

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-175

FINAL DECISION

Attorney Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. This case was docketed upon the BCMR's receipt of the applicant's completed application on September 8, 1999.¹

This final decision, dated October 26, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, an (; pay grade E-6), asked the Board to advance him to (pay grade E-7) effective ; to remove from his record an enlisted performance evaluation form (EPEF) dated , and negative administrative entries (page 7s); to restore 25 days of leave; and to make him eligible for appointment as a chief warrant officer.

APPLICANT'S ALLEGATIONS

The applicant stated that he passed the servicewide examination (SWE) for promotion to in and was informed on , that he would be advanced to . However, on , his commanding officer (CO) removed him from the promotion list for advancement to . He alleged that his CO did so in retaliation for a discrimination complaint that he and four other crewmembers on the had filed against the CO and the engineering officer (EO) of the cutter in . He alleged that the CO had insufficient cause to remove him from the promotion list and justified the removal based on false harassment complaints made by the applicant's wife during their divorce. He alleged that the CO's

¹ This final decision is being issued more than 10 months after the day of filing because the applicant requested and was granted five extensions totaling 123 days to reply to the Chief Counsel's advisory opinion.

justification was false because the problems had been resolved six months previously, their divorce became final on _____, and his wife later retracted her false allegations of harassment.²

The applicant alleged that when he asked his CO why he was not removed from the promotion list earlier if his previous marital problems were a concern, he was told that the CO had not bothered to remove him because he "did not expect the list to move as far as it had." He alleged that the CO stated that he removed the applicant from the list because of the mark of "progressing" he had received for the evaluation period ending _____. However, under Articles 5.C.25.c. and 10.B.7.2.c. of the Personnel Manual, he argued, a mark of "progressing" does not stop an advancement, though it does prevent a member from participating in an SWE.

The applicant also alleged that his CO retaliated against him by assigning him a mark of "progressing" for the evaluation period ending _____ as well. He alleged that the "progressing" mark was patently false because the CO, who based the mark on the applicant's need to improve in the "directing others" and "developing subordinates" performance categories, assigned him an average mark of 4³ for "directing others" on his EPEF for that period. The applicant stated that the CO's retaliatory mark of "progressing" also denied him the opportunity to take the SWE in _____, so he was not allowed to requalify for advancement for another two years.

SUMMARY OF THE RECORD

On October 26, 1981, the applicant enlisted in the Coast Guard as a seaman recruit. He attended A School and advanced to _____ in _____. He was advanced to _____ in _____ and to _____ in _____. Prior to being assigned to the _____, he served on the cutters _____, as well as at various shore units. His record contains several commendations and letters of appreciation for meritorious service.

On _____, the executive officer of the _____ entered a negative page 7 in the applicant's record. The page 7 states that he showed up for work two hours late because he had not informed his command that he was attending sick call. Then, when assigned to repair to a propulsion alarm panel, he stated that he could not do so because the doctor had limited him to light duty. However, when asked to show his medical chit, it was discovered that he was fit for full duty. Later, he

² The applicant submitted a copy of an undated letter signed by his ex-wife. In this letter, she stated that in early 1997, she initially sought marriage counseling not knowing that it could get the applicant in trouble at work. After she "accidentally got him in trouble at work," he asked for a divorce. When he asked her to move out of the house, she stated, she tried to get back at him by "exaggerating [their] problems and his behavior" and by seeking a restraining order. She concluded that, after 10 years of marriage, "until this situation drove a wedge between us due to the actions of the Family Advocacy Office and his command, there had never been any physical violence, either toward myself or our son. I'm writing this now because I know that my actions have hurt his career, and I would like to set the record straight in an attempt to right the wrong that I did to him."

³ Members are evaluated on a scale from 1 to 7, with 7 being the best possible mark.

was overheard making derogatory remarks about his supervisor on the phone. The applicant acknowledged and signed the page 7.

In , the applicant took the SWE for promotion to . The same month, he was assigned to the Coast Guard cutter . On , the CO began serving as the captain of the . Also in , the results of the SWE were issued, indicating the applicant had qualified for promotion but was ranked in place, well below the cutoff point of for being guaranteed promotion. On his EPEF for the evaluation period ending , the CO and other members of his rating chain recommended him for advancement and assigned him ten marks of 6, nine marks of 5, and three marks of 4 in the performance categories.

On , the CO of the entered a page 7 in the applicant's record documenting his wife's allegations of emotional abuse and threats of physical abuse. A counselor recommended that he have no contact with his wife, and the CO issued a military restraining order barring him from calling, writing, or meeting his wife outside of scheduled joint counseling sessions. The applicant acknowledged and signed the page 7.

On , the CO entered a page 7 in the applicant's record indicating that the order not to contact his wife had been lifted in light of his continuing cooperation. However, the CO noted that the applicant should minimize contact with his wife because of a "potentially volatile situation that still exists."

On , the eligibility list for advancement to E-7 was republished, showing the applicant's name in 30th place on the list. The applicant took the SWE again in .

On , the CO entered a page 7 in the applicant's record documenting allegations of sexual harassment lodged by "a female employee of a ." The woman's supervisor told the CO that the applicant had badgered her for her phone number, threatened to follow her home, told her he knew where she lived, and revealed to her that he had obtained personal information about her. The page 7 states that the applicant persisted in these actions despite repeated statements by the woman that she was not interested in having a personal relationship with him. The applicant was in uniform on at least one occasion of this alleged harassment. The CO informed him that further conduct of this sort would cause him to be charged under the Uniform Code of Military Justice and could subject him to civilian criminal and civil charges as well.

On , the applicant's CO did not recommend the applicant for advancement but instead marked him as "progressing" on his EPEF for the evaluation period ending , due to the behavior documented in the page 7 dated . The "progressing" mark was documented with a page 7 notifying the applicant that "to be recommended for advancement, you must demonstrate that you are ready to become a chief petty officer by your actions and in support of all Coast Guard policies and traditions." The applicant received five marks of 5, sixteen marks of 4, and one mark of 3 (for "human relations") in the performance categories.

On [redacted], the CO entered a negative page 7 in the applicant's record documenting recent complaints of emotional abuse and fear of physical abuse lodged by his wife. The page 7 indicates that on [redacted], the applicant confronted his wife as she left her office about a missed appointment with his divorce attorney. His wife said that the confrontation renewed her fear of physical abuse from him. The page 7 also states that on [redacted], he used his car to force his wife, who was driving another car, to stop. After forcing her to stop, he demanded that she return the car to him. In doing so, he drove dangerously on a busy street in rush hour traffic and again put her in fear of personal harm. The page 7 states that his wife was soon granted a restraining order against him. A U.S. Navy Family Advocacy Program Case Review Committee found that the applicant had emotionally abused his wife and recommended that he undergo counseling. The CO ordered that he attend Alternatives to Violence Group therapy sessions while the [redacted] was in port. He also warned the applicant in the page 7 that his lack of self-discipline and confrontational tendencies could irreparably harm his career in the Coast Guard. The applicant acknowledged and signed the page 7.

On [redacted], the eligibility list for advancement to E-7 was issued. The applicant's name was in [redacted] place among all [redacted], again well below the cutoff point of [redacted] for guaranteed promotion.

On [redacted], the applicant and four other crewmembers filed a complaint of discrimination against the CO of the [redacted] with the Civil Rights Officer for [redacted]. They alleged that the CO frequently made derogatory comments regarding Puerto Ricans, Cubans, Mexicans, and African Americans. In addition, the applicant had alleged that the CO and EO discriminated against him by appointing someone else ([redacted]) to the position of assistant [redacted]. On [redacted], the Commander of [redacted] ordered an informal investigation into alleged discriminatory behavior by the CO and EO of the [redacted].

On [redacted], the investigating officer (IO), a commander, sent a report on his investigation into the alleged discrimination by the CO and the EO to the Commander of [redacted]. The IO found that the CO habitually used very coarse language and that 11 of 16 crewmembers indicated that the CO had "expressed comments derogatory to Hispanics." However, some of the specific allegations of discriminatory language made by the applicant and the allegations of racist language regarding African Americans were denied by other witnesses of these incident, including other Hispanic witnesses. The IO concluded that, while there was no proof of discriminatory action by the CO, he had made comments degrading to Hispanics, contrary to the Commandant's Human Relations policy. The IO also concluded that none of the allegations regarding the EO had been corroborated and that the EO's conduct had been "of the highest professional caliber."

Regarding the applicant, the IO concluded that the allegation of discrimination with respect to the appointment of an assistant [redacted] was not creditable because the CO's decision was "based only on job performance and personal problems of an emotional divorce that was affecting [the applicant's] job per-

formance." The IO also concluded that the applicant was "unwilling to accept that the actions of [the CO and EO] were because of his personal problems (emotional divorce, sexual harassment charge, and leadership and management skills). His unwillingness to accept personal responsibility has led him to believe that he has been the subject of discrimination. I found him to not be creditable as a witness." The IO reported that the "necessary trust and faith" between the CO and the applicant had been "traumatically shattered by this investigation and cannot be successfully revived." Among other things, he recommended that the applicant not be assigned to the same command as the CO. He attached to his report 16 statements signed by the enlisted crewmembers of the ; statements signed by the CO, EO, and executive officer (XO) of the cutter; and summaries of telephone interviews with alleged witnesses who were Coast Guard members or government employees not assigned to the .

On , the applicant was removed from the and sent to on a temporary assignment.

On , the Commander of , acting as the convening authority, approved the report of an informal investigation into allegations of discriminatory behavior by the CO and EO of the . The Group Commander stated that as a result of the report, he counseled the CO concerning his behavior, sent the CO an admonitory letter, and advised the CO that the information contained in the report would be reflected in his next evaluation. The Group Commander also transferred the applicant and another complainant off of the for thirty days and began to look for new permanent billets for them. In addition, the crew of the underwent a one-day diversity training seminar, to be followed up with a "climate assessment" in the spring.

On , the applicant voluntarily withdrew his discrimination complaint to the Civil Rights Officer.

On , the CO entered a page 7 in the applicant's record documenting the fact that he had asked the Human Resources Services and Information Center (HRSIC) to remove the applicant's name from the eligibility list for advancement to . The page 7 indicates that the removal is justified by (1) the mark of "progressing" on the , evaluation that resulted from his wife's complaints in and from the sexual harassment complaints lodged by the employee's supervisor and (2) continuing "incidents of improper and unprofessional conduct concerning his spouse" since the mark of "progressing" was awarded. The CO stated that "[w]hile the member has demonstrated superior technical ability as an , his leadership and professional qualities do not meet the standards expected of a Senior Petty Officer, much less a Chief Petty Officer." The CO wrote on the page 7 that to restore his eligibility for advancement to , the applicant should demonstrate better self-control while finalizing his divorce, assume a more aggressive leadership role on the job, and "not allow personal feelings, beliefs and perceptions to adversely affect his development as a manager and military professional." The applicant refused to sign this page 7.

On _____, the applicant's supervisor (the EO), marking official (the XO), and approving official (the CO) assigned the applicant a mark of "progressing" on his EPEF for the evaluation period ending _____, instead of recommending him for advancement. The page 7 documenting this mark advised the applicant to concentrate on improving his leadership skills, such as his performance in "directing other" and "developing subordinates." On the EPEF, he received one mark of 6, seven marks of 5, eleven marks of 4, and three marks of 3 for "developing subordinates," "responsibility," and "loyalty." EPEF marks are supposed to be recommended by the supervisor, who places "X"s in the circles on the form corresponding to his recommended numerical marks; assigned by the marking official, who fills in the circles; and concurred in by the approving official. The copy of the applicant's EPEF for the period ending _____, submitted by the Chief Counsel's office, shows that "X"s were drawn in the circles corresponding to marks of 5 for "developing subordinates" and "responsibility" and to a mark of 6 for "loyalty." In addition, an "X" appears in the circle for a mark of 5 for the category "working with others," although the circle filled in by the marking official was for a mark of 4.

The applicant eventually received permanent transfer orders and never returned to the _____. He received his new command's recommendation for advancement on his next four EPEFs, but was not permitted to take the SWE in _____ because of the mark of "progressing" he received on his _____ EPEF.

On _____, the applicant appealed his _____ EPEF. In his appeal, he alleged that the marks in the EPEF were not justified and were retribution for his discrimination complaint against the EO and CO. He alleged that the EO and CO had created a hostile work environment for him and that nothing he did was acceptable in their eyes. The applicant specifically challenged the marks of 5 he received for "quality of work" and "stamina," the mark of 4 he received for "working with others," and the three marks of 3 for "developing subordinates," "responsibility," and "loyalty." For each category, he cited examples of his work that he felt justified higher marks.

On _____, the CO forwarded the applicant's appeal to the Group Commander with a memorandum recommending disapproval. The CO defended each of the contested marks. He indicated that, while the applicant's "stamina" and "quality of work" were very good, they did not greatly exceed expectations. Regarding the marks for "working with others" and "developing subordinates," he indicated that the applicant seemed to work best alone, did not take a leadership role in team efforts, and did not make any special effort to coach junior crewmembers, although "he did participate in entry-level training for break-in crewmembers during the qualification process." Regarding the mark of 3 for "responsibility," the CO stated that the applicant refused to accept responsibility for his behavior toward his wife and, when ordered to attend anger management counseling in _____, vehemently protested and complained to anyone who would listen. In addition, the CO cited the applicant's refusal to believe that his behavior had caused the EO to appoint someone else assistant _____. The CO also cited the sexual harassment complaint against the applicant by the employee's supervisor, which occurred during the previous evaluation period.

Regarding the mark of 3 for "loyalty," the CO stated that the applicant refused to support the decisions of the command and complained loudly both to fellow crewmembers and to those outside the command about the EO's decision to appoint someone else as assistant and about the CO's attempts to help him resolve his issues with his wife through counseling.

On , the Commander of forwarded the applicant's appeal to the Commander of the Seventh Coast Guard District with a memorandum recommending disapproval. The Group Commander stated that the informal investigation of discrimination had concluded that neither the CO nor the EO had discriminated against the applicant although "there were areas requiring improvement" on the cutter. The Group Commander stated that the page 7s entered in the applicant's record just prior to and during the evaluation period reflected poorly on his leadership abilities and that, in the Group Commander's opinion, he had not yet accepted responsibility for his actions.

On , the Commander of the Seventh Coast Guard District denied the applicant's appeal, stating that "[b]ased on my review and the recommendations of staff members, I cannot support changing the assigned marks which you appealed nor can I recommend you for advancement."

On , the applicant filed a complaint of reprisal with the Department of Transportation Office of Civil Rights. The complaint was accepted for investigation on , and investigated from , through . However, the report of the investigation was never finished because recent regulations preclude an investigation of a case that is the subject of a BCMR application before the Board issues a final decision.

The Office of Civil Rights supplied the Board with a copy of its incomplete report. The only new information contained therein was that the CO wrote in a statement that he received no written input from the applicant's new supervisor at prior to completing the EPEF but that he spoke with the supervisor on the telephone. He alleged that the supervisor said he had little work for the applicant to do and that the applicant had had no opportunity to assume a leadership role. The supervisor was asked if he provided any input to the CO for the EPEF and, if so, to provide a copy of that input to the investigator. The supervisor wrote, "I did not."

VIEWS OF THE COAST GUARD

On May 19, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The Chief Counsel stated that the applicant took the SWE at his previous unit and that "[n]either Applicant's Commanding Officer nor [redacted] Command Staff were fully aware that Applicant's name was on the E-7 SWE list prior to [redacted]."

If Applicant's military superiors had known his name was on the SWE advancement list, they would have taken action in [redacted], concurrent with the assignment of the 'Progressing' recommendation." He argued that under Articles 5.C.25.c. and 5.C.4.b.1. of the Personnel Manual, the mark of "progressing" required the applicant's CO to withhold his advancement. The Chief Counsel stated that there is no time limitation on this action so the CO did not err by removing the applicant's name from the promotion list in [redacted] although five months had passed since he first received the mark of "progressing."

The Chief Counsel argued that the applicant "has failed to prove by a preponderance of the evidence that 'but for' his complaint of discrimination in [redacted], his Commanding Officer would have authorized his advancement to E-7 in [redacted]."

He argued that the applicant's actions, documented in the page 7s, fully support the "progressing" marks and that a CO's recommendation for advancement is the most important eligibility requirement under Article 5.C.4.e.4 of the Personnel Manual. In addition, he argued that the applicant has failed to prove "a misstatement of a significant hard fact or a clear violation of a statute or regulations." *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992). Absent strong evidence to the contrary, the Chief Counsel stated, the Board should presume that the applicant's marking officials acted correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel also argued that the CO could also have withheld the applicant's advancement on the basis of the mark of "progressing" he received for the evaluation period ending [redacted]. However, even if the applicant had received a perfect EPEF with a recommendation for advancement in [redacted], the Chief Counsel argued, he would still have been ineligible for advancement in [redacted]

because as soon as he received the mark of "progressing" in [redacted], he has lost his command's recommendation and was ineligible for advancement. Moreover, he could not become eligible again until he (a) regained his CO's recommendation and (b) requalified for advancement by passing another SWE. Personnel Manual, Article 5.C.31.f. Therefore, the Chief Counsel argued, even if the Board found the challenged EPEF to be erroneous, that determination would be irrelevant to the applicant's eligibility for advancement, which was based on the [redacted] EPEF.

Statement by Commander

The Chief Counsel attached to his advisory opinion a statement signed by the Commander of . The Group Commander stated that his investigation of the applicant's allegations in had found "no evidence [that] the Commanding Officer or Petty Officer acted in a discriminatory manner toward [him]." The Group Commander stated that in , the Executive Officer of told him that they had received a message from Headquarters authorizing the applicant's advancement to . The Executive Officer told the Group Commander that he had discussed the matter with the CO of the and that he concurred with the CO's recommendation that the applicant's name be removed from the advancement list. The Group Commander stated that he concurred and endorsed the recommendation to remove the applicant from the list. He also stated that "had or CGC been aware that he was on the E-7 advancement list in when he was assigned a mark of progressing, [he] would have taken prompt action to have his name removed." The Group Commander indicated that advancement from E-6 to E-7 is "the equivalent of an officer's promotion to field grade That distinction means the member must be immediately capable of assuming positions of significant leadership and responsibility. In my opinion, [the applicant] was not sufficiently qualified to advance to E-7."

Statement by the CO of the

The CO stated that he assigned the applicant a mark of "progressing" on the EPEF because of the allegations of sexual harassment made by the manager, who was "a trusted senior officer in the USCG Reserve." However, he alleged, he was unaware that the applicant's name was on the promotion list for . He further alleged that had he known about it, he "would have taken immediate action to have his name removed."

The CO stated that in , he learned from the reports of a U.S. Navy Family Advocacy Case Review Committee of "a disturbing pattern of [the applicant's] continued threatened physical abuse and emotional abuse" of his wife. He stated that the applicant became very angry, called him unfair, and accused his wife of lying when the CO ordered him to attend Alternatives to Violence Group Counseling.

About the investigation, the CO stated only that he was aware of the applicant's allegations but that the IO had concluded that he had not acted in a discriminatory manner toward the applicant or any other crewmember.

The CO stated that on , the Executive Officer of called him and told him that he had just received an advancement authorization for the applicant, effective . The CO stated that the Executive Officer was intimately aware of the applicant's performance deficiencies and strongly recommended that the CO take action to remove his name from the advancement list. Therefore, on , he informed the applicant of his intent and notified HRSIC that the applicant's name should be removed. The CO stated that "[t]he

basis for my removal action was that [the applicant] had failed to demonstrate the leadership and professional qualities required of a Chief Petty Officer, specifically by his sexual harassment behavior, his threatened physical abuse and emotional abuse of his spouse, and his failure to assume responsibility for his actions." The CO alleged that the applicant's discrimination complaint was not a factor in the decision.

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On May 19, 2000, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond. The applicant requested several extensions and responded on October 4, 2000.

The applicant stated that under Article 5.C.4.e.5.b. of the Personnel Manual, removing a member from an advancement list requires a CO to enter a page 7 announcing and explaining the removal. He stated that if his CO had done this in _____, he would have appealed that EPEF and filed his discrimination complaint much sooner. On the other hand, he stated that if he had known his complaint would cause him to be removed from the promotion list, he would never have filed it.

Contrary to the Chief Counsel's view, the applicant stated that the investigation confirmed his allegations that the CO had made numerous racist remarks. He stated that he only withdrew his formal complaint because he had been transferred off the cutter and thought the CO would not be able to continue his "vendetta." He stated that the very negative consequences of the investigation for the CO's career caused the CO to retaliate against him.

Moreover, the applicant alleged that both the CO and the EO knew that he had taken the _____ SWE in _____ because the command had just finished administering the examination. He alleged that "[t]hey knew I was on both [the _____] lists because they asked me if I was going to make the cut off, and I replied that I was not going to make it. He said that the advancement list, with his name on it, was issued in _____ and _____ 1997, but the CO thought he was too low on the list to be advanced. He stated that he was the last person to be authorized for advancement from the _____ list in _____.

The applicant also stated that in _____, the EO and XO had only recently been transferred to the _____ and so were unfamiliar with his performance. He alleged that prior to this EPEF, his leadership skills had never been called into question by any command. He argued that these facts and the timing of his removal from the advancement list constitute substantial evidence that his removal was due to his recent discrimination complaint.

The applicant pointed out that the Chief Counsel did not address the fact that his ex-wife has withdrawn her complaints and retracted her allegations. He also pointed out that the allegations of sexual harassment made by the employee and _____ manager were never proven.

APPLICABLE LAWS

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

Under Article 5.C.4.b.1.l. of the Personnel Manual in effect in _____, a member must be recommended for advancement by his or her CO to be eligible to take the servicewide examination for promotion.

Article 5.C.4.e. states the following:

4. Advancement Recommendation. The commanding officer's recommendation for advancement is the most important eligibility requirement in the Coast Guard advancement system. A recommendation for advancement shall be based on the individual's qualities of leadership, personal integrity, and his or her potential to perform in the next higher pay grade. Although minimum performance factors have been prescribed to maintain overall consistency for participation in SWE, the commanding officer shall be personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation.

Time Limit. The commanding officer's recommendation for advancement or change in rating by participation in the SWE is valid only for a specific competition and must be renewed for each succeeding competition. When a member is evaluated as either "Not Recommended" or "Progressing" an entry on an Administrative Remarks, CG-3307, stating the reason(s) why, is required and the member shall be counseled on the steps necessary to earn a recommendation.

5. Personnel Data Record Entries.

• • •

b. Withdrawal of Recommendation. The following entry must be made on an Administrative Remarks, CG-3307, in the enlisted Personnel Data Record when the commanding officer withdraws his or her recommendation.

"(Date): Recommendation and nomination for advancement and participation in the (month and year) for Servicewide competition for (rate) is withdrawn. Reason: (Explain).

When applicable, notify [the Pay and Personnel Center] to invalidate the recommendation for advancement of the candidate.

Under Article 5.C.25.c., if a CO withholds an advancement, it "may be effected at a later date but not later than the expiration of the current eligibility list. When the commanding officer feels that an individual is deserving of an advancement that has been withheld, he or she shall advise [the Personnel Command] with their recommendation in order that the member may be advanced. No member whose advancement has been withheld may be carried over to the new eligibility list."

Under Article 5.C.25.d., "[i]f at any time prior to effecting an advancement, a commanding officer wishes to withdraw his or her recommendation because an individual has failed to remain eligible and it appears that eligibility will not be attained prior to expiration of the current eligibility list, the com-

manding officer shall advise the Pay and Personnel Center ... to remove the individual's name from the eligibility list."

Under Article 5.C.31.f., "[i]ndividuals who have their names removed from an eligibility list must be recommended and qualify again through a subsequent SWE competition."

Under Article 5.C.32., "[c]ommanding officers shall take appropriate steps to identify personnel under their command who appear on the advancement eligibility lists when published"

In October 1997, the Commandant issued Change 27 to the Personnel Manual, which made several non-substantive amendments to these regulations. For example, Article 5.C.4.b.1.l. was amended to require COs to prepare an Administrative Remarks (page 7) if a member receives a mark of "progressing" or "not recommended" on an EPEF. In Articles 5.C.25.d. and 5.C.5.b., HRSIC was substituted for the Pay and Personnel Center. In Article 5.C.4.e.4., "adherence to core values" was added as another factor upon which COs should base their recommendations for advancement. In addition, the last sentence of that article was moved to Article 5.C.5.a.

Article 10.B. of the Personnel Manual governs the preparation of EPEFs. Article 10.B.1.b. states that "[e]ach commanding officer must ensure all enlisted members under their command receive accurate, fair, objective, and timely evaluations." Each enlisted member is evaluated by a "rating chain" of three persons: a supervisor, a marking official, and an approving official. Under Article 10.B.4.d., the supervisor assigns recommended performance marks for each performance category by placing an "X" in the appropriate circles. The marking official then reviews the draft EPEF, discusses with the supervisor "any recommendations considered inaccurate or inconsistent with the member's actual performance," and assigns the final performance marks by filling in the appropriate circles. The approving official reviews the EPEF to ensure "overall consistency between assigned marks and actual behavior and output" and to ensure that "evaluatees are counseled and advised of appeal procedures." The approving official may return an EPEF for revision if he or she thinks any marks are inaccurate. Otherwise he or she signs the EPEF, concurring in the marks assigned by the marking official.

In addition, each member of the rating chain indicates on the EPEF whether he or she recommends the member for advancement, considers the member to be "progressing," or does not recommend the person for advancement. Article 10.B.7. states that in making this decision, rating chain members must consider the member's past performance and ability to perform the duties of the next higher pay grade. A mark of "progressing" should be assigned to a member who "is making progress toward qualifying for the next higher pay grade, but has not yet fully demonstrated the technical and/or leadership skills. This member is not eligible to participate in the Servicewide examination." When a member receives a mark of "progressing," the approving official must prepare a page 7 in accordance with Article 5.C.4.e.

Under Article 10.B.5.a., members in pay grade E-6 receive "regular" semi-annual evaluations at the end of each May and November from their permanent "parent" commands. The EPEF is prepared by the parent command even if the member has been assigned to temporary active duty in another command.

Under Article 10.B.10., a member may appeal performance marks within 15 days of receiving a copy of an approved EPEF but may not appeal a negative recommendation for advancement on an EPEF. Upon appeal, a member's commanding officer either raises assigned marks as requested by the member or forwards the appeal to the Appeal Authority with an endorsement containing "specific examples of demonstrated performance that warranted the assigned marks." Article 10.B.10.b.2.e.

Article 10.A.2.g. provides that certain officers may be disqualified from serving on the rating chain of another officer. Article 10.A.2.g.(2)(b) states that "[d]isqualified" includes relief for cause due to misconduct or unsatisfactory performance, being 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 whether the Reported-on Officer will receive a fair and accurate evaluation." No similar provision exists to protect enlisted members from biased rating chains.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant alleged that his CO assigned him marks of "progressing" on his and EPEFs and removed him from the advancement list due to racial bias and in retaliation for a discrimination complaint he had filed. The report of the informal investigation of his complaint, conducted in , indicates that the CO may have created a hostile work environment on the by persistently referring to Hispanics with coarse expletives and by making derogatory statements about Hispanic nations and people.

3. The applicant alleged that the "progressing" mark was not justified by the sexual harassment and abuse complaints that had been lodged against him during the evaluation period. He alleged that these complaints were false or exaggerated. Although the applicant's ex-wife now regrets and retracts her complaints, the Board is not convinced that her complaints were false or exaggerated. The Family Advocacy Program Case Review Committee and the judge who granted her a restraining order were apparently convinced that the applicant posed a threat to his wife. Moreover, the applicant presented no

evidence indicating that the employee's allegations were false or that his CO acted irrationally in believing the complaints. The Board finds that the applicant has not proved by a preponderance of the evidence that the complaints lodged against him by his ex-wife or by the employee's supervisor, as described in the page 7s, were false or exaggerated. In addition, the Board finds that these incidents justified the rating chain's decision to mark him as "progressing" under Articles 5.C.4.e.4. and 10.B.7. of the Personnel Manual. The complaints, though originating from his personal life, revealed behavior by the applicant that could reasonably be expected to affect negatively his ability to assume leadership roles in his professional life.

4. Under Articles 10.B.7.a.(4) and 5.C.4.e.4. of the Personnel Manual, when the applicant's CO withdrew his recommendation for advancement by marking him as "progressing" in , he should have notified the Pay and Personnel Center to remove the applicant's name from the advancement list and prepared a page 7 for the applicant's record documenting this action. The CO failed to do so for several months. The CO alleged that he was unaware that the applicant was on the advancement list. However, COs are tasked with this knowledge under Article 5.C.32., and the list was issued in both and . In addition, the Board finds that the applicant's allegation that the CO did not bother to remove him from the list before because he thought the applicant was too far down on the list to be advanced before the list expired quite credible. His name appeared well below the cutoff points for guaranteed promotion in both and .

5. Although the Chief Counsel is correct in stating that the Personnel Manual prescribed no time limit within which the CO had to inform the Pay and Personnel Center of the "progressing" mark, the Board finds that the CO unduly delayed this required action. However, the Board is not convinced that the CO's delay substantially harmed the applicant. The applicant stated that he might have appealed the EPEF and filed a discrimination complaint sooner, but neither of these actions would have resulted in his regaining his recommendation for advancement or retaining his place on the advancement list. Under Article 10.B.10. of the Personnel Manual, approving officials' negative recommendations for advancement on EPEFs may not be appealed; only numerical marks may be appealed. Likewise, there is no evidence that the informal investigation, if conducted in or rather than , would have reached a different conclusion. The IO's report indicates that neither the CO nor the EO had discriminated against the applicant in their decisionmaking and that their actions were based on the complaints against him and his uncertain leadership skills rather than on racial bias.

6. The applicant alleged that the decision to remove him from the advancement list in was made in retaliation for the discrimination complaint he filed against his CO in . The Chief Counsel argued that the discrimination complaint was irrelevant to his removal from the list because the removal was required by the "progressing" mark. The Chief Counsel argued that under Article 5.C.31.f. of the Personnel Manual, after once losing his command's recommendation for advancement in , the applicant could only

become eligible for advancement if he passed a subsequent SWE. However, Article 5.C.25.c. clearly provides that after removing a recommendation for advancement, a CO may later re-recommend a member for advancement and advise the Personnel Command to return his name to the advancement list as long as that list has not expired. Therefore, while the discrimination complaint may have been irrelevant as to whether the applicant lost his CO's recommendation for advancement in , it could have been a factor in the CO's decision not to re-recommend him for advancement before the list expired. Anytime prior to the expiration of the list, the CO could have granted the applicant his recommendation for advancement if his performance justified such action. Because he had never informed the Pay and Personnel Center of the "progressing" mark in the first place, no further action would have been necessary to permit the applicant to advance to .

7. Therefore, the Board must determine whether the CO's decision not to re-recommend the applicant for advancement but instead to (at last) inform HRSiC that the applicant had lost his recommendation in was made in retaliation for the discrimination complaint or was completely justified by the applicant's record. In making this determination, the Board bears in mind that the applicant's discrimination complaint resulted in negative, potentially career-ending entries in the CO's own record. The CO had a strong reason to retaliate.

8. In , the applicant's record showed that he had great expertise as an . However, it also showed that within the past year⁴ he had (a) repeatedly emotionally abused his wife;⁵ (b) used his vehicle to force another vehicle to stop in rush hour traffic so that he could confront his wife; (c) been subject to both military and civilian restraining orders; and (d) repeatedly harassed a civilian female employee, at least once while in uniform. Although this conduct apparently abated during the fall of (no further complaints were documented in his record), the Board finds that any CO would be unlikely to recommend a member with this record for advancement to , regardless of his expertise. Moreover, the CO's decision to continue withholding his recommendation from the applicant and to inform HRSiC of the "progressing" mark was expressly discussed by the Commander and Executive Officer of . These officers knew of the potential for retaliation because they were intimately aware of the negative consequences of the applicant's discrimination complaint for the CO, and yet they concurred in the CO's decision to ask HRSiC to remove the applicant from the advancement list. Therefore, the Board finds that the preponderance of the evidence indicates that the applicant was removed from the advancement list in for very good reasons and that his removal was not in retaliation for the discrimination complaint he and four other crewmembers had filed against his CO.

⁴ The applicant alleged that in making a recommendation for advancement, an approving official is limited to performance within the evaluation period. However, this argument is not supported by the regulations. Articles 5.C.4.e.4 and 10.B.7. of the Personnel Manual do not prohibit rating officials from considering members' past performance in deciding whether to recommend them for advancement.

⁵ As stated in finding 3, the Board is not persuaded that these incidents did not occur.

9. The applicant alleged that he received low numerical marks and a mark of "progressing" on his EPEF in retaliation for filing the discrimination complaint against his CO and the EO, who served as the approving official and supervisor for the EPEF. The mark of "progressing" prevented him from participating in the SWE and thereby further delayed his requalification for advancement. If the applicant were an officer, both the CO and the EO would have been disqualified from serving on his rating chain under Article 10.A.2.g. of the Personnel Manual. Although enlisted members are not protected from potentially biased rating chain members in this way, they are entitled to accurate, fair, and objective evaluations under Article 10.B.1.b. In addition, they have a right of appeal under Article 10.B.10., which the applicant exercised.

10. The "X"s on the applicant's EPEF indicate that the EO may have recommended higher numerical marks in the categories "working with others," "developing subordinates," "responsibility," and "loyalty" than those assigned by the XO, his marking official. The XO who chose to assign these lower marks was not the subject of any of the applicant's discrimination complaints or of the investigation. The applicant has presented no evidence indicating that the XO was coerced into assigning lower marks by the CO. In addition, for the reasons stated in finding 8, above, the "progressing" mark on this EPEF was justified by the applicant's record.

11. In his endorsement to the applicant's appeal, the CO explained and justified each of the challenged numerical marks. In justifying the mark of 3 for "responsibility," the CO erroneously referred to the employee's sexual harassment complaint, which occurred during the previous the evaluation period. However, the mark was fully justified by the other reasons cited in the endorsement. Moreover, the applicant's allegations of inaccuracy and retaliation were presented and considered in his appeal of the EPEF, which was denied. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the EPEF was inaccurate or that the low numerical marks or "progressing" mark in that EPEF were assigned in retaliation for his discrimination complaint.

12. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of
denied.

, for correction of his military record is hereby

