DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-035

DECISION OF THE DEPUTY GENERAL COUNSEL UNDER DELEGATED AUTHORITY

INTRODUCTION

I concur in the relief granted by the Board. However, since the Board submitted its recommended decision, there have been additional case developments in BCMR Docket No. 1997-114 that should be discussed here, since the Coast Guard urges reliance on that case in opposing relief. I also wish to elaborate on upon the reasons why in my view relief should be granted.

I adopt the background and discussion sections of the recommended decision, through the first two paragraphs of the section entitled "BCMR Case Cited by the Coast Guard" on page 12. The further discussion, and Findings and Conclusions below, will replace the balance of the Recommended Decision.

FURTHER DISCUSSION

The Board's decision in BCMR Docket No. 1997-114 denying relief was challenged as being arbitrary and capricious in a petition filed with the United States District Court for the District of Columbia, and the Court remanded the case to the BCMR for a more complete account of its reasoning. A new Board was constituted, which considered the case anew, but it was unable to reach a unanimous decision. Under the Board's regulations, where that occurs, final action is reserved to the Secretary, and as his delegate I issued a final agency decision in the case. BCMR Docket No. 2000-008. The case remains under review by the District Court.

The Department's final decision in Docket No. 2000-008 denied the relief sought by the applicant. It found that proper procedures had been followed in assigning the applicant to one Coast Guard cutter, that her preference for assignment to another cutter could not be satisfied due to legitimate berthing problems, and that gender had not impermissibly been considered in making the assignments. The decision rejected arguments that the Coast Guard had committed an error or injustice by failing to assign her to a billet so that she would not have needed to

sell her house at a loss; that her assignment had been motivated by a desire to provide a companion for a new female ensign it planned to assign to the vessel; and that the Coast Guard had improperly considered the individual needs of two male servicemembers but not hers.

FINDINGS AND CONCLUSIONS

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

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

2. It is longstanding Coast Guard policy that, in making assignments, service needs come first, and that its members must be available for unrestricted duty assignment worldwide, Coast Guard Personnel Manual (PERSMAN) at 4.A.1.a and 4.A.6.a. Applicant clearly was subject to these requirements.

3. In filling the position that was to become vacant aboard the cutter *Mellon*, PERSMAN, at 4.B.3.c.2., directs that the detailer consider an "assignment continuum" consisting of service needs; assignment priorities and geographic stability; career enhancement, diversity, and qualification requirements; and advancement potential.

4. The Coast Guard also considers the work-life needs and preferences of its members in making assignments, recognizing that such a practice may enhance morale, job satisfaction, retention, and productivity. These considerations do not however outweigh the most important factor of service need.

5. The Report of Investigation prepared by the Departmental Office of Civil Rights includes statements by several credible witnesses who corroborated the applicant's allegations that in January 1996, a detailer issued her orders to the Coast Guard cutter *Mellon* in retaliation for her filing a sexual harassment complaint against a friend of his in 1992. Witnesses also corroborated her allegations that the detailer had threatened to use his position against her and had induced another officer to act against her. The detailer's denials of many of the applicant's allegations were contradicted by witnesses and by some of his own statements. His explanation for how she was chosen for the orders to the *Mellon* was contradicted by witnesses and by Coast Guard records.

6. The applicant has shown by a preponderance of the evidence that in making the assignment, the detailer was motivated in significant part by a desire to exact retribution for the sexual harassment complaint that she had filed.

7. The record also shows that service needs and other "assignment continuum" factors were not properly applied in applicant's case. Although

assignment decisions are entitled to a presumption of regularity, there were inconsistencies in determinations by the detailer not to extend the applicant but to extend others who had not sought extensions, and to assign her to the *Mellon* despite the fact that there were similarly situated second-class yeomen who were located closer to the cutter's home port, a criterion he stated had been used. The detailer was unable to satisfactorily explain how he reached these decisions. Under these circumstances, the presumption of regularity has been overcome.

8. The Coast Guard erred when it permitted applicant's assignment to be made, not in accordance with its published criteria, but in retribution for a sexual harassment complaint.

9. The Coast Guard argued that the applicant should have accepted the orders and sought a remedy through Article 138 of the Uniform Code of Military Justice or the civil rights procedures rather than accept a voluntary discharge. It further contended that she had no evidence that she would have faced an intolerable situation had she accepted the assignment.

10. The applicant stated that she did not feel "safe" taking orders to the *Mellon*, fearing that she would be "in the middle of the ocean with someone who believed I deserved whatever he could get away with doing to me." She did not know, and absent some admission by the detailer, had no way of knowing, why he had assigned her to the *Mellon*. Although not necessarily rejecting other shipboard assignments, she offered at the time to take any other shore billet. Given the circumstances, applicant's concern and offer were not unreasonable.

11. The Coast Guard committed an injustice when, rather than considering alternative assignments, it forced the applicant to choose between (1) accepting orders crafted by a detailer who had threatened her and which involved a possible platform for further retaliation, and (2) accepting a voluntary discharge.

12. The applicant did not waive the argument that her discharge was unjust when she signed the settlement agreement in August 1997. Moreover, the agreement expressly preserves her right to ask the Board to add the time between her discharge and reenlistment to her total creditable service so that she may receive the consequent benefits and back-pay.

13. BCMR Docket No. 2000-008 is clearly distinguishable from this case. There, the applicable procedures were followed when the applicant was given a shipboard assignment, and her claims of discrimination were found not to have merit. Here, the applicable procedures were not followed, and the assignment was improperly influenced by a motive to take reprisal action against the applicant for her complaint.

14. Although the Coast Guard argued that it has no authority to pay a member for time not served on active duty, it is well established that the Board may exercise its authority to correct an applicant's record by removing an unjust discharge and break in service.

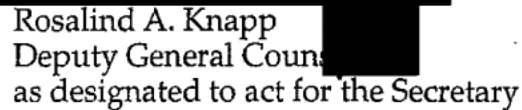
15. Relief is appropriate as ordered below.

ORDER

The application for correction of the military record of ., USCG, is hereby granted as follows:

- The applicant's DD Form 214 dated March 13, 1996, and all other references to her discharge on that date shall be removed from her record.
- The applicant's record shall be corrected to show no breaks in service at anytime in 1996 and 1997. The time between March 13, 1996, and August 29, 1997, shall be credited to her as time served on active duty.
- The Coast Guard shall pay the applicant all back-pay and allowances she is due as a result of these corrections, minus any wages she may have earned from other sources while discharged from the Service.

June 30, 2000
Date



Rosalind A. Knapp
Deputy General Coun
as designated to act for the Secretary

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-035

FINAL DECISION

Attorney Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 of the United States Code. It was commenced upon the BCMR's receipt of the applicant's application on November 24, 1997.

This final decision, dated November 5, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a yeoman second class (YN2), first enlisted in the Coast Guard on August 27, 1979. On March 13, 1996, she accepted a voluntary discharge to avoid accepting orders she alleged were retaliatory for a sexual harassment complaint she had made. After an investigation by the Departmental Office of Civil Rights (OCR),[1] she signed a settlement agreement with the Coast Guard and reenlisted on August 29, 1997.

The applicant asked the Board to correct her record to show no break in service so that she would receive back-pay and benefits and be credited with active service time for the year and a half between her discharge and reenlistment.

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[1] The following persons were interviewed by the OCR investigator:

R. is the chief warrant officer whom the applicant accused of seeking retribution.
L. is the administrative warrant officer whom the applicant accused of seeking retribution at R.'s instigation.
X. is a commander and the executive officer at MSO San Francisco.
P., K., A., and W. are all witnesses who were stationed at MSO San Francisco.
O. is another yeoman against whom R. allegedly sought retribution.
C. is a captain and the commanding officer at MSO San Francisco.
G. is a commander, chief of the Enlisted Assignment Branch, and R.'s second-line supervisor.
S. is a lieutenant commander and the applicant's last supervisor before her discharge.
T. is a lieutenant commander and president of the 1996 yeoman TERA panel.

APPLICANT'S ALLEGATIONS

The applicant alleged that she suffered retaliation as a result of lodging a sexual harassment complaint against a petty officer in 1992, while stationed in Hawaii. As a result of the complaint and subsequent investigation, the petty officer went before a captain's mast and took early retirement in lieu of a court-martial. The applicant was then transferred to the Marine Safety Office (MSO) in San Francisco, California, because, she alleged, a chief warrant officer (R.) who was a very close friend of the petty officer threatened to "get" her for lodging the complaint against his friend. The applicant alleged that R. told her that he would soon be her detailer,[2] and then he would be able to "take care of" her.

The applicant alleged that, after R. became the yeoman detailer for the western United States, he made her job at MSO difficult by prejudicing her administrative warrant officer (L.) against her by telling that officer his own view of the sexual harassment complaint. She alleged that thereafter L. constantly criticized her without cause. She also alleged that L. wrote a Page 7 (administrative remarks) to include in her record about an alleged inappropriate relationship but never wrote a Page 7 to include in the record of the supervisor with whom she was supposedly involved, even though the regulations hold a ranking member primarily responsible for having an inappropriate relationship with a member of lower rank. The applicant stated that she requested and received a transfer out of L.'s department after he told her that he knew that everything that had happened in Hawaii was her fault.

During her tour at MSO, the applicant alleged, she received several messages from R. through other members to the effect that he had not forgotten about her. The applicant's tour at MSO was scheduled to end in November 1996. In July 1995, she received notice from the Military Personnel Command (MPC) indicating that a request for extending her tour would probably be granted. The applicant applied for an extension. She wanted to stay in the area because she had a young daughter institutionalized nearby.

The applicant alleged that on January 2, 1996, she was contacted while on leave by another yeoman, who informed her that R. had called the applicant personally to inform her that he was sending her to a new billet. When she returned R.'s call, he told her that she was being transferred to the *Mellon*, a Coast Guard cutter based in Seattle, Washington, on April 1, 1996, "so [she] better start packing." When she reminded him that her tour was not scheduled to end until November 1996, he said, "This is it [applicant's first name], and you should have expected something like this." She alleged that members are usually informed when their extension requests have been disapproved so that they can submit another "dream sheet" of preferred posts.

The applicant alleged that when her leave ended on January 8, 1996, a lieutenant commander told her that "she had talked to [L.] the week before and

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[2] A "detailer" is an officer who recommends and has significant control over which enlisted member is ordered to which billet.

that he had told her that I was to receive those orders because of some guy I went after in Hawaii." She also alleged that when she informed her department head of the situation and told him she did not want to accept orders arranged by R., he told her there was nothing he could do because there was no proof. The command's chief yeoman responded similarly.

The applicant alleged that the executive officer (X.) asked her that same day what orders she would be happy with. She told him she was afraid to take anything R. offered her. She said she would rather be discharged than accept orders to a unit in which she would not feel safe. She "fear[ed] being sent out in the middle of the ocean with someone who believed I deserved whatever he could get away with doing to me." She alleged that she finally told the [executive officer] she would take "any shore billet anywhere" because "[h]e didn't seem to hear anything I had said to him of my concerns or my fears." When the executive officer asked her why she didn't cite her daughter as a "special needs" situation to get out of orders to a ship, she responded that she did not mind accepting orders to a ship, it was receiving any orders from R. that she feared.

The applicant lodged a civil rights complaint of retribution with her command on January 16, 1996. On January 17, 1996, an opportunity to apply for early retirement was announced, and the applicant applied for it on January 19, 1996. On the same day, she was called by a Coast Guard civil rights counselor about her civil rights complaint. She told him she had applied for early retirement but that she was afraid R. "would have some say on the results." He told her that her command believed that she just did not want to go to sea. He said her command was drafting a letter to request that her tour be extended for another year.

The applicant's request for early retirement was denied. She alleged that it was because R. was one of the officers on the committee that decided whose applications would be accepted. She alleged that it was discriminatory for the Coast Guard to allow the officer who had sexually harassed her to retire early in lieu of court-martial but to deny her early retirement.

On January 31, 1996, X. asked her if she would settle her complaint informally at the command level. After discussing her options with him, she decided to file a formal complaint. She also asked him about the letter the counselor had told her the command was writing regarding her extension. She alleged that the executive officer told her "there were some editing problems and the letter isn't going to be sent, besides you have filed a Civil Rights claim and seem to be taking care of it yourself." Rather than accept the orders to the *Mellon* arranged by R., the applicant chose to be discharged.

The applicant was discharged on March 13, 1996. In April 1997, she received a copy of the Report of Investigation prepared by the Department of Transportation's Office of Civil Rights. (A summary of the report begins on page 6, below.) The report arrived with a letter urging her to settle informally with the Coast Guard and stating that, if they did not settle, the OCR would issue a final agency decision after 30 days. However, in August 1997, after the OCR had re-

peatedly refused to issue its decision, the applicant finally accepted an offer to settle with the Coast Guard. (All pertinent parts of the settlement provisions are reproduced on pages 12 and 13, below.)

VIEWS OF THE COAST GUARD

On September 30, 1998, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The Chief Counsel argued that relief should be denied because the applicant voluntarily left the Coast Guard at the end of her enlistment[3] instead of accepting orders. Rather than accept a voluntary discharge, the Chief Counsel alleged, the applicant should have accepted the orders she received to serve on the *Mellon*. Once there, she could have used Article 138 of the Uniform Code of Military Justice (UCMJ) or other prescribed complaint processes to contest the orders or address her concerns. Furthermore, the Chief Counsel alleged, the applicant "provide[d] no evidence[4] that she would have faced an intolerable situation if she executed the orders and, furthermore, there is no evidence that her future command would not have taken appropriate action if called upon to do so."

In addition, the Chief Counsel alleged that the applicant had waived the argument that her discharge was unjust when she accepted the settlement agreement. As proof of this, the Chief Counsel quoted several paragraphs from the settlement agreement.

Finally, the Chief Counsel argued that the Coast Guard lacks authority to pay a member for time not served on active duty. The Chief Counsel cited BCMR Docket No. 1997-114 for the proposition that the applicant cannot receive back-pay because she chose to be discharged rather than pursuing her claims while on active duty. Although paragraph eight of the settlement agreement allows the applicant to seek relief through the BCMR, the Chief Counsel argued that it did "not concede that her claim has any merit nor that the Coast Guard has any fiscal law authority to pay Applicant active duty pay and allowances and grant benefits including leave for a period of time when the Applicant did not serve on active duty."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On October 9, 1998, the applicant responded to the Chief Counsel's advisory opinion by stating that she "accepted discharge because [she] had no other alternative other than to accept orders from an individual who had threatened me with retribution." She stated that she "chose discharge over reenlistment simply because to reenlist and then refuse orders would have allowed the Coast

[3] The applicant's six-year enlistment was due to end February 13, 1996, but she was not discharged until March 13, 1996.

[4] Paragraph eight of the Settlement Agreement prohibits the applicant from submitting evidence to the BCMR other than the OCR's Report of Investigation.

Guard the opportunity to prosecute, making me a criminal." Punishments could have included, she alleged, a dishonorable discharge, forfeiture of all pay and allowances, and up to two years' confinement, under Article 90 of the UCMJ, or a bad conduct discharge, forfeiture of all pay and allowances, and up to six months' confinement, under Article 92 of the UCMJ.

In response to the Chief Counsel's argument that she should have reported to the *Mellon* and used Article 138 remedies to resolve the problem, she alleged "[t]he UCMJ process was not recommended by my superiors as the goal was to stop issuance of orders by this officer or cancel the orders issued by this officer. To submit a CG-4910 against the Detailer for violation of Article 138 would not have taken the Detailer out of the loop." "Further, when I pursued Article 138 charges while still at MSO San Francisco, I was advised that since the members were from two different commands, Article 138 would not be appropriate."

SUMMARY OF REPORT OF INVESTIGATION

On April 14, 1997, an investigator for the Departmental Office of Civil Rights sent the applicant and the Coast Guard a report of his investigation of the applicant's complaint. The report largely substantiated many of the applicant's allegations concerning R.

In 1992, a petty officer who had gone before a captain's mast for sexually harassing the applicant took early retirement in lieu of being court-martialed. The applicant's complaint and the result were common knowledge at the base. Several witnesses stated that R. was a very close friend of the petty officer. The applicant was soon transferred to MSO San Francisco. R. became the yeoman detailer in February 1993. He exercised significant control over the decisions made regarding her request for extension, her orders to the *Mellon*, and her denial of early retirement.

Witnesses' Statements Concerning Retribution by L.

L., the administrative warrant officer, confirmed that he had prepared a Page 7 for the applicant's record regarding an inappropriate relationship with her supervisor. He stated further that "he did not get around to writing a Page 7 on [the supervisor] because the issue got elevated with [the applicant's] reaction to being issued the Page 7 and all was resolved in a counseling session." He denied that the Page 7 had anything to do with his friendship with R., but he admitted that R. had told him about her sexual harassment complaint.

A witness, P., stated that she believed "[the applicant] got the Page 7 in this case instead of [the supervisor] because [L.] did not like [the applicant]." P. also stated that L. and R. were in frequent contact and "got along rather well." She indicated that the two did favors for each other. Another witness, K., stated that L. and the applicant "did not get along well."

Witnesses' Statements Concerning Extension and Orders to Cutter

Another witness, A., stated that she had heard R. confront the petty officer who had harassed the applicant "about the fact that he would jeopardize his marriage and career over 'someone like [the applicant].'" She also stated that,

> when [R.] got his orders to become the Detailer, he made a statement to people in the office that he had a list of all of the people he would pay back once he became Detailer. He then named some of the names of people that were on his list. She said there was only one name of the people he mentioned that she knew, [O.], who had previously been stationed at Group/Base Honolulu. She said that R. disliked [O.] less than he disliked [the applicant]. Therefore, they (the people in the office) knew that [the applicant] would definitely be a target if [O.] was to be a target.

Regarding the applicant's request for extension at MSO, Witness W. stated that in July 1995, the MPC asked commands about staffing concerns. He responded by indicating that all of the yeomen at his command were due to leave at about the same time, "leaving the command with little or no 'corporate' knowledge." At the time, only two of the command's seven yeomen "could realistically expect to be extended." One of the two was the applicant. W. received a response from R.'s second-line supervisor (G.) at MPC stating that it would "consider an extension." W. stated that in his experience, such a response meant that a request for extension would be granted. He "had never seen a yeoman not be granted an extension when told he or she would probably get one through written correspondence, unless there was an overriding concern . . . ."

W. further stated that, when he heard of the applicant's orders, he was very surprised, and he questioned R., who told him that they needed to fill billets with "the most qualified candidates, and that all options would be considered." Although W. got the impression that no concrete decision had been made, he soon received the applicant's orders to the *Mellon*, and

> [t]his disturbed him, . . . because he was aware that [R.] had already telephoned at least two female yeoman [sic] stationed at Coast Guard Island [Alameda] who did not want to remain at their commands and were told by [R.] that they would be extended in their current assignments whether they wanted to be or not. Yet, he had two yeoman [sic] who wanted to stay, but [R.] would not give them extensions. He said that both yeoman [sic] . . . were initially extended against their wishes. . . .

W.'s statements were corroborated by X. X. also stated that the normal process for assigning enlisted members was that, "if nothing is available for the member in the areas that he/she enters on the Assignment Data Form (dream sheet), the Detailer gets back to the member and lets him/her know that none of the desired options are available. The member is then asked for other choices." W.'s statement regarding the two yeomen whose tours had been extended

against their wishes was corroborated in regard to one of the yeoman by A., who knew the yeoman in question.

In response to questions concerning the procedure for reviewing and deciding on extension requests, G. indicated that R. forwarded extension requests to the branch with recommendations. R. did not have final authority to approve or disapprove such requests. He stated that, when he had informed the applicant's command that they would "consider an extension," no guarantees were made. G. stated that no action was ever taken on the applicant's request for extension because she was ordered to the *Mellon* before it was necessary. High priority is given to filling empty billets on ships. Decisions regarding extension requests are usually made last.

W. also stated that R. had explained the applicant's orders to the *Mellon* by saying that the cutter "had a female berthing requirement and that [the applicant] was the closest female second-class yeoman who did not have sea duty." However, "when all yeoman orders had come out, they discovered that there was a female second-class yeoman already stationed in Seattle who got transferred to . . . Topeka, Kansas, and a second female second-class yeoman at . . . Arcata, [California], was sent to either Headquarters or [Topeka]. . . . [N]either of these two second-class yeoman [sic] had sea duty time as a yeoman and both were closer to the [cutter] than [the applicant was]." Moreover, W. stated, in contradiction to R.'s claim that the *Mellon* required a female, a male yeoman was assigned to the cutter when the applicant chose to be discharged rather than accept the orders. W.'s statement regarding the two transfers was corroborated by K.

A. stated that she and several other members had monitored the transfer orders that year "because they knew who [R.] liked and disliked. The few people they knew were his favorites went where the group knew they wanted to go. The few that they knew for sure that [R.] disfavored, [the applicant and O.] both got assignments they did not want."

P. stated that L. "told her he knew [where the applicant] was being ordered to, that [the applicant] did not yet know, and that she was going to be surprised. P. stated that "she got the impression [L.] was happy about [the applicant's] going to a ship. She also said it seemed like he knew that [R.] was doing this intentionally and he was satisfied that it was happening. She said further that "it was her sense that while she and [L.] were discussing [the applicant's] orders, that [L.] knew something about [the applicant's] incident in Hawaii."

S., who was the applicant's last supervisor before her discharge, stated that she asked L. about the applicant's orders and that "he said something to the effect that he was not surprised that [the applicant] was going to a ship and alluded to the fact that he was not surprised because . . . the Detailer was stationed with [the applicant] in Hawaii and knew of the incident in Hawaii." S. stated that she informed the applicant of the substance of her conversation with L. because she knew it "somewhat confirmed [the applicant's] concerns."

The applicant's commanding officer (C.) at MSO stated that he did not learn of her concerns about R. until January 11, 1996. He stated that before that date, he thought her chief concern was to stay near her daughter. When C. tried to arrive at an informal resolution to the complaint, the applicant asked (1) for orders to any shore unit and (2) for R. to be removed as detailer. On January 31, 1996, when X. told G. about the applicant's retribution complaint, G. responded that, unless she enrolled in the special needs program, the applicant's orders would not be changed because "on paper" she "fit" the billet profile. "[G.'s] bottom line was that even if there were some personal differences between [the applicant] and [R.], there was still a fit for her to go to the [cutter] and that if [R.] had not made the assignment someone else would have." C. stated that when the applicant learned of G.'s response, she decided to follow through with a formal complaint.

In a letter to OCR dated February 15, 1996, that accompanied the applicant's complaint, C. also stated that "it is difficult to measure the impact that this very real perception of retribution by [R.] has had on [the applicant]. . . . If this investigation proves [R.] was using his position as detailer against [the applicant] to get revenge for [the petty officer's] forced retirement, then [the applicant] should be given the option of retiring . . . . It is further requested that [the applicant] be allowed to remain on active duty and assigned to [the same unit] pending the outcome of this investigation."

G. stated that enlisted members are considered tour complete and may be transferred at any time during the calendar year their tours are scheduled to end. Regarding the applicant's orders to the *Mellon*, he stated that, "a need for a YN2 aboard USCGC *Mellon* came up unexpectedly. . . . [T]he incumbent YN2 aboard USCGC *Mellon*, who was not tour complete in 1996 and thus not expected to have to be replaced, decided to leave the Service rather than reenlisting as had been previously expected." This development "created a need for a relatively rapid transfer of a YN2." He explained that R. had "immediately looked for [yeomen] who were tour complete in 1996 and for units with 'extra' [yeomen] that could more easily absorb the transfer of a member a few months earlier in the assignment process than might normally be expected." In addition, "[t]he Cutter Command had expressed a strong need for mid-grade enlisted women to be assigned, due to the distribution of pay grades of the women already aboard." Because the applicant fit the requirements and her command had "extra" yeomen, she was "an excellent choice for the position." G. stated that, after X. informed him of the applicant's fear of retribution, he and another officer reviewed the rationale for her orders, agreed the decision was a good one, and decided it should not be cancelled.

When questioned further about these statements, G. stated that he had misremembered the circumstances. The yeoman whom the applicant was supposed to replace was a male who was tour complete that year. In fact, he was overdue for transfer. Coast Guard records indicate that, apart from the applicant, six female yeomen stationed in California and Washington were tour complete and had not done sea duty at the time of the applicant's orders. The OCR inves-

tigator interviewed four of the six. All of those interviewed were tour complete before November 1996, and all were transferred to land-based assignments. Two were already stationed in Seattle at the time. Another was stationed closer to Seattle than was the applicant's unit. Of the four, three had no "extenuating circumstances or conditions to prevent them from performing sea duty."

X. indicated that, at the time the applicant received her orders, there were no "extra" yeomen assigned to his command. However, on January 3, 1996, the same day the applicant learned of her orders from R., R. sent a message to W. indicating that he was assigning an "extra" yeoman to the station. The "extra" yeoman arrived in mid-January.

When the investigator first questioned R., he stated that he could not recall the nature of the charges the applicant had brought against the petty officer in Hawaii, what findings had been made at the captain's mast, or what the results were. Later, however, R. insisted that, when he made the decision to assign the applicant to the *Mellon*, he had informed G. that his decision might be attributed to that fact that she had accused his friend of sexual harassment and he had been forced to retire.

R. admitted having known that the applicant's daughter was institutionalized at the time he recommended that she be transferred to the *Mellon*. He stated that the cutter had requested a mid-grade female yeoman and that a process of elimination had brought him to choose the applicant.

Witnesses' Statements Concerning Early Retirement

On January 16, 1996, the Commandant solicited applications for early retirement (Temporary Early Retirement Authority (TERA)) from officers and enlisted members. The applicant met the announced qualifications. She applied on January 19, 1996, to be retired on October 1, 1996.

When questioned about the selection process, R. stated that the panel's first priority was that ships not be adversely affected. "'Anyone,' according to [R.], '[a]pplying for TERA who had been ordered to a ship would not get recommended.'"

T., the president of the TERA panel, stated that "the criteria for selection would include, but not be limited to, factors such as grade, years of service, obligated service, special skills, performance history, and programmatic needs . . . ." In addition, the applicants' rotation dates, time in service, time in grade, expiration of enlistment, conduct, special skills, requested retirement dates, and command endorsements had been considered to minimize adverse impacts on the units. No other criteria were developed. "[T]here was no hard and fast rule regarding applicants who had been order[ed] to or [were] stationed on a ship. However, information indicating that people were already aboard ships or had been ordered to ships, was used in helping them make their decisions because ships were their highest priority."

T. further stated that there were five members, including R., on the yeoman TERA selection panel. Four of the five members had to be in agreement as to each person on the final list of those selected for TERA. Of the fifteen yeomen second class who applied for TERA, eight were approved. "When asked why [the applicant] was not recommended for the early retirement program given she would have had fifteen years service by the requested retirement date, she was tour complete in 1996, her enlistment expired in 1996, her conduct was acceptable, and she received her command's endorsement for early retirement, [T.] stated that the panel's report . . . indicated that [the applicant] was not recommended because she was under orders afloat."

EXCERPTS OF THE SETTLEMENT AGREEMENT

On August 20, 1997, the applicant signed a settlement agreement with the Secretary, the Department of Transportation (DOT), and the Coast Guard. The parties agreed as follows:

> FIRST: [The applicant] agrees and accepts that this Agreement is the result of a compromise and shall never at any time for any purpose be construed as an admission by [DOT] of any liability or responsibility to [the applicant] . . . as a result of [her] prior enlisted service in the United States Coast Guard.
>
> SECOND: [The applicant] agrees to report to U.S. Coast Guard Recruiting Office . . . for processing back into the Coast Guard. . . .
>
> THIRD: [DOT] will offer [the applicant] a five (5) year enlistment contract. This contract is contingent on [the applicant's] ability to qualify for enlisted status in the Coast Guard.
>
> FOURTH: Upon return to service in the Coast Guard, [DOT] will immediately assign [the applicant] to . . . a Yeoman Second Class billet. . . .
>
> FIFTH: With the exception of the specification of the duty location, [the applicant] will be subject to all the laws, regulations . . . applicable to all enlisted personnel . . . .
>
> SIXTH: [The applicant] will make no further claims against [DOT] in connection with her prior enlisted service in the United States Coast Guard except as set forth in EIGHT below.
>
> SEVENTH: After execution of this agreement, a copy shall be provided to the Departmental Office of Civil Rights and [the applicant's] formal complaint shall be dismissed with prejudice. [The applicant] and [DOT] mutually agree that from the date of the execution of this Agreement they will keep the terms and fact of this Agreement completely confidential, and that they will not release or disclose any information concerning this Agreement to anyone except as otherwise required by law.
>
> EIGHTH: [The applicant] may file a petition to [DOT's] Board for the Correction of Military Records in which she can seek backpay and credible [sic] service for the period of time between the expiration of her prior enlistment contract and the initiation of the enlistment contract signed in conformity with this Agreement, and if the evidence supporting such petition is limited to the evidence in the Department's Report of Investigation, the Coast Guard will not present additional evidence regarding such petition.

> NINTH: [The applicant] acknowledges that she has thoroughly reviewed and discussed all aspects of this Agreement, and acknowledges that she is fully aware that she is entitled to seek legal counsel to review the document, and to advise her concerning the document. [The applicant] also acknowledges that she is voluntarily entering into this Agreement of her own free will.
>
> TENTH: [The applicant] hereby totally and unconditionally releases, and forever discharges [DOT] . . . from any and all charges, causes of action . . . arising from [her] prior enlistment in the Coast Guard.
>
> • • •
>
> SEVENTEENTH: By executing this Agreement, [the applicant] acknowledges that this agreement was the result of mutual consideration; and that this Agreement was made freely and fairly and was not the result of any duress or bad faith negotiations.

APPLICABLE LAWS

According to Chapter 5-D-5 of the Civil Rights Manual (COMDTINST M5350.11B), all members have the right "[t]o present a discrimination complaint to the command without fear of intimidation, reprisal or harassment."

Article 138 of the UCMJ (10 U.S.C. § 938) states as follows:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

According to Chapter 7-B-3 of COMDTINST M5810.1C, which contains the regulations that interpret the UCMJ, a "commanding officer" means "[a]ny Coast Guard commanding officer empowered to impose nonjudicial punishment upon the complainant, which includes any superior commanding officer in the chain of command."

According to Chapter 7-I of COMDTINST M5810.1C, "Notwithstanding anything to the contrary in this Part, the provisions of Coast Guard regulations addressing civil rights complaints shall apply to complaints falling under the purview thereof."

According to Chapter 5-I-1 of the Civil Rights Manual, "Any member who experiences an incident of reprisal as a result of filing a complaint of discrimination or participating in the discrimination complaint procedures in this chapter, should file a complaint of reprisal with their district or Headquarters unit Civil Rights Officer. . . ."

According to Chapter 5-F-1 of the Civil Rights Manual, "All members of the chain of command shall do everything possible, within Coast Guard policy, to facilitate a satisfactory informal resolution of any complaint of discrimination prior to resorting to the formal complaint procedures described in this chapter."

Chapter 5-F-6 provides that, after the complaint is lodged with the command, a military civil rights counselor/facilitator "shall meet with the member, explain the discrimination complaint procedures and attempt to facilitate a resolution at the lowest level of the command. Complainants will be counseled to seek redress of their complaints through other appropriate administrative or disciplinary procedures if the requested remedy is not within the purview of this instruction. If a resolution is not achieved within 15 days, the [counselor/facilitator] shall assist the member in preparing the formal complaint if the complainant so desires."

BCMR CASE CITED BY THE COAST GUARD

In BCMR Docket No. 1997-114, the applicant was in second place on the chief warrant officer promotion list when she was offered a promotion before the man who was first on the list. However, her promotion was conditioned upon her accepting orders to a cutter based in Florida. The applicant alleged that the Coast Guard wanted to assign a woman to the cutter because another woman had already received orders to the cutter. Coast Guard policy states that, whenever possible, it will assign women to ships in groups of two or more. Accepting the orders would have been difficult for her as it would have moved her far away from her ailing mother and forced her to sell or rent her house at a loss. She alleged that, had the Coast Guard not considered her gender, she would have received orders that did not create a hardship for her. She declined the tendered appointment and thereby lost a promotion to CWO2.

The Board denied relief, finding that the applicant had confused permissible gender consideration with illegal gender discrimination. The Board also found that, in refusing the orders to Florida, the applicant had violated Article 4-A-6.a. of the Personnel Manual, which requires members to be available for unrestricted duty assignment worldwide.

FINDINGS AND CONCLUSIONS

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

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

2. The Report of Investigation prepared by the Departmental Office of Civil Rights includes statements by several credible witnesses who corroborated the applicant's allegations that in January 1996, a detailer issued her orders to the Coast Guard cutter *Mellon* in retaliation for her filing a sexual harassment complaint against a friend of his in 1992. Witnesses also corroborated her allegations that the detailer had threatened to use his position against her and had induced another officer to act against her. The detailer's denials of many of the applicant's allegations were contradicted by witnesses and by some of his own state-

ments. His explanation for how she was chosen for the orders to the *Mellon* was contradicted by witnesses and by Coast Guard records.

3. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that in January 1996 she received orders to a cutter from a detailer whose primary motivation for the assignment was to exact retribution for a sexual harassment complaint she had filed.

4. The Coast Guard argued that the applicant should have accepted the orders and sought a remedy through Article 138 of the Uniform Code of Military Justice or the civil rights complaint procedures rather than accept a voluntary discharge. The Board finds that none of the remedies promulgated by the Coast Guard would have permitted the applicant to avoid accepting the orders chosen by the detailer (shipboard duty on the *Mellon*) who sought to use his position to exact retribution from her.

5. The Board finds that the Coast Guard erred when it issued orders intended as a reprisal against the applicant for filing a sexual harassment complaint. Furthermore, the Board finds that the Coast Guard committed an injustice when it forced the applicant to choose between accepting orders crafted by a detailer who had threatened her and accepting a voluntary discharge.

6. The Board finds that the applicant did not waive the argument that her discharge was unjust when she signed the settlement agreement in August 1997. Moreover, the agreement expressly preserves her right to ask the Board to add the time between her discharge and reenlistment to her total creditable service so that she may receive the consequent benefits and back-pay.

7. The Board finds that the final decision in BCMR Docket No. 1997-114 is not relevant to the decision in this case. The applicant in that case was not the target of reprisals for filing a sexual harassment complaint.

8. Although the Coast Guard argued that it has no authority to pay a member for time not served on active duty, it is well established that the Board may exercise its authority to correct an applicant's record by removing an unjust discharge and break in service.

9. Therefore, the Board should grant the relief requested by the applicant.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]