

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2014-054**



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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 30, 2014, upon receipt of the completed application, and assigned it to staff member [REDACTED] as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 23, 2015, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant, a [REDACTED], pay grade E-6), asked the Board to correct his record to show that he was advanced to [REDACTED] chief [REDACTED] pay grade E-7), with back pay and interest; modification of professional growth points to account for lost time; a full tour as an E-7 or to complete his current tour of duty until June 2015 for family stability; and the authorization to present his case to the Coast Guard's "Senior Leadership Council, DEOMI [Defense Equal Opportunity Management Institute] and any appropriate EEO [Equal Employment Opportunity] body."

The applicant also requested a delay of his pending retirement date of September 1, 2014, and the cancellation of his retirement letter or extension of his retirement date. (Since the applicant filed his application with the Board, he was retired by reason of maximum service or time in grade on September 1, 2014.)

The applicant took the May 2011 servicewide examination (SWE)<sup>1</sup> for advancement to [REDACTED] E-7 and placed number 8 on that list and was above the cut. The applicant provided documentation in the form of May 2011 SWE cutoff and 2012 enlisted advancement announcements that show that had his advancement progressed as anticipated, he would have been advanced on April 1, 2012. However, the applicant's commanding officer (CO) did not

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<sup>1</sup>SWEs are examinations given to enlisted members on a predetermined schedule to determine their advancement priority from the highest score to the lowest score.

recommend the applicant for advancement in December 2011 in the applicant's enlisted employee review (EER)<sup>2</sup> for the May 31 to November 30, 2011 marking period. The applicant was subsequently removed from the advancement list for [REDACTED] as a result. The CO refused to reinstate the recommendation for advancement in the December 2011 EER when asked by the applicant in June 2012.

In support of his allegations, the applicant submitted many documents, some of which have been incorporated into the summary below. Among those documents were his narrative statement of the events and a timeline. Where relevant, other documents constituting the record are also described, as follows:

### ***May to November 2011 Marking Period and Related EER***

The applicant reported to the response department of a marine safety unit (MSU) in July 2011. According to the applicant's account, when he checked in to the MSU, he was told that there would be no chief petty officer (E-7) in his chain of command. Because he was number 8 on the advancement list for advancement to [REDACTED] E-7, the applicant was told that he would be acting as the enlisted supervisor for the response department of the MSU and should conduct himself as the chief petty officer. As such, the applicant stated that he was responsible for making the day to day decisions for the response department's activities. The applicant's chain of command consisted of an ENS N; a LTJG H; a LT R, who was the unit's executive officer, or XO; and a LCDR F, who was the applicant's commanding officer, or CO.

The applicant explained that during the marking period in question (May to November 2011), he and his family experienced a number of serious personal events. The applicant submitted a timeline with "stressful" and "highly stressful" events marked and which are incorporated into the discussion below. A stressful event marked on the applicant's timeline during the marking period included the applicant's July 2011 permanent change of station (PCS) move to the MSU, which was 40 days after the applicant's daughter had been born by cesarean section. The timeline indicated that due to a change in a household goods contract during the PSC transfer, the applicant's family had to unpack their own boxes. The applicant subsequently took 15 days leave to unpack and assist with his newborn daughter and his wife's recovery.

The applicant also submitted documentation in the form of physician reports and notes showing that that he had visited doctors on September 20, 2011 and in November 2011 about a left knee injury. He provided physician notes indicating that the applicant was authorized to work but was restricted from lifting loads greater than 20-25 pounds, kneeling or squatting and should limit any bending, twisting, turning, pushing, and pulling movements as well as any walking, standing, or sitting. The applicant had surgery for his knee on November 28, 2011. A physician's note indicates that the applicant was off work from November 8 to December 12, 2011, and returned to work on light duty from December 12, 2011 to January 9, 2012.

In his narrative, the applicant stated that as a result of his knee injury and surgery, he was on pain medication and on light duty for most of the 180-day marking period, so that only 60

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<sup>2</sup> The EER is a series of web pages in the Coast Guard Human Resources Management System used to report the performance evaluations of Coast Guard enlisted personnel.

days of actual time during the period was spent not on leave or light duty. The applicant's timeline also indicated that his mother-in-law arrived in August 2011 for a gall bladder surgery on October 11, 2011. In mid-October 2011, the applicant consulted with an academic counselor for online classes and was recommended to take two classes beginning November 1, 2011.

The applicant alleged that on October 28, 2011, he was counseled by LTJG H that his CO felt that the applicant's performance was being affected by his issues at home, citing the applicant's unsatisfactory performance at a recent outreach effort. According to the applicant, LTJG H told him the CO was considering removing his recommendation that the applicant be advanced to [REDACTED] E-7.<sup>3</sup> In response, the applicant expressed frustration to LTJG H, stating that although he had been made acting chief petty officer, he had received no mentoring and had no chief petty officer to defend the applicant's decisions. At the meeting, the applicant was also informed that [REDACTED] S was being placed in his chain of command. In response, the applicant dropped one of his two online courses and began coming into work earlier and staying later. The October 28, 2011 counseling session was documented in an administrative remarks page (Page 7),<sup>4</sup> that was issued in January 2012 and is discussed below.

About two weeks later, the applicant alleged he was verbally informed by MTSC S that his performance had improved and would retain his command's advancement recommendation. To demonstrate his improved performance, the applicant cited the fact and provided documentation that his CO had endorsed the applicant's application to become an instructor at a Coast Guard training center to teach marine safety in early November 2011. In his timeline, the applicant also alleged that he began having issues with his blood pressure around this time. He stated that he contacted the Coast Guard's Employee Assistance Program (EAP) and obtained the number of a local counselor, although he did not contact the counselor at this time.

On November 27, 2011, the applicant stated, a biopsy was taken of his mother-in-law's kidney, which was discovered in early December 2011 to be cancer. The applicant also had his knee surgery on November 28, 2011. The applicant's mother-in-law had surgery on December 15, 2011 to remove the tumor and half of her affected kidney. The applicant stated that at this point, he and his family were "really feeling overwhelmed by the demands of two young children, my recovery from surgery, my mother-in-laws [sic] recovery and dealing with cancer and still unpacking house hold goods but are holding on to the pending advancement to E7 as a ray of light."

In December 2011, the applicant received PCS orders to a Coast Guard Sector that was located in an area where the waiting list for the applicant's desired housing was one year long. In order to receive his official PCS orders and be placed on his desired housing waiting list, the

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<sup>3</sup> Under Article 3.A.19.d. of the Coast Guard's Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.2, if 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 individual's name is removed from the advancement list.

<sup>4</sup> Under Section 10.A. of the Coast Guard's Personnel and Pay Procedures Manual, HRSICINST M1000.2A, an administrative remarks page (page 7) provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value.

applicant stated that he focused on completing his PCS departing paperwork. In his narrative, the applicant stated that on December 21, 2011, LTJG H found the applicant working on his PCS paperwork instead of on a waterways management qualification. The applicant noted that during this time he was also still on pain medication and on light duty after his knee surgery. The applicant alleged that as a result of this incident, he was marked as not recommended for advancement on his EER for the marking period and was removed from the advancement list.

The date on the bottom of the EER (attached) indicates that it was prepared on December 16, 2011. Its attached Member Counseling Receipt shows that the applicant was counseled on the EER by LTJG H on December 19, 2011. On the EER, the applicant received mostly average and above average marks<sup>5</sup> of 4 and 5. He received two excellent marks of 6 for the “Communicating” and “Respecting Others” competencies. He received two below standard marks of 3 for “Monitoring Work” and “Stamina.” On the Member Counseling Receipt, reviewer comments on these two competencies were as follows:

- Monitoring Work (3): “Sometimes needed help in prioritizing routine tasks and was unable to quickly recognize difference between routine and priority tasks and organized work accordingly.”
- Stamina (3): “Did not handle stressful situations well.”

In the “Recommendation for Advancement” competency, the applicant was marked “Not Recommended for Advancement.” On the Member Counseling Receipt, the comments for this section state:

Since July 2011, [the applicant] has consistently lacked devotion to duty and struggles to prioritize home/work issues. Member’s inability to resolve out-of-work problems has severely handicapped his opportunity to lead subordinates [sic]. On October 28, 2011, [the applicant] was counseled by [ENS N], [MTSC S], and [LTJG H] on his lack of leadership and poor performance. It is my determination that [the applicant] does not currently have the potential to perform at the next higher pay grade.

The receipt also included an instruction to the evaluatee that he had 15 calendar days to submit an appeal, but did not state the required forum(s) for the appeal or reference any underlying policies or procedures.

Following up on the EER, the applicant’s CO sent a message to the CO at the MSU’s parent command, with a copy to the Coast Guard’s Personnel Service Center (PSC), on December 21, 2011. The subject of the message was listed as “Removal from Active Duty SWE Eligibility List” and referenced the Officer Accessions, Evaluations, and Promotions Manual,

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<sup>5</sup> Article 5.F.1.b. of COMDTINST M1000.2 describes the marks that may be assigned by a member’s rating chain. Per Article 5.F.1.b(1), on an employee review comparison scale, the rating chain marks each evaluatee against the written standards, not against others in the same rate or rating. The guidelines for establishing marks are provided in Article 5.F.1.b(3) of the manual. There are 7 possible marks, which range from “Unacceptable” for a mark in the first spot to a high of “Superior” for a mark in the seventh spot. A mark of 4, “Average,” represents the expected performance level of all enlisted personnel.

COMDTINST M1000.2, Article 3.A.19.D. The message requested that the applicant be removed from the SWE advancement eligibility list, stating that “[t]he commanding officer has withdrawn advancement recommendation due to failing to demonstrate the ability to perform at the next paygrade.”

In his narrative and timeline, the applicant stated that he sought out the CO a few days after the PCS paperwork incident. The applicant stated that he had avoided approaching the CO previously, because he had been shipmates with the CO in a previous unit and had wanted to avoid the appearance of favoritism. The applicant stated that in this meeting, he told the CO that he did not feel as if he had mishandled any significant tasking and that all indicators still showed that he was ready for advancement to E-7, outside of the factors affecting him at the time. The applicant alleged that the CO told him that there was still a pattern of behavior and that he was afraid that the applicant would go to his next duty station and not fare well under the pressure of a busier port, calling the CO’s recommendation into question. The applicant stated that he told the CO that he had demonstrated on multiple occasions that he could perform under great stress, such as at times when he had been deployed during disasters such as Hurricane Katrina.<sup>6</sup> The applicant also alleged that the CO reminded him of a “previous episode” at a unit he and the CO had served at 10 years before. In response, the applicant stated that he told the CO that the circumstances then included the passing of his father, a recent return from an arduous overseas unit, and trips to the emergency room with his wife, and also stated that he had served with distinction since that time. The applicant alleged that when he referenced his performance before arriving at the MSU, “it was disregarded as possible favoritism” by his previous command. The applicant stated, “I also shared my frustration that I was in an office full of people that would risk their lives for complete strangers, but that when one of their own struggled, they feed on them.” He also stated that he pointed out to the CO that he had no negative documentation; that he had been given a full endorsement to become an instructor at a Coast Guard training center, which showed the applicant’s leadership potential; referenced his previous performance during Hurricane Katrina as indicative of his ability to function under stress; and pointed out that the PCS paperwork incident had occurred after the end of the marking period. The applicant stated that the meeting ended with no change to the removal of the CO’s advancement recommendation.

Later the same day, the applicant also asked whether the command enlisted advisor (CEA)<sup>7</sup> for the MSU had been contacted. The applicant alleged that he was told that the CEA

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<sup>6</sup> On January 10, 2006, the applicant received meritorious service medal for his service as a member of a disaster assistance response team in New Orleans, Louisiana from August 30 to September 10, 2005. The medal notes that the applicant displayed great courage in rescuing people from flooded areas and assisted in the rescue of hundreds of people.

<sup>7</sup> When Coast Guard Personnel Manual (Changes 1-42), COMDTINST M1000.6A, was issued, it renamed the position “command enlisted advisor” to be “command master chief” (CMC). Pursuant to Commandant Instruction 1306.1C, “Command Senior Enlisted Leader (CSEL) Program, of which CMCs are a part, CSEL members assist and advise the flag or commanding officer of mission, morale, and well-being impacts of existing or proposed policy changes, recommend action to correct adverse conditions and improve quality of life for enlisted personnel, promote good order and discipline by assisting in matters pertaining to health and wellness, job satisfaction, and morale, and ensure a positive command climate and an atmosphere of respect and professionalism, with zero tolerance for discrimination, sexual assault and/or sexual assault, among others. CMCs are not in the chain of command and, irrespective of a CMC’s existence, official communications on matters requiring the traditional, appropriate mode of redress are processed normally through the chain of command.

had been fully briefed by LTJG H. The applicant stated that it did not occur to him to reach out to the CEA, as he had never done so before and assumed she would reach out to him if there were any issues. Additionally, the applicant alleged that LTJG H informed him that even if the applicant appealed the employee review, the advancement recommendation decision would not be affected.<sup>8</sup> The applicant stated that around this time he utilized the Coast Guard's employee assistance program and started counseling. The applicant also withdrew from his remaining online course.

The applicant stated that when he subsequently contacted the CEA in April 2012, the CEA informed him that she had never been briefed on his situation and had just received an email stating that the applicant's advancement recommendation was being rescinded. The CEA stated that she assumed that the applicant would have called her if she were needed.

### *January 2012 Page 7*

On January 26, 2012, the applicant received an administrative remarks page (Page 7), which addressed the applicant's October 28, 2011 counseling session with LTJG H, MTSC S, and ENS N.<sup>9</sup> The Page 7 stated that the applicant was verbally counseled that he "could not be recommended for advancement based on [his] poor performance." The Page 7 stated the purpose of counseling session was "to benefit you and give you the opportunity to make immediate improvement." In support, the Page 7 stated, "It is the determination of your marking chain that you have not demonstrated leadership and management qualities expected of a Chief Petty Officer. This decision is founded on your lack of initiative and failure to prioritize personal tasks and unit missions." The Page 7 also listed several areas for the applicant to complete to demonstrate his devotion to duty and prove his leadership. Among the areas was for the applicant to become a "self-starter" and "accurately prioritize personal and subordinate tasks; delegate appropriately and equally, set realistic deadlines, and follow through on all activities related to the [unit] missions and duty." The Page 7 also noted that the applicant should complete his waterways management representative qualification, and that he should make himself available to his chain of command for professional discussions to enhance his communication and listening skills.

In his narrative, the applicant noted that the Page 7 came two months after the November 30, 2011 end of the relevant marking period. In addition, the applicant alleged that the documentation lacked specific detail so as to establish a pattern of a significant enough nature to warrant the subsequent action. The applicant also stated that the Page 7's comment that he should "[a]ccurately prioritize personal and subordinate tasks" implies that the applicant was negligent "in allowing myself to become overwhelmed." The applicant disagreed with this implication, stating that the comment "illustrate[d] the complete lack of understanding of how I was being affected and a lack of compassion."

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<sup>8</sup> Article 5.G.4. of COMDTINST M1000.2 provides that the recommendation for advancement portion of an EER may not be appealed.

<sup>9</sup> Although only LTJG H was mentioned by the applicant, the Page 7 also noted that MTSC S and ENS N were also a part of the applicant's October 28, 2011 counseling meeting.

The applicant stated that he became disillusioned and began to experience anxiety, which led him to experience dry heaving attacks at work and rising blood pressure. The applicant stated that in February 2012, he was prescribed medication for anxiety. He also stated that he consulted a physician regarding high blood pressure concerns in April 2012. The applicant noted that he was also pulled from a duty rotation based on the medical officer's recommendation.

The applicant noted several accomplishments in the months after the Page 7 was issued. The applicant stated that in February or March 2012, he was directly requested by a Coast Guard District to represent it at an April 2012 meeting of 50 Coast Guard representatives and present a case study. The applicant submitted an email from the District praising his performance at the meeting. The applicant also noted that in April 2012, he acted as his unit's point of contact for a Coast Guard organizational assessment survey, which assesses personnel attitude. The applicant stated that given recent events, he was perplexed that he was requested by command to act as the point of contact; however, he did not "utilize the survey to air [his] grievances."

In April 2012, the applicant submitted an application for a tuition assistance waiver relating to the online course he had withdrawn from in December 2011, which was approved. In the section regarding command's basis for the approval, the reviewer listed that the applicant's medical condition had prevented the successful completion of the course. The applicant also submitted a memorandum, dated May 7, 2012, from a CDR S of a Coast Guard clinic stating that based on the combination of the applicant's medical conditions, home life, and work life, it was reasonable to conclude that taking a night class would be overwhelming. In the memorandum, CDR S stated that he had evaluated the applicant on April 24, 2012. CDR S stated that the applicant had informed him of his knee surgery and of the pain medication he was on, which "most likely affected his ability to perform at work, at home, and ability to do schoolwork." CDR S also noted other circumstances such as the applicant's mother-in-law's evaluation for cancer and the December 2011 advancement recommendation withdrawal. Specifically, CDR S noted, "his command support of him being promoted to chief was pulled which led to depressive and anxiety symptoms."

In May 2012, the applicant received his EER for the December 1, 2011 to May 31, 2012 marking period. The applicant received mostly average to excellent marks of 4, 5, and 6. He received a superior mark of 7 for the "Communicating" competency. In addition, the applicant was marked "Recommended for Advancement." The applicant signed the member counseling receipt attached to the EER on May 30, 2012, which indicated that he was counseled on the EER by MTSC S. In the advancement recommendation section of the member counseling receipt, the following comment was written:

Over this marking period [the applicant] completely turned his performance around from his previous set of marks where he had received the "Not Recommended." In six short months [the applicant] quickly identified the issues that caused his lapse in performance and quickly and easily took on the responsibility for his actions and made tremendous strides to get the "Recommendation" back. Not only does [the applicant] have the potential, but he demonstrated the leadership requirements needed to serve as a Chief Petty Officer.

*June 2012 Meeting with the CO*

On June 9, 2012, the applicant approached the CO about reinstating him on the advancement list.<sup>10</sup> The applicant stated that he told his CO that he had made positive steps. The applicant stated that he also presented documentation of an acute mental health condition to the CO, as proof of an unknown condition to be factored into the CO's consideration of whether to reinstate the advancement recommendation. The applicant stated that in this meeting, he also pointed out that in the subsequent May 2012 EER, the CO had recommended the applicant for advancement to E-7. In addition, the applicant pointed out that because he had over 20 years of service, if the recommendation were not changed, he would likely be screened for separation by the Career Retention Selection Panel (CRSP).<sup>11</sup> The applicant also stated that he pointed to his experience during Hurricane Katrina, a highly stressful situation, and performance prior to his current duty station at the MSU as more indicative of his normal behavior and performance.

As documentation of his condition, the applicant submitted a doctor's note, dating July 11, 2012, stating that he had had an initial psychiatric evaluation on June 13, 2012 and was given a diagnosis of adjustment disorder with anxiety and depression. The note also stated that in the doctor's professional opinion, the condition was acute and was "related to psychosocial issues. Due to these issues, reportedly, he became overwhelmed and unable to cope." The note also established that the applicant was responding well to treatment, including medication and individual counseling, and stated that the applicant recognized that he had gained healthier coping skills. The note also stated that the applicant would continue with medication, with the intent to taper off in the near future.

The CO agreed to and did change the applicant's May to November 2011 EER marks for "Monitoring Work" and "Stamina" from below average marks of 3s to average marks of 4s, citing that the marks had been made "before knowing that the performance lapse was caused by an undiagnosed medical condition." However, at June 9, 2012 meeting, the applicant's CO refused to also change the EER by reinstating the advancement recommendation. The applicant alleged that the CO stated that the reason for the refusal was "accountability" and the possibility of a relapse in the future at the applicant's next duty station. The applicant stated, "The whole while I felt that more effort was being placed into the process of screening persons for Chief than the responsibilities of the command to my wellbeing and vitality. There was more emphasis on keeping me from making Chief and protecting the CO's credibility, than in looking into our guidance's and supporting a shipmate in need." The applicant alleged that the CO's actions demonstrated that the CO lacked understanding of the applicant's circumstances, their effect on the applicant, and of the relevant policies. The applicant stated, "I felt like he had decided who and what I was and nothing was going to convince him otherwise." As a result of the

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<sup>10</sup>Article 5.G.4. of COMDTINST M1000.2 provides that an approving officer's decision on the advancement recommendation portion of an EER is final and may not be appealed by the enlisted service member. However, it also provides that "if the Approving Officer learns of new information, he or she may decide to change the recommendation..."

<sup>11</sup> CRSP refers to a Coast Guard workforce shaping program which evaluates candidates with a certain number of years of service for retirement for involuntary retirement. The applicant was considered but non-selected by CRSP in 2012. However, in 2013, the applicant was selected for retirement through the Coast Guard's High Year Tenure (HYT) policy, which evaluates retirement-eligible Coast Guard members for retirement.



experience, stated the applicant, “My faith in the Coast Guard as an organization built on the cores values was destroyed.”

On November 26, 2012, the applicant was recommended and sat for a waterways qualification board given by ENS N, among others. The applicant was not recommended for the qualification.

In 2013, the applicant was reviewed for separation under the Coast Guard’s High Year Tenure (HYT) policy, and retired from the Coast Guard on August 31, 2014.

### ***Issues with ENS N***

In March 2012, the applicant stated that he began having issues with ENS N, regarding the applicant’s supervision of his direct subordinate, a MST2 E. As an example, the applicant described an incident where the subordinate had called ENS N when ENS N was at home and on leave for permission to not complete a task that the applicant had assigned to her while the applicant was out of office. Neither the subordinate or ENS N contacted the applicant.

The applicant also alleged that ENS N had been confronted several times about his behavior towards another subordinate, against whom he was “constantly and excessively” seeking to not recommend for advancement and to prevent the subordinate from reenlisting. The applicant stated that in April 2013, ENS N called a meeting with the applicant where he raised his voice and was extremely aggravated, which the applicant’s supervisor noted was excessive.

The applicant alleged that he learned in May 2013 that a prohibited relationship dating back from 2011 was discovered between ENS N and MST2 E for which the applicant stated ENS N was disciplined. The applicant stated that he suspects that his situation may not have been handled properly. The applicant alleged that ENS N “harassed” and “demonstrated a hostile attitude” toward him, which “may have affected [ENS N’s] input up the chain” about the applicant to the CO.

### ***Alleged Violations of Coast Guard Policies***

The applicant made a number of allegations that the manner in which his rating chain removed his advancement recommendation in December 2011, the rescinding of the recommendation, his CO’s subsequent refusal to reinstate the recommendation, and hence his removal from the advancement list, violated Coast Guard policies or were contradictory.

First, the applicant contended that his initial removal from the advancement list in December 2011 while he was on light duty was in conflict with the Coast Guard’s policy in its Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, Chapter 3.A.13.e., entitled “Disabled Personnel,” regarding treatment of such service members for advancement purposes. He also alleged that the circumstances violated the policy established in Chapter 5.F.1.c. of the manual, entitled “Limited Opportunity to Perform,” regarding EERs for members with a limited opportunity to perform for reasons such as illness, injuries, and pregnancy. The applicant alleged that Chapter 5.F.1.c. required engaging medical consultation

and support, which was not done before the advancement recommendation was rescinded. The applicant alleged that “these actions,” presumably the alleged failure to engage medical consultation and support before rescinding his advancement recommendation, was “not in line with a ‘Reasonable’ person standard.” The applicant alleged that because there was no medical consultation until the applicant went to go see a doctor regarding blood pressure issues in April 2012, reasonable accommodations were not made to allow him to begin the process of healing. The applicant alleged that the command should have required a screening by a medical authority to eliminate or identify any underlying issues before withdrawing the recommendation.

Second, the applicant implied that reasons listed in the January 2012 Page 7, which he characterizes as the “singular negative documentation,” cited “[o]nly vague and general reasons,” in violation of COMDTINST MI000.2, Chapter 5.F.1.a.(2) and Chapter 5.F.2.a.(3).<sup>12</sup> The applicant contended that the Page 7 “failed to demonstrate pattern or significance enough to warrant the taken actions.”

Third, the applicant alleged in essence that his CO’s actions and his overall performance contradicted the assessment made by the CO in removing the advancement recommendation. In support, the applicant pointed out that his CO had given the applicant an endorsement for an instructor position in November 2011, the CO had allowed the applicant to act as a District representative and present a case study in March 2012, and the applicant’s designation as the unit’s point of contact for the Coast Guard organizational assessment survey. In addition, the applicant pointed out that the CO had given the applicant his recommendation for advancement in the subsequent employee review for the December 2011 to May 2012 marking period. The applicant emphasized that his medically diagnosed anxiety and depression were what caused him “to deviate so suddenly from [his] usual high standards of performance.” The applicant emphasized that the depression and anxiety had been diagnosed as temporary, acute problems that were improving at the time he approached his CO about reinstating the advancement recommendation.

Fourth, the applicant cited a number of official Coast Guard internal messages<sup>13</sup> regarding Coast Guard-wide guidance on the importance of respect between shipmates, positive

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<sup>12</sup> In his statements, the applicant cited Chapter 5.F.2.(3) of COMDTINST MI000.2, “Documentation,” which does not exist. Presumably, however, the applicant meant to reference Chapter 5.F.2., also entitled “Documentation,” which discusses standards for supporting remarks in EERs.

<sup>13</sup> The applicant referenced five internal Coast Guard messages (known as ALCOASTs), issued by the Commandant except where noted:

1. ALCOAST 271/10 Shipmates 2: My Guiding Principles (regarding the Commandant’s principles, including respect for shipmates by committing to “a climate of care and concern”);
2. ALCOAST 275/10 Shipmates 3: Respect Our Shipmates – Command Climate (regarding the Commandant’s principles for work climate and direction on maintaining positive command climates to achieve mission excellence and emphasizing the importance of respect for shipmates);
3. ALCOAST 355/12 Administration of the Defense Equal Opportunity Management Institute (DEOMI) Organizational Climate Survey (DEOCS) (citing the Coast Guard’s Civil Rights Manual, COMDTINST 3550.4 [series] and describing the administration of and reason for the DEOCS);
4. ALCOAST 037/12 Shipmates 19: Respect Our Shipmates – Duty Demands Courage (stating that there is no tolerance for sexual assault, hazing, harassment, and discrimination); and
5. ALCOAST 058/10 New Anti-Harassment and Hate Incident Procedures COMDTINST (issued by Coast Guard’s Civil Rights Directorate, announcing release of new procedure).

command climates and respect for civil rights, and the Coast Guard's no tolerance position on sexual assault, hazing, harassment, and discrimination. The applicant emphasized that while such guidance "direct[ed] support for Coast Guard members and their families," he was frustrated because he was "not being reasonably supported by the organization that stood to help others in times of distress. No one would help me."

Fifth, the applicant cited the Coast Guard's anti-discrimination and anti-harassment policy statement and an ALCOAST message, ALCOAST 058/10 "New Anti-Harassment and Hate Incident Procedures COMDTINST," regarding anti-harassment and hate incident procedures, to imply that he had been subjected to impermissible bias against persons with disabilities, a hostile work environment, discrimination and/or harassment in violation of those messages and policy. The applicant stated that the ALCOAST message "directed inclusion, not exclusion" and noted that the message prohibited showing bias by reason of disability. The applicant also stated, "The Anti-Discrimination and Anti-Harassment Policy Statement... speaks against creating environments that could be perceived as intimidating, offensive or hostile, as in invalidating past performance, as well as the deliberate and subjective act of withholding my CO recommendation as a judgment of my leadership potential and punishment for a disability caused by a temporary and resolving medical condition[.] Of which Medical Mental Health conditions are a protected category." The applicant also included a copy of the Anti-Discrimination and Anti-Harassment Policy Statement, in which he had highlighted the word "disability" in the document's listing of protected classes.

Sixth, the applicant cited Article 2.C.6.e of Coast Guard's Civil Rights Manual, COMDTINST M5350.4C, which defines "hate incidents" as "any intentional act...of intolerance committed against a person, a group of individuals, or property which is motivated, in whole or in part by the offender's bias against a race, color, religion, sex, national origin, disability, age, or sexual orientation and which is intended to or is more likely than not to have the effect of intimidating others or inciting others to similar conduct." The applicant stated that he observed two other service members in his unit, in addition to himself, who both had issues with advancement recommendations but had been recognized for good performance either prior to or after their recommendation issues. The applicant cited this high instance of advancement recommendation issues and implied that such command action met the hate crime definition in the Civil Rights Manual.

Seventh, the applicant referenced the Coast Guard's Suicide Prevention Program Instruction, COMDINST 1734.1A, and specifically the portions that emphasized that personnel should be able to seek mental health care without risk to his or her career and that command personnel should help personnel get support. The applicant also cited Article 7.a.(2), which directed supervisory and command personnel to promote stress control principles to improve psychological health by, as emphasized by the applicant "help[ing] members maintain a work-life balance" and "[a]lways act[ing] ethically." The applicant alleged that his rating chain's actions severely increased his stress levels and negatively impacted his emotional well-being.

The applicant alleged that because of his experience, his "condition of being overwhelmed" worsened, required medication, and negatively impacted his home life and his spouse's belief in the Coast Guard. The applicant also alleged that he and his wife feel

“punished” for supporting their family and that fears of unemployment have almost pulled his family apart. The applicant stated that the events cost him income, forced him into retirement, and “all but shattered my self esteem.”

### *Letter from CWO4 M*

In support of his request, the applicant submitted a December 12, 2013 letter from a CWO4 M, who also served at the MSU during the time in question. CWO4 M stated that he was assigned to a different department at the MSU and while he cannot attest to the applicant’s performance, he observed the applicant on several occasions performing trainings and responding to missions. CWO4 M stated that the applicant is a talented speaker who has commanding presence. CWO4 M stated that he was shocked to learn that the applicant had been removed from the E-7 advancement list and the “apparent lack of support from the Unit Command Chief.” CWO4 M met with the applicant several times with a CWO4 B, and he and CWO4 B spoke in support of the applicant with command, and the parent Sector’s command senior chief and the parent Sector’s commander. CWO4 M stated that throughout, the applicant, was “severely distracted” and at the time “simply decided to go along with the command and not fight the issue.”

CWO4 M stated that he and CWO4 B approached the applicant’s CO, XO, and command chief several times. He stated that the command was “determined to not rescind the ‘not recommended’ option. The Command Chief simply stated that even though he disagreed, the command was not backing down, so there was no sense in getting involved.” CWO4 M also stated that it appeared that the response department’s chief and his assistant “were receiving a lot of attention from the Executive Officer concerning the operation of the response department.” And, the response chief’s and his assistant’s “final decision was to do whatever the XO wanted in the way of managing the dept personnel.” CWO4 M stated that it is his opinion that the applicant was not given an equal chance to demonstrate his professionalism and experience given the circumstances.

## **VIEWS OF THE COAST GUARD**

On June 16, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant’s request. In so doing, he adopted the findings and analysis provided in a memorandum, dated April 11, 2014, signed by Commander, Personnel Service Center (PSC).

PSC characterized the applicant’s stated basis for relief as his CO’s withholding of the advancement recommendation while the applicant was on light duty.

PSC noted that the applicant had failed to avail himself of the process described in COMDTINST M1000.2, Chapter 3.A.19.d, to dispute the disputed advancement recommendation rescission. PSC described Chapter 3.A.19.d. as outlining the process for the removal of a commanding officer’s recommendation for advancement and also outlining the procedure for reviewing such a decision under Article 138 of the Uniform Code of Military Justice (UCMJ).

PSC also found that the applicant was clearly put on notice of his shortcomings via the January 2012 page 7 remarks and had failed to show that [REDACTED] or rating chain failed to follow the Coast Guard's policy as described in COMDTINST M1000.2, Chapter 5.F.1.c.1. Chapter 5.F.1.c.1 states, "[R]ating chains shall ensure that individuals do not receive adverse employee reviews solely for temporary health conditions that may limit a member's ability to perform."

PSC stated that while the applicant clearly faced very stressful and unexpected circumstances, the applicant had failed to show that his CO and rating chain did not follow Coast Guard policy in deciding to not recommend the applicant for advancement and in having the applicant removed from the advancement list. Accordingly, PSC recommended that no relief be granted by the Board.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On June 16, 2014, the Chair mailed the applicant a copy of the advisory opinion and invited him to submit a written response within [REDACTED] days. The applicant was granted extensions and submitted his response on October 15, 2014.

In his response, the applicant stated that due to his changed circumstances,<sup>14</sup> he would not need all of the relief that he requested.

The applicant also disputed PSC's characterization of his stated basis for relief, stating that he had also made other assertions requiring redress.

The applicant noted that PSC had only referenced seven items in its matters of record, although the applicant had submitted 21 documents in his request to this Board.

The applicant reiterated that the January 2012 page 7 remarks, which were included in PSC's matters of the record, was dated and signed after the actions described therein and failed to describe in detail what specific tasks the applicant had failed to do, deadlines missed, or projects not completed.

The applicant also emphasized that under COMDTINST M1000.2, Article 3.A.19.d., which was used as the basis of his CO's message removing the applicant from the advancement list, he should have been afforded the opportunity to regain his CO's advancement recommendation. The applicant also stated that he was not afforded the opportunity to regain his CO's recommendation. However, he stated, "[W]hen I had regained it [for the subsequent marking period] before the end of the eligibility list, I was still denied the opportunity to advance..." The applicant emphasized that the decisions to rescind the advancement recommendation and not to reinstate it were made without medical input or consulting the Sector. The applicant also alleged that the MSU's parent Sector's commanding officer has since instituted a policy against removing a CO recommendation for advancement without first

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<sup>14</sup> The applicant filed his request with the Board in January 2014. The applicant was retired from the Coast Guard on August 31, 2014.

briefing the Sector's commanding officer, which the applicant stated further demonstrates that his case was not handled properly.

With regard to the availability of filing a complaint under Article 138 of the UCMJ, the applicant stated that he did not understand that his only redress was such a complaint. Moreover, he stated that he is merely seeking a correction and is not seeking to punish anyone.

In response to PSC's finding that he had failed to show that policy was not followed, the applicant disagreed, stating that the documents in his request prove his position. He also stated that he showed that several Coast Guard policies were not followed, and that "there existed a Command Climate exactly at the time the Commandant was directing otherwise and in direct conflict with his Commands." The applicant also alleged that the Coast Guard advisory opinion "appears more vested in protecting the sanctity of the Commanding Officer, than reminding him of his responsibilities to his members even when the Commandant has directed it over and over again."

### **APPLICABLE POLICY**

The BCMR's rule at 33 C.F.R. § 52.13 provides, "No application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant."

#### ***Enlisted Advancement and CO/OIC Recommendation for Advancement***

In late 2011 and 2012, the Enlisted Accessions, Evaluations, and Advancements Manual, COMDTINST M1000.2, governed the evaluation and advancement of enlisted members.

Article 3.A.1.a. of the manual states, "The objective of the enlisted advancement system is to ensure the required degree of proficiency at the various grade levels within each specialty and promote those best qualified to fill vacancies which occur."

Under Article 3.A.3.b., following the SWE in May each year, the candidates for advancement to a particular rate are ranked according to a calculation that assigns points for each candidate's SWE score, performance marks, time in service, time in present pay grade, medals and awards, and sea duty.

Article 3.A.3.a.(2) states that for E-5 through E-9 advancements, a "cutoff point is established for each rating and rate based upon vacancies anticipated at the time the eligibility list is compiled. Personnel who are below the cutoff point should plan on participating in subsequent SWEs in order to maintain eligibility." Article 3.A.25.b. states, "Only those personnel whose name[s] appear above the cutoff are assured of advancement."

Article 3.A.4.b.(2) establishes that a member is not eligible to compete for advancement by taking the SWE unless the member is recommended for advancement by his or her CO/OIC.

Article 3.A.4.e.(4) of the manual provides that one of the member's responsibilities is to maintain his or her eligibility requirements, including his or her command recommendation for advancement:

The [commanding officer/officers in charge'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, adherence to core values, 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 the 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.

Article 3.A.4.e. establishes the responsibilities of Coast Guard commanding officers and officers in charge (CO/OICs) in executing the advancement program. CO/OICs are responsible for the timely evaluation of assigned personnel, submitting recommendations, and coordinating with examining boards. With regard to the advancement recommendation, Article 3.A.4.e.(4) reiterates that the CO/OIC's recommendation is the most important requirement for advancement, and that the commanding officer must be personally satisfied that the member's performance is sufficiently strong to earn the recommendation. It also notes that the recommendation "is valid only for a specific competition and must be renewed for each succeeding competition."

Article 3.A.19.c., "Withholding Advancements," establishes guidelines for a CO to withhold advancement, including because a disciplinary action is pending, the member has not maintained eligibility for advancement, the member is undergoing medical treatment as a result of his or her own misconduct and subject to disciplinary action, holding an aviation rating but in a non-flying status, the member's name appears below the cutoff on the advancement eligibility list and has been declared unfit for duty by the Coast Guard's physical disability retirement and separation procedures, and the member has not complied with the Coast Guard's weight and body fat standards. Article 3.A.19.c.(3) also specifically notes that withheld advancements under the grounds just described "may be effected at a later date, but not later than the expiration of the current eligibility list." Upon the CO's determination that the individual "is deserving of advancement," the CO will advise Commander with his or her recommendation. However, no member whose advancement has been withheld may be carried over to a new eligibility list.

In contrast, Article 3.A.19.d., entitled "Cancellation of Advancement," establishes guidelines for the withdrawal of an advancement recommendation. It states:

If 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 commanding officer shall advise Commanding Officer (CG PPC) by message with Commander (CG PSC-EPM), as an information addressee, to remove the individual's name from the eligibility list. When the

commanding officer notifies Commander (CG PSC) that he or she has withdrawn his or her recommendation, he or she shall state his or her reasons for the action and include a statement that the individual understands the reasons his or her name will be removed from the eligibility list.

The provision also provides that the only review of the commanding officer's decision under Article 3.A.19.d. is a complaint under Article 138 of the Uniform Code of Military Justice (UCMJ). However, it also notes that under Article 138, "no one, including the Officer Exercising General Court Martial Jurisdiction (OEGCMJ) has the authority to change a commanding officer's decision on an advancement recommendation and re-instate a member on the eligibility list for advancement except Commandant (CG-12). An OEGCMJ...may forward the Article 138 complaint with a recommendation for reinstatement to Commandant (CG-12)."

Article 7.e. of Commandant Instruction 1070.1, Correcting Military Records, states that "Congress established UCMJ Article 138 as a means for a military member to seek redress of alleged 'wrongs' committed by the member's commanding officer. A 'wrong' can include an allegedly improper personnel record entry."

Article 7.A. of the Military Justice Manual, COMDTINST M5810.1E, states that a member whose commanding officer refuses to reject a wrong may file a complaint with the responsible Officer Exercising General Court-Martial jurisdiction over the complainant [OEGCMJ]. Article 7.A.4.a. provides that a complaint under Article 138 "must be submitted to a superior commissioned officer within 90 days of the date of discovery of the alleged wrong, and the complainant must have requested in writing redress from his or her commanding officer and have been refused. ... The OEGCMJ may waive the 90-day time limit and the requirement for written request for redress and denial thereof for good cause and action on the complaint by the OEGCMJ constitutes such waiver."

Article 3.A.25.f. of COMDTINST M1000.2, entitled "Removal from Eligibility List," reiterates guidelines for removing an individual from an advancement list. It states, "An individual's name may be removed by Commander (CG PSC) as a result of disciplinary action, or for other good and sufficient reasons, whereby the individual is no longer considered qualified for the advancement for which previously recommended. Commanding officers shall withhold any advancement under such circumstances and advise Commander (CG PSC) of their intentions relative to removal from the list. A commanding officer may also direct that the individual not be removed from an eligibility list but that advancement is being withheld for a definite period...Individuals who have their names removed from an eligibility list must be recommended and qualify again through a subsequent SWE competition."

### ***Enlisted Employee Reviews***

Article 5.A.2. of COMDTINST M1000.2 establishes that CO/OICs "must ensure all enlisted members under their command receive accurate, fair, objective, and timely enlisted employee reviews."



Regarding required supporting remarks, Article 5.B.1. states that supporting remarks are required to be submitted with an enlisted employee review (EER) “to address the future leadership potential of all enlisted personnel, E-6 and above” when a member is “not recommended for advancement.”

Article 5.B.1.c. of the manual reiterates, “All employee reviews submitted on enlisted personnel, E-6 and above, are required to include supporting remarks, documenting the individual’s leadership potential, along with the commanding officer’s advancement recommendation. They must clearly identify the member’s current and future potential for positions of greater responsibility...”

Article 5.D.1.d. of the manual also establishes that a unit is responsible for ensuring employee reviews are completed, including a signed counseling sheet, no later than 21 days after the end of the employee review period ending date.

Article 5.F.1.a.(2) provides that an enlisted member’s rating chain is to evaluate the member “on the required period ending date to assess his or her actual performance since the last recorded employee review. The rating chain shall base employee reviews on how the member performed in each competency consistently throughout the period...”

Documentation guidelines for supporting remarks are established in Article 5.F.2. of the manual. Article 5.F.2.a. notes that an employee review “is designed to inform members how they are performing compared to the written standards. The form requires few or no supporting remarks and should cover explicitly all performance factors for each evaluatee. The rater may use the employee review as a tool in counseling the evaluatee.” The provision also emphasizes the important of specificity: “Specific comments that paint a succinct picture of the evaluatee’s performance and qualities allow the reader to determine WHAT or HOW they exceeded or failed to meet the standards and may reduce or even eliminate subjectivity and interpretation...If the reader cannot form a clear performance picture, the human tendency is to disregard or assign a lesser value to the comments. This ‘collective group of words’ could be the deciding factor in today’s competitive environment for choice assignments.”

### ***CO/OIC’s Recommendation for Advancement***

Article 5.G. of the manual addresses the CO/OIC advancement recommendation section of an EER. Article 5.G.1. states, “While the rating chain must consider past performance, it must also consider and base the recommendation on the member’s potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service’s core values.” The rating chain member must address the recommendation section for each employee review.

Article 5.G.2. of the manual establishes the criteria for a member’s rating chain to consider in making an advancement recommendation:

- a. **RECOMMENDED.** The member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade. The rating chain should choose this entry regardless of the member’s qualification or eligibility for

advancement. If the member has met all eligibility requirements, choosing this value constitutes an official recommendation for advancement....

b. NOT RECOMMENDED. The member is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.

Under Article 5.G.3., if an approving official marks the member as “Not Recommended,” the member must be counseled on the steps necessary to earn a recommendation and prepare supporting remarks. Article 5.G.4. provides, “The Approving Official's decision on the advancement recommendation is final and may not be appealed.” It also notes, however, that if the approving officer learns of new information, he or she may decide to change the recommendation per Article 5.J.2 (described below). Article 5.1.c. states, “The recommendation for advancement portion on the employee review may not be appealed.”

Regarding changes to an employee review, including the advancement recommendation portion, Article 5.J.2. provides, “Approving Officials are authorized to change any mark they assigned to members still attached to their unit if the Approving Official receives additional information that applies to the particular employee review period.” Under Article 5.J.2.b. of the manual, to make any changes after an employee review has been marked final, the Approving Official may write, sign, and send a letter to the Commanding Officer to request changing the remarks. The letter must indicate, among other things, the original and revised numerical mark, conduct mark or commanding officer’s recommendation for advancement.

### ***Standards for Members with a Limited Opportunity to Perform or for Disabled Personnel***

For EER purposes, Article 5.F.1.c. of COMDTINST M1000.2 provides employee review guidelines “[f]or members with a limited opportunity to perform for reasons such as illness, injuries, and pregnancy” as follows:

(1) Occasionally, circumstances resulting from a temporary condition may limit a member’s opportunity to perform. These circumstances may cause specific performance restrictions; e.g., those imposed by a medical authority, and may even require restructuring or reassigning duties. While rating chains shall not give preferential treatment, commanding officers shall ensure these individuals do not receive adverse employee reviews solely for these circumstances.

(2) In consultation with the health care provider, the commanding officer must establish a “reasonable expectation of performance” in the member’s current circumstances. In particular, the commanding officer must determine whether a member requires reassignment to a different work environment, restrictions on performing specific types of tasks, or reduced work hours. When considering reassigning or restructuring duties, commanding officers shall strive to identify service needs, which compliment the member’s temporary limited abilities.

For advancement purposes, Article 3.A.13.e., entitled “Disabled Personnel,” discusses advancement for personnel that have been hospitalized, are awaiting medical board or physical

evaluation board action, or who are not fit for duty. Article 3.A.13.e.(1) states, “Personnel who have been recommended for advancement and are either hospitalized, awaiting action of a medical or physical evaluation board or are in a not fit for duty status will be permitted to participate in and be advanced under the SWE competition process provided all of the following criteria are satisfied: (a) The individual retains the commanding officer's recommendation.; (b) The commanding officer feels such competition would not be detrimental to the individual's health.; (c) In the judgment of the commanding officer, there is a reasonable expectation that the individual will be able to return to a fit for duty status.” Article 3.A.13.e.(2) applies to persons who have been declared unfit for duty by a final action on physical disability retirement and separation procedures.

As defined in Chapter 3.F.16e. of the Coast Guard Medical Manual, COMDTINST M6000.1E, in effect during the time in question, an “adjustment disorder” is a:

[t]ransient, situational maladjustment due to acute or special stress does not render an individual unfit because of physical impairment. However, if these conditions are recurrent and interfere with military duty, are not amenable to treatment, or require prolonged treatment, administrative separation should be recommended.

Chapter 5.B.3. of the manual states that adjustment disorders are generally treatable and are not grounds for separation. However, when such conditions persist or treatment is likely to be prolonged or non-curative (e.g., inability to adjust to military life/sea duty, separation from family/friends) the service member should be processed pursuant to the Coast Guard’s separation procedures.

Chapter 5.C. also provides guidance for command-directed mental health evaluations of Coast Guard members. Chapter 5.C.1. notes the importance of preventing unwarranted involuntary health evaluations or involuntary hospitalization as a form of harassment or retaliation. Chapter 5.C.2.b. provides a specific procedure by which command may request a non-emergent mental health evaluation for a member, which involves contacting a Coast Guard clinic, providing a memorandum to a senior health services officers or clinic CO documenting the request, counseling the member and providing written notice of the request, and obtaining the member’s signature for the notice.

### ***Harassment***

Article 2.C.2.a. of the Coast Guard’s Civil Rights Manual, COMDTINST M5350.4C, defines “prohibited harassment” as including, but not limited to:

...unwelcome conduct, whether verbal, nonverbal, or physical conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, offensive, or hostile environment on the basis of an individual's protected status, which includes: race, color, religion, sex, national origin, age, disability, genetic information, sexual orientation, marital status, parental status, political affiliation, or any other basis protected by law. Among the types of unwelcome conduct prohibited by this policy are epithets,

slurs, stereotyping, intimidating acts, and the circulation or posting of written or graphic materials that show hostility toward individuals because of their protected status. Acts of physical violence, and actual, implied, or veiled threats of violence, are forms of prohibited harassment. Any form or manner of threatening or provoking remarks or threatening gestures in the workplace is also prohibited.

Article 2.C.6.e. of the manual defines a “hate incident” as:

[A]ny intentional act (conduct or speech) of intolerance committed against a person, a group of individuals, or property which is motivated, in whole or in part, by the offender’s bias against a race, color, religion, sex, national origin, disability, age, or sexual orientation and which is intended to or is more likely than not to have the effect of intimidating others or inciting others to similar conduct.

As an example of a hate incident, Article 2.C.6.e. notes the display, presentation, creation of depiction of a symbol widely identified with hatred or oppression, such as nooses or swastikas.

With regard to a definition for the protected class of “disability,” the Article 1.A.1.a. of the Civil Rights Manual refers to the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, which it states “makes clear that the term *disability* should be interpreted broadly. It states that mitigating measures shall not be considered in assessing whether an individual has a disability, clarifies that an impairment that is episodic or in remission is defined as a disability if it would substantially limit a major life activity when active, and states that people who are only regarded as disabled are not entitled to reasonable accommodation.”

The definition for “disability” as provided in the ADA Amendments Act of 2008 is found in 42 U.S.C. § 1202. Section 1202(1) states:

The term “disability” means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).

With regard to the definition of “disability” as it pertains to the last category, Section 1202(1)(C), paragraph 3(B) of the section specifically notes that “Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.”

Section 1202(2)(a) also states that generally, “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”

## 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 command erroneously and unjustly withdrew his recommendation for the applicant to advance to [REDACTED] E-7 in December 2011, at a time when the applicant was on light duty and faced with a number of stressful circumstances affecting his mental health and performance. The applicant also alleged his command acted erroneously and unjustly in refusing to reinstate the advancement recommendation to place him back on the advancement list, when requested by the applicant in June 2012. The applicant asked for retroactive advancement to [REDACTED] E-7 with back pay and allowances, modification of professional growth points to account for lost time, and authorization to present his case to various Coast Guard leadership, equal employment opportunity, and defense equal opportunity bodies.<sup>15</sup> The Board begins its analysis in every case by presuming that the disputed information—in this case, the CO's decision to remove the applicant's name from the advancement list and not reinstate it later—is correct as it appears in the applicant's record. The applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>16</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”<sup>17</sup>

3. The applicant alleged that his command's December 2011 withdrawal of its advancement recommendation, which led to the applicant's removal from the May 2011 SWE advancement list for MTSC while he was on light duty, was unjust and erroneous. In support, the applicant cited COMDTINST M1000.2, Article 5.F.1.c., “Limited Opportunity to Perform,” and Article 3.A.13.e., “Disabled Personnel.”

a. Article 5.F.1.c. of COMDTINST M1000.2 provides that a CO shall ensure that an employee with a limited opportunity to perform by reason of illness and injury does not receive an adverse employee reviews solely for that circumstance. It notes that a CO must establish a “reasonable expectation of performance” for the member's circumstances “[i]n consultation with the health care provider.” In particular, it directs the CO to determine if the member requires reassignment, work restrictions, or reduced work hours. The record shows that the applicant was given work restrictions by his doctors, such as load lifting limits and walking, standing, sitting, and bending limits, from at least October 2011 to January 2012. The applicant does not discuss how the December 2011 EER failed to take these specific work restrictions, established by his health care providers, into account. Rather, his disputed issue deals with the recommendation for

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<sup>15</sup> The applicant also requested a delay of his retirement date of September 1, 2014, cancellation of his retirement letter or extension of his retirement date, and to complete a full tour as an E-7 or complete his current tour of duty until June 2015. After the applicant submitted his application to the Board in January 2014, the applicant retired from the Coast Guard on September 1, 2014. Subsequently, these requests are not discussed in detail herein.

<sup>16</sup> 33 C.F.R. § 52.24(b).

<sup>17</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).

advancement section of the EER, which focuses on the applicant's prioritization of home/work issues and ability to resolve out-of-work problems and not on his physical capability to perform his work. As a result, the Board finds that the applicant has not provided sufficient evidence to overcome the presumption of regularity with respect to whether the December 16, 2011 EER improperly led to his removal from the advancement list while he was on light duty in violation of Article 5.F.1.c.

b. Article 3.A.13.e. of COMDTINST M1000.2 establishes advancement guidelines for persons (a) hospitalized, (b) awaiting the action of a medical or physical evaluation board, (c) in a not fit for duty status, and (d) who have been declared unfit for duty by a final action on physical disability retirement and separation procedures. The applicant was not declared unfit for duty and does not fall into the last category. Subpart 3.A.13.e.(1) establishes that personnel in first three categories who have been recommended for advancement are permitted to participate in and be advanced under the SWE competition process. However, it also establishes that participation is contingent upon the criteria that "[t]he individual retains the commanding officer's recommendation." The applicant did not meet the prerequisite that he retain his CO's recommendation to participate in the SWE competition process at the time of the December 16, 2011 EER and the recommendation's withdrawal was not subsequently changed. As a result, regardless of whether the applicant may or may not fall into the category of persons covered by Article 3.A.13.e., the Board also finds that the provision does not apply to the applicant's situation to show that an error was made in violation of the policy.

4. The applicant also alleged that his command's December 2011 withdrawal of its advancement recommendation, and later decision to not reinstate the recommendation, while he had an acute adjustment disorder with anxiety and depression,<sup>18</sup> was unjust and erroneous. The record shows that the applicant experienced a number of stressful events during the marking period. These issues affected his work performance, which was noticed by his command. The applicant also acknowledged that these life events had negatively impacted his performance and his mental health, as shown by his June 2012 request that his CO reinstate the advancement recommendation on the basis of a previously undiagnosed acute adjustment disorder with anxiety and depression.

The record also reflects, however, that his command was not unaware of the applicant's issues or his efforts to improve in making the decisions to withdraw and not reinstate the advancement recommendation. The applicant's skills were recognized by his rating chain; he was given his CO's endorsement to be an instructor, he was chosen to be a point of contact for an organizational assessment, and he was allowed to act as a District representative to present a case study. His CO's awareness of the applicant's improved performance is also demonstrated by the

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<sup>18</sup> The applicant references multiple times that the withdrawal of the recommendation while he had a "medical condition" was incorrect. It is not clear whether the medical condition he references refers to his knee injury or his adjustment disorder. However, his CO's June 2012 changes to the marks on (but not to the advancement recommendation section of) the December 2011 EER was based upon a "medical condition" and followed the applicant's June 7, 2012 special request to speak to the CO on the basis of a "recent determination of a medical condition." According to his health provider's note, the applicant was diagnosed with an adjustment disorder with anxiety and depression at a psychiatric evaluation on June 13, 2012. Given the above, the Board has assumed that the applicant is referring to his adjustment disorder when referring to the erroneous or unjust removal of the advancement recommendation while he had a medical condition.

fact that he regained his CO's recommendation for advancement in the EER for the subsequent marking period. In addition, in his meetings with the CO, the applicant alleged that he discussed his prognosis of recovery with treatment and medication with the CO and argued that his prior performance showed that he could perform under stress and his performance during the May to November 2011 marking period was atypical of his performance. The applicant also stated that he pointed out to his CO the likely end to his Coast Guard career that would result if the CO did not change the withdrawal of the advancement recommendation in the December 2011. The applicant alleged that the CO's decision to not reinstate the advancement recommendation in light of all these factors shows that the decision was not just contradictory but also unjust and erroneous. However, a preponderance of evidence in the record, from his CO's active role in facilitating and recognizing the applicant's positive work performance to the applicant's statements regarding his discussions with the CO, shows that the CO was aware of all these factors in withdrawing the recommendation and in making his specific decision to change the December 2011 EER by improving the applicant's marks on the basis of the applicant's adjustment disorder but not by reinstating the advancement recommendation.

Under Article 3.A.4.e.(4) of COMDTINST M1000.2, to give a recommendation of advancement, a CO must be "personally satisfied that the member's overall performance in each factor has been sufficiently strong to earn the recommendation." Article 5.G.1. of the manual establishes that in determining whether to make such a recommendation, the rating chain "must consider past performance, [and] it must also consider and base the recommendation on the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service's core values." Article 5.F.1.c. of the manual cautions that an employee should not be given an adverse employee review solely because of a limited ability to perform due to illness. The applicant alleges that this article stands for the proposition that his command should have required a screening by a medical authority to eliminate or identify any underlying issues. However, he also acknowledged that he himself did not seek out a counselor for his issues until at least 2012. And, when given the documentation of his adjustment disorder, his command did account for the applicant's medical provider's input and changed the low marks on the December 2011 EER. With regard to the CO's decision to withdraw the advancement recommendation, it should be noted that the language of Article 5.F.1.c. indicates that it applies to a review insofar as the review evaluates present performance—and not necessarily to an evaluation of future potential to perform. For example, the article notes that a CO should work with the member's health care provider to establish a reasonable expectation of the member's performance "in the member's current circumstances" and consider possible reassignments or restructuring of duties that "compliment the member's temporary limited abilities."

Given the applicant's documented compromised work performance in the face of multiple stressors during the marking period; the weight given to the subjective evaluation of a member's CO in giving an advancement recommendation under the Coast Guard's policies; and the inherent uncertainty in making a recommendation for a subordinate's ability to perform at a higher level of responsibility at a future point of time, the Board finds that the applicant has not provided sufficient evidence to overcome the presumption of regularity with respect to his CO's decision to withdraw his recommendation for advancement in the December 2011 EER and subsequent decision to not reinstate the recommendation for that EER.

5. The applicant implied that the advancement recommendation withdrawal was improperly based upon an event that took place outside of the relevant May 31 to November 30, 2011 marking period. In his narrative of events, the applicant states that on December 21, 2011, LTJG H found the applicant working on his PCS paperwork instead of on a waterway management qualification and “because of this [he] was marked ‘not recommended’ for advancement based on my leadership potential.” However, the applicant signed the associated member counseling receipt for the EER containing the disputed section where the CO withdrew his advancement recommendation on December 19, 2011. COMDTINST M1000.2, Article 5.D.1.d. establishes that a unit has 21 days after the end of the marking period to complete the employee review. The applicant has not provided sufficient evidence to overcome the presumption of regularity with respect to the period of performance his rating chain considered in completing the December 2011 EER.

6. The applicant alleged that the remarks in the January 2012 Page 7 were insufficiently specific and failed to demonstrate a pattern of significance enough to warrant the taken actions in violation of COMDTINST M1000.2, Articles 5.F.1.a.(2) and 5.F.2.<sup>19</sup> Both provisions cited by the applicant reside in Article 5, which establishes guidelines for the Coast Guard’s EER system and does not cover administrative remarks such as the Page 7. The provisions specifically reference guidelines for EERs and do not apply to the Page 7. Regardless, although the Page 7 does not list specific instances or dates of perceived issues, it does note that the applicant had demonstrated a lack of initiative and failure to prioritize personal tasks and unit missions, and lists in detail specific areas for improvement (and hence also implied areas of deficiency). The applicant has submitted no evidence to show that the Page 7 is erroneous or that he did not receive the guidance listed at the October 28, 2011 counseling session it describes. The Board finds that the remarks in the Page 7 were neither in violation of COMDTINST M1000.2, Articles 5.F.1.a.(2) and 5.F.2, nor were they insufficiently specific so that the December 2011 withdrawal of the applicant’s advancement recommendation and his CO’s subsequent June 2012 refusal to reinstate the recommendation was unjust or erroneous.

7. The applicant also alleged that the Page 7 was untimely, as it was entered into his record in January 2012, although the counseling session it references occurred on October 28, 2011. The Coast Guard’s instruction, Commandant Instruction 1000.14B, regarding the preparation and submission of administrative remarks, does not include any guidance regarding the timeframe for entering an administrative remark in the record. Insofar as the October 28, 2011 meeting was intended to assist the applicant in immediately improving his performance so that he could be recommended for advancement, it is troubling that the Page 7 with its detailed listing areas for improvement was only issued after the recommendation was withdrawn in December 2011. As a result, the applicant did not have the benefit of the Page 7’s written guidance for the remainder of the relevant marking period. The record also reflects that due to his knee surgery, the applicant was not at work from November 8 to December 12, 2011 and returned to work on light duty on December 12, 2011. This gave the applicant approximately just 2 weeks where he was at work before his surgery and during the marking period to enact the guidance from the October 28, 2011 counseling session to improve his performance. However, regardless of date the Page 7 documenting the counseling session was entered into the

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<sup>19</sup> See footnote 12.



applicant's record, the counseling session still took place well before the end of the marking period. The date of the Page 7 does not make the withdrawal of the applicant's advancement recommendation or his CO's subsequent refusal to reinstate the recommendation unjust or erroneous.

8. The applicant alleged the December 2011 withdrawal of his advancement recommendation was a violation of the Coast Guard's anti-discrimination and anti-harassment policies, as it was "a judgment of my leadership potential and punishment for a disability caused by a temporary and resolving medical condition[,] Of which Medical Mental Health conditions are a protected category." In the copy of the Coast Guard's Anti-Discrimination and Anti-Harassment Policy Statement he provided, he highlighted "disability" among the protected classes listed. In essence, the applicant alleged that the December 2011 withdrawal of his advancement recommendation was prohibited harassment or discrimination, on the basis of a disability in the form of an acute adjustment disorder.

The Coast Guard's Civil Rights Manual, which establishes the Coast Guard's anti-harassment and anti-discrimination policies and procedures, refers to the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, with regard to its definition of "disability." This definition is found in 42 U.S.C. § 1202, which establishes that "disability" refers to a physical or mental impairment that substantially limits one or more major life activities, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Or, in the situation where an individual is regarded as having such an impairment, the term "disability" does not apply to impairments that are transitory (expected duration of 6 months or less) and minor. The applicant's adjustment disorder was diagnosed as acute, and his physician anticipated that the applicant would be able to taper off his medication for the condition. His physician made no note of major life activities that had been substantially limited by the applicant's mental condition. In addition, the applicant inherently acknowledged both the temporary nature of his disorder and its limited impact on his activities in alleging that his performance was not so limited so as to affect his ability to perform at a higher pay grade in the near future. The applicant's own opinion that he was "disabled" is insufficient to include him in the protected class of disabled individuals protected by the Coast Guard's policies in the manner he claims.

Regardless, the applicant does not describe any specific instance in his interactions with his rating chain where his rating chain specifically targeted him, as opposed to others, specifically on account of his acute adjustment disorder. Rather, the withdrawal of the applicant's advancement recommendation "as a judgment of his leadership potential" can reasonably be interpreted as a leadership decision by his command within the permissible boundaries of COMDTINST MI000.2's advancement recommendation policies. Although the applicant undoubtedly experienced a high number of stressful events during the May to November 2011 marking period, as someone who was seeking advancement to a pay grade and position with a greater level of responsibility, it was incumbent on the applicant to demonstrate to his CO's "personal satisfaction" his capacity to handle life stressors and even greater levels of responsibility without becoming overwhelmed.

The applicant also specifically alleges that he was harassed by his immediate supervisor, ENS N, and that it is his belief that ENS N's attitude towards him may have contributed to his command's decision to remove his advancement recommendation. However, the applicant does not describe any specific instance demonstrating that ENS N directly harassed him on account of his adjustment disorder or provide evidence that ENS N directly influenced the CO's decision to withdraw the advancement recommendation. The Board finds that the applicant has not provided sufficient evidence to overcome the presumption that the applicant's rating officials acted correctly, lawfully, and in good faith in making their evaluations.<sup>20</sup>

9. The applicant implies in his narrative that his command acted improperly by not directly engaging, as opposed to just sending an email notification to, the unit's command enlisted advisor (CEA, also known as a Command Master Chief or CMC)<sup>21</sup> regarding the decision to withdraw the advancement recommendation. However, there is no requirement that a CEA be consulted with regard to EERs or advancements in the Coast Guard's relevant policy manual, COMDTINST M1000.2. Similarly, the CEA was not a part of the applicant's rating chain. No policy was violated by the applicant's command in not consulting, as opposed to notifying, the CEA regarding the December 2011 EER and advancement recommendation withdrawal.

10. In his response to the Coast Guard's advisory opinion, the applicant alleges that under COMDTINST M1000.2, Article 3.A.19.d., he should have been afforded the opportunity to regain his CO's advancement recommendation. He also alleged that he was also wrongfully denied the opportunity to advance when he received his CO's recommendation in the subsequent marking period and before the expiration of the original advancement list. Article 3.A.19.d. states (emphasis as provided by applicant's response), "If 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 commanding officer shall advise Commanding Officer (CG PPC) by message...to remove the individual's name from the eligibility list." However, the applicant mistakes the purpose of Article 3.A.19.d., which is not to direct that a member is entitled to be placed back on an advancement list if he or she obtains another advancement recommendation before the original advancement list has expired. Rather, Article 3.A.19.c. is phrased as guidance to a CO as to what considerations and process to apply at a specific point of time — the time at which the applicant is no longer deemed eligible for advancement — and when the CO cannot know for certain but believes that that the applicant will not be able to attain eligibility. This is supported by the fact that whereas the preceding subarticle of the same chapter in COMDTINST M1000.2, Article 3.A.19.c., "Withholding Advancements," does specifically provide a process by which a member may advance after a withheld (as opposed to a withdrawn or cancelled) advancement recommendation, Article 3.A.19.d. does not. Additionally, each of the May 2011 SWE advancement cutoff and related enlisted personnel advancement announcements included by the applicant in his application include the following language or language that is similar:

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<sup>20</sup> *Arens*, 969 F.2d at 1037; *Sanders*, 594 F.2d at 813.

<sup>21</sup> See note 5.

The Commanding Officer's recommendation for advancement must be maintained for the period from recommendation to advancement. Personnel failing to maintain the CO's recommendation for this period shall be invalidated from the Servicewide Exam(s) (SWE) in which they participated. Personnel who have been invalidated must be recommended and qualify again through a new SWE competition.

The record shows that the applicant did receive his CO's advancement recommendation in the May 2012 EER and at a point of time at which the original advancement list had not yet expired. However, the applicant's CO decided not to change his decision to withdraw the applicant's December 2011 advancement recommendation, so that the applicant "failed to maintain" the recommendation and was invalidated from the advancement process. The Board finds that no error was made or injustice committed when the applicant's name was not put back on the advancement list, even though he had obtained his CO's recommendation for advancement at a later time.

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

12. Additionally, the Coast Guard's advisory opinion noted that the applicant failed to avail himself of the process outlined in COMDTINST M1000.2, Article 3.A.19.d., although the Coast Guard did not use this reason as an underlying basis for its recommendation that no relief be granted. However, both Articles 5.G.4. ("The Advancement Recommendation") and 5.I.1.c. ("Appeals"), of COMDTINST M1000.2 expressly state that an Approving Official's decision on the advancement recommendation may not be appealed. Moreover, neither the member counseling receipt for the December 2011 EER nor the specific provision of the relevant manual addressing EER appeals, Article 5.I.1.c., make any mention of the option of filing an Article 138 charge. The only right to appeal provided in Article 5.I.1.c. is the right to appeal the numerical performance marks, not the advancement recommendation. Given the confusing guidance given in the Coast Guard's own policies, the Board strongly rejects the Coast Guard's implied argument that the applicant did not exhaust his administrative remedies by not filing an Article 138 complaint under the UCMJ.

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

**ORDER**

The application of [REDACTED] [REDACTED], USCG (Retired), for correction of his military record is denied.

January 23, 2015

