

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2000-008

**DECISION OF THE DEPUTY GENERAL COUNSEL
UNDER DELEGATED AUTHORITY**

INTRODUCTION

The applicant in this case has alleged that the Coast Guard improperly considered gender in assigning her to a finance and supply billet aboard the cutter [REDACTED]. She applied originally to the Board for Correction of Military Records for relief in 1997, and by opinion of April 8, 1998 the Board denied her request. She sought judicial review of that decision, and on [REDACTED] the United States District Court for the District of Columbia remanded the decision to the Board to obtain a more complete account of its reasoning. A newly constituted Board has now divided 2 to 1, with the majority favoring a grant of relief. Under the Department's regulations, where the Board is unable to act unanimously, final action is reserved to the Secretary, 33 Code of Federal Regulations section 52.64. The Deputy General Counsel is delegated authority to act for the Secretary on such matters.

The present Board's majority would find that an injustice occurred when the Coast Guard considered the individual needs and desires of two similarly-situated male servicemembers, but failed to so consider those of the applicant. The majority would order that the applicant's record be corrected to show that she was appointed to the grade of CWO2, effective January 1, 1996, with back pay and allowances. The Board's minority member would find that the assignment situation faced by the Coast Guard was unfortunately one in which not all assignees could be pleased, and that the applicant has not shown that the Coast Guard was motivated by a discriminatory intent in making the assignments. Accordingly, the minority member would deny relief.

Upon review, I believe that the facts and law require a denial of relief. In view of the conflicting rationales offered by the members of both Boards, the potential significance of the case as guiding action in future assignment cases, and my interest in fulfilling the request of the District Court to explain fully and with clarity the Department's reasoning in the matter, I am issuing this separate opinion.

DISCUSSION

I adopt the Case Background and the summaries of the various Statements and Responses submitted by the Applicant and the Coast Guard, as stated in the Majority Opinion and presumptively accepted by the dissenting member. These provide a description of the issues and evidence in the matter. I further adopt Findings and Conclusions numbered 1 through 3 and 5 through 7, which are common to both opinions. Finally, I adopt Findings and Conclusions numbered 8 and 9 of the Majority Opinion (those of the dissenting member are somewhat different, but have conclusions unnecessary to this opinion).

Finding and Conclusion 4 addresses the Board's practice on accepting hearsay statements, specifically oral statements of witnesses that are summarized by Coast Guard staff. The applicant has cited the Board's 1982 opinion in Docket No. 51-82, which states in relevant part that

In cases...where the credibility of the witnesses is an issue, we wish to consider only written, signed statements (or oral testimony in cases where a hearing before the Board has been granted.) It has been our policy to require corroboration for hearsay statements by petitioners, and we believe it only fair to require the same of the Coast Guard.

The Board's rules do not preclude hearsay evidence, and the language of the cited passage should not be read as establishing or restating a rule that hearsay evidence is not admissible in Board practice. "Board policy" has not in fact been to "require corroboration" of all hearsay statements by applicants, in order to permit the statements to be considered. The statement probably reflects the reality that, given the legal presumption that military officials perform their duties correctly, lawfully, and in good faith, see, e.g., *Arens v. United States*, 969 F.2d 1034, 1037 (1992), it is generally necessary for an applicant to rely on more than hearsay evidence to prevail in a case.

Rather, Board practice has been in accord with standard administrative adjudications, in which a factfinder is not bound by the Rules of Evidence and may consider any evidence deemed to be relevant and material. See, e.g., Montana Power Co. v Federal Power Commission, 185 F. 2d 491, 498 (D.C. Cir. 1950) cert. denied 340 U.S. 947 (1951); 4 Stein, Mitchell & Mezines, Administrative Law, §26.01 at 26-2 to 26-3 (Administrative Procedure Act provides for the admission of all evidence that is not irrelevant, immaterial, or unduly repetitious).

The Board's language in Docket No. 51-82 concerning Coast Guard corroboration is probably better read as an admonition to the service to obtain sworn statements of witnesses where possible, rather than merely expect that unsworn and unsigned statements as summarized by others would be of equal probative value. Other Board precedents are in accord that unsigned and unsworn statements may be given little weight: see, e.g., Docket No. 36-96 (Reconsid-

eration), (Coast Guard's summary of unsigned "recollections" by members of a rating chain considered, but found insufficient to refute "unwavering written statements" to the contrary).

The Board on remand does not appear to have relied on the unsigned statements challenged by the applicant, and I have not.

As to the relevant Coast Guard Regulations and Personnel Manual provisions, they are worth restating from the Majority Opinion:

UNITED STATES COAST GUARD REGULATIONS

Section 7-3-3. of the Coast Guard Regulations states that "[t]he assignment of commissioned officers' quarters on board ship shall be in accordance with the plans of the ship as approved by the Commandant. The plans shall show the quarters assigned to the commanding officer, the executive officer, and the engineering officer, and may show the quarters assigned to other heads of departments. Rooms not specifically designated on the plans shall be assigned by the commanding officer, having due regard for the relative rank of the officers concerned. . . ."

PERSONNEL MANUAL

4.A.1.a. Objective

.... In distributing and assigning members, Service needs come first.

4.A.6.a. Commandant's Policy

[I]t is a long standing feature of military service and the Commandant's policy that all Coast Guard members be available for unrestricted duty assignment worldwide.

4.A.7. Women's Duty Assignments and Rotations

Commander, CGPC assigns women to any Coast Guard unit having adequate privacy for each gender in berthing and personal hygiene. . . .

3. The Service makes every attempt to assign women to units in groups of two or more for medical and companionship reasons; however, the Service will not arbitrarily deny women an assignment solely due to lack of a second woman.

Cf. 4.B.3.c. 2. Assignment Continuum

2. The Assignment Officer (AO) shall consider the following assignment continuum when making any assignment decision:

a. Service needs

b. Assignment priorities and geographic stability. The AO will attempt to reassign the member first within the local area (local stability). If an appropriate assignment is not available there, the next attempt will be made to reassign the member within the geographic boundaries of the current district (regional stability) where he or she now is stationed. If the district geographic area does not provide an assignment opportunity, then the entire Area (Atlantic or Pacific as appropriate) will be considered.

c. Career enhancement, diversity, and qualification requirements; advancement potential.

I also wish to expand on the Coast Guard's policies with regard to the assignment of members, for the service's actions here must be measured against those policies to assist in determining whether an error or injustice was committed here. As stated clearly in the Personnel Manual, the needs of the service must be the primary consideration ("Service needs come first," PERSMAN Art. 4-A-1a). However, the Coast Guard's advisory opinion goes on to explain as follows:

It is generally in the Coast Guard's interest, as well as the members', to try to accommodate individual work-life needs and preferences in the assignment process, particularly when a member or the member's family has made unusual sacrifices or faces hardship as a result of a Coast Guard assignment. Such a practice enhances morale, job satisfaction, retention, and productivity. Assignment decisions therefore call for the exercise of considerable discretion by the designated individuals in decisions that seek to accommodate the needs and preferences of individual members while simultaneously meeting the needs of the affected units and the Coast Guard generally.

The Chief of the Officer Personnel Management Division provided this additional elaboration:

Service need is the single most important factor, but also considered are the needs of the unit, and the individual's desire. In simple terms, a "perfect" assignment occurs when all three factors can be met. However, Assignment Officers also consider numerous additional factors which may not be as apparent as the Service/unit/individual triumvirate. Among these are an individual's linear ranking on an appointment list; any declared "special needs" as defined by the Coast Guard's mandatory Special Needs program; an individual's

demonstrated skill-set and earned qualifications; past performance; past assignment history including past sea duty, prior assignment to restricted or isolated duty, prior overseas or otherwise arduous duty; career growth opportunities for the assignee; transfer costs; diversity (not purely a gender or minority issue but also addresses accession source); collocation desires if applicable; criticality of the vacancy; rank structure (acceptable rank level considered); immediate family impacts; working spouses; and any additional information that comes to the attention of the Assignment Officer.

The Findings and Conclusions numbered 10 through 28 below, and the ordering paragraph, shall substitute for those numbered 10 through 21 of both Majority and dissenting opinions and their ordering paragraphs.

FINDINGS AND CONCLUSIONS

(Note: Findings and Conclusions 1 through 9 are discussed above.)

10. A vacancy was identified on the [REDACTED] due to the retirement of the F&S CWO3 effective February 1, 1996. (This prospective open billet on the [REDACTED] was being filled as a winter appointment, a time when there are fewer appointments being made and hence less flexibility in making assignments than during the spring and summer.) A male chief above the applicant on the eligibility list was next in line for such an appointment, and then the applicant. A male CWO3 on the [REDACTED] had also submitted an assignment data sheet for reassignment; he was specifically seeking the [REDACTED] assignment as his most desired billet. A fourth option was the next person on the CWO F&S eligibility list, a Chief Petty Officer who was a Food Service Specialist.

11. As discussed above (Findings 6 and 8), it was not necessary to appoint the male chief above the applicant on the eligibility list to the vacant [REDACTED] simply because he was "first-in-line" for an appointment. If assignments were that mechanical, there would be no need for the Coast Guard to provide Personnel Manual guidance on the various criteria that should be considered in making appointments.

12. The CWO F&S billet on the [REDACTED] was not restricted only to newly appointed CWO's. The Coast Guard's Commissioned and Warrant Officer Billet Manual, COMDTINST M5320.7Q, does not distinguish CWO billets on the basis of rank nor does it specify that certain billets be reserved for newly appointed CWO's. Therefore, the billet on the [REDACTED] could have been assigned to any CWO F&S in the Coast Guard, including the CWO3 on the [REDACTED]. There was no error or impropriety in considering him for the position.

13. In considering these potential appointments, the assignment officer initially had the following information:

a) The male chief above the applicant on the eligibility list was qualified for the [REDACTED] assignment. He had reported to a duty assignment in [REDACTED] only the previous summer. However, another F&S vacancy was coming up in [REDACTED], in April-May, 1996 for which he would be qualified. This chief had just made a permanent change of station to [REDACTED] and detailing him back to the [REDACTED] would have involved a considerable expense that could be avoided by retaining him in an [REDACTED] assignment. [REDACTED] was also his most desired area of assignment. If this chief were assigned to the [REDACTED], another qualified member would soon need to be found for the [REDACTED] billet.

b) The applicant was qualified for the [REDACTED] appointment. She was serving as Chief Petty Officer in the supply department of a facility in [REDACTED]. On her assignment data form, she indicated a preference for assignments in Yorktown and Portsmouth, Virginia, and at Coast Guard Headquarters in Washington. Her least desired assignments were to billets in Juneau, Alaska and Alameda, California. None of her desired assignments involved shipboard duty, or assignment to any billets in or around [REDACTED]. She stated that she was available for an unaccompanied tour, and did not indicate any "special needs." All of the applicant's past assignments had been to billets in the continental United States, and the last three have been to [REDACTED]. The assignment officer contacted the Executive Officer on the [REDACTED] to learn of its berthing situation and was informed that berthing was not available for a female.

c) The male CWO3 on the [REDACTED] who had the billet on that vessel equivalent to the one becoming vacant on the [REDACTED], had stated to the assignment officer that if there ever was an assignment to the First Coast Guard District (New England) he would like to be considered for it. This member, who had become aware of the impending vacancy on the [REDACTED], submitted an assignment data form even though he was not in the assignment cycle. This member's top four assignment preferences were to the New England area, with the [REDACTED] billet leading the list. He stated on his assignment data form that he "strongly desired" that assignment; that he was "extremely familiar with shipboard operations"; and that his wife maintained their home in [REDACTED], but "since the birth of our first child in MAR95 the difficulties of single parenting during my extended absences have proven formidable." The member indicated that he understood he would be obligated for a full additional three years of shipboard duty. He also stated that he would be willing to transfer at no cost to the U.S. Government. (Of course, if this warrant officer were authorized to transfer to the [REDACTED] billet, he would need to be backfilled on the [REDACTED]. The assignment officer spoke to the Executive Officer on the [REDACTED], who advised that berthing was available there for a female officer.)

14. The applicant could not be assigned to the [REDACTED] due to berthing problems. The only available vacancy in a double stateroom would be that of the departing warrant officer, who shared the room with a male Lieutenant. Coast Guard policy does not permit males and females to "bunk together." ("Women will be assigned to any unit within the Coast Guard having adequate privacy for each sex in berthing and personal hygiene.... Sleeping quarters must be separate, with privacy provided by rigid bulkheads." Coast Guard Personnel Manual, Article 4.A.10.a.) Applicant has argued that a creative solution would have been to move the ship's engineering officer, a male, from his single stateroom into the double stateroom with the Lieutenant, and berth the applicant in the single stateroom. While I endorse gender-neutral personnel policies and support "creative solutions" to the obstacles to such policies that inevitably exist, it is not reasonable to displace the third-ranking officer on the vessel from his single stateroom in order to fill it with the most junior one. There are only three single staterooms on board a vessel of this type, and they are reserved for the three highest-ranking officers: the ship's captain, its executive officer, and its engineering officer. These assignments are based not only on rank and prestige, but also function, since the staterooms are designed to serve as their offices as well as berths. In most workplace settings, desirable quarters are allocated based on rank, seniority, or similar factors, and management would not consider displacing an employee who has earned the right to those quarters for a very junior one. Such a move would likely here, as elsewhere, provoke serious morale and policy issues, and in this case would, further, disrupt the ability of the engineering officer to conduct his office business as otherwise expected. Moreover, such a move would not have been in accord the Coast Guard's general statement of policy that "accommodations for female personnel assigned to ships should be essentially the same as that provide males of similar pay grade and rank." (Emphasis supplied.) Coast Guard Personnel Manual, Article 4.A.10.a.

15. Given this combination of circumstances, it was reasonable for the assignment officer to propose the assignments he did: retain the male chief in [REDACTED], even though a short-term "double-billeting" would be entailed; reassign the male CWO3 from the [REDACTED] to the [REDACTED]; and assign the applicant to backfill the vacancy thereby created on the [REDACTED].

16. I agree with the Majority Opinion in that the assignment officer considered the personal preferences of the male chief in [REDACTED] and the CWO3 on the [REDACTED] in making his proposal. Such consideration is consistent with the Coast Guard's specified criteria for filling vacancies and was not improper. I further agree with the Majority Opinion that the assignment officer had an obligation to equally consider the applicant's personal preferences.

17. Given however that the needs of the service come first, consideration of personal preferences does not mean assignment exclusively based on those personal preferences. As the dissenting member observed, "unfortunately, in making assignments, everybody is not going to be pleased."

18. At the time the assignment officer made his proposal, he would have known that the applicant preferred a land-side assignment in the mid-Atlantic area. However, he would have had no reason to know of applicant's concerns for her ailing mother, since she had specified no special needs (and in fact had requested assignments either in [REDACTED]), nor of her housing situation.

19. In reviewing the other stated criteria for assignment, it was reasonable to propose that the applicant be selected to backfill on the [REDACTED] based on her personnel information. She had a storekeeper background (desirable but not required for a 270 F&S position); she had no dependents and was available for an unaccompanied tour; she had had several [REDACTED] assignments in succession; and her resume showed no sea duty, no restricted or isolated duty, or assignment outside the continental United States. According to the Minutes of a Women's Advisory Council Meeting that the applicant submitted with her application, going to sea is usually "seen as a reward when a women [sic] makes Chief," and 25% of all Coast Guard billets are afloat. The "least desired" billets she specified in her assignment data form were not shipboard ones, so the assignments officer would have no reason to expect that she affirmatively sought to avoid shipboard assignments. Further, one of those "least desired" assignments was a [REDACTED] position, so she would not likely have been pleased with an assignment to the [REDACTED] vacancy that was also upcoming.

20. After receiving the endorsement of his commander, the assignment officer thereafter informed the applicant that she would be promoted on 1 January 1996 and was receiving orders to the [REDACTED]. He did not discuss with her the [REDACTED] vacancy and berthing situation, or otherwise disclose the reasoning behind the assignments.

21. According to a letter the applicant sent to the President of the Women's Advisory Council on 26 Nov 1995, she was at first "truly excited" about the appointment. However, she then learned three things. First, that she would stand to lose (allegedly \$24,000) were she to sell her home. Second, that the chief above her on the eligibility list had not yet received orders. And third, that she would be backfilling on the [REDACTED] so that its F&S officer could rotate to the same position on the [REDACTED], in order to be nearer his family. She then became, in her words, "confused and agitated," believing that gender had impermissibly become the "driving force" for her assignment.

22. The applicant, and others on her behalf, thereafter questioned the assignment, speaking to the assignment officer himself and a Captain in the then-Military Personnel Command. She then expressed a preference for an appointment aboard the [REDACTED] or an assignment in [REDACTED] so that she would not have needed to sell her home. These inquiries were dealt with rather brusquely by the assignment officer, who according to several accounts questioned whether the applicant's rationale for resisting the assignment was a desire to avoid sea duty. The Captain clarified to her at this time that the assignment of the CWO3 from the

██████████ would be treated as a new appointment; i.e. the obligation would be for the full three-year term and not just the balance of the CWO3's shipboard assignment period.

23. The applicant also had at least one conversation with the CWO3 aboard the ██████████. He informed her that the Commanding Officer of the vessel affirmatively welcomed a female officer, since the vessel had none. It is unclear how or whether this same information was communicated to assignments officer, but he has not denied stating that the applicant was receiving orders to the ██████████ because she was a female and the ██████████ needed a female.

24. As related above, applicant's preference for an assignment to the ██████████ could not be satisfied due to berthing problems. Nor has applicant shown that the Coast Guard committed an error or injustice by failing to assign her to a billet in the ██████████ area, the rationale for which was a desire to avoid a financial loss on the sale or rental of her home. If military assignments could be avoided simply for this reason, many assignments would be, especially in periods of depressed housing prices (as 1995 was). Moreover, such an assignment would have required the Coast Guard to temporarily double billet the position. (The Coast Guard did double billet for the chief in ██████████, but this was apparently the only downside perceived to that assignment. Here it is one of several downsides, including as others permitting an assignment to be avoided due to a depressed housing market, and having to fill an F&S billet with a Food Service Specialist rather than a CWO2 with a storekeeper background.)

25. The assignments officer could have been more sympathetic and understanding with respect to the applicant's special needs, but the applicant contributed to the misunderstanding by asserting special needs subsequent to her being assigned to the ██████████ that were not asserted in her assignment data form and so not considered in connection with the original assignments. In the form, the applicant had indicated a preference for assignments to ██████████ outside the commuting distance from her residence in ██████████. Applicant has not explained why she would not have needed to sell or rent her house if she had been assigned to those locations. Also, her assignment data form did not indicate any special need with respect to caring for her mother.

26. The Majority Opinion's rationale for recommending a grant of relief is not that there was gender discrimination (it would find that the applicant has not proven that it was gender that caused the Coast Guard to treat her differently), but that the Coast Guard treated the males with flexibility and was by contrast rigid with her. I agree that the basis for any difference in treatment was not gender, but the fact that the perceived preferences expressed by the two male officers generally paralleled Coast Guard needs, while the preferences she expressed did not and, further, did not seem consistent with the assignment data she had earlier submitted.

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 2000-008

FINAL DECISION ON REMAND

██████████ Deputy Chairman:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. This case was remanded to the BCMR by the United States District Court, Civil Action No. ██████████. This remand has been docketed by the Board as No. 2000-008.

The Board reached a recommended final decision in this case on November 18, 1999. Two of the three duly appointed members, the majority, voted to grant relief. One member, the minority, voted to deny relief.

On April 30, 1997, the applicant filed an application (Docket No. 114-97) with the Board requesting that her record be corrected by showing that she was appointed to the rank of CWO2, with a date of rank of January 1, 1996 and with back pay and allowances. The applicant alleged that the Coast Guard had discriminated against her because of her gender in the CWO assignment process.

On April 9, 1998, the Board issued a final decision denying the applicant's request for relief. The Board determined that the applicant had confused gender consideration with gender discrimination and that the Coast Guard acted in accordance with the Personnel Manual when it offered the applicant a CWO assignment, which she declined to accept.

On April 13, 1998, the applicant filed a complaint in the United District Court for the ██████████ challenging the BCMR decision. She alleged that the Board's decision was "arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence."

On ██████████ the Court entered an order remanding this case to the Board. The Court determined that the Board had departed from precedent -- by accepting a written statement that purported to contain summarized statements from seven other individuals -- without providing a rationale for doing so. The Court noted that in a prior BCMR decision, No. 51-82, the Board expressed its intention to consider only written, signed statements as evidence, to require corroboration for hearsay statements, and to reject the practice of quoting in declarations oral statements made by witnesses to members of the Chief Counsel's staff. The Court stated that "[i]n the

absence of any explanation for this departure from precedent, the BCMR's decision making process appears deficient."

In Docket No. 51-82, the Board stated the following with respect to the Coast Guard's practice of quoting verbal statements of others in its advisory opinions:

[W]e wish to express our disapproval of the Coast Guard's recent practice of quoting in position papers the oral statements made by witnesses to members of the Chief Counsel's staff. . . .

In cases . . . where the credibility of the witnesses is an issue, we wish to consider only written, signed statements (or oral testimony in cases where a hearing before the Board has been granted). It has been our policy to require corroboration for hearsay statements by petitioners, and we believe it only fair to require the same of the Coast Guard. We wish to emphasize that we do not question the veracity of the Chief Counsel or his staff, but we must recognize that oral statements are often subject to various interpretations, and we wish to have the statements of witnesses in writing, in their own words, so that we may review the statements ourselves.

The Court also determined that the Board failed to make adequate findings on genuine issues of material fact. The Court stated that the BCMR did not address the striking inconsistency between the Coast Guard's disregard for the applicant's geographical preferences and its attention to those of two male officers. The Court further stated that the gravamen of the applicant's discrimination claim is the Coast Guard's preferential treatment of male officers relative to its treatment of her. The Court further stated that the Board failed to address the marked inconsistency in the Coast Guard's reasoning for appointing the applicant to the [REDACTED]. In this regard, the Court noted that after the applicant had declined appointment to the [REDACTED], the Coast Guard then appointed the next person on the list, a male officer with a food service background, to the [REDACTED], when it stated that it was seeking a CWO with a storekeeper background for that job.

The Court stated as follows in its conclusion:

[T]he BCMR's decision[] remains insufficient for the Court to conduct a meaningful review. . . . Although the Court cannot find that the BCMR acted arbitrarily and capriciously in denying [the applicant's] request for correction of her record, the Court does find that the propriety of the BCMR's decision cannot be sufficiently discerned from its extremely laconic, and ultimately inadequate, written findings. Given the BCMR's abrupt and unexplained departure from precedent with respect to its admission and reliance upon hearsay evidence, and given its utter disregard of [the applicant's] compelling evidence suggesting that the Coast Guard afforded male officers favorable treatment by heeding their

geographic preferences, the BCMR has failed to provide a sufficient account of its reasoning.

Background

The applicant was a storekeeper chief (SKC; pay grade E-7) at the time she applied for relief (April 30, 1997). On September 1, 1997, she was advanced to SKCS, pay grade E-8. Previously, in 1995, she applied for promotion to CWO2 (Chief Warrant Officer (2)). She was selected and tendered an appointment as a CWO2, with a date of rank of January 1, 1996, and with appropriate pay and allowances. She declined this appointment.

The applicant's appointment as a CWO2 was "conditioned on her acceptance of orders" to USCGC [REDACTED], a cutter that was homeported in [REDACTED]. She rejected that appointment on the ground that it was gender-based and discriminatory. The applicant alleged that because the gender based precondition discriminatorily set by the Coast Guard was not feasible, the applicant was compelled to decline the tendered appointment.

The precondition allegedly related to the fact that another woman officer had already been ordered assigned to the [REDACTED]. The applicant alleged that the Coast Guard conditioned her appointment because it "wished to avoid having only one female officer aboard" that ship. The applicant also alleged that the Coast Guard refused to entertain any alternatives that would permit the applicant to address family obligations (her mother was ailing), while it accommodated a male chief warrant officer at the same time.

The applicant also alleged that the precondition violated an alleged anti-discrimination rule (Article 4.A.7.a. of the Personnel Manual).¹ That section provided that the Service "will not arbitrarily deny women an assignment solely due to lack of a second woman."

The applicant explained that the end-result of the CWO selection process is the preparation of an annual promotion list, which is divided by the various CWO specialties. Prospective CWO2s are promoted off the promotion list in the order in which their names are listed, and are promoted only if and when a vacancy occurs in their specialty. Selectees are informed of the duty station to which they will be assigned when tendered a CWO appointment and afforded five days (subject to extension) in which to accept or decline the appointment.

The applicant stated that in September 1995, when she was tendered an appointment as CWO2 (F&S) [Finance and Supply], with the condition that she accept assignment to the [REDACTED] she was not "the next prospective CWO2(F&S) on the

¹ The provision was originally Art. 4.A.10(a)(4) of the Personnel Manual, which was adopted as part of Change 20 on July 7, 1994. The current text was adopted on February 3, 1994, as part of Change 26.

promotion list." The next person on the appointment list was a male chief (who was assigned to duty in [REDACTED]). Despite the fact that this person was above her among the F&S specialists on the CWO list, he was not tendered a commission before she was. The applicant alleged that she was discriminated against by being tendered a commission before him because the Coast Guard's assignment process considered her gender instead of only her position on the promotion list.

The applicant also alleged that there was no F&S vacancy on the [REDACTED] but there was one on the [REDACTED]. A vacancy was, however, created on the [REDACTED] by prematurely reassigning a male officer from [REDACTED]. The CWO2 on the [REDACTED] (and the then prospective assignee to the [REDACTED]) was a male geographical bachelor² who elected to leave his family in the [REDACTED] while serving on the [REDACTED], which was located in [REDACTED] but who wanted to relocate to the First Coast Guard District to be near his family. At the time in question, this male CWO2 had only served one year of a three-year tour on the [REDACTED].

The applicant alleged that the Coast Guard committed two errors: (1) it permitted a male CWO to leave the [REDACTED] and rejoin his family two years early, and (2) it made the applicant a companion for a female ensign on the [REDACTED]. The applicant alleged that this one-two punch disregarded "the normal process" of working down the CWO2 promotion list as well as the Personnel Manual. The normal process involved offering promotion "in the proper sequence" from the promotion list.

The applicant alleged that she was told by a Coast Guard captain in the assignments branch that if she declined the [REDACTED] appointment, the Coast Guard would simply assign the next person on the CWO2 (F&S) list to that cutter. She alleged that this did not happen -- the next person promoted to CWO2 (F&S) off the same promotion list received orders to the [REDACTED], not the [REDACTED].

The applicant alleged that as a result of her non-acceptance of the out-of-sequence tendered orders and promotion, the Coast Guard apparently decided not to assign the female ensign to the [REDACTED]. The geographical bachelor remained on the [REDACTED]. Another male CWO2, who was below the applicant on the advancement list and who had been a cook, was assigned to fill the vacancy on the [REDACTED].

The applicant alleged that she was improperly tendered the [REDACTED] appointment out of sequence. She stated that if she had been offered promotion in the proper sequence, she would not have received a tender until mid-1996. The applicant alleged that seven CWO2 vacancies were slated to occur just in the [REDACTED] metropolitan area in mid-1996. She stated that had the Coast Guard tendered her appointment in order, she would have accepted the appointment and orders to any one of those seven vacancies.

² A geographical bachelor is a married member of the Service whose duty station is other than where his family resides.

According to a November 26, 1995 letter by the applicant to the President, Women's Advisory Council, acceptance of the [REDACTED] assignment would have required her to dispose of her house in [REDACTED] quickly. She learned that to do so she would have to sell the house at a \$24,000 loss or rent it as a depressed rental. According to the letter, she told the Council that she "was disadvantaged because [she] was forced to decline an appointment because the orders were based on gender." She said she felt that "the practice of assignment by gender is totally wrong, if not illegal."³

Statements Submitted by the Applicant

a. A CWO4 (JL) submitted a statement in support of the applicant. He stated he had previously served as an assignment officer. He claimed that the applicant's assignment officer violated Coast Guard policy by "issuing orders to her before [they were issued to another member] who was above her on the list and by rights should have received orders to the next open billet." (The CWO4 did not identify the Coast Guard rule or regulation that prohibits a member from issuing orders to a lower-ranked person, nor did he identify the meaning of "by rights should.") He stated that he was told by the applicant's detailer that "[the applicant was going to the [REDACTED] because she was female and that was it!" The CWO4 further stated that when it became obvious to the applicant that the vacancy was on the [REDACTED] she readily agreed to transfer to the [REDACTED], since it was in the area of her [REDACTED].

This CWO4 and the applicant were apparently assigned to the same unit during the period under discussion. The CWO4 stated that the unit's CWO (F&S) had submitted his retirement request and the CO wanted to keep the applicant at the unit to fill that vacancy upon her advancement to CWO2. The CWO4 stated that the detailer would not consider the possibility of the applicant remaining at her then current unit. The CWO4 stated that the applicant was discriminated against because she was female.

b. A second statement was submitted by a CWO (Ret.) (MJD). She was at the time the storekeeper enlisted assignment officer. The CWO stated that the applicant was treated unfairly by the Coast Guard, which did not consider her needs. The applicant's mother, who lived in [REDACTED], was afflicted with crippling arthritis, osteoporosis, other conditions, and was emotionally dependent on the applicant. Assignment of the applicant to the CGC [REDACTED] would have been "better" for the applicant because it was homeported in [REDACTED]. Assignment of the applicant to CGC [REDACTED], which was homeported in [REDACTED], would make it "almost impossible" for the applicant to address an emergency with respect to her mother. This CWO corroborated the statement of the CWO4, that the applicant's then unit requested that she fill the vacancy created by the retirement of its F&S, but the detailer refused to do this. She stated that the F&S at the applicant's unit departed on June 1, 1995, and that the applicant actively filled the position upon his departure.

³ According to the head of the CG Personnel Command, there is no record of the women's council having received the applicant's 1995 letter or of responding to it.

This CWO stated that she spoke with the detailer about the applicant's situation. She stated that the detailer told her that the applicant was just trying to avoid sea duty. She stated that the detailer informed her that the applicant would go to the [REDACTED] because they needed a female onboard to act as a senior role model for the enlisted females on board.

c. A CWO3 (JP) said that "[i]t was unwritten policy at the MPC (Personnel Command) to assist new personnel as best as they could, we always tried to find solutions to problems. This was not done for [the applicant]. The assignment officer for [the applicant] was rigged (sic) and unbending."

Original Views of the Coast Guard

On March 23, 1998, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The Chief Counsel of the Coast Guard said that the applicant failed to prove that the Coast Guard committed error or injustice in her case. He said that she has not established that she was a victim of gender discrimination merely by showing that her gender was considered in an assignment decision. The Chief Counsel said that assignment decisions "call for the exercise of considerable discretion" and that in exercising that discretion Coast Guard personnel are presumed to have discharged their duties correctly and lawfully "absent . . . convincing evidence to the contrary." The Chief Counsel stated that the applicant has not presented evidence rebutting that presumption and is not entitled to relief.

The Chief Counsel noted that there are occasions when the Coast Guard is required to consider gender. According to the first half of provision 3, Article 4.A.7.a.3. of the Personnel Manual, "The Service makes every attempt to assign women to units in groups of two or more for medical and companionship" reasons.

The Chief Counsel also noted that Article 4.A.7.a. of the Personnel Manual requires gender consideration. It requires that women in the Coast Guard be assigned only to Coast Guard units "having adequate privacy for each gender in berthing and personal hygiene." The Chief Counsel said that the [REDACTED] the cutter the applicant preferred, "did not have berthing available for a woman warrant officer."

The Chief Counsel alleged that the applicant presented no evidence to support her claim that the Coast Guard favored a male officer over her solely because she was a woman. He said that the assignment process includes less desirable assignments because the process is of necessity discretionary.

The Personnel Manual says (Art. 4.A.1.a.1) that in assigning personnel "Service needs come first."

The Chief Counsel accordingly said that the applicant had failed to prove error or injustice and her application should therefore be denied.

Summaries of Statements Submitted by the Coast Guard

The Coast Guard submitted statements from several witnesses with its advisory opinion. These statements are summarized below.⁴

a. A CWO (F&S) (DCP) stated that all known assignments for the next year are published in the preceding August (shopping list); all prospective CWOs are required to submit their assignment data by October. The billets are competed for and are not filled by first come, first serve. "In no instance is a vacancy simply arbitrarily filled by the next prospective CWO. The assignment decision is based upon assessment of all pertinent information."

b. Another CWO4, the F&S assignment officer (detailer), (DJG) stated in a 1998 affidavit, that the vacancy was on the [REDACTED] and it was an "off season" assignment as the regular assignments were to fill vacancies effective from late spring to the end of summer 1996. He stated that the preference was to assign an F&S with a supply background to the job on the [REDACTED], since the person assigned would serve as the supply department head. The person above the applicant on the appointment list was a cook and therefore did not have the expertise necessary to fill the F&S job on the [REDACTED]. The cook was assigned to a job as the Exchange officer in [REDACTED], which was to become vacant in 1996. The assignment officer stated that off-season assignments are filled from the warrant officer selection list, although an exception can be made if there is a current F&S who is qualified, available or had command support for an early transfer, and is otherwise a good fit to fill the billet.

The assignment officer stated that the applicant was a good fit for the job on the [REDACTED]. However, after checking with the executive officer on the [REDACTED], he learned that all the staterooms on [REDACTED] were occupied by male officers, with the exception of one double occupancy stateroom which had only one male officer. None of these officers were scheduled for rotation. [REDACTED] was accordingly unavailable to accommodate a female officer. The assignment officer stated that since a male officer was needed on the [REDACTED] he decided to recommend rotating the F&S from the [REDACTED] to the [REDACTED].

The assignment officer stated that appointments to warrant officer must be made in sequential order from the appointment list. Therefore, it was necessary to assign the CWO who was above the applicant on the appointment list (with a mess specialist background) to the upcoming vacancy in [REDACTED], before the applicant could be appointed as a warrant officer. He stated that the applicant has indicated that her least desired assignment area was [REDACTED]. She was then assigned to [REDACTED] where she could head a department afloat.

⁴ The quoted hearsay submitted by the Coast Guard in the attachment to its original comments will not be considered by the Board in this remand decision. However, two witnesses who earlier gave verbal accounts have now given written signed statements that were submitted with the Coast Guard's supplemental views. These statements will be considered by the Board, along with all other credible evidence.

Applicant's Response to the Original Coast Guard Views

On March 23, 1998, the Board sent the applicant a copy of the views and recommendations of the Coast Guard, with an invitation to her to respond to them.

On April 3, 1998, the applicant sent the Board her responses to the views of the Coast Guard. The applicant sharply criticized the Coast Guard's failure to generate a timely advisory opinion.

She also criticized alleged defects in the advisory opinion that was submitted to the Board. She criticized the statements by Coast Guard witnesses and called for an evidentiary hearing. The applicant objected to the statement from a CWO3 that contained the summarized statements from other individuals. She stated that "[t]he Coast Guard's practice of using third-party submissions was roundly and properly condemned by the BCMR in Docket No. 51-82, in a decision that was approved by the Deputy General Counsel on October 17, 1982.

The applicant stated that paragraph 4f. of the advisory opinion supports her contention that there was no vacancy on the [REDACTED] when that assignment was tendered to her. Paragraph 4.f. states in pertinent part, as follows:

[T]he reason that the next person on the CWO appointment list went to the [REDACTED] rather than the [REDACTED] was simply that the vacancy was aboard the [REDACTED] and not the [REDACTED]. There is no requirement for the Coast Guard to remove assigned personnel just to ensure that berthing is available for a woman who wants to be assigned to that unit.

The applicant took issue with the advisory opinion in the following significant areas:

The Coast Guard stresses the virtues of accommodating the personal preferences of CWO [R] and chief [C]. What is not apparent is why (other than gender), those individuals' preferences were deemed worthy of respect but not [the applicant's].

Contrary to the Coast Guard's statement of its normal practice, the next CWO (F&S) assigned to the . . . [REDACTED] [CWO S] had been a cook (Subsistence Specialist Chief).

The statement attributed to [the applicant that she could not go to sea] is false. . . . She expressly told [the detailer] that she would take orders to [REDACTED] when she learned it was available.

She also submitted a three-page statement by a CWO4 who had previously submitted a two-page statement with the application.

Supplemental Views of the Coast Guard on Remand

On October 21, 1999, the Board received the supplemental views of the Coast Guard recommending that the Board affirm its original decision, which was to deny relief to the applicant.

The Chief Counsel submitted the comments of the Coast Guard. He stated that the decision by the Board finding no discrimination was correct. The Chief Counsel stated that the applicant's description of the warrant officer appointment process - to sequentially issue orders based on the member's position on the CWO appointment list - is inaccurate. He stated that even if the applicant's description of the assignment process is accepted, the Coast Guard did not violate this alleged practice. In this regard, the Chief Counsel stated that "the CWO F&S who would have received PCS [permanent change of station] orders to the . . . [redacted] if the applicant had accepted her PCS orders, was not on the CWO appointment list with the Applicant and therefore his assignment was not accomplished by somehow passing over Applicant's name on the CWO appointment list."

The Chief Counsel stated that the warrant officer billet manual does not distinguish CWO billets on the basis of rank, nor does it specify that certain billets are normally reserved for newly appointed CWOs. Therefore, any CWO F&S could have been assigned to the billet, not just newly appointed CWOs, like the applicant. The plan to assign someone other than the applicant to the [redacted] was not to be an assignment in lieu of the applicant but rather one dictated by service need.

The Chief Counsel stated that the [redacted] was the vessel with the vacant billet, but it did not have berthing for a female officer. He stated that the only space available at the time was a double occupancy stateroom that already had a male officer in it. The Chief Counsel further stated as follows:

The only way to have made a female officer berth available in [redacted] at that time would have been to move a mid-grade lieutenant (department head) to share the stateroom with the male junior officer. Such a move would be contrary to Coast Guard policy and would be to the detriment of the function of a senior Department Head. The . . . detailer sought the reassignment of a male officer to [redacted] in order to open the existing vacancy and associated commission and promotion to Applicant.

[T]he . . . [redacted] was not listed as one of Applicant's assignment preferences (in fact no afloat billet was listed), the Applicant failed to formally document her pressing family and financial obligations . . . in accordance with the Coast Guard Special Needs Program.

Without repeating CGPC's [Coast Guard Personnel Command's] explanation in its entirety, the BCMR's attention is drawn to two key points: First, the assignment of a junior female officer to [the] . . . [redacted] in January 1996 was barred by Coast Guard policy due to the

lack of appropriate berthing accommodations for the Applicant, and; second, the subsequent assignment of a CWO F&S (food service specialist) to [the] . . . [redacted] after Applicant, through her withdrawal, changed the pool of potential assignees, does not prove illegal discrimination.

The Chief Counsel argued that the applicant did not present any evidence to contradict the Coast Guard that no berthing was available for her on the [redacted], but rather argues that the Coast Guard should have moved a male officer from his single berth stateroom to the vacant berth that was available in a double occupancy stateroom. According to the Chief Counsel, the applicant's solution is problematic for three reasons: 1) It would remove a mid-grade officer serving as a senior department head from a single berth stateroom assigned to facilitate the duties and responsibilities of that position; 2) the applicant's solution would have created a situation violating the Service's fraternization policy (Article 8.. of the Personnel Manual) by mandating that a mid-grade berth with a junior officer; and 3) the applicant's solution ignores the wide disparity in the applicant's military status and that of the mid-grade officer.

The Chief Counsel stated that the subsequent assignment of a CWO F&S (food service specialist) to the [redacted] does not prove illegal discrimination. He stated that it is undisputed that an off-season F&S vacancy arose on the [redacted] at the retirement of the incumbent. He stated normally the Coast Guard would prefer to assign an F&S with storekeeper experience to this shipboard billet. The Chief Counsel stated that a general statement of policy does not preclude the assignment of a CWO F&S with a cook's background, if the circumstances dictate, as in this case. The Chief Counsel argued that the assignment of the cook to the [redacted] after the applicant had refused her assignment to the [redacted], was conducted in accordance with the normal practice of sequentially working down the CWO appointment list.

The Chief Counsel stated that the Board was not in violation of any explicit or implicit regulation or policy when it considered and relied upon the declarations submitted by the Coast Guard in its advisory opinion dated March 23, 1998. The Chief Counsel disagreed that the Board departed from precedent (BCMR No. 51-82) when it relied upon the Coast Guard's hearsay evidence without providing a rationale for doing so. The Chief Counsel stated that BCMR No. 51-82 stands for the proposition that the Coast Guard Chief Counsel's staff should not quote unsworn witness statements made to the Chief Counsel's staff because they do not carry the indicia of credibility. The Chief Counsel stated that in dicta, the Board questioned the Coast Guard's use, and by implication, the credibility of unsigned, unattested statements quoted by the Chief Counsel in his Advisory opinion. The Chief Counsel stated that the standard of admissibility applied by the reviewing courts and administrative law judges is that "an administrative tribunal is not required to exclude hearsay evidence in the form of a document if its authenticity is sufficiently convincing to a reasonable mind and if it carries sufficient assurance as to its truthfulness." See Fairfield Scientific Corp. v. United States, 222 Ct. Cl. 167, 611, 611 F. 2d. 854, 859 (1979), appeal after remand 655 F. 2d 1062.

The Chief Counsel stated the declaration containing the hearsay contained factual information that was not rebutted and must be presumed credible. He stated

that the current sworn statements from key individuals whose statement were summarized in that original declaration, support the credibility presumption that the Board should provide to the original declaration that contained the hearsay. The Chief Counsel argued that the Board should interpret their decision in Docket No. 51-82 to apply only where credibility of quoted statements is an issue, not as to hearsay evidence or hearsay within hearsay evidence.

The Coast Guard stated that the use of hearsay in the present case is distinguished from that criticized in Docket No. 51-82 because in the present case, the Coast Guard submitted signed declarations setting forth the facts relevant to this case. Further, the Chief Counsel stated that 33 CFR 52.21 states that "a hearing is not limited by the legal rules of evidence but reasonable standards of competency, relevancy, and materiality are observed for the receipt and consideration of evidence."

The Chief Counsel stated that even if hearsay evidence was barred by regulation, the disputed evidence was not submitted for the truth of the matter asserted and is, therefore, not excludable hearsay. He stated that the statement containing the hearsay in the original proceeding was not submitted for the truth of the matter asserted, but was used for the purpose of demonstrating why the applicant's detailer took certain actions. The Chief Counsel re-submitted this statement with the hearsay statements removed. He also submitted a signed affidavit from two of the witnesses quoted in the original hearsay document, another signed affidavit from the detailer, and a statement from Chief of the Officer Personnel Management Division (OPMD). Each of these is discussed below.

1. The OPMD stated that the Coast Guard considers a variety of factors in making assignments. He also stated that there is a general preference to assign former storekeepers rather than former food service specialists to their first CWO assignment as supply officers aboard 270-foot cutters. He stated that "[a]lthough the service attempts to assign former storekeepers as CWO F&S's aboard cutters, the ships are often willing to accept former food service specialist if it means getting the person on board sooner versus waiting for a storekeeper to come up on the [WO] appointment list."

The OPMD stated that 270-foot cutters have a crew of 97, with includes approximately 13 officers. The cutters berth officers in two-person staterooms (with the exception of the commanding officer, executive officer and engineering officer, who have private staterooms). He reiterated that the applicant could not be assigned to the [REDACTED] because it lacked berthing and privacy for additional female officers. He denied that the applicant's subsequent assignment to the [REDACTED] was to serve as a companion for another female officer, but she was offered the afloat opportunity because the [REDACTED] had a vacant two-person stateroom and could accommodate female officers. He asserted that the Coast Guard was willing to provide the applicant with the opportunity to serve on the [REDACTED], even though it would cost additional funds to do so for both the applicant and the officer she would be replacing.

The OPMD stated that the applicant's concern for her mother was understandable, but parents do not meet the Coast Guard's definition of "immediate family." He stated that the applicant's concern for selling her home "is a concern shared by virtually all senior Coast Guard members, whether officer or enlisted."

2. The Coast Guard submitted a sworn statement from the detailer's supervisor at the time. He basically stated that there was no berthing on the [REDACTED] for the applicant. He stated that he recalled that the detailer confirmed with the [REDACTED] XO the unavailability of female berthing on board the [REDACTED]

3. In his supplemental views, the Chief Counsel submitted another statement from the detailer, dated October 14, 1999. The detailer stated that he learned in October 1995 that a vacancy would occur on the [REDACTED] on February 1, 1996, due to the retirement of the current F&S on that ship. The [REDACTED] requested a replacement immediately upon the December 1, 1995 departure of the F&S, who had been granted terminal leave from December 1, 1995 through January 31, 1996. The detailer stated that it was Coast Guard policy at that time to "back-fill when the vacancy occurs, not when the command has made the decision to let personnel depart on 60 days leave in conjunction with their retirement."

He stated that at the time the next person on the appointment list was the CWO in [REDACTED]. He stated that to the best of his recollection the CWO had just reported to [REDACTED] during the summer of 1995. He stated that he knew there would be a vacancy in [REDACTED] on 1 May 1996 and he had a vacancy on the [REDACTED] on February 1, 1996. He stated that looking at the situation he thought he could leave the CWO in [REDACTED] because it would be best for the Coast Guard and the applicant had indicated that [REDACTED] was her least desired assignment. With respect to the [REDACTED], he stated that he was advised that there was no berthing on the [REDACTED] for the applicant. He stated that he had had previous conversations with the CWO on the [REDACTED] who indicated his desire for an assignment to the first Coast Guard district. The detailer stated that this CWO was willing to accept the assignment to the [REDACTED]. He stated that he planned to leave the CWO in [REDACTED], assign the applicant to the [REDACTED] and assign the CWO from the [REDACTED] to the [REDACTED]. This plan was approved by his supervisor. Subsequently, the applicant refused her assignment to the [REDACTED], which amounted to the removal of her name from the CWO appointment list. He stated that he then contacted the next person on the CWO appointment list who was an F&S with a cook's background, who accepted the assignment to the [REDACTED]. With respect to the applicant's desire to remain in the [REDACTED], the detailer stated that he told the applicant that he could not over billet her in that area.

4. The CWO on the [REDACTED] submitted a sworn statement. With respect to learning about the vacancy on the [REDACTED], the CWO stated the following:

[The [REDACTED] moored [REDACTED] August 1995. I spoke with the Support Officer [the F&S CWO] who informed me that he was retiring and suggested that I may be able to talk to the detailer and cross deck to relieve him. At the time . . . my voluntary Geographical Bachelor status . .

at such great distance periodically caused marital stress. A transfer to [REDACTED] would alleviate my extended absences from home and my command positively endorsed my decision.

The CWO on the [REDACTED] further stated that the XO on the [REDACTED] was pleased that he might be assigned to that ship. He stated that the [REDACTED] had berthing concerns since it "already had two female officers assigned." He stated that he "spoke to [the detailer] explained his situation and formally requested the assignment by submitting an assignment data card. He stated that he understood that his assignment was contingent upon the applicant's acceptance of the CWO appointment and orders to the [REDACTED]. He stated that the applicant was not interested in going to sea at this point in her 18 year career. He stated that the CO on the [REDACTED] was enthusiastic about the possibility of the applicant's assignment because he "want[ed] a female officer since [the [REDACTED] had no female officers." This CWO stated that it was after learning of the applicant's assignment to the [REDACTED], that the CO directed him to initiate action to request assignment of a new female ensign to the [REDACTED] as a second female officer on behalf of [the applicant].

Applicant's Response to the Supplemental Views of the Coast Guard.

On November 3, 1999, the Board received the applicant's response to the supplemental views of the Coast Guard. The applicant complained about the delay that occurred in the original processing of this case. She also stated that the standard of review that is applicable to the Court in reviewing a BCMR decision does not apply to the Board.

With respect to the use of hearsay by the Board in the original proceeding, the applicant stated that the Board's decision in Docket No. 51-82 "could not be clearer in having disapproved the Coast Guard's practice of submitting documents that purport to quote individuals who have not executed written statements. She stated that unless the Board is disposed to abandon the rule in Docket No. 51-82 and explain why it is doing so, the ban must be honored and no portion of any Coast Guard declaration that purports to quote others may be relied on in support of the Board's eventual decision on remand.

The applicant stated that the Coast Guard advisory opinion fails to explain why the Coast Guard departed from its known warrant officer assignment practices. Nor does it provide a substantial basis on which a disinterested observer could conclude that the system functioned fairly in this case.

The applicant stated that contrary to the Coast Guard's defense that there was no berthing available for a woman officer on the [REDACTED], there was a double stateroom available. She stated that all that was required to accommodate her on the [REDACTED] was to move a male officer who was berthing alone into a double stateroom. She claimed that this would have been in accordance with the builder's design. The applicant submitted a copy of the plan for officer's berthing for the 270-foot cutters that included both the [REDACTED] and the [REDACTED]. She stated that the plan shows single

staterooms for the CO, XO, and the EO and six double staterooms that could accommodate 2 person each. According to the applicant's calculation, there was berthing available for 15 officers as opposed to the 13 as claimed by the Coast Guard.

The applicant argued that it would not have been fraternization as the Coast Guard claimed to assign two junior officers of different pay grades to a double stateroom. She argued, as the bottom line, that there were two male officers, each occupying stateroom that could accommodate two persons. This would have been a small price to pay to foster an environment in which women aspire to the same career opportunities as men and it would further the Department's policy regarding gender integration of the officer corps. The applicant stated that the lieutenant who would have had to move in with the one occupying a double stateroom was a junior officer. See Captain George E. Krietemeyer, USCG, The Coast Guardsman's Manual 102 (8th ed. 1991). The applicant argued that junior officers are addressed as Mr., Mrs., Miss, or Ms. Both lieutenants and warrant officers are addressed in this fashion.

In response to the Coast Guard's comment that the lieutenant (LT) who would have had to move into a double stateroom had ten years commissioned service, the applicant stated that if the implication was that the lieutenant would have had to bunk with a younger person, this is of no moment. She claimed that it was also a matter of speculation, since the officer occupying the double stateroom may, for all the record shows, have been senior to or older than the lieutenant.

The applicant also took issue with the implication by the Coast Guard that the LT, who would have been the engineering officer on the [REDACTED], had to have a single stateroom in order to perform sensitive job functions. She asserted that there is no support for such a claim in the record. She stated that if there were such a requirement, all department heads, -- indeed, all officers -- would require single staterooms, since there will be times that any officer assigned to a ship may have to meet in private with enlisted, warrant or officer subordinates, for counseling, etc. She discounted the Coast Guard's efforts to describe the officer in question as a senior department head. She stated that according to the Chief Counsel's comments, on this class of ships, the wardroom includes a CO, XO, and four department heads (supply, operations, engineering, and deck). She stated that as the supply officer, she too would have been a department head.

Turning to the advisory opinion's comment that the applicant's appointment as a CWO2 "was conditioned upon her accepting PCS [permanent change of station] orders to fill a service vacancy on the [REDACTED], the applicant stated there was no vacancy on the [REDACTED]. She pointed out that the F&S on the [REDACTED] had only completed one year of a three year tour when this situation arose. She argued that since there was no vacancy on the [REDACTED], the condition was improper, and her failure to meet it was not a valid basis for withholding the CWO appointment.

The applicant argued that the Coast Guard's version of the sequence of events with respect to the proposal to assign a woman ensign to the [REDACTED] is refuted by the record. She specifically points to an e-mail written by her then CO, dated October 3,

1995, which stated that "Female ENS is already a 'done' decision." She further stated "[g]iven this, and the regulation stating that 'women will not arbitrarily be denied an assignment solely because of lack of a second woman,'" it is difficult to understand why the "done decision" to assign a woman to the [REDACTED] was abandoned.

The applicant stated that the comment in the advisory opinion -- that she could not have been assigned to fill the F&S billet at her present command because to do so would have constituted over-billeting -- is false. She stated that there was a CWO F&S vacancy at her current command at the time in question. She stated that she was filling that billet at the time (the F&S who was in the billet had retired) and her command wanted to keep her in that assignment.

The applicant stated that there is no merit to the Coast Guard's argument that it could not have given her a stateroom of her own because it would have offended the regulation under which women assigned to ships must be given accommodations "essentially the same as that provided to males of similar pay grade or rank." The applicant stated that the Coast Guard misconstrues the purpose of the regulation which is to "ensure that the berthing made available for women officers is suitable and not demeaning or otherwise such as to discourage women from seeking or accepting orders to sea duty." The applicant asserted that women are entitled to a "level quarterdeck." She stated that leveling the quarterdeck may well entail some inconvenience for male officers. Therefore, she states that if compelling a male officer who occupies a stateroom meant for two to accept a roommate is the price that must be paid, it seems modest enough, and hardly entitled to the kind of dispositive effect the Coast Guard would have the Board give it.

With regard to the Coast Guard observation that the applicant had no sea duty, she stated that sea duty is not a requirement for the storekeeper rating. She stated that she has gone where she has been ordered and cannot be faulted for the fact that the Commandant had not previously sent her to sea.

The applicant stated that the Coast Guard makes much of the fact that she did not formally seek special treatment, through the special needs program, because of her mother's condition, but neither did the male CWO3 on the [REDACTED]. She stated that this male F&S secured favorable treatment by simply telephoning the detailer and explaining that he wanted to be closer to his family.

The applicant objected to any use of the statement from the CWO (DCP) who claimed to have made an investigation in this matter. She stated that it was not his job to investigate this situation. Additionally she stated his declaration is incompetent and improper because he purported to describe the assignment process for CWOs even though his declaration revealed that he played no role in the events at issue.

In summary the applicant stated as follows:

[T]he Coast Guard claims that by rejecting PCS orders to the [REDACTED] [the applicant] "knowingly caused her removal from the CWO appointment list."

In fact, the orders she received were irregular because they proposed to use her to fill a nonexistent vacancy for the purpose of conferring a benefit on a male officer who was not scheduled for transfer for more than a year, and whose need for the transfer was a function of his own voluntary geographical bachelorhood. Compounding the irregularity, she was presented with these orders out of the normal sequence based on selection board standings. When she declined the orders, the "vacancy" proved not to exist after all, since in fact no one was ordered to the [REDACTED]. In personnel terms, the withholding of her appointment was the perfect crime.

Additional Evidence

On November 16, 1999, at the request of the Board, the Coast Guard supplied an affidavit from the executive officer (XO) of the [REDACTED] during the period in question. The XO stated that there were 15 officers assigned to the cutter. He further stated that the only berthing available at the time was in a double stateroom that already had a single male officer assigned to it.

The applicant was given an opportunity to respond to this additional information. On November 17, 1999, the Board received the applicant's reply. She stated that the Coast Guard could have put the EO in with the operations officer because they were the same pay grade, they both graduated from the Coast Guard Academy, and were commissioned the same year and (1990), and had the same lieutenant date of rank (November 23, 1994).

UNITED STATES COAST GUARD REGULATION

Section 7-3-3. of the Coast Guard Regulations states that "[t]he assignment of commissioned officers' quarters on board ship shall be in accordance with the plans of the ship as approved by the Commandant. The plans shall show the quarters assigned to the commanding officer, the executive officer, and the engineering officer, and may show the quarters assigned to other heads of departments. Rooms not specifically designated on the plans shall be assigned by the commanding officer, having due regard for the relative rank of the officers concerned. . . ."

PERTINENT PROVISIONS OF THE PERSONNEL MANUAL

4.A.1.a. Objective

.... In distributing and assigning members, Service needs come first.

4.A.6.a. Commandant's Policy

[I]t is a long standing feature of military service and the Commandant's policy that all Coast Guard members be available for unrestricted duty assignment worldwide.

4.A.7. Women's Duty Assignments and Rotations

Commander, CGPC assigns women to any Coast Guard unit having adequate privacy for each gender in berthing and personal hygiene....

3. The Service makes every attempt to assign women to units in groups of two or more for medical and companionship reasons; however, the Service will not arbitrarily deny women an assignment solely due to lack of a second woman.

Cf. 4.B.3.c. 2. Assignment Continuum

2. The Assignment Officer (AO) shall consider the following assignment continuum when making any assignment decision:

a. Service needs

b. Assignment priorities and geographic stability. The AO will attempt to reassign the member first within the local area (local stability). If an appropriate assignment is not available there, the next attempt will be made to reassign the member within the geographic boundaries of the current district (regional stability) where he or she now is stationed. If the district geographic area does not provide an assignment opportunity, then the entire Area (Atlantic or Pacific as appropriate) will be considered.

c. Career enhancement, diversity, and qualification requirements; advancement potential.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction to determine the issues in this proceeding under section 1552 of title 10, United States Code. The application was timely.

2. The applicant requested an oral hearing. The Chairman, pursuant to §52.31 of the Board's rules, recommended disposition on the merits without a hearing. The Board concurred in that recommendation, finding sufficient documentation in the record on which to make a decision.

3. The applicant brought this application to secure her tendered appointment as a CWO2 plus retroactive date of rank, back pay, and allowances. She alleged that the Coast Guard discriminated against her in the warrant officer appointment/assignment process because she was a female, thereby creating a situation that made it necessary for

her to decline the tendered warrant officer appointment. In Docket No. 114-97, the Board denied the applicant's request for relief. She appealed the Board's decision to the United States District Court. On [REDACTED] the Court remanded this case to the Board to provide a more sufficient account of its reasoning. There were two areas of concern for the Court: First was the Board's departure from precedent, without explanation, in accepting a statement, which was a part of the Coast Guard's advisory opinion, that contained summarized interviews. Second was the Board's failure to address the applicant's "compelling evidence suggesting that the Coast Guard afforded male officers favorable treatment by heeding their geographic preferences."

4. The Board only considered signed statements in reaching this final decision on remand. However, the Board notes that the comments in Docket No. 51-82 criticizing the quotation of oral statements of others by the Coast Guard in its advisory opinion, do not stand for the proposition, as the applicant argues, that the Board will never consider hearsay or an oral statements. The Board expressed a preference for written statements, which is the better policy. However, Docket No. 51-82 leaves open for the Board to decide when it can use oral statements and how much weight, if any, should be given to oral statements. Hearsay evidence is admissible in administrative proceedings and should be available for consideration by this Board in the appropriate circumstance.

5. In 1995, the applicant competed for promotion to CWO in the Finance and Supply (F&S) specialty. She was selected to become a CWO2 by the Warrant Officer Selection Board, but her appointment was conditioned upon her accepting orders to the CGC [REDACTED] in [REDACTED]. She alleged that the Coast Guard policy was to promote newly appointed warrant officers in the order that their names appeared on the warrant officer appointment list. In her case, she alleged that the Coast Guard violated this policy by issuing her orders to the [REDACTED] before appointing a male chief who was ahead of her on the list. She further alleged that the Coast Guard was willing to accommodate two male officers (a senior chief and a CWO3) in their desire for certain assignments, when it was not willing to consider any alternatives to her assignment to the [REDACTED].

6. The Coast Guard policy was, in accordance with its regulation, to appoint newly selected warrant officers in the order that their names appeared on the appointment list. Article 1-D-9 of the Personnel Manual, in effect at the time, stated that "candidates recommended for appointment are listed by the selection board in order of their final scores on eligibility lists." The eligibility lists establish the precedence of candidates in each specialty. Both the detailer at that time and another CWO4, who was a former detailer, agree that warrant officer appointments were made in sequential order from the appointment list. The male chief was properly appointed before the applicant. See detailer's 1998 and 1999 statements.

7. An appointment to warrant officer can occur only when a vacancy occurs within the ranks of those officers already serving in that specialty. See Article 1-D-9, Personnel Manual. Once a prospective vacancy is identified, finding an assignment for that prospective warrant officer begins. Therefore, when an appointment is tendered to an individual, it is accompanied by a duty assignment. The potential CWO has 5 days to decide whether to accept the appointment/assignment, in accordance with Coast

Guard policy. If the potential CWO rejects the appointment, that individual, in cases like the applicant's, must wait five years before competing again for warrant officer.

8. There is nothing in the regulation that requires the next eligible candidate on the appointment list to fill the specific vacancy that opened the door for that individual's promotion to WO [warrant officer] grade. The regulation limits only when an appointment to warrant officer can occur. Therefore, the Board finds that when a vacancy is created in the WO ranks, the Coast Guard may in its discretion assign and reassign personnel to billets that meet the needs of the service, as long as the next appointment from the WO appointment is made in sequential order. Put another way, there is nothing in the regulation that requires the next eligible person for appointment to CWO to be assigned to a specific billet. He or she may be assigned to billets as the needs of the service dictate.

9. With the understanding that the applicant did not have a right to demand a specific billet, the question is did the Coast Guard discriminate against the applicant because of her gender in the appointment/assignment process, by treating her differently than the two males involved in this process? To answer this question, the facts must be closely examined.

10. A vacancy was identified on the [REDACTED], as early as August 1995, due to the retirement of the F&S CWO3 effective February 1, 1996. (This prospective open billet on the [REDACTED] was considered a winter appointment. Most assignments occur during the spring and summer.) There is no evidence in the record that the chief who was above the applicant on the eligibility list was considered for the [REDACTED] billet. Although he was given a warrant officer appointment before the applicant was tendered an appointment (in accordance with regulation), his appointment was made after it was determined that the applicant would be assigned to the [REDACTED]. The job to which the chief was assigned in [REDACTED] did not become vacant until April 1, 1996. See the Detailer's 1998 affidavit. The decision to appoint the chief as a CWO2 with orders to the [REDACTED] job while that billet was still occupied by a sitting CWO caused two CWOs (in [REDACTED]) to be assigned to the same job for a period of approximately six months. This action appears contrary to the statement in the detailer's 1999 affidavit that it was Coast Guard policy at that time to "back-fill when the vacancy occurs." Of course, the chief was already in [REDACTED] and wanted to remain there. This sequence of events made it appear that the Coast Guard gave special consideration to the chief.

11. In addition to the chief in [REDACTED], the Coast Guard was willing to give special consideration to the needs of the CWO3 on the [REDACTED] who had only served one year of a three year tour. The Coast Guard was willing to transfer him from his current job to the open job on the [REDACTED] so that he could be closer to his family in [REDACTED]. Despite Article 4.A.5.a. of the Personnel Manual which states that tour lengths should be adjusted to meet the needs of the Service, the detailer in this case was willing to adjust the CWO3's tour to meet his personal desire to be closer to his family. The Board is persuaded in this finding because it was the CWO3 who sought a transfer from the [REDACTED] after the prospective vacancy on the [REDACTED] became known to him in August 1995. In fact in August 1995, the CWO3 discussed possible

reassignment to the [REDACTED] from the [REDACTED] with the retiring CWO on the [REDACTED]. The CWO3 went on to say that he discussed it with the XO of the [REDACTED] and later with the detailer who suggested that he submit an assignment data card. He submitted the assignment data card around August 25, 1995. See statement submitted by this CWO3 dated October 13, 1999 and the assignment data card dated August 28, 1995.

Therefore, the Board concludes that it was not service need alone, but rather the personal desires of the CWO3 for a transfer, that led to the creation of the potential vacancy on the [REDACTED]. The detailer knew that the CWO3 on the [REDACTED] wanted the reassignment to the [REDACTED] sometime during the month of August 1995, notwithstanding the fact that he stated in his October 1999 statement that he did not become aware of the vacancy on the [REDACTED] until October 1995. The Board is persuaded that if the Coast Guard was not intent on giving special consideration to the CWO3 on the [REDACTED], it would have initially acknowledged in its dealings with the applicant that an available billet existed on the [REDACTED], but due to a lack of berthing on that cutter, she could not be assigned to that job. Instead, the available billet on the [REDACTED] was kept private and was not discussed with the applicant, until she met with the detailer to discuss her assignment to the [REDACTED].

12. The CWO on the [REDACTED] commented that he understood that he would only receive orders to the [REDACTED] if the applicant accepted F&S orders to the [REDACTED]. From this it appears that the CWO on the [REDACTED] was aware of the plan to offer the applicant the assignment on the [REDACTED] before such assignment or any assignment was even discussed with the applicant. At some point, the applicant was contacted by the detailer and told that she would be going to the [REDACTED]. It was only after she became aware through conversations with the chief above her on the appointment list that he had not been contacted by the detailer that she became concerned about the assignment process. See CWO4 (JL's) statement. CWO4 (JL) and the applicant then discussed the matter with the detailer, where they learned that the available billet was actually on the [REDACTED]. The applicant offered to go to the [REDACTED] but her offer was not accepted by the detailer. The applicant received her orders to the [REDACTED] on September 20, 1995. She declined the orders on October 3, 1995.

13. After observing the favorable manner in which the Coast Guard treated the chief in [REDACTED] and the favorable manner in which it intended to treat the CWO3 on the [REDACTED], the applicant asked for special consideration for her situation, i.e. that she would have to sell her home at a projected \$24,000.00 loss and that if assigned to the [REDACTED] she could live with her mother who was ailing. She requested to either remain in the [REDACTED] area and fill an F&S open job at her current command or to be placed in the [REDACTED]. She stated that the Coast Guard was not willing to consider any alternatives to the [REDACTED] in her situation. The Board finds that the Coast Guard was willing to consider the special needs or desires of the two males but was not willing to consider the special needs or desires of the applicant.

14. The Coast Guard denies that the applicant was assigned to the [REDACTED] because of her gender, but her assignment to the [REDACTED] occurred because she could not be assigned to the [REDACTED] due to a lack of berthing. The lack of berthing for a

female on a cutter is a legitimate reason for not assigning the applicant to the [REDACTED]. The Board finds by a preponderance of the evidence that there was no berthing for the applicant on the [REDACTED]. Except for the CO, XO, and EO [engineering officer] who were entitled to private staterooms, all of the other double staterooms on the cutter were taken except for one double stateroom that had one male officer. Obviously, the applicant could not have been assigned to share this stateroom. Berthing was a factor that had to be considered in making an assignment to the [REDACTED].

15. But unfortunately, this does not answer the harder question, which is, even though the applicant could not be assigned to the [REDACTED], should the Coast Guard have considered her needs as it did those of the chief and the CWO3 in forcing her to go to the [REDACTED]? The Board must answer this question affirmatively. The Board agrees that the Coast Guard was not obligated to make assignments based on the personal needs and desires of its members. However, once the Coast Guard began making special concessions in this situation, it put itself in a position that by fairness required it to consider each individual's personal circumstances. There is nothing in the record showing that the Coast Guard made any effort to accommodate the personal needs of the applicant, as it did for the males. Neither has the Coast Guard described to the Board's satisfaction how it reached the conclusion that the CWO3 from the [REDACTED] was the best person for the job on the [REDACTED]. In this regard, the Coast Guard has failed to state if there were any other competitors for the [REDACTED] job, and if so, why they were not selected. The Coast Guard has not even stated if the [REDACTED] assignment was known to others except for the CWO3 i.e. were others given an opportunity to compete for the assignment. Further, the Coast Guard has not explained why the [REDACTED] was the only assignment that would meet both the needs of the Service and those of the applicant.

16. Except for a lack of berthing on the [REDACTED], each of the Coast Guard's other arguments for placing the applicant on the [REDACTED] is not persuasive. Even with a lack of berthing for the applicant, all the [REDACTED] needed was a male F&S. That could have been any male F&S and did not have to be the F&S from the [REDACTED]; it could have been the chief who was above her on the appointment list, and evidence suggests that according to practice it probably should have been. The billet on the [REDACTED] was to be filled by the F&S from the [REDACTED] because he asked for it.

17. With respect to the applicant's request to remain in the [REDACTED] and fill the vacant F&S billet at her current command the detailer stated that "he could not over billet her in the area." This argument appears contrary to his actions with respect to the assignment of the chief to the F&S billet in [REDACTED]. It is clear from the evidence that pertains to this situation, that the F&S [REDACTED] billet would not be vacant until April 1, 1996. The detailer over billeted the [REDACTED] assignment. Therefore, the Board is not persuaded that the detailer could not have assigned the applicant to the [REDACTED] because of over billeting.

18. Contrary to the Coast Guard's position in the original application, service need did not dictate that the F&S assigned to the [REDACTED] had to have a supply background. This conclusion is supported by the fact that after the applicant declined

the CWO appointment, a F&S with a cook's background was assigned to the [REDACTED]. Therefore, the CWO in [REDACTED] (who had a background as a cook) could have been assigned to the [REDACTED].

19. The Coast Guard's argument that the applicant objected to the orders because she did not want to go to sea, is specious. While it is undisputed that the applicant had no sea duty, she was willing to accept orders to the [REDACTED], a Coast Guard cutter. Sea duty is sea duty whether it is on the [REDACTED].

20. It may well be true, as the Coast Guard argues, that leaving the chief in [REDACTED] would save the Service money. However, saving money does not seem to have been the Coast Guard's priority in this case. In this regard, the OPMD stated that the Coast Guard was willing to provide the applicant with the opportunity to serve on the [REDACTED], even though it would cost additional funds to do so for both the applicant and the officer she was replacing.

21. The Board cannot say that the applicant's treatment amounted to gender discrimination. The applicant has not proven that it was gender that caused the Coast Guard to treat her differently from the two males involved in this situation. However, the Board does find that the Coast Guard was flexible in its willingness to assign the chief and the CWO3 to desired assignments that met their personal needs or desires, but was very rigid in its stance toward the applicant. The applicant's assertion that the Coast Guard refused to consider any other assignments for her except the [REDACTED] is supported by CWO4 (JL) and the retired CWO. Nothing from the Coast Guard contradicts the applicant on this point. Such overt difference in treatment between officers, male or female, is unfair. The Coast Guard's inflexibility toward the applicant in this case, led her to decline an appointment to CWO due to a financial hardship.

22. It very well may have been that the assignments that took place in this situation were in the best interest of the Service; however, that has not been demonstrated in this case. As stated above, once the Coast Guard began to consider individual desires and needs, it was obligated to do so in a manner that does not disadvantage one member for the advantage of another, unless it can show a compelling need to do so. Off season appointments are normally filled from the appointment list (see the CWO3 (P's) redacted statement). However, in this case the Coast Guard did not do so, but made or was willing to make several other appointments, to the satisfaction of those members, until it reached the applicant. The process followed in this case creates a strong inference of special treatment toward the males to the disadvantage of the applicant. The Board has been and is hesitant to immerse itself in the Coast Guard's assignment process. However, when an applicant demonstrates an injustice that "shock our conscience" the Board must act to correct that injustice.

23. Accordingly, under the facts presented in this case, the Majority of the Board finds that the applicant is entitled to relief.

ORDER

The application to correct the military record of [REDACTED]
[REDACTED] SCG is granted. Her record shall be corrected to show that she was
appointed to the grade of CWO2, effective January 1, 1996, with back pay and
allowances.

[REDACTED]

*see dissenting opinion

[REDACTED]

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-008



DISSENTING OPINION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was remanded to the Board on September 23, 1999 by the United States District Court.

This dissenting opinion, dated November 18, 1999, is signed by one of the three duly appointed members who were designated to serve as the Board in this case.

FINDINGS AND CONCLUSIONS

The dissenting member makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submissions, and applicable law, which are summarized in the Board's majority opinion in this case:

1. The Board has jurisdiction to determine the issues in this proceeding under section 1552 of title 10, United States Code. The application was timely.
2. The applicant requested an oral hearing. The Chairman, pursuant to §52.31 of the Board's rules, recommended disposition on the merits without a hearing. The Board concurred in that recommendation, finding sufficient documentation in the record on which to make a decision.
3. The applicant brought this application to secure her tendered appointment as a CWO2 plus retroactive date of rank, back pay, and allowances. She alleged that the Coast Guard discriminated against her in the warrant officer appointment/assignment process because she was a female, thereby creating a situation that made it necessary for her to decline the tendered warrant officer appointment. In Docket No. 114-97, the Board denied the applicant's request for relief. She appealed the Board's decision to the United States District Court. On

the Court remanded this case to the Board to provide a more sufficient account of its reasoning. There were two areas of concern for the Court: First was the Board's departure from precedent, without explanation, in accepting a statement, which was a part of the Coast Guard's advisory opinion, that contained summarized interviews. Second was the Board's failure to address the applicant's "compelling evidence suggesting that the Coast Guard afforded male officers favorable treatment by heeding their geographic preferences."

4. The Board only considered signed statements in reaching this final decision on remand. However, the Board notes that the comments in Docket No. 51-82 criticizing the quotation of oral statements of others by the Coast Guard in its advisory opinion, do not stand for the proposition, as the applicant argues, that the Board will never consider hearsay or an oral statement. The Board expressed a preference for written statements, which is the better policy. However, Docket No. 51-82 leaves open for the Board to decide when it can use oral statements and how much weight, if any, should be given to oral statements. Hearsay evidence is admissible in administrative proceedings and should be available for consideration by this Board in the appropriate circumstance.

5. In 1995, the applicant competed for promotion to CWO (chief warrant officer) in the Finance and Supply (F&S) specialty. She was selected to become a CWO2 by the Warrant Officer Selection Board, but her appointment was conditioned upon her accepting orders to the CGC [REDACTED]. She alleged that the Coast Guard policy was to promote newly appointed warrant officers in the order that their names appeared on the warrant officer appointment list. In her case, she alleged that the Coast Guard violated this policy by issuing her orders to the [REDACTED] before appointing a male chief who was ahead of her on the list. She further alleged that the Coast Guard was willing to accommodate two male officers in their desire for certain assignments, when it was not willing to consider any alternatives to her assignment to the [REDACTED]

6. The Coast Guard policy was, in accordance with its regulation, to appoint newly selected warrant officers in the order that their names appeared on the appointment list. Article 1-D-9 of the Personnel Manual, in effect at the time, stated that "candidates recommended for appointment are listed by the selection board in order of their final scores on eligibility lists." The eligibility lists establish the precedence of candidates in each specialty. Both the detailer at that time and another CWO4, who was a former detailer, agree that warrant officer appointments were made in sequential order from the appointment list. The male chief was properly appointed before the applicant. See detailer's 1998 and 1999 statements.

7. An appointment to warrant officer can occur only when a vacancy occurs within the ranks of those officers already serving in that specialty. See Article 1-D-9 of the Personnel Manual. Once a prospective vacancy is identified, finding an assignment for that prospective warrant officer begins. Therefore, when an appointment is tendered to an individual, it is accompanied by a duty

assignment. The potential CWO has 5 days to decide whether to accept the appointment/assignment, in accordance with Coast Guard policy. If the potential CWO rejects the appointment, that individual, in cases like the applicant's, must wait five years before competing again for warrant officer.

8. There is nothing in the regulation that requires the next eligible candidate on the appointment list to fill the specific vacancy that opened the door for that individual's promotion to WO [warrant officer] grade. The regulation limits only when an appointment to warrant officer can occur. Therefore, the Minority finds that when a vacancy is created in the WO ranks, the Coast Guard may in its discretion assign and reassign personnel to billets that meet the needs of the service, as long as the next appointment from the WO appointment list is made in sequential order. Put another way, there is nothing in the regulation that requires the next eligible person from the CWO appointment list to be assigned to a specific billet. He or she may be assigned to another billet as the needs of the service dictate. Therefore, the chief who was above the applicant on the appointment list had to be appointed as a CWO2 before the applicant could be appointed, but the chief did not have to be assigned to the [REDACTED]. He could be assigned wherever the needs of the Service dictated.

9. With the understanding that the applicant did not have a right to demand a specific billet, the question is did the Coast Guard discriminate against the applicant because of her gender in the appointment/assignment process, by treating her differently than the two males involved in this process? The Minority finds that the Coast Guard did not illegally discriminate against the applicant in the appointment/assignment process.

10. A vacancy was identified on the [REDACTED], in August 1995, due to the retirement of the F&S CWO3 effective February 1, 1996. (This prospective open billet on the [REDACTED] was considered a winter appointment. Most assignments occur during the spring and summer.) The senior chief at the top of the appointment list was given a warrant officer appointment, albeit not to the [REDACTED], before the applicant was tendered an appointment, even though the billet he was assigned to did not become vacant until April 1, 1996. As discussed above, the Minority finds that the Coast Guard's action in promoting the chief without assigning him to the [REDACTED] did not violate any regulation. Of course, the chief was already in [REDACTED] and wanted to stay there. While assigning the chief to the [REDACTED] billet would have solved the problem for the applicant, it would not have been in the best interest of the Service to do so. First, to assign the chief to the [REDACTED] billet would have required the Coast Guard to move him across the country after just having assigned him to [REDACTED] in 1995, prior to his selection for CWO2. Second, the Coast Guard would have had to fill the billet in [REDACTED] several months later, at an additional cost. Third, the applicant had expressed a desire on her assignment data card not to be assigned to [REDACTED]. Fourth, the chief was happy to remain in [REDACTED] and accept the F&S billet that would become vacant on April 1, 1996. Thus, the assignment of the chief to the [REDACTED] billet appears to the Board to have been a sound decision that met the needs of the Service.

11. It is true that the Coast Guard was willing to transfer a CWO3 (F&S), who had only served one year of a three year tour, from his current job on the [REDACTED]. The CWO3 sought a transfer from the [REDACTED] to the [REDACTED] after the prospective vacancy on the [REDACTED] became known to him in August 1995, in order to be closer to his family in [REDACTED]. In fact in August 1995, the CWO3 discussed his possible reassignment to the [REDACTED] with the retiring CWO on the [REDACTED]. CWO3 went on to say that he discussed it with the XO of the [REDACTED] and later with the detailer who suggested that he submit an assignment data card. He submitted the assignment data card around August 25, 1995. See statement submitted by this CWO3 dated October 13, 1999 and the assignment data card dated August 28, 1995. Article 4.A.5.a. of the Personnel Manual permits tour lengths to be adjusted to meet the needs of the Service. Moreover, the Board can find nothing in the record or regulations that prohibit such contact with the detailer.

12. At some point during her assignment processing, the applicant learned that the CWO vacancy had been created by a retirement on the [REDACTED] and that a CWO3 from the [REDACTED] was being considered for the assignment. Subsequently, she requested assignment to the [REDACTED], but her request had to be denied due to a lack of berthing. The lack of berthing for a female on a cutter is a legitimate reason for not assigning the applicant to the [REDACTED]. See Article 4.A.7., Personnel Manual. The Board finds by a preponderance of the evidence that there was no berthing for the applicant on the [REDACTED]. Except for the CO, XO, and EO [engineering officer] who were entitled to private staterooms, all of the other double staterooms on the cutter were fully occupied except for one double stateroom that housed one male officer. Obviously, the applicant could not have been assigned to share this stateroom. In order to have assigned the applicant to the [REDACTED], the EO who was third in command would have been required to relinquish his single stateroom. The berthing of the EO in a double stateroom would have been contrary to the plans of the cutter, which show that the EO was entitled to single berthing. According to Coast Guard Regulations, (CG M5000.3b. (1992)), the cutter's berthing plan was approved by the Commandant.

13. The Minority finds that there was a lack of berthing on the [REDACTED] for the applicant, as claimed by the Coast Guard. Since the CWO3 wanted a transfer and had indeed requested one, a plan was devised to transfer him to the [REDACTED] and to fill his job on the [REDACTED] with the applicant. The CO on the [REDACTED] recommended approval of the CWO3's transfer, and the XO on the [REDACTED] was also in favor of the transfer. The CWO3 had supply experience, which satisfied a need of the Coast Guard to fill F&S billets with appointees with a supply background or experienced CWOs (F&S). The CWO3 was considered for the [REDACTED] because the applicant could not be assigned there and because his transfer served the needs of the Coast Guard. There is nothing, in and of itself, improper about assigning personnel to an assignment that meets the needs of the Service, while at the same time serving the needs of the member.

14. After observing what she believed to be the favorable manner in which the Coast Guard treated the chief in [REDACTED] and the favorable manner in which she believed it intended to treat the CWO3 on the [REDACTED], the applicant asked for special consideration for her situation, i.e. that she would have to sell her home at a projected \$24,000.00 loss and that if assigned to the [REDACTED] she could live with her mother who was ailing. She specifically requested to remain at her current command and fill a vacant F&S billet there. The Coast Guard refused to change her assignment to the [REDACTED]. The applicant has not demonstrated by a preponderance of the evidence that the Coast Guard's refusal to change her assignment was based on gender. If the applicant had been a male or if there were available berthing on the [REDACTED], she would have probably been assigned to that billet. Because she did not qualify for the [REDACTED] billet and the CWO3 did, and the Coast Guard entertained sending him to the [REDACTED] does not mean that the applicant was treated unfairly because of her gender. In making assignments, especially where female officers are concerned, there has to be appropriate berthing. This means that by necessity some jobs, specifically aboard ship, will not be available to female officers. Such was the case for the applicant with respect to the [REDACTED] billet.

15. It may appear on the surface that the Coast Guard treated the males involved in this situation differently than it did the applicant. However, upon closer scrutiny, the Minority finds that the Coast Guard was presented with a problem on how to fill the [REDACTED] billet and meet the needs of the Service at the same time. Unfortunately, in making assignments, everybody is not going to be pleased. The applicant just happened to come up on the appointment list for promotion to CWO2 during the off-season. This unfortunate timing was further compounded by the fact that a decision had to be made on the best way to fill a vacant billet on the [REDACTED], which could not accommodate a female officer. The applicant has not shown by a preponderance of the evidence that the Coast Guard was motivated by discriminatory intent in making these assignments.

16. The solution the Coast Guard devised to solve this problem was the assignment of the CWO3 to the [REDACTED] and the applicant to the [REDACTED]. This appears to be a reasonable solution, particularly since the detailer felt that the applicant needed to be assigned to a tour of sea duty. She could do this duty on the [REDACTED]. The applicant has no sea duty and she certainly could not obtain any by remaining at her current unit.

17. The Coast Guard must be free to assign its personnel as it sees fit. It cannot be left to the members of the Service to approve or disapprove an assignment. Members must be willing to go where assigned. The applicant has not proved by a preponderance of the evidence that her proposed assignment was not based on Service need.

18. The reason given initially by the Coast Guard for not assigning the chief in [REDACTED] was his lack of a supply background. He was a cook. The Coast Guard preferred to fill these supply billets on the 270' cutters with members who have a supply background. This is a legitimate criterion for making an assignment as supply department head. It was only after the

applicant refused her assignment, that the Coast Guard resorted to the next person on the appointment list to fill the [REDACTED] billet; he had been a cook.

19. The applicant did not suffer illegal gender discrimination in the appointment/assignment process. In making this off season appointment, the applicant's gender was lawfully considered. If she were to be assigned to a cutter, it had to be one that had available berthing for a female officer. The only two cutters discussed in this situation were the [REDACTED]. After making a determination that no such berthing existed on the [REDACTED] the Coast Guard devised a plan that it thought was both fair and met the needs of the Service. From the evidence, the Minority member of the Board finds that in assigning the applicant to the [REDACTED] the Coast Guard considered the following factors: the lack of berthing on the [REDACTED] for a female and the availability of berthing on the [REDACTED] the applicant's supply background; the desire of the Coast Guard to place her in a prestigious department head position; and her lack of sea duty. For an 18 year veteran, who had had no sea duty, she could expect to receive such an assignment. She could not secure sea duty on the [REDACTED], but she could perform sea duty on the [REDACTED]. Neither the chief in [REDACTED] nor the CWO3 were to receive assignments based solely on their personal needs or desires. They each filled an assignment that served the needs of the Coast Guard, just as the applicant would have done had she decided to accept her orders to the [REDACTED].

20. The applicant has submitted insufficient corroboration to show that she was assigned to the [REDACTED] to provide companionship for a female ensign. This accusation was denied by both the Chief Counsel and the CWO3 who was on the [REDACTED] at that time.

21. The applicant has failed to prove that she was discriminated against because of her gender in the assignment process under review. Accordingly, this case should be denied.

ORDER

The application to correct the military record of
USCG is denied.

