



gories,<sup>1</sup> a recommendation for promotion, and a mark in the fifth spot on the comparison scale, indicating that she was among the better of the “competent professionals who form the majority of this grade.”<sup>2</sup> On her second OER, she received mostly marks of 5 with some 4s and 6s, another mark in the fifth spot on the comparison scale, and a recommendation for promotion. She was promoted to lieutenant junior grade on March 24, 2001, awarded an Achievement Medal for her work in the office, and on her third OER, dated June 29, 2001, she received primarily marks of 5 and 6 with one mark of 4 and one of 7 in the performance categories, another mark in the fifth spot on the comparison scale, and a recommendation for promotion “with peers.”

On October 9, 2001, the applicant reported for duty as a Training Officer at a large Group, where she was responsible for coordinating the training of about 650 members. On her first semiannual OER in this position, she received primarily marks of 4 and 5; a recommendation for promotion “with peers”; and a mark in the fourth spot on the comparison scale, indicating that she was “one of the many competent professionals who form the majority of this grade.” On her second OER in this position, she received primarily marks of 5 in the performance categories; a recommendation for promotion “with the best of her peers”; a mark in the fifth spot on the comparison scale, indicating that she was one of the better of those many competent professionals. The third OER she received at this command is very similar and notes that her “recent selection for promotion to LT is well-deserved.” As a result of her selection, the applicant was integrated into the regular Coast Guard on April 24, 2003. In addition, she was reassigned as a Communications Officer for the Group Communications Center, where she supervised 16 enlisted members. On her final OER at this Group, dated July 18, 2003, she received all marks of 5 and 6 in the various performance categories and another mark in the fifth spot on the comparison scale.

The applicant’s next assignment was to serve as a team leader of a Field Intelligence Support Team (FIST) for the Captain of a very large port. She was promoted to lieutenant (LT) on October 4, 2003. On her only OER in this position, she received all marks of 5 and 6 in the performance categories; a recommendation for promotion “with peers”; and a mark in the fifth spot on the comparison scale, which denoted an “excellent performer; give toughest, most challenging leadership assignments.” She also received another Achievement Medal for her work in this position in October 2004.

On January 3, 2005, the applicant was temporarily separated from the Coast Guard. She returned to active duty, however, and reported for duty as a budget execution manager for the Commandant on December 1, 2005. On her OER for this service, she received primarily marks of 5 with six 6s and two 7s in the various performance categories; a “strong” recommendation for promotion; and another mark in the fifth spot on the comparison scale.

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<sup>1</sup> In OERs, officers are evaluated in 18 different performance categories, such as “Professional Competence,” “Teamwork,” and “Initiative,” on a scale of 1 to 7, with 7 being best and a middle mark of 4 being “the expected standard of performance.” Personnel Manual, Art. 10.A.4.c.4.g.

<sup>2</sup> On an OER comparison scale, the Reporting Officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the Reporting Officer has known throughout her career. Although the marks on the scale are not numbered, there are 7 possible marks.

From August 1, 2006, through May 22, 2007, the applicant was assigned to serve as a search and rescue program analyst. She actually served only two months in this position, however, because she was sent on detail to the Deployable Operations Group (DOG) Commissioning Cell. On her OER, therefore, she received primarily marks of “not observed,” as well as some 4s and 5s, but was recommended for promotion and for operational assignments of increased responsibility. For her detail to the DOG Commissioning Cell, where she worked as the Assistant Chief of the Personnel Support Division from October 5, 2006, through June 1, 2007, the applicant received primarily marks of 6 and 7 on her OER; the Deputy Director’s “highest recommendation for promotion to LCDR”; and another mark in the fifth spot on the comparison scale. She received a Commendation Medal for this service.

The applicant was permanently assigned to the new DOG to help develop and standardize the equipment and training of deployable specialized forces from May 23, 2007, through May 31, 2008. On her OER for this work, she received primarily marks of 6 with five 5s; a recommendation for promotion to LCDR “now”; and another mark in the fifth spot on the comparison scale.

On July 21, 2008, the applicant reported for duty as the Contingency Planning and Force Readiness Planning Officer in the Planning Department of Sector XXXXXXXX. On March 9, 2009, the applicant submitted a request to transfer from the Planning Department. Her request is not in the record before the Board. On March 17, 2009, the Sector Commander refused her request, stating that although the applicant was discontent with her supervisor, the Planning Officer, head of the Planning Department,

2. ... there was no evidence presented that Coast Guard regulations or policy are being violated. Rather, the situation appears to be grounded in a disagreement of leadership philosophy and personality conflict. Because you concurred with this assessment, I feel it is most appropriate to keep you in [the department]. I believe it is best for your Coast Guard career and it is in the best interest of advancing the important initiatives within the Planning Department.

3. The Deputy [Sector Commander] and I have discussed the concerns you raised with [the supervisor] and we have communicated our leadership expectations to her. Any violations of Coast Guard policy or regulation will be dealt with in a swift and appropriate manner. In the meantime, because this situation is essentially a personality and leadership conflict, it is incumbent on you to understand your supervisor’s work expectations and to function effectively within those expectations.

### ***Applicant’s Article 9-2-2 Complaint***

On March 23, 2009, the applicant submitted a complaint against her immediate supervisor, the Sector Planning Officer, pursuant to Article 9-2-2 of Coast Guard Regulations.<sup>3</sup> The

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<sup>3</sup> U.S. Coast Guard, COMDTINST M5000.3B, Coast Guard Regulations, Art. 9-2-2 (providing that any member who feels oppressed by her superiors or observes misconduct by superiors “shall not fail in their respectful bearings toward such superiors, but shall report such oppression or misconduct ... [to the next superior officer who is not a

applicant accused her supervisor of creating a hostile work environment within the department since August 2008 and of abusing her authority by “displaying careless, capricious conduct with continuous and severe abusive language.”

The applicant stated in her complaint that when she reported to the Planning Department in August 2008, it was already planning and executing a full-scale exercise, “Operation A.” Her supervisor, however, already had a biased opinion of her, told her to shadow her (the supervisor), and then assigned her menial tasks and did not allow her to take an active role. For example, when she advised her supervisor that another person had failed to bring certain necessary items (“T-cards”), her supervisor yelled at her in front of several agency partners and other members and told her to find replacements. The applicant was embarrassed by this but thought it would be an isolated incident.

After Operation A ended, the applicant “attempted to solidify [her]self as a productive member of the Sector and the planning department.” She rewrote the Sector’s mass rescue operations plans and continuity of operations plans and also worked to qualify as a command duty officer (CDO). She turned in draft plans for one unit in October 2008, but her supervisor was not completely satisfied and “we went through approximately six iterations before the plan was approved and signed.”

On November 10, 2008, the applicant alleged, she submitted certain invitation letters she had drafted to her supervisor approval. The supervisor departed on leave<sup>4</sup> and the applicant herself left on a temporary assignment to Headquarters. The applicant did not hear anything more about the letters and assumed they had been approved and signed. When the supervisor returned from leave, she came into the office and “flung a blue routing folder into my face” and yelled, “What is this.” The applicant stated that she had no idea why her supervisor was being abusive and so gained her composure, went to her supervisor’s office doorway, and asked her not to speak to her (the applicant) in that way or to throw things at her. Her supervisor was irate and “yelled for me to get into her office and sit down.” The applicant refused and went back to her desk. After her supervisor followed her and repeated the order, the applicant returned to the supervisor’s doorway but did not enter and sit down because she was upset. Her supervisor told her that the blue folder contained the invitations. Her supervisor was furious that they had not been sent out and asked the applicant why she had not followed up on them. When the applicant replied that she had heard nothing about them since she submitted them to the supervisor, the supervisor admitted that a yeoman should have sent them out but claimed that it was the applicant’s responsibility to check on their status. The applicant did not think it was her responsibility to check on their status but “was more upset with the way [she] was approached” because her supervisor had disrespected and embarrassed her. The applicant stated that there was noticeable tension in the office after this incident, and that her supervisor “continued to make it a difficult place to work,” although the applicant tried to improve the situation.

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subject of the report] ... An officer receiving a report of oppression or misconduct shall take such action in conformity with these regulations as, in the officer’s judgment, justice demands. Any appeal from the action taken shall be addressed to the immediate superior of the officer who shall have taken such action, and shall be forwarded through that officer and through all other officers through whom the previous report was forwarded.”).

<sup>4</sup> The applicant did not provide the date the supervisor departed on leave.

Once after she stood watch as Command Duty Officer (CDO) in early March 2009, the applicant stated, she remained on duty and participated in a training session until 3:00 p.m., although it was a department practice to leave work at noon after standing watch. At 3:15, because she could not find her supervisor to tell her she was leaving, she sent her an email saying that she was leaving. The email that the applicant received in return (which she did not submit to the BCMR), was “the final straw in the continuous pattern of singling me out.” Therefore, she requested a transfer from the department. She had a meeting about her request with the Sector Commander and Deputy Sector Commander, and the next day her supervisor accused her of having been insubordinate in the past and stated that in the future such conduct would be documented. Her supervisor had this meeting officially witnessed by the Chief of Logistics and stated that in the future someone else would have to be in the room when they met. The applicant agreed that that was a good idea. Her supervisor also accused her of fraternization in that other members had mentioned that the applicant spent too much time with some enlisted members and needed “to keep some professional distance.” The applicant alleged that these accusations were false and were made in retaliation for the applicant’s request to transfer. The applicant alleged that this “reprisal continued throughout the meeting” and that the supervisor told her, “Honestly, it doesn’t matter if you think it is a great idea or not, you need to treat me as your boss, we are not peers.” Her supervisor also claimed that an email that the applicant had sent to another superior officer was disrespectful. The applicant stated that she did not agree with that assessment (but she did not submit a copy of this email to the BCMR).

The applicant concluded her complaint by asking to be transferred, to have her complaint reviewed by the Area Commander, to have a Punitive Letter of Reprimand entered in her supervisor’s record, and to have unspecified false statements that her supervisor had made about her investigated.

### ***Article 9-2-2 Complaint Processing***

On March 30, 2009, the Sector Commander asked the District Commander for assistance in resolving the applicant’s complaint. He explained that he was treating it as a discrimination or civil rights complaint since the complaint “contains many of the elements of a complaint” filed under the Equal Opportunity Manual. The Sector Commander noted that he had tried to resolve the matter informally without success and had temporarily moved the applicant to another department.

Also on March 30, 2009, the Sector Commander referred the applicant for a mental health evaluation based on the fact that she had not shown up for work on several occasions without notifying her chain of command; the fact that her personality conflicts with her supervisor had “made for a challenging workplace”; the applicant’s “stated and observed ability to effectively merge work-related stressors and the physical manifestation of this stress”; and “an escalation of the events listed above in recent weeks.” The applicant was advised of her right to consult an attorney, to seek a second opinion, and to communicate without restriction to the Inspector General, an attorney, a member of Congress, or others.

On April 1, 2009, the Sector Commander reassigned the applicant from the Planning Department so that she reported directly to the Deputy Sector Commander.

On April 9, 2009, a Coast Guard equal opportunity specialist sent an email to the applicant summarizing a meeting they had attended with the Sector Collateral Duty Civil Rights Officer and the District Equal Opportunity Advisor. The EO specialist noted that the applicant had complained of a “hostile work environment” and alleged that her supervisor had publicly berated and belittled her; used loud, angry tones and profanity to her; engaged in unduly harsh and/or unwarranted criticism of her work; failed to provide necessary training and guidance to complete her tasks; and counseled her, in the presence of another officer, about alleged insubordination and fraternization with enlisted personnel. The EO specialist noted that the applicant was unable to identify a protected class (e.g., race, sex, religion) or a protected activity as the basis of the “alleged harassing actions.”

The EO specialist noted that although the applicant had complained that she had been referred for a mental health evaluation in reprisal for having requested a transfer to another department and for submitting her complaint under Article 9-2-2 of Coast Guard Regulations, she also stated that she did not want to file a discrimination complaint about a hostile work environment and would instead pursue some other, unspecified avenue of redress. The EO specialist reminded the applicant that such a complaint must be filed within 45 days of the alleged discriminatory event.

On April 10, 2009, a psychologist reported that the applicant was not evaluated and was instructed to return to her duty station because the referral memorandum was incomplete.

On April 14, 2009, the applicant replied to the EO specialist’s email and stated that because she had been asked not to repeat everything in her memorandum during their meeting, she wanted to ensure her memorandum would be incorporated as her “full testimony of the events.” In addition, she denied that her supervisor had failed to provide her with all necessary training. Finally, the applicant noted that she had never characterized her complaint as a discrimination complaint and that it was the Sector command that had treated it as such. She asked whether the EO specialist’s email constituted the District Commander’s official response to her complaint under Article 9-2-2 of Coast Guard Regulations.

The EO specialist replied the same day, noting that their discussion during the meeting had not amounted to “testimony”; that the applicant’s memorandum would be maintained in the file on the matter in the Office of Civil Rights; and that her email did not constitute an official response to the applicant’s complaint under Article 9-2-2 but simply documented the applicant’s decision not to file a discrimination complaint at the time of their meeting, which was initiated based on a request by the Sector Commander. The EO specialist stated that because the applicant had decided not to file a discrimination complaint, any other response to her complaint was the responsibility of her chain of command and not the Office of Civil Rights.

### *Climate Assessment*

On April 16, 2009, the District EEO Manager reported to the Sector Commander about a climate assessment conducted in the applicant’s department. He stated that interviews with nine personnel had revealed the following:

No evidence of illegal discrimination was presented during the assessment. The overwhelming majority of personnel interviewed reported high professional regard for [the Sector Commander] ... . The majority of personnel interviewed reported high regard for [the supervisor's] ability to achieve results, while also using descriptors such as strong personality, possibly inflexible, and blunt ...

The District EEO Manager recommended that the applicant be reassigned to another department within the Sector; that future referrals for psychological examinations identify "specific erratic behavior(s)"; that such referral not be presented by a corpsman (enlisted health specialist) but by a supervisor and medical officer; that standards in disclosure of sensitive personal information be reinforced; that members being counseled with a witness present be advised in advance and allowed to bring their own witness; that superior officers should be reminded to correct inferior officers' inappropriate conduct whether they are their supervisors or not; that officers' requests for mentors be treated seriously and not laughed at; and that the fraternization policy be reinforced.

### *Applicant's Article 138 Complaint*

On April 27, 2009, the applicant filed a request for redress of grievances under Article 138 of the UCMJ.<sup>5</sup> She alleged that her CO's referral for a mental health evaluation was reprisal for her Article 9-2-2 complaint about a hostile work environment, and she alleged that the referral memorandum contained several false statements. She alleged that the claims that (a) she had not shown up for work without notifying her chain of command and (b) her personality conflict with her supervisor had "made for a challenging workplace" were false. She stated that there was no documentation supporting these false statements. The applicant stated that her work environment continued to be hostile and she asked the Sector command to ensure that her CO and his subordinates stopped all forms of harassment and reprisal, to expunge her upcoming OER, and to transfer her out of the Sector.

In response to the applicant's Article 138 complaint, on April 30, 2009, her CO rescinded the referral for a mental health evaluation, denied the request to expunge the upcoming OER, and denied the request to transfer her out of the Sector. He advised her that she could appeal the decision to the District Commander.

On June 5, 2009, the applicant appealed her CO's decision to the District Commander. She noted that her hostile work environment complaint was not based on any illegal discrimination factors, such as race or gender. But she pointed out that the EO Manager's climate assessment had found that the command could not articulate any erratic behaviors that supported her referral for a mental health evaluation and had recommended that she be transferred within

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<sup>5</sup> 10 U.S.C. § 938 ("Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.").

the Sector to a position commensurate with her rank and skills. Instead, she had been reassigned to serve as a “project officer” with no defined duties and then as a “training officer,” which is normally just a collateral duty. The applicant stated that she did not believe she could receive a fair OER from the Sector command because of the hostile and retaliatory environment. Therefore, she requested a change in the composition of her rating chain that would prepare the OER and a reassignment to a position commensurate with her rank and skills, such as a position in the Prevention or Response Departments. She also asked the District Commander to investigate the retaliatory actions taken against her.

On June 8, 2009, the Sector Commander forwarded the applicant’s Article 138 complaint to the District Commander for review and decision. He also reminded the District Commander that he had forwarded her March 23, 2009, Article 9-2-2 complaint to him on March 30, 2009.

On June 10, 2009, the District Chief of Staff acknowledged receipt of the Article 138 complaint and the Article 9-2-2 complaint. He stated that he had assigned an officer to investigate her Article 138 complaint. Regarding her Article 9-2-2 complaint, he stated that it had been investigated by the Office of Civil Rights and that he had considered the matter closed when she elected not to pursue the EO process. Regarding her request to transfer, he noted that she had already been transferred to the Response Department in accordance with her request.

### *Final Action on Complaints*

On August 10, 2009, the District Commander responded to the applicant’s Article 138 and Article 9-2-2 complaints as follows:

- Regarding the applicant’s request for transfer, he noted that it was originally denied but that she had been internally reassigned to work directly for the Deputy Sector Commander pending transfer orders from the Personnel Service and that on June 10, 2009, she had received new orders.
- Regarding her request to be transferred out of the Sector, the District Commander stated that he would not approve this request because he had found her Article 9-2-2 complaint, i.e., her “allegations of oppression and retaliation,” were unsupported and did not justify an immediate transfer.
- Regarding her request that her supervisor receive a punitive letter of reprimand, the District Commander denied the request noting that he found her allegations against her supervisor to be unsupported and that her supervisor had “acted appropriately in providing leadership and guidance to you to develop skills in Coast Guard contingency planning.”
- Regarding her request that the statements in the mental health referral be investigated, the District Commander stated that an investigation had shown that the statements in the referral were “factual and accurate” and so no further action was necessary.
- Regarding her claim of harassment and reprisal, the District Commander stated that the investigation had shown that “no instances of ‘harassment’ or ‘reprisal’ by the Command at Sector XXXXXXXX occurred,” so no further action was necessary. He noted that the



referral was improperly issued, not because of any intent to harass or retaliate, but because the wrong officer—the Sector Logistics Chief—had signed the form while only the Sector Commander had the authority to do so. However, the Sector Commander had known that the referral was being issued and “believed it was necessary in response to your statements.”

- Regarding the applicant’s OER, the District Commander stated that this was not a cognizable complaint under Article 138. He noted, however, that because she had been reassigned from the Planning Department to work directly for the Deputy Sector Commander before the evaluation period ended, the OER would be prepared by the Deputy Sector Commander and not by her former supervisor.
- Regarding the applicant’s complaint about the processing of her Article 9-2-2 complaint, the District Commander acknowledged that her complaint had been treated as an EO complaint instead of an Article 9-2-2 complaint. He stated that this was an unintentional administrative oversight. Based on the new investigation and given that the applicant had already been transferred to a new department, however, he concluded that there were no grounds for further redress. He noted that her complaint and his response would be provided to the Area Commander to review at his discretion and that she also had a right to refile her complaint with the Area Commander.

### *Disputed OER*

The disputed OER in the applicant’s record covers her service at Sector XXXXXXX from July 21, 2008, to June 30, 2009.<sup>6</sup> The Deputy Sector Commander completed the supervisor’s portion of the OER, the Sector Commander served as the reporting officer, and the District Chief of Resources served as the OER reviewer. The OER contains three below-standard marks of 3 for “Results/Effectiveness,” “Workplace Climate,” and “Initiative,” eleven standard marks of 4 for “Planning and Preparedness,” “Using Resources,” “Adaptability,” “Professional Competence,” “Speaking and Listening,” “Writing,” “Looking Out for Others,” “Developing Others,” “Teamwork,” “Evaluations,” and “Responsibility,” and four above-standard marks of 5 for “Directing Others,” “Judgment,” “Professional Presence,” and “Health and Well-Being.” She also received a mark in the third spot on the OER comparison scale, denoting a “fair performer; recommended for increased responsibility.” The low marks are supported by the following written examples of performance and other comments:

... Per Article 10.A.4.h.1. this OER is a Derogatory Report, [the applicant was] removed from primary duties on 2009/04/01 and assigned as Special Projects Officer under supervision of Deputy Sector Commander ...

... missed or was late with several key milestones [in Sector Mass Rescue Operation plan and exercise] ... caused similar schedule slips during development of [unit COOP plan] ...

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<sup>6</sup> The Board notes that the applicant submitted a draft version of the disputed OER that was apparently rejected by the Personnel Service Center because it was not signed by the correct rating chain. The OER that was actually entered in her record is described here.

Strained relationship w/ Planning Chief created tension w/in office, hampered productivity of team. ... provided little input for own OER

By her own admission [the applicant] was unable to work effectively with her supervisor ... due to what she characterized as a conflict in leadership & management philosophy. [The applicant] was subsequently removed from the planning department head's direct supervision & placed under the Deputy's direct supervision. [She] displays a good aptitude & positive attitude toward operational related duties such as CDO, [search and rescue] & small boat operations, but unfortunately did not place the same importance or energy on equally critical but less operational planning functions.

... Struggled to keep development of COOP, MRO plans on track, although eventual MRO table top exercise covering [a station's area of operations] proved to be highly successful; ... Reluctance to adequately manage RFO team created extra workload for others. ...

This officer was assigned to a billet without the prerequisite knowledge & experience given the rank & importance of the position. Unfortunately, despite every effort to provide training, OJT & opportunities, [she] was not able to become effective & productive in her primary duties & ultimately requested an in-house transfer to a Response billet. Already selected for [promotion to LCDR/O-4] but needs to gain maturity, time & project management skills & broader based experience/knowledge/comfort zone before being assigned positions of greater responsibility. Marked improvement in both performance & attitude since re-assignment is good indicator of potential for future success as an O4.

### *Applicant's OER Addendum*

Because the disputed OER was called "derogatory," the applicant was entitled to append an addendum to the OER.<sup>7</sup> In her addendum, dated December 15, 2009, she disputed whether the OER is "derogatory," noting that under Article 10.A.4.h.(c), an OER is derogatory if it "[d]ocuments adverse performance or conduct which results in the removal of a member from his or her primary duty or position." She stated that the OER was not derogatory because she was removed from her position due to her own request and her harassment complaint against her supervisor—not as a result of adverse performance or conduct.

The applicant also stated that her prior supervisor, the Sector Planning Officer, should have been allowed to provide any input for the OER because the applicant was removed from her department when the OER was prepared and yet the low marks in the OER are based on her allegedly poor performance while assigned to the Planning Department and that information could only have come from her prior supervisor. She also claimed that all of the members of her chain of command within the Sector should have been disqualified from preparing the OER pursuant to Article 10.A.2.g. of the Personnel Manual because she had filed an Article 138

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<sup>7</sup> Even when OERs are not "derogatory," officers may submit OER "replies" for inclusion in their records.

complaint against them, which raised a “substantial question” of whether she would receive a fair and accurate OER from them.

The applicant “strongly disagreed” with the assessment of her performance in the OER, claimed that she met “all assigned deadlines well in advance of those deadlines,” and noted that there is no other documentation of performance counseling in the record. She stated that she strongly believes that the OER was prepared in reprisal for her complaint of a “hostile work environment” against the head of the Planning Department and her Article 138 complaint against her chain of command and so she did not receive the fair, accurate, and objective evaluation she was entitled to under the Personnel Manual.

#### ***Deputy Sector Commander’s Endorsement of the OER Addendum***

OER addenda are forwarded through the rating chain for comments, called “endorsements.” On December 16, 2009, the Deputy Sector Commander, CAPT P, who prepared the supervisor’s portion of the disputed OER, stated that the decision to remove the applicant from the Planning Department was based the applicant’s performance because she was

ineffective in her primary duties within the planning shop. Important tasks, such as development of our Mass Rescue Operation Plan and exercise, were not getting done without the intervention of other members of the Sector staff. Compounded by [the applicant’s] inability and/or refusal to take direction from the Sector Planning Officer, the situation became a significant disruptive influence within the command. We moved her from under the supervision of the Planning Officer to the Sector Deputy on or about 01 April 2009, then coordinated a more permanent solution with OPM.

The Deputy noted that the applicant’s complaints were properly forwarded to the District and that the investigation showed that the Planning Officer’s statements had been factual and accurate and that the applicant’s claims of oppression, harassment, retaliation, and reprisal were unsupported. The Deputy concluded that the disputed OER “fairly and factually depicts the level of her performance during the marking period.” He noted that both he and the Sector Commander had formally counseled the applicant on numerous occasions and so the OER came “as no surprise to her.” He alleged that the Sector “invested considerable effort to support [the applicant] and help her to become an effective, productive Coast Guard officer within the planning office. ... Her performance improved somewhat after she was removed from the Planning Office, but in my opinion, her performance still did not meet the expectations of an officer with her time in grade and time in service.”

#### ***Sector Commander’s Endorsement of the OER Addendum***

The Sector Commander, CAPT T, who served as the reporting officer for the OER, stated that the marks and comments in the OER—

1. ... are accurate reflections of her performance and consistent with my considerable personal observations during the period in question. ... [The applicant’s]

struggles to adjust to her new assignment and inability to work with her supervisor required me to be personally involved in coaching, counseling and reviewing her work. I am therefore very familiar with her work, capabilities and potential.

2. [The applicant's] transfer from the Planning Department occurred because of her failure to meet critical Sector needs in that position, not as a result of her complaint against her supervisor. In fact, I denied her original request for transfer precisely because I knew it would have to be reflected poorly in her OER. Only after she continued to falter and critical deadlines were missed despite personal attention and help from me and the Deputy Sector Commander, did I make the decision to transfer her. At the time I personally counseled [her] and told [her] that while she would receive a fresh start in her new assignment, her failure to perform in her planning assignment would be reflected in her OER.

The Sector Commander noted that the applicant's complaints were investigated by the District, which determined that they were unfounded and that it is not the intent of the Personnel Manual to allow an officer to disqualify her entire rating chain merely by filing complaints against them.

#### ***Endorsement of the OER Reviewer for the Addendum***

The OER reviewer stated that the disputed OER and addendum documents were all submitted in accordance with the requirements of Article 10 of the Personnel Manual. He stated that it would not be appropriate to disqualify the applicant's entire rating chain because she filed complaints against them, especially since her complaints had been investigated by an outside party and were found to be unfounded. He stated that neither the Deputy Sector Commander nor the Sector Commander had any personal interest or conflict that would raise a substantial question as to whether they could provide a fair and accurate assessment of the applicant's performance during the marking period.

#### ***Subsequent Performance***

On September 1, 2009, before the disputed OER was entered in her record, the applicant was promoted to LCDR as a result of her selection for promotion in 2008. As a Maritime Law Enforcement Operations Planner in the Response Department of Sector XXXXXXXX from July 1, 2009, to May 3, 2010, the applicant received primarily marks of 5 in the performance categories, with three 4s and three 6s; a recommendation for promotion "with peers"; and a mark in the fourth spot on the comparison scale, denoting a "good performer; give tough, challenging assignments."

In June 2010, the applicant was transferred to serve as the branch chief of a District Operational Planning Office. On her OER dated April 30, 2011, she received primarily marks of 6 with four marks of 5 and marks of 7 for "Speaking and Listening" and "Health and Well-Being" and another mark in the fifth spot on the comparison scale. The officer who served as her supervisor and reporting officer called her a "self-assured, focused and tenacious officer" with a "strong operational background" who was "highly recommended for promotion with peers." On

her second annual OER, dated April 30, 2012, she received primarily marks of 6, one mark of 5, and marks of 7 for “Speaking and Listening,” “Teamwork,” “Responsibility,” and “Health and Well-Being”; another mark in the fifth spot on the comparison scale; and comments about her “unwavering ability to meet challenging operational demands” and being “highly recommended for promotion with peers.” Her April 30, 2013, OER was very similar but included six marks of 7.

### **VIEWS OF THE COAST GUARD**

On January 29, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In recommending denial, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC submitted sworn declarations by the officers who signed the disputed OER, which are summarized below, and concluded that the applicant has failed to prove that the OER was inaccurate or a product of retaliation or reprisal or that she was removed from her duties in retaliation or reprisal for her complaints. Based on those declarations, PSC concluded that the applicant was removed from her duties as the best course of action for all concerned.

Regarding the comments and marks in the OER, PSC noted that the rating officials continue to support them and that the Sector Commander, who served as the reporting officer, had an unusual “depth and breadth of interaction” with the applicant during the reporting period and so was “well suited to evaluate” her performance.

PSC concluded that the applicant had poorly performed her duties during the marking period and “created numerous distractions for her chain of command with accusations subsequently investigated and found to be largely unfounded.” Therefore, the OER was not a product of retaliation or reprisal, and the applicant’s request should be denied.

#### ***Declaration of the Deputy Sector Commander***

The Deputy Sector Commander, CAPT P, stated that because the Planning Officer reported directly to him, he had regular interaction with the planning staff and the work performed in that department. He noted that he himself has extensive experience in contingency planning and so he was very familiar with the applicant’s duties.

The Deputy “strongly refute[d]” the applicant’s claim that the OER was prepared in retaliation for her complaints. He stated that not only were her complaints unfounded, but “the OER accurately and fairly characterizes the nature of her performance ... Because [she] had little previous experience in contingency planning, we aggressively worked to help her obtain the necessary training to perform her duties successfully,” and sent her to several appropriate training courses. However, she “failed to meet critical planning milestones and deadlines related to her work assignments. Her planning duties were ultimately completed only through the intervention of others on the [planning] staff.”

The Deputy stated that he became aware of the applicant's struggles with her responsibilities early in the evaluation period and took an interest in her professional development. He and the Sector Commander "provided her counseling and mentoring in an effort to get her on the right track," but she "ultimately indicated that the planning duties did not appeal to her" and that she wanted to work in the Response Department. The applicant also stated that "she did not agree professionally with [the Planning Officer] and thus had trouble following her orders." The Sector Commander initially refused to move her because it might be detrimental to her career, but her "substandard performance and demeanor because worse and began to adversely impact the broader Sector staff. When it became apparent that no course of action other than a transfer to the Sector Response Department would resolve the situation," they removed her from the Planning Department and then had her officially transferred to the Response Department.

The Deputy stated that the disputed OER is "very objective and accurate." He noted that the applicant "provided almost no OER input beyond the administrative data required in block 1," but he "took the time to collect the facts and background information to ensure the OER accurately reflected her performance over the entire period." The Deputy alleged that he is "extremely confident that this OER reflects no bias or ill-will" against the applicant and the fact that she filed a complaint did not relieve him of his obligation as a supervisor to truthfully and accurately document her performance.

#### *Declaration of the Sector Commander*

The Sector Commander, CAPT T, who prepared the reporting officer's portion of the disputed OER, stated that while he would not normally have been aware of the details of a junior officer's job performance, he was very aware of the applicant's performance and is "completely satisfied that the OER ... is a fair and accurate report on her performance during the period."

The Sector Commander stated that he became aware of the applicant's struggles early in her tenure, so they worked to ensure that she received the proper training and support to succeed on the Planning Staff. They ensure that she was "involved in every major exercise and attended training for Planning, Incident Command Systems, pollution response, and Mass Rescue Operations." However, the applicant "was not effective and productive in her primary duty and missed several key milestones that negatively impacted the Sector's planning and exercise missions."

The Sector Commander stated that he did not become aware of the applicant's difficulties with her supervisor until a few weeks before she filed her Article 9-2-2 complaint. Based on the information in that complaint, he initiated an EEO investigation, but the applicant "clarified that her complaint was not an EEO complaint." He then initiated another investigation but both investigations identified only personality conflicts between the applicant and the Planning Officer and "nothing to warrant action" except that he counseled both of them. He told the applicant that she had to be able to work effectively even with people she does not like or with whom she has "philosophical differences regarding leadership style."

The Sector Commander stated that at the applicant's request, he removed the Planning Officer from her chain of command and had the applicant reassigned to the Response Department.

ment, but the marks and comments in the disputed OER “fairly and accurately reflect her performance during this period.”

Regarding the applicant’s referral for a mental health evaluation, the Sector Commander stated that during counseling sessions, the applicant told him several times that “she was under tremendous stress and that it was adversely impacting her health.” He asked her if she wanted to receive counseling, and she said she did. They “discussed a command directed evaluation as a means to expedite her receiving the care that she wanted and needed,” and so he directed the Logistics Officer to make the arrangements. When she received the written notice for the referral, however, the applicant “found it more formal and ‘threatening’ than expected,” and so he rescinded the referral.

**APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On January 30, 2014, the Chair sent copies of the views of the Coast Guard to the applicant and her counsel, inviting a written response. Neither mailing was returned by the Post Office, and no response was received.

**APPLICABLE REGULATIONS**

Article 10.A.1.b.1. of the Personnel Manual in effect in 2009 states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Article 10.A.4.c.4. provides the following instructions for supervisors completing the first 13 marks on an OER (similar instructions are provided for reporting officers for completing the last 5 marks in Article 10.A.4.c.7.):

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



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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. ...



g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a Reporting Officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.”

Article 10.A.2.d.2.j. states that a Supervisor “[p]rovides the new Supervisor with a draft of OER sections (3-6) when the Supervisor changes during a reporting period.”

Article 10.A.2.g.2. of the Personnel Manual states that a rating chain member may be disqualified from evaluating a subordinate if the rating chain member has been “relie[ved] for cause due to misconduct or unsatisfactory performance, [is] an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.”

Article 10.A.4.h.1.c. states that one type of “derogatory” OER is an OER that “[d]ocuments adverse performance or conduct which result in the removal of a member from his or her primary duty or position.” Under Article 10.A.4.h.2., the reported-on officer may file an addendum to a derogatory OER, and the rating officials must endorse the addendum by signature and may add comments.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.<sup>8</sup>

2. The applicant asked the Board to remove from her record her OER for the period July 21, 2008, through June 30, 2009. She alleged that the numerical marks and comments in the OER are erroneous and unjust and that the OER was prepared in retaliation or reprisal for her complaints against her chain of command. When considering allegations of error and injustice, the Board begins its analysis by presuming that a disputed OER is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.<sup>9</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.<sup>10</sup> To be entitled to relief, the applicant cannot “merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense,” but must prove that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>11</sup>

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<sup>8</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

<sup>9</sup> 33 C.F.R. § 52.24(b).

<sup>10</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>11</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).



3. The applicant alleged that she was the victim of a hostile work environment in the Planning Department at Sector XXXXXXX. The alleged events that she described are that when she reported to the department she was assigned to shadow her supervisor and to perform some menial tasks pursuant to a full-scale exercise that was already being planned and executed; that her supervisor yelled at her to get some replacement T-cards during the exercise; that her supervisor once “flung a blue routing folder into my face” and yelled, “What is this?” and later yelled at her to enter her office and sit down,” although the applicant did not feel responsible for not having followed up on the invitations she was assigned to prepare but that did not get mailed while the supervisor was away on leave; and that her supervisor once sent her an email that the applicant did not submit but that she felt was “the final straw in the continuous pattern of singling me out.” These events allegedly occurred over the course of the eight months that the applicant worked in the Planning Department.

4. The applicant submitted no evidence whatsoever to support the above allegations. Even if the Board were to assume they are factual as the applicant described them, however, the incidents are grossly inadequate to prove that the applicant was harassed by the Planning Officer or subject to a “hostile work environment.”<sup>12</sup> To create a “hostile work environment,” the hostility must be based on a protected status, such as race or gender, and occasional hostile or humiliating words and actions are insufficient.<sup>13</sup> Factors that courts consider aside from bias include the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating or merely offensive; and whether the conduct unreasonably interfered with an employee’s work performance.<sup>14</sup> A “hostile work environment” exists in the civilian world “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”<sup>15</sup> Given the scant and vague allegations of the applicant, which she did not bother to support with any evidence, her Article 9-2-2 complaint about a hostile work environment appears to have been frivolous.

5. The applicant alleged in her Article 138 complaint against the Sector Commander that the referral for a mental health evaluation was a matter of reprisal for her Article 9-2-2 complaint against the Planning Officer. Because the Article 9-2-2 complaint did not accuse the Sector Commander of any misconduct or poor leadership, it is not clear to the Board why the applicant thought he might have been motivated to retaliate against her as a result of it. Moreover, the Sector Commander’s declaration shows that he discussed the referral with the applicant before the referral form was issued and she initially agreed to it as a way to get counseling faster. How-

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<sup>12</sup> Military officers are not actually protected from “hostile work environments” under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-16; see *Roper v. Dep’t of the Army*, 832 F.2d 247, 248 (2<sup>nd</sup> Cir. 1987) (finding that “the *Feres* doctrine prevents members of the military from challenging military decisions through actions brought under Title VII”). However, “it is the Coast Guard’s policy to apply the same protections [in Title VII] to the military workforce.” Equal Opportunity Manual, Chap. 3.A.5.b. “It is incumbent on those in leadership positions to create a workplace environment built on the core values of honor, respect, and devotion to duty, and to ensure that the workplace is free of discrimination or harassment on any prohibited basis.” *Id.* at Chap.1.d.

<sup>13</sup> See *Overton v. N.Y. State Div. of Military and Naval Affairs*, 373 F.3d 83, 99 (2d Cir. 2004) (Pooler, J., concurring).

<sup>14</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

<sup>15</sup> *Id.* (citations omitted).

ever, when she felt threatened by the statements and legal language on the referral form, the Sector Commander rescinded it. According to the District Commander, investigations of both complaints concluded that the applicant's allegations were unfounded and that the statements on the referral form were accurate. The Board finds no basis in the record for drawing a different conclusion.

6. The applicant alleged that she was removed from the Planning Department on April 1, 2009, in retaliation for her Article 9-2-2 complaint. The preponderance of the evidence shows, however, that the applicant asked to be moved from the department and that the Sector Commander finally removed her not only because of her request but also based on her poor performance, especially her failure to meet certain deadlines and to follow her supervisor's directions. There is no evidence supporting the applicant's claim that her removal from the Planning Department was a matter of reprisal or retaliation.

7. The applicant alleged that the disputed OER should not be designated as "derogatory" pursuant to Article 10.A.4.h.1.c. of the Personnel Manual because she was removed from the Planning Department for reasons other than adverse performance and conduct. The record shows that the applicant was removed from the Planning Department at least in part because she requested it, and she might not have been reassigned had she not requested it. The record also shows, however, that the applicant was removed in part because of her poor performance and conduct. There is no evidence that she would have been moved if her performance and conduct in the Planning Department had been good. In this regard, the Board notes that the command did not reassign her immediately to an open billet but made her a "special projects officer" directly under the Deputy Sector Commander until they could move her into a real billet with transfer orders. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the disputed OER was erroneously categorized as "derogatory" pursuant to Article 10.A.4.h.1.c.

8. The applicant alleged that the Planning Officer should not have had any input into her OER because of the applicant's Article 9-2-2 complaint and that the Deputy Sector Commander and Sector Commander should not have been on her rating chain because of her Article 138 complaint. An officer, however, may not disqualify his or her own rating officials by filing unfounded complaints against them. Under Article 10.A.2.g.2. of the Personnel Manual, a rating official may be disqualified from evaluating a subordinate only if the rating official has been "relie[ved] for cause due to misconduct or unsatisfactory performance, [is] an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation." The applicant submitted no evidence showing that her superiors were ever named as parties to a formal investigation or court of inquiry.<sup>16</sup> In addition, because informal investigations showed that both complaints were unfounded, her complaints did not create a conflict of interest. The investigations showed that there was nothing of significance that the applicant could report or prove about her superiors' conduct towards her that could have harmed their careers. Therefore, the Board finds

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<sup>16</sup> U.S. Coast Guard, COMDTINST M5830.1A, Administrative Investigations Manual, Article 1.D.8. (Sept. 2007) (defining a "party" as a "person who is required to be accorded specific rights in connection with a Formal Investigation or Court of Inquiry").

that the applicant has failed to prove by a preponderance of the evidence that her rating officials should have been disqualified or that the Planning Officer could not properly have provided information for the disputed OER in accordance with Article 10.A.2.d.2.j. or that her rating officials could not have relied on the Planning Officer's reports about her performance in accordance with Articles 10.A.4.c.4.d. and 10.A.4.c.7.d. of the Personnel Manual.

9. The applicant alleged that the disputed OER is inaccurate and that the low marks and negative comments were prepared in reprisal for her complaints. The applicant submitted nothing to show that the marks and comments are inaccurate, however, and her complaints were found to be unfounded. The rating officials not only signed the OER, they have signed sworn declarations reaffirming its accuracy and fairness. The Board finds no grounds for removing the disputed OER from the applicant's record because she has not shown that it was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>17</sup>

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>17</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

**ORDER**

The application of [REDACTED], USCG, for correction of her military record is denied.

