefore, under 14 U.S.C. § 283, she will presumably be separated from active duty on June 30, 2010.

On August 7, 2009, the Personnel Records Review Board (PRRB) issued a decision denying the applicant's request to have the disputed comment removed from the OER. The PRRB noted that CDR X had submitted a statement saying that "there are several presentations of fact and conclusion within [the applicant's] application that are not accurate, based on my knowledge." With respect to the applicant's alleged supervisory relationship with LTJG X, the PRRB wrote that as the Operations Officer, the applicant was the Watch Captain of the VTS and noted the comment that she "'oversaw the watch standing and qualifications of 3 JOs,' one of which was the other officer in the relationship." The PRRB stated that while the applicant was not a member of LTJG X's rating chain, she had trained him and that a "romantic relationship within this context could undermine the respect for authority or result in the relationship being used for personal gain or favor," which is an unacceptable relationship under Article 8.H.2.c. of the Personnel Manual. The PRRB noted that several other comments show that the applicant filled a position of authority over other the watch teams, LTJG X was a member of one of these watch teams. The PRRB found that while the applicant was not on LTJG X's rating chain, "she did hold a position of authority which could be undermined or be used to influence personnel decisions." The PRRB disagreed with the applicant's arguments that it was unjust for the command to use information that had been submitted by a stalker against her. With regard to her allegations about a member of the VTS staff accessing the PeopleSoft database to gain information about her, about the command's alleged interference in her attempt to gather statements, and about gender discrimination, the PRRB noted that if she felt her civil rights were being violated, she could have filed a civil rights complaint, but she did not do so. The PRRB concluded that the applicant's rating chain had carried out its duties properly and that she had not overcome "the presumption of regularity with respect to the construction or submission of the disputed OER." The PRRB included affidavits from the applicant's rating chain, which are summarized below.

Statement of Mr. X, the Applicant's Supervisor

Mr. X stated that "[n]o one shaped my response to any query in this matter, and no one has imposed any language above my signature on any of the OERs I have signed." He noted that he was "a party to a post-investigation discussion with the Deputy Sector Commander [and CDR X] during which 'potentially inappropriate' was proposed as mitigating language for both officers' OERs in documenting the result of the by then concluded investigation. I recall being uncomfortable with that process but did not push back very forcefully as the remark was not made above my signature." Mr. X also stated that his deflection of the request from the applicant's attorney to the District legal office pertained only to her request for the published rating chain because he did not think he should provide her with a Sector-wide instruction. Mr. X

stated that he played no part in the IO's investigation, was unaware of the allegations until the investigation was completed, and cannot recall any behavior that was disruptive to the mission of the VTS.

Statement of CDR X, the Applicant's Reporting Officer

CDR X noted that he had submitted a statement to the applicant dated January 7, 2009, about the revision of the disputed comment in her OER. CDR X stated that he had no knowledge of the content of the counseling letter that the Sector Commander had given the applicant until he reviewed the applicant's PRRB application. CDR X stated that in drafting the OER he was allowed to rely on other officers' "reliable reports" and that he did so. In addition, he stated that his queries to the Deputy Sector Command "were all initiated to ensure I fulfilled my responsibilities within the officer evaluation system," CDR X denied ever telling the applicant that he was told that if he did not change the statement, the reviewer would add a comment page. CDR X explained that what he told her was that if he removed the disputed comment, instead of amending it, the command could discuss adding a reviewer comment with her reviewer. He also told her that, in his opinion, it would have been more detrimental to her if the allegation of an inappropriate relationship appeared on a separate reviewer comment page rather than amid the reporting officer's comments. CDR X also denied that the Deputy Sector Commander inappropriately influenced his affidavit. CDR X stated that he had asked the District legal office to review his statement to ensure that it was responsive to the applicant's questions and that neither the legal office nor the Deputy Sector Commander proposed any changes to his affidavit.

Statement of the Reviewer

The reviewer of the disputed OER stated that he has "no further information to provide that might either support or refute [the applicant's] allegations regarding the OER in question."

SUMMARY OF THE INVESTIGATION

The applicant submitted redacted copies of documents from the report of the investigation into her conduct. The documents show that on December 27, 2007, the Sector command appointed a lieutenant commander to serve as a preliminary inquiry officer (IO) to investigate alleged violations that the applicant and LTJG X had violated Article 133 (conduct unbecoming an officer and gentleman) and Article 134 (adultery) of the UCMJ. The investigation was initiated upon receipt of an anonymous letter alleging that the applicant had knowingly violated every core value of the Coast Guard by having a romantic relationship with an enlisted member on active duty, lying to investigators about an inappropriate relationship between two operations specialists, fraternizing with several enlisted members, and engaging in a relationship with a married officer with three children. The anonymous letter states that the applicant had interfered in the investigation of the relationship between the two enlisted members by covering up information and informing them of how the command was handling the investigation. He alleged that the applicant also attempted to blackmail the investigator into stopping the investigation in that case.

The applicant and LTJG X were advised of their rights in writing and signed statements showing that they did not desire to consult lawyers but did desire to submit statements and to

answer questions. The IO, a lieutenant commander, submitted a report on January 22, 2008, finding that an “inappropriate relationship” had occurred between them. The IO noted that the applicant had asked her fiancé to move out of their home when she returned from a trip to Tennessee to visit LTJG X; that the applicant had filed a harassment complaint against her fiancé with the police on November 11, 2007; and that in that complaint she identified him as her fiancé and stated that she had “been with him for 5 years.” The IO stated that LTJG X “is separated and no longer living with his wife” but that in the State of Texas, “a couple is either married or not” and a married couple “remains married until the union is legally dissolved by divorce.”

The IO stated that the applicant and LTJG X had violated Article 8.H.2.g.2. of the Personnel Manual and that they did not comprehend the seriousness of their actions and had also violated Article 133 of the UCMJ. The IO recommended that the charge of adultery be dismissed “due to lack of evidence” and that the applicant and LTJG X be formally counseled and issued administrative letters of censure. The IO also noted that the applicant’s ex-fiancé and an unknown person working at the VTS had “colluded” to make the command aware of the relationship and that the unknown person had accessed their personal data in the Coast Guard’s database.

The IO included in the report copies of emails between the applicant and LTJG X in her report. In an email dated October 18, 2007, LTJG X wrote the following to the applicant:

I am in love with you. I don’t want anything to be a distraction or deterrent from that priority. I feel like we need one of those hugs right now that regain both of our sanity.

It’s killing me to not have you here with me right now. I want to look into your eyes and tell you that everything is going to be fine, because I know that it is. We are two very smart individuals and we know how to handle our business accordingly. ...

Now that other tune ... that sounded like the music that is always played at weddings right before the bride comes down the aisle ... isn’t it? That’s what I think of. I can imagine you in a white dress.

I can’t wait for this horrible separation to be over. I can’t wait to be side by side, together again.

The applicant responded with an email stating that she loved him, that she was not going anywhere, and that her feelings for him were “much stronger than any anxiety” she felt.

The IO also included the following documents in the report of the investigation:

- A police report dated November 9, 2007, states that the applicant had lodged a complaint of harassment against her ex-fiancé. She told the police that “she had been with her ex-fiancé for approximately five years when they decided to break up” and that he “took nearly all of his belongings and left before she went on a 3½ week training class.” However, when she returned home from the training on November 6, 2007, she found that all of his belongings had been removed, “but there was a bullet that was left on the dresser in the bedroom.” In addition, the ex-fiancé “had been calling her and emailing her.” The police called the ex-fiancé, who stated that he had left a “large deer stand in the garage of their home” and asked when he could retrieve it.
- A photograph of the ex-fiancé, identified as SK2 A, with his arm around the applicant.

- A photograph of the applicant and the ex-fiancé posed as a couple on one side of a fireplace with the two operations specialists posed as a couple on the other side of the hearth.
- A photograph of the applicant and the female operations specialist wearing jeans and revealing shirts posed on either side of a fireplace.

Summary of the IO's Interview with LTJG X

On January 9, 2008, the IO advised the LTJG X of his rights in writing again and interviewed him. The IO showed him a copy of the email dated October 18, 2007, and asked him to describe his relationship with the applicant. LTJG denied having had an adulterous affair with the applicant. He stated that initially they exercised together but realized that the relationship could get complicated because they were attracted to each other and so they “made a decision to end it” and were “proud that we made that decision.” LTJG X denied that the applicant had caused his separation, which he blamed on his wife, but his statement to the IO about the timing of his separation from his wife has been blacked out.

Summary of the IO's Interview with the Applicant

On January 9, 2008, the IO advised the applicant of her rights in writing. She presented the applicant with a copy of her email to LTJG X. The applicant stated that her ex-fiancé must have guessed her password and sent it to the command. When the IO asked her what “separation” LTJG X referred to in his email to her, the applicant stated that it was a reference to her being away on temporary duty. The applicant denied having an adulterous affair with LTJG X and denied being the cause of his divorce. She stated that their relationship involved only activities such as biking and rollerblading but that they had started to feel affection for each other. The applicant stated that their relationship had developed into an affectionate one in October and had ended in December when she was away at SAR School. When asked why the relationship had ended, the applicant replied, “We both agree that it was not right for now. Him going through his divorce and me getting over my ex-boyfriend. Besides he was a married man.”

Summary of Interview with Ms. X

On January 11, 2008, the IO interviewed Ms. X, who was a secretary at the Sector command. Ms. X stated that the applicant had told her she was entering a romantic relationship with LTJG X in October or November 2007. Ms. X stated that she had seen their relationship start with “harmless flirting in the office.” Ms. X stated that she had seen LTJG X hug the applicant from behind and that it was not just a friendly hug. Ms. X stated that the applicant had made a point of saying “on more than [one] occasion that they [had] not had sex so their relationship would not be a violation of [the] UCMJ.” LTJG X had told Ms. X that he wanted to get a divorce before his 10th anniversary so that his wife would not get any of his retirement pay. Ms. X further stated that the relationship between the applicant and LTJG X had cause his separation from his wife. She stated that when the applicant's ex-fiancé had found an email that LTJG X had sent her, the ex-fiancé was upset and had contacted both LTJG X and LTJG X's wife. Thereafter, LTJG X's wife had confronted LTJG X. Ms. X stated that she had gathered from the applicant that these confrontations had happened “upon her return from SAR training. It's my understanding that [LTJG X] made plans to file for separation around the same time that [the ex-fiancé] was informed that their relationship was over and to move out. I know [the applicant]

asked [the ex-fiancé] to move out but the first of November.” Ms. X stated that the applicant had theretofore worn an engagement ring from the ex-fiancé. Ms. X stated that she had heard that the ex-fiancé had done something inside the applicant’s house while she was away but that he had acted out of anger. She stated she was concerned that the ex-fiancé “will be made to appear like a stalker and [LTJG X] her protector.”

Summary of Interview with the Applicant’s Ex-Fiancé

On January 15, 2008, the IO interviewed the applicant’s ex-fiancé after he contacted the IO by telephone to impart information for the investigation. The IO stated that his description of events from September 2007 to the present aligned with those of Ms. X, the applicant, and LTJG X. The ex-fiancé told the IO that he was engaged to the applicant but had seen the applicant walking around a car wash holding hands with LTJG X; that LTJG X had greeted the applicant at an airport with a hug and a romantic kiss; that LTJG X had visited the applicant’s house; that the applicant had taken a trip to Tennessee with Ms. X; and that the IO should check the “dream sheets” of the applicant and LTJG X because they had listed the same units. The ex-fiancé stated that he had mailed the packages with evidence about the romantic relationship between the applicant and LTJG X but that someone in the applicant’s “shop” had prepared the packages.

Summary of Re-Interview with LTJG X

On January 16, 2008, the IO re-interviewed LTJG X after reminding him of his rights. The IO asked him when he had separated from his wife and family and when he had filed for divorce. His responses to the questions have been blacked out. He stated that he could not recall embracing the applicant from behind in Tennessee; after a hesitation he admitted to hugging the applicant in the airport upon her return from SAR School but refused to say whether he had kissed her; he denied having held hands with the applicant at a car wash. The IO advised LTJG X that the car wash incident had occurred the day before the applicant left for SAR School, and that before the incident, when the ex-fiancé had asked the applicant “if she wanted to do something or go out,” the applicant had told him that “she wanted time to herself.” Therefore, the ex-fiancé was surprised to see them together.

Summary of Re-Interview with the Applicant

On January 16, 2008, the IO re-interviewed the applicant after reminding her of her rights. In the interview, the applicant stated that she had traveled to Tennessee to be with Ms. X and LTJG X and that LTJG X had embraced her from behind in a loving way during a trip to Tennessee. In addition, she admitted that upon her return from SAR School, her ex-fiancé was supposed to pick her up at the airport, but when he called her to remind her, she told him not to come and that Ms. X would. However, LTJG X picked her up instead and hugged and kissed her passionately. The applicant denied having been holding hands with LTJG X when they ran into her ex-fiancé at a carwash. She denied that LTJG X had ever visited her house overnight.

With respect to her relationship with her ex-fiancé, the applicant stated that she had “been with him” about 2.5 years and was engaged to him for “less than a year” beginning in 2006. When the IO noted that a police officer’s report of the first complaint she had filed against her

ex-fiancé stated that the applicant had identified him as her fiancé and that they had been together for five years, the applicant stated that she had asked the police to correct the report.

The applicant also admitted that she had shown her draft statement to LTJG X before submitting it to the IO. The IO noted that the draft had contained a second paragraph, which did not appear in the final version and “informed her that such act can be perceived as conspiracy to interfere with the investigation or collusion.”

SUMMARY OF DOCUMENTS SUBMITTED BY THE APPLICANT

On January 24, 2008, the applicant sent the Sector Logistics Chief an email noting that her ex-fiancé had information about her e-resume in PeopleSoft and asking about the possibility of getting the assistance of the Coast Guard Investigative Service (CGIS). This email was forwarded to the Deputy Sector Commander, who replied, “This is not a CGIS issue but of concern. Somebody is feeding [the ex-fiancé] some info, might not be from this command if it is from PeopleSoft. I need to know more about how we can determine ‘who accesses what’ in PeopleSoft (if there is even a way to do that).” The Sector Logistics Chief replied that regular “Employee Review” access to PeopleSoft would not reveal an officer’s e-resume and that the ex-fiancé could have obtained the information from someone outside the command or by obtaining the password from someone with higher authority access to PeopleSoft. The Personnel Service Center had stated that PeopleSoft only tracks who makes a change in the database, not who views what information, but that it was possible CGIS or CGHQ might be able to do so. The Sector Commander responded that the applicant should be informed that “there is no way to determine who accessed the info in PeopleSoft.”

On February 7, 2008, the Sector Commander gave the applicant a private letter (not to be included in her military record) to document a counseling session. In the letter, he stated that he was concerned about her unacceptable relationship with LTJG X, whom she occasionally supervised and who was legally married. He noted that they had exchanged romantic emails and kissed passionately in an airport and that she had traveled to Tennessee to be with him. He further noted that she had previously been engaged to an enlisted member while they were both on active duty and that such a relationship between an officer and an enlisted member was prohibited. The Sector Commander stated that the “[r]esolution of these matters can take many courses,” but that he had chosen to counsel her instead of imposing non-judicial punishment. He noted that her conduct would be reflected in her OER.

On February 14, 2008, a Coast Guard legal assistant attorney sent the applicant’s ex-fiancé a letter demanding that he cease all contact with her. On February 16, 2008, the Deputy Sector Commander asked if the applicant’s complaint about a stalker was a new case. He received a reply indicating that there was only one alleged stalker, not two.

On October 6, 2008, the applicant emailed CDR X asking for a signed statement saying that he had been told that if he did not change the original comment about a “potentially unacceptable relationship,” the reviewer would add a comment page that would be more detrimental to her career and saying that the IO had not interviewed him.

On October 21, 2008, CDR X sent LT C of the District legal office an email saying that he had received a voicemail message from the applicant's attorney. CDR X stated that he had briefed the Deputy Sector Commander on her message "and told him I intended to contact [the legal office] on this request. CDR X asked LT C to contact the applicant's attorney for him.

On November 3, 2008, CDR X sent LT C another email stating that he had received another email from the applicant's attorney, who told him she had been expecting a telephone call from either CDR X or LT C and had not received one. CDR X stated, "Per our conversation on 10/22/08, you intended to make contact with [the attorney] to advise her that I would not be returning the call. ... Please contact [the attorney], per above, so she understands that my direct contact with her is not authorized." On November 4, 2008, LT C replied, stating that he had informed the attorney "in no uncertain terms that any inquiries regarding this matter should be coordinated through DX legal, specifically me. ... Also, per your request from our previous conversation, [the attorney] and her client were made aware that it is not the intent of the command to stonewall their efforts with respect to seeking information from the command that may be useful to their cause, but that coordinating command inquiries/responses through DX legal is needed given the nature of the BCMR process, particularly when attorneys are involved."

On November 6, 2008, the applicant's supervisor, Mr. X, signed a statement for her stating that the applicant "was not the supervisor of [LTJG X]." In addition, he stated that in late 2007 or early 2008, the Deputy Sector Commander had asked him "without any context" about supervisor/subordinate relationships among the officers at the VTS and that he had told the Deputy Sector Commander that he "was the supervisor for all officers assigned to [the] VTS." Mr. X also sent the Deputy Sector Commander an email about his contact with the applicant's attorney. Mr. X stated in his email that his "narrowly focused statement is not a problem" and asked whether the Deputy Sector Commander had "any reservations" about providing the attorney with a copy of the Sector rating chain without a FOIA request. The Deputy Sector Commander responded stating, "Do not respond to the request from the lawyer. Please refer her to [LT C] at DX legal. ... DX legal has the lead and will do the talking for us."

Also on November 6, 2008, the applicant's attorney sent Mr. X a request seeking a copy of the Sector's published rating chain and a statement about whether the applicant had supervised LTJG X and whether he had ever told anyone that the applicant was not LTJG X's supervisor. Mr. X replied the next day, telling the attorney to "refer further requests for information in this matter to [LT C] of USCG District x legal."

On December 10, 2008, the applicant's attorney sent an email to LT C reminding him that he had told her that CDR X was willing to provide a written statement. LT C forwarded the email to CDR X. CDR X responded by emailing him a draft affidavit, noting that he had asked the Deputy Sector Commander to review it and that he had concurred, and asking LT C to review it as well.

On January 7, 2009, the applicant's reporting officer, CDR X, signed a statement for the applicant's attorney. He stated that the Personnel Command had returned the disputed OER to the command on July 17, 2008, because of the ambiguous word "potentially." The Personnel Command required that the comment be removed or reworded. Because the Deputy Sector Commander had previously approved the wording of the comment, CDR X consulted him and,

with his concurrence, revised the comment and forwarded the revision to the OER reviewer before further forwarding the revised version back to the Personnel Command the same day. CDR X stated that he was not involved in the investigation and had not been questioned by the IO but had reviewed the IO's report. CDR X stated that no one ever told him that if he did not change the comment in response to the Personnel Command's request that the OER reviewer would add a comment page.

On April 20, 2009, the applicant's own attorney signed an affidavit stating that after she left a message on CDR X's voicemail on October 21, 2008, her call was returned not by CDR X but by LT C of the District Legal Office. When the attorney complained that she was being stonewalled, LT C told her that he would contact CDR X and that she would hear back either from him or from CDR X. However, she did not hear back from CDR X, and so she called him again and left another voicemail. CDR X again failed to return her call, but LT C called her on November 4, 2008, and told her that CDR X did not wish to speak to her "because all official command statements had to be coordinated with Legal" and that if she sent LT C her questions, he would forward them to CDR X, who would provide a statement. The attorney told LT C that she was not looking for an official statement and that she might have follow-up questions. However, LT C told her that all contact had to be through him "because [CDR X] did not 'feel comfortable' speaking with an attorney." The applicant's attorney stated that on November 4, 2007, she also called Mr. X and asked him for a statement. He agreed to provide a statement and a copy of the Sector's published rating chain. Mr. X sent her a signed affidavit on November 6, 2008, but the next day sent her an email asking her to "refer further requests for information in this matter to [LT C]." Therefore, she concluded that someone at the Sector was interfering with the investigation and she never called the Sector again. However, she called the Legal Office on November 19, 2008, and told CAPT T that someone at the Sector was interfering with her investigation. CAPT T told her that the Legal Office was not telling the witnesses that they could not talk to her but that they did not want to speak with her and that if she persisted in trying to contact them she might "draw a bar complaint" from one of the witnesses. On January 7, 2009, CDR X responded to questions she had sent him through LT C after gaining the Deputy Sector Commander's concurrence. The attorney further complained that she believed that the ex-fiancé had sent the Sector command two emails that were not included in the response to her request for information about the investigation under the Freedom of Information Act (FOIA).

On April 21, 2009, LTJG X provided an affidavit for the applicant. He stated that he had reported for duty to Sector Xxxxxx on December 15, 2005, and began working as a Watch Supervisor at the VTS in April 2006. To clarify his chain of command, he asked Mr. X if the applicant, as the Operations Officer, was his supervisor, and Mr. X said, "No." Mr. X told him that the Operations Officer "is there to coordinate the watch." LTJG X was selected for promotion to LT in September 2007. LTJG X stated that as a Watch Supervisor, he ensured that watch operations were conducted in accordance with standard procedures, disseminated and logged information as necessary, monitored the workloads of his staff to optimize operations, supervised the qualification training for assigned personnel, and performed "overall supervision and management of assigned section." LTJG X stated that Mr. X was his supervisor and that Mr. X "was the approving authority for all matters above the Watch Supervisor level." LTJG X stated that his duties included making reports to many Sector personnel, including the applicant, but that the applicant did not have any input into his evaluations. LTJG X stated that he and the applicant "were peers, especially with my selection for LT."

LTJG X further stated that his marriage had begun dissolving in October 2005 because his wife had had an affair. They had attended counseling “for the sake of the children,” but his wife began another affair in February 2007. They discussed divorce “many times throughout the year,” but it was unaffordable until October 2007, when he could move out to another residence and they could both afford an attorney. LTJG X stated that the applicant “had absolutely nothing to do with the dissolution” of his marriage, and his divorce was final in May 2008.

LTJG X stated that the applicant’s ex-fiancé had harassed him with threatening telephone calls and emails and had driven by his house to watch him. LTJG X complained that when he asked the Sector command to investigate how the ex-fiancé had obtained private information about him, his request was denied. LTJG X stated that the ex-fiancé was a harasser with violent tendencies and noted that the ex-fiancé had left a single bullet in the center of a dresser “after he moved his stuff out” of the applicant’s residence.

VIEWS OF THE COAST GUARD

On March 12, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG argued that the applicant’s allegation that she did not have a supervisory role with respect to LTJG X is meritless because as the VTS Operations Officer, she was “responsible for all aspects of traffic management,” as the disputed OER states. The JAG stated that it is “inherent in the applicant’s position as the VTS’s Ops Officer that some degree of supervision and oversight must be maintained [with regard to] the daily watch sections and the watch section supervisors. ... To allege otherwise is farcical at best.” The JAG noted that the disputed OER is “replete with examples of the applicant’s supervisory-duty connotations: In this instance, the applicant knew or should have known that the very essence of her position as the ‘Operations Officer’ preclude[d] her from any type of relationship other than a professional supervisor/subordinate – working relationship with [LTJG X].” The JAG concluded that the applicant’s romantic relationship with LTJG X was clearly in violation of Article 8.H.2.f. of the Personnel Manual.

The JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC, the successor to the Personnel Command). The PSC submitted additional affidavits from the applicant’s rating chain. The PSC stated that the rating chain fulfilled its duties in accordance with the Personnel Manual and that language in the OER shows that as the Operations Officer and the senior watch officer, she was second in charge at the VTS and had authority over LTJG X. The PSC stated that LTJG X was periodically under the applicant’s direction, such as when Mr. X was absent, “and not just on matters concerning watchstanding.” The PSC also denied that the applicant and LTJG X were “peers” because the applicant “was nearly 5 years senior in rank, preparing for the LCDR Selection Board and [LTJG X] was still a lieutenant junior grade, not having been promoted to full lieutenant until 14 July 2008.”

The PSC also noted that because Article 8.H.2.f. of the Personnel Manual uses the word “inappropriate” to describe an unacceptable relationship, the rating chain’s use of the term was

valid. The PSC also noted that the command chose to issue the applicant an administrative letter of censure, instead of punishing her at mast, due *not* to a lack of evidence but to how the relationship came to the attention of the command. The PSC stated that it was not unjust to mention the relationship in the OER just because of her ex-fiancé's involvement because the relationship was properly investigated and the many of the allegations were found to be true.

The PSC also denied that the disputed comment was gender-biased and noted that she did not file a civil rights complaint. The PSC stated that it does not compare officers' OERs and opined that the applicant was fortunate to have received good marks on the OER since the disputed comment "justifies a below standard mark."

The PSC noted that the applicant did not submit an OER Reply to rebut the disputed comment in her OER and that she had the opportunity to submit a written communication to each of the selection boards that reviewed her record for selection to LCDR, but chose not to. The PSC further noted that in 2008, only 342 of 448 candidates were selected for promotion to LCDR and in 2009, only 256 of 364 candidates were selected.

Statement of Mr. X, the Applicant's Supervisor

Mr. X stated that he was the applicant's and LTJG X's direct supervisor at the VTS. Therefore, he thought it was odd that he was never questioned by the IO. He stated that he participated in a discussion with the Deputy Sector Commander and CDR X about how to describe the relationship between the applicant and LTJG X in their OERs, and he was uncomfortable with the involvement of the Deputy Sector Commander in the development of the OER. (He also alleged that such involvement was an ongoing problem because the reviewer had made "attempts to rewrite various OERs on [the] junior officers" at the VTS.) However, he did not object to the Deputy Sector Commander's involvement because the disputed comment would not be in his section of the OER. Mr. X stated that he was unaware that the Personnel Command had rejected the disputed comment as originally written until the applicant informed him of it. Mr. X stated that nothing that had occurred left him particularly proud of any of the participants.

Statement of CDR X, the Applicant's Reporting Officer

CDR X stated that LTJG X's January 2008 semiannual OER with the comment about the "potentially unacceptable relationship" was reviewed by the Deputy Sector Commander "to ensure it as consistent with the command's decision as a result of the investigation." This OER was cleared and validated by the Personnel Command. Therefore, he used the same comment in drafting the applicant's May 2008 annual OER, but it was rejected by the Personnel Command and so he revised it as stated in his January 7, 2009, statement for the applicant. CDR X stated that he did not abdicate his responsibility as a reporting officer to provide an independent review of her conduct, but he did use the Sector Commander's determination about the applicant's conduct as a reliable report on which he could base an OER comment. CDR X also repeated statements that appear in his other statements in the record.

Statement of the Applicant's Reviewer

The reviewer stated that he is "convinced that an error or injustice did not occur" with respect to the disputed OER. He noted that as the VTS Operations Officer, the applicant was second-in-charge at the VTS and, "on occasion, acted as VTS Operations Director during her supervisor's abs[ences]. Consequently, she was in a supervisor-to-subordinate relationship with [LTJG X] and others who worked within the VTS."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 2, 2010, the Board received the applicant's response to the Coast Guard's advisory opinion. In addition, she stated that she did not submit an OER Reply because under the regulations, an OER Reply cannot result in a correction of the OER and "would have served only to invite additional erroneous and unjust negative comments" in her record. With regard to the claim that she should have filed a civil rights complaint if she felt she had been the victim of gender-based discrimination, the applicant stated that, although she was aware that the language in her OER had been changed and that the language in LTJG X's OER had not been changed, she did not know that the command had made a conscious decision to treat her differently until she received their emails in response to her FOIA request in April 2009. Moreover, she noted, a civil rights complaint would not have resulted in the correction of the OER either as only the BCMR has that authority.

The applicant argued that because the Sector Commander's administrative letter of censure was based on an erroneous determination of LTJG X's marital status and because CDR X stated that he based the disputed OER comment on a "reliable report" from the Sector Commander, "to the extent the comment in the OER was based on marital status it was erroneous." The applicant reiterated her allegation that she did not supervise the applicant and noted that the reviewer's comment that she was Acting Operations Director when Mr. X was absent does not indicate that this ever occurred while the romantic relationship was occurring. The applicant alleged that the Coast Guard did not submit any evidence that she ever supervised the applicant. She alleged that if she did have a supervisory/subordinate relationship with LTJG X, she was unaware of it and that they were entitled to rely on Mr. X's statement to LTJG X that the applicant was not his supervisor. She argued that it shocks the sense of justice for the command to punish them for engaging in an "inappropriate relationship" after Mr. X told LTJG X that the applicant was not his supervisor.

The applicant alleged that the statements of CDR X and Mr. X show that the Deputy Sector Command exercised an undue influence over the disputed comment in her OER. The applicant alleged that the evidence shows that the Deputy Sector Commander directed that the inclusion of both the original comment and the revised comment in the OER and that CDR X should not have consulted him when deciding what comments to make in the OER.

The applicant elaborated on many of the allegations made in her application and concluded that she has proved that the disputed comment is erroneous and unjust and that because the comment was in her record when it was reviewed by the LCDR selection boards in 2008 and 2009, her failures of selection should be removed from her record.

APPLICABLE REGULATIONS

Regulations about Relationships

Article 8.H.1.c. states that “[p]rofessional interpersonal relationships always acknowledge military rank and reinforce respect for authority. Good leaders understand the privilege of holding rank requires exercising impartiality and objectivity. Interpersonal relationships which raise even a perception of unfairness undermine good leadership and military discipline.”

Article 8.H.1.d. states that “[p]roper social interaction is encouraged to enhance unit morale and esprit de corps. Proper behavior between seniors and juniors, particularly between officers and enlisted personnel, enhances teamwork and strengthens respect for authority.”

Article 8.H.2.c. states that “[s]ervice custom recognizes that personal relationships, regardless of gender, are acceptable provided they do not, either in actuality or in appearance:

- “1. Jeopardize the members' impartiality,
- “2. Undermine the respect for authority inherent in a member's rank or position,
- “3. Result in members improperly using the relationship for personal gain or favor, or
- “4. Violate a punitive article of the UCMJ.”

Article 8.H.2.d. states that the following:

The great variety of interpersonal relationships precludes listing every specific situation that members and commands may encounter. While some situations are clearly discernible and appropriate action is easily identified, others are more complex and do not lend themselves to simple solutions. Evaluating interpersonal relationships requires sound judgment by all personnel. Factors to consider in assessing the propriety of a relationship include:

1. The organizational relationship between the individuals: whether one member can influence another's personnel or disciplinary actions, assignments, benefits or privileges;
2. The relative rank and status of the individuals: peers, officer and enlisted, CPO and junior enlisted, supervisor and subordinate, military and civilian, instructor and student; and
3. The character of the relationship; e.g., personal, romantic, marital.
 - a. Personal relationship: Non-intimate, non-romantic association between two or more people (of the same gender or not), such as occasional attendance at recreational or entertainment events (movies, ball games, concerts, etc.) or meals. (Does not involve conduct which violates the UCMJ.)
 - b. Romantic relationship: Cross-gender sexual or amorous relationship. (Does not involve conduct which violates the UCMJ.)
 - c. Unacceptable relationship: Inappropriate and not allowed under Service policy. Resolution normally administrative. Relationship must be terminated or otherwise resolved once recognized.
 - d. Prohibited relationship: Violates the UCMJ. Resolution may be either administrative, punitive, or both as circumstances warrant.

Article 8.H.2.f. states the following:

Romantic relationships between members are unacceptable when:

1. Members have a supervisor and subordinate relationship (including periodic supervision of duty section or watchstanding personnel), or
2. Members are assigned to the same small shore unit (less than 60 members), or
3. Members are assigned to the same cutter, or

4. The relationship is between chief petty officers (E-7/8/9) and junior enlisted personnel (E-4 and below), or
5. The relationship is manifested in the work environment in a way which disrupts the effective conduct of daily business.

The nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position. This policy applies to Reservists in an active status, whether or not on duty.

Article 8.H.3.b. cites as examples of unacceptable relationships supervisors and subordinates being in private business together and supervisors and subordinates in a romantic relationship.

Regulations about OERs

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Every officer normally has a “rating chain” of three senior personnel, including a Supervisor, the Reporting Officer, and the Reviewer. Personnel Manual, Article 10.A.2.e.1.e. Article 10.A.1.c.4. states that the Supervisor is “[n]ormally, the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements.” The Reporting Officer is normally the Supervisor’s supervisor, and the Reviewer is normally the Reporting Officer’s supervisor.

Article 10.A.2.d.2.a. states that it is the responsibility of the Supervisor to evaluate the reported-on officer in the execution of her duties and to prepare the Supervisor’s portion of the OER form.

Article 10.A.2.e.2.a. states that it is the responsibility of the Reporting Officer to evaluate the reported-on officer based on direct observation, reports of the Supervisor, and other “reliable reports” and to prepare the reporting officer’s portion of the OER form. Article 10.A.2.e.2.c. states that an RO

[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed.

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.” Article 10.A.2.f.2.b. states that the Reviewer “[a]dds comments as necessary, using form CG-5315 (series), that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer.” Article 10.A.2.f.2.c. states that the Reviewer “[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions,

or inconsistencies between the numerical evaluation and written comments. However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed.”

Article 10.A.2.i. states that the Personnel Command “[p]rovides final quality control review of OERs containing substantive errors, including “restricted” remarks as outlined in Article 10.A.4.f. Normally, the appropriate member of the original rating chain will return these OERs to the Reviewer for correction or redaction.”

Article 10.A.4.c.7. instructs Reporting Officers to write comments on the third page of an OER as follows:

d. In the "comments" block following each evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Reporting Officer shall draw on his or her observations, information provided by the Supervisor, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

Under Article 10.A.4.g., an officer may submit a Reply to any OER for entry in his record with the OER within 21 days of receiving the final OER. An OER Reply is forwarded up the rating chain, whose members may attach endorsements with written comments. An OER Reply does not constitute a request to correct the OER.

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 10 U.S.C. § 1552. The application was timely filed.

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

3. The applicant alleged that the disputed comment in her OER is erroneous and unjust and that the comment and her subsequent failures of selection for promotion to LCDR should be removed from her record. The Board begins its analysis by presuming that the dis-

² See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

puted OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.³ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.⁴ To be entitled to relief, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁵

4. The applicant alleged that the disputed comment is factually erroneous and unjust because her romantic relationship with LTJG X was not an "inappropriate" relationship under Article 8.H. of the Personnel Manual. The Board finds that the preponderance of the evidence indicates that the applicant did engage in an unacceptable and hence inappropriate relationship with LTJG X under Article 8.H.2.f.1. of the Personnel Manual. Numerous comments in not only the disputed OER (which covers the period LTJG X was assigned to the VTS) but the applicant's two prior OERs as the VTS Operations Officer, as quoted on pages 6 and 7 of this final decision, show that as the VTS Operations Officer, the applicant had significant control and influence over the VTS watch and hence over the work schedule and workload of LTJG X and the other Watch Supervisors. As the reviewer stated, she was second-in-charge at the VTS and would have been in charge in Mr. X's absence. Whether Mr. X was ever absent during the duration of the applicant's romantic relationship with LTJG X or whether the applicant ever made a formal or even informal appraisal of the applicant's performance are not dispositive. Likewise the fact that the applicant was not LTJG X's supervisor for the purpose of his OER preparation is not dispositive. Her duties as the Operations Officer, senior watch officer, and overseer of the watchstanding and qualification of watchstanders clearly placed her in a supervisory position to LTJG X in numerous respects. The applicant's and LTJG X's denials in the regard are not persuasive. Nor does the fact that the IO did not focus his report on whether the applicant supervised LTJG X render the conclusion about their work relationship uncertain given the ample documentation of the applicant's control over and duties with respect to the watch in her OERs.

5. The applicant argued that she was unfairly surprised by the command's determination that her relationship with LTJG X would be deemed unacceptable because they were "peers" and that she should have been able to rely on Mr. X's statement to LTJG X that the applicant was not his supervisor. The record indicates that when LTJG X was assigned to the VTS, he wanted to clarify his rating chain and so asked Mr. X whether the applicant was his supervisor, and Mr. X said "No" because the applicant was not on LTJG X's rating chain. However, as Article 8.H.2.f.1. of the Personnel Manual makes clear, whether an officer is a member of your rating chain is not determinative of whether a romantic relationship would be deemed unacceptable because even temporary oversight while one is on watch can make a romantic relationship

³ 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

between the officers unacceptable. The Board believes that given the duties of the applicant and LTJG X within the VTS, they either knew or should have known that a romantic relationship between them was not acceptable under Article 8.H. Nor is the Board persuaded that they were “peers” since the applicant was a senior LT up for selection for promotion to LCDR and LTJG X had just been selected for promotion to LT.

6. The applicant alleged that the OER comment is unjust because it was based on information provided to her command by a “stalker” who conspired with someone within the command who misused the database to gain access to her e-resume. The Board does not agree that the source of the report that triggered the investigation renders the disputed OER comment, which was based on the report of the investigation, unfair. While the applicant’s ex-fiancé suggested to the IO that his source of information was someone at the VTS, the record shows that he was former enlisted member of the Coast Guard who would have known many people throughout the Service. The Board does not believe that the fact that a small part of the information and evidence the ex-fiancé provided to the command was possibly obtained through a Privacy Act violation renders the disputed OER comment unjust.

7. The applicant alleged that the disputed comment is a manifestation of gender-based discrimination because LTJG X’s OER contained the comment with the phrase “potentially unacceptable,” which provides more “wiggle room.” The record shows that the inappropriate relationship was documented in LTJG X’s OER for the period ending January 31, 2008. This OER for LTJG X would have been prepared and validated by the Personnel Command months before the rating chain prepared the disputed OER for the applicant in June 2008. The record further shows that the reporting officer attempted to use the same language in the applicant’s OER that it had used in LTJG X’s OER, but the phrase “potentially unacceptable” was rejected by the Personnel Command. Under Article 10.A.4.c.7. of the Personnel Manual, a comment must be “sufficiently specific to paint a succinct picture of the officer’s performance and qualities,” and under Article 10.A.2.1., the Personnel Command was responsible for “final quality control” of OERs. Therefore, the Board does not believe that the Personnel Command erred by rejecting the vague comment about a “potentially unacceptable relationship.” Following this rejection, the command considered whether they should alert the Personnel Command to the fact that the rejected language was already in LTJG X’s record and opted not to do so because they preferred the vaguer language. Thus, the record clearly shows that the comment about the inappropriate relationship in the applicant’s OER differs from that in LTJG X’s OER only because the Personnel Command noticed and objected to the vagueness when it reviewed her OER and required the rating chain to revise her OER but did not when LTJG X’s OER was reviewed several months earlier. The Board finds that the applicant has not proved by a preponderance of the evidence that the comment about the inappropriate relationship in her OER differs from the one in LTJG X’s OER because of gender-based discrimination. Nor is the Board persuaded that the applicant was entitled to an identical comment to the one in LTJG X’s OER since, as the senior officer, she was more responsible for refraining from engaging in the inappropriate relationship.

8. The applicant alleged that the emails she submitted and the statements of Mr. X and CDR X show that the Sector Commander and Deputy Sector Commander used undue influence to ensure that the inappropriate relationship was documented in her OER and to control the wording of the comment. Mr. X’s statement implies that he felt it was improper for the Deputy Sector Commander to discuss the comment with the members of the rating chain and that he felt

uncomfortable during their meeting. However, Mr. X was not responsible for the disputed comment since it was in the reporting officer's portion of the OER. Therefore, how Mr. X personally felt about the Deputy Sector Commander's input is not germane. Mr. X did not say that the Deputy Sector Commander directed the preparation of the OER comment over CDR X's objection, and there is no evidence that CDR X did not write the final version of the disputed comment himself as he thought it should be written after the Personnel Command rejected the first version. Moreover, as CDR X stated, under Article 10.A.2.e.2. of the Personnel Manual, he was free to seek input from other officers, and there is no evidence in the record that CDR X did not voluntarily seek the advice of the Deputy Sector Commander. The Board notes in this regard that the Personnel Command sent the objection to the OER comment by email to CDR X and the reviewer, not to the Deputy Sector Commander. The Board finds that the applicant has not proved by a preponderance of the evidence that the Sector Commander or Deputy Sector Command exercised improper influence in the preparation of her OER.

9. The applicant alleged that the claims of her command and rating chain members should all be considered suspect because the command and the District legal office interfered with her attorney's attempt to gather evidence. The record shows that CDR X did not want to communicate with the applicant's attorney directly, chose to communicate in writing through the District legal office, and consulted the Deputy Sector Commander and the legal office before finalizing his responses to the attorney's written questions. Such conduct was certainly within his prerogative as nothing in the BCMR statute or regulations requires officers to communicate with applicants or their attorneys. The record also shows that the Deputy Sector Commander told Mr. X on November 6, 2008, "Do not respond to the request from the lawyer. Please refer her to [LT C] at DX legal. ... DX legal has the lead and will do the talking for us." However, Mr. X statements show that he deflected the request from the applicant's attorney only with regard to her request for the published rating chain because he did not think he should provide her with it without a FOIA request. Mr. X further stated that "[n]o one shaped my response to any query in this matter," and the critical comments in his statements support his contention. The applicant's rating chain members have submitted several affidavits in this matter, and the Board is not persuaded that they were silenced by the command or otherwise prevented by the command or the District legal office from revealing any evidence or information that could affect the outcome of this case.

10. The applicant made numerous allegations with respect to the actions and attitudes of various officers in her rating chain and chain of command. Those allegations not specifically addressed above are considered to be not dispositive of the case.⁶

11. The record contains ample evidence supporting the conclusion of the IO, the Sector command, and the applicant's rating chain that she engaged in an inappropriate and unacceptable relationship with another member of the VTS staff during the reporting period for the disputed OER. She has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.⁷ Therefore, in

⁶ See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

⁷ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

the absence of prejudicial error in her record, the Board finds no grounds for removing her failures of selection for promotion to LCDR from her record.⁸

12. Therefore, the applicant's requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁸ When an applicant proves that her military record contained a prejudicial error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant's failure of selection should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982). When an officer shows that her record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the failure of selection. *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), *citing Engels*, 678 F.2d at 175; *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005). To void a failure of selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded." *Engels*, 678 F.2d at 175.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied. No copy of this decision shall be entered in her military record.

Philip B. Busch

Vicki J. Ray

Kathryn Sinniger