

**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. 2016-049**

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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 after receiving the completed application on January 4, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 10, 2017, 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 master chief ██████████/E-9) on active duty, asked the Board to correct his record by removing two CG-3307 (“Page 7s”)<sup>1</sup> dated November 29, 2012, and January 9, 2013; by removing his November 30, 2012, Enlisted Employee Review (EER); and by backdating his advancement to master chief to July 1, 2013, as if he had not been removed from the ██████████ advancement eligibility list resulting from the May 2012 service-wide examination. The applicant also asked the Board to reinstate his eligibility period for a Good Conduct Medal, which was terminated as a result of the unsatisfactory conduct mark on the disputed EER.

The applicant explained that in the fall of 2012, he was a senior chief ██████████/E-8) on the advancement eligibility list for ██████████/E-9 and was assigned as a Sector Command Center (SCC) Supervisor—the top enlisted member at the SCC. He had two teams of enlisted members and civilians subordinate to him, and he reported directly to a lieutenant, who was Chief of the SCC. A few newly assigned junior officers also reported directly to the Chief.

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<sup>1</sup> An Administrative Remarks record entry, form CG-3307, known as a “Page 7,” is used to document a member’s notification of important information, achievements, or counseling about positive or negative aspects of a member’s performance in the member’s military record. Personnel and Pay Procedures Manual, PPCINST M1000.2B, Chapter 10.A.1.

The applicant stated that in November 2012, he was subject to an investigation that erroneously and unjustly resulted in the removal of his name from the advancement list. The applicant stated that he was not shown the convening order for the investigation, but on December 13, 2012, the investigating officer (IO) sent him an email informing him that the investigation had been convened because he had been accused of, and counseled in writing on a Page 7 about, misconduct and violating the Coast Guard's core values but he had denied the accusations. The applicant stated that he was also accused of refusing to sign the Page 7 dated November 30, 2012, but he was never actually presented it. The email also stated that he was accused of showing disrespect to a superior commissioned officer in violation of Article 89 of the Uniform Code of Military Justice (UCMJ).

The applicant stated that when the investigation was complete on January 9, 2013, he was presented with a Page 7, which he refused to sign because it referenced the Final Action Memorandum (FAM) of the investigation and included information he knew was untrue. In addition, he was shown only the FAM, which was signed by his commanding officer (CO) and a few of the enclosures to the Report of Investigation (ROI). The FAM included a list of things he had been accused of doing, but only some of them were true.

The applicant stated that his command erroneously and unjustly delayed preparation of his November 30, 2012, EER pending the completion of the investigation. On January 11, 2013, he received the EER. His marks were significantly lower than those he had received on his 2011 EER, he received an unsatisfactory conduct mark, and he was not recommended for advancement. He alleged that when the Executive Officer (XO) of the Sector counseled him about the EER, the XO told him that if he appealed the EER marks, they could be further reduced. Thereafter, his name was removed from the master chief advancement list and he was not eligible to compete for advancement in May 2013 by taking the service-wide examination (SWE) because of the mark of not recommended for advancement. Moreover, his transfer orders to an E-9 billet were cancelled.

Regarding the findings in the FAM, which resulted in the poor EER and his loss of his CO's recommendation for advancement, the applicant stated the following:

- a. "Go stuff a/her hole": The applicant alleged that his CO's finding that the applicant had made the derogatory sexual comment to "go stuff a hole" or "go stuff her hole" to a male junior officer regarding a female junior officer is false. The applicant alleged that he was accused of making this comment on October 23, 2012, to the male junior officer after the female junior officer asked the applicant to switch duty days with her. The applicant stated that he was not even at work that day because his son was sick and showed the IO documentation to that effect. Moreover, he alleged, he had often switched duty days with the female junior officer, and had offered help in this way twice in October 2012 and again on November 5, 2012. The applicant argued that it was illogical for his CO to find that he would make such a comment to the male junior officer on October 23, 2012, because he was not even at work that day and he routinely swapped duty with the female junior officer. In support of these allegations, he submitted emails, which he also provided to the IO, showing that he had swapped watches with the female junior officer before and after the alleged incident and that on the morning of October 23, 2012, he informed

the SCC that he would stay home because his child became sick after his wife had already left for work and that he would return to work the next day.

The applicant alleged that although the CO found the male junior officer's accusation to be credible, there is reason to doubt that officer's credibility. He stated that in November 2012, the male junior officer and a lieutenant had written a "decision paper" recommending a change in the organization of the SCC that would place one or more junior officers within his chain of command, specifically between him and the SCC Chief, so that the junior officers assigned to the Command Center would get supervisory experience that they could be evaluated on for promotion purposes. The applicant stated that he objected to the proposed reorganization because the SCC Supervisor—the senior enlisted member—would no longer have any supervisory relationship with the junior enlisted members. He discussed the issue with the [REDACTED] Rating Force Master Chief at Coast Guard Headquarters, who agreed with him, and so he told the authors of the decision paper that he would not support it and suggested other ways that the junior officers could be evaluated on their leadership potential. He alleged that two days later one of these junior officers made allegations against him. The applicant alleged that the male junior officer blamed the applicant for the failure of his plan and so made these false allegations.

- b. Calling a geographic region a "clitoris" during an all-hands meeting: The applicant admitted making this statement but denied that he made it during an all-hands meeting. The applicant alleged that he made the comment in a one-on-one conversation with a male petty officer, did not intend to offend anyone, and regrets the comment. He claimed that he "did not make this comment in a room full of people."
- c. Asking "Does the carpet match the drapes" during a mustache-growing contest: The applicant explained that in November 2012, some members of the command participated in a mustache-growing contest to raise money for prostate and testicular cancer research, and it was judged by the CO. During the judging, the CO asked a member standing next to the applicant why the color of his mustache did not match the color of his hair. The applicant stated that he responded, "the curtains don't match the drapes," not by asking whether "the carpet matched the drapes," which is a reference to pubic hair. The applicant complained that the CO had endorsed a contest that, by its nature, was open only to men, but then he blamed the applicant "for any negative command climate resulting from it." He also alleged that he had invited the very comment he accused him of making by asking why the man's mustache did not match his hair. He alleged that "his response—curtains vs. carpet—was specifically intended to refer to the head and not the pubic region, thus avoiding any sexual inference." He argued that even if someone heard "carpet," instead of "curtains," he had "merely stated out loud what everyone else was thinking" because the CO had already put the image in their heads by asking the man about the color of his mustache and hair. The applicant argued that it was particularly unjust for the CO to ask that question and then hold the applicant "responsible for having answered it."
- d. "Those look nice ... I mean your boots": The applicant "categorically denied" ever making this sexually inappropriate comment to a female non-rate. He claimed that he had never and never would comment on a shipmate's breasts and he cannot recall complimenting any non-rate's boots, "but if he did, it would have been something to the effect of 'your boots look sharp.'"

- e. “A cunt hair away [or short]”: The applicant stated that he neither admits nor denies making this comment in the presence of a female petty officer while measuring Plexiglas about six months before the investigation. He stated that he cannot recall the alleged incident but has used the term in the past and, if he used it, “regrets that anyone was offended by it.”
- f. Saying “fuck” to a petty officer at an all-hands training in front of a Coast Guard family member: The applicant stated that he reprimanded a petty officer for being completely insubordinate, out of line, and disrespectful, but did not use the word “fuck.” The applicant submitted the statement of an OSC, who wrote that as he recalls, his own daughter was present when a petty officer questioned the applicant about his lack of qualifications for all positions in the SCC. The applicant paused for a very long time and then spoke to the petty officer in a raised voice but did not utter a curse word “because I would have spoken to him Chief to Chief if he had done such a thing.”

Thus, the applicant concluded, of the claims in the FAM, three are entirely false and one was misheard and misconstrued by his CO (“curtains” vs. “carpet”). That leaves one being possible (“cunt hair away/short”) and his reference to a geographical region being a clitoris, which was in a one-on-one conversation with a male petty officer, not at an all-hands meeting. The applicant argued that “even if these things are inappropriate for the workplace (a point Applicant does not necessarily dispute), taken as a whole they are insufficient to warrant the harsh results.” He argued that even if the above six incidents were true, they would not justify the findings in the FAM about creating a toxic workplace or his EER marks.

The applicant noted that the FAM also accuses him of creating a toxic workplace in the SCC by repeatedly engaging in inappropriate, abrasive, and demeaning behavior, being disrespectful to superiors, abusing his position of authority, being short-fused, and refusing to listen to others. The applicant stated that because he was not shown all the evidence in the ROI, he does not know what conduct the FAM is referring to. Moreover, he alleged, he was never counseled about any negative performance at the SCC before he was counseled about his EER in January 2013. Instead, he was repeatedly praised and he had a good relationship with his supervisor, the SCC Chief. The applicant stated that he prides himself on being a competent and compassionate leader. He stated that because of the nature of their work in the SCC, he “sometimes was required to tell both officers and enlisted members things they did not necessarily want to hear. My leadership strategy with [the Chief of the SCC] was that, as second-in-command in the Command Center, I was expected to sometimes be the ‘bad cop.’” Therefore, he argued, it was unjust to blame him for the allegedly “toxic workplace” in the SCC, to give him the bad OER dated November 30, 2012, to remove his name from the advancement eligibility list, and to cancel his transfer orders to an E-9 billet.

The applicant alleged that the preparation of his November 30, 2012, annual EER was delayed until early January 2013 pending the completion of the investigation and that this delay was erroneous and unjust because there was no authority for the delay and it deprived him of due process. The applicant explained that under Article 5.E.1.b.(2) of COMDTINST M1000.2, the Enlisted Accessions, Evaluations, and Advancements Manual (hereinafter “Enlisted Manual”), the EER of an E-8 must be completed and submitted no later than 30 days after the end of the

marking period and no delay is allowed. However, his CO erroneously delayed preparation of the EER because his alleged misconduct had occurred during the marking period.

The applicant alleged that had his annual EER not been delayed, it would not have been based on the information in the ROI. And if his command had later decided to document the results of the investigation in an unscheduled EER, he would have received more due process in accordance with Article 5.E.2.c. of the Enlisted Manual. The applicant argued that it was erroneous and unjust for his command to delay his annual EER while depriving him of the due process provided under the provisions for an unscheduled EER. Therefore, he argued, the November 30, 2012, EER should be removed from his record.

The applicant stated that he did not appeal the EER because the Sector XO, who was the Approving Official for the OER, actively discouraged him from doing so. He alleged that on January 11, 2013, the XO, a commander, told him that he would not be allowed to review the ROI in order to appeal the EER and that if he appealed it, the Admiral might lower his marks rather than raise them. The applicant stated that he had a right to appeal the EER marks pursuant to Article 5.I.2.a. of the Enlisted Manual. Moreover, under Article 5.I.2.b., EER marks may be raised because of an appeal but not lowered. Therefore, the XO gave him erroneous advice, which led him to forgo his right to appeal. Because he was erroneously and unjustly discouraged from appealing the EER, the applicant alleged, it should be removed from his record. Moreover, he argued, he could not reasonably appeal the EER when he could not rebut the allegations against him because he was not shown the statements in the ROI. Therefore, the applicant argued that the EER should also be removed because it is based on and references evidence that he was not allowed to review and rebut. The applicant asked the Board to obtain a copy of the investigation.

Regarding the Page 7 dated November 29, 2012, the applicant argued that it should be removed from his record because “it may have been altered,” it was never presented to him, it includes a factual error, and his command requested that it be removed. The Page 7 claimed that his performance and conduct had been unsatisfactory, particularly in the EER performance categories “Working with Others,” “Setting an Example,” and “Respecting Others.” It states that he had used offensive, disrespectful language in the Command Center when asked to swap duty with another member and created “a perceived hostile work environment.” The Page 7 states that although one-time, minor infractions are insufficient to affect EER marks, the applicant’s comment was “extremely inappropriate and you can anticipate lower than normal, not adverse, marks.”

The applicant alleged that he never saw this Page 7 until he submitted a FOIA request in March 2013.<sup>2</sup> Then, when he requested and received a copy of his official Headquarters record in January 2014,<sup>3</sup> he found the Page 7 in it with the words “member refused to sign. 30 NOV 12” initialed by his CO below the signature block where the applicant’s signature would have appeared. However, his record also contained a memorandum from the CO dated January 15,

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<sup>2</sup> The applicant submitted a copy of this FOIA request, in which he sought copies of documents “that originated from [the Sector],” including the convening order for the investigation, the ROI, and all “associated documents, attachments and interviews.”

<sup>3</sup> The applicant submitted a copy of his request for a copy of all his military records.

2013, in which the CO requested removal of the November 29, 2012, Page 7 from the applicant's record, but it was not removed. The applicant alleged that his CO intended for the Page 7 dated January 9, 2013, to replace the one dated November 29, 2012, but instead both remain in his record. The applicant alleged that the fact that he also received a copy of the November 29, 2012, Page 7 without the notation that he had refused to sign it pursuant to a FOIA request after the date his CO initialed it to indicate that he had refused to sign it "calls into question the legitimacy of the document."<sup>4</sup> In addition, he alleged, because he was never actually presented the Page 7, the handwritten notation that he had refused to sign it is false.

The applicant argued that the Page 7 dated January 9, 2013, should also be removed from his record. It describes the results of the investigation, his CO's actions, the revocation of his CO's recommendation for advancement, and his removal from the advancement list. The applicant stated that he refused to sign this Page 7 because he was not allowed to review the statements against him in the ROI and because his review of the FAM showed that it contained false information. He argued that the Page 7 alleges that in addition to the specific incidents described in the FAM, he was "inappropriate, abrasive, and demeaning," and put people's lives at risk. Yet, he was not allowed to see the evidence against him and so could not rebut the allegations. He argued that it was unjust for the Coast Guard to base potentially career-ending personnel actions on secret information.<sup>5</sup>

The applicant complained that the FAM states that he "likely violated" Articles 89, 91, 117, and 134 of the UCMJ, but he did not actually commit the misconduct described therein and the mistakes he made do not meet the elements of these crimes. For example, Article 91 of the UCMJ prohibits treating with contempt or disrespecting a petty officer, and the applicant argued that the only instances of misconduct described in the FAM that could be considered disrespectful of a petty officer are those numbered (2), (5), and (6) above. However, he has denied that (2) or (6) occurred as described in the FAM, and using the phrase "a cunt hair away," he alleged, is not sufficiently disrespectful or contemptuous to warrant a criminal charge under Article 91. Article 117, he stated, concerns the use of provoking words so as "to induce a breach of the peace under the circumstances." He argued that none of the language attributed to him in (1) through (6), above, could be considered likely to induce a breach of the peace under the circumstances, even assuming the descriptions of those incidents are accurate, which they are not. Similarly, the applicant argued that none of his language was "indecent," as required for a charge under Article 134 of the UCMJ. The applicant stated that the Manual for Courts-Martial defines indecent language as "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought." He argued that is also must violate military community standards, according to *United States v. Hullet*, 40 M.J. 189, 191 (C.M.A. 1994). The applicant argued that "[n]one of

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<sup>4</sup> The applicant submitted a copy of this Page 7, which he received pursuant to a FOIA request, which does not have the notation about his refusal to sign.

<sup>5</sup> The applicant submitted a copy of the response to his FOIA request, dated April 4, 2013, which states that 91 responsive pages had been found, 18 would be released, and 73 would be withheld, including the enclosures to the ROI, pursuant to either the Privacy Act and 5 U.S.C. 552(b)(6) or FOIA exemption 5 U.S.C. 552(b)(5) for "pre-decisional and deliberative process intra-agency material." The applicant also submitted a copy of his FOIA appeal, which argued that the redaction of 73 out of 91 pages did not show that the Coast Guard had made "reasonably segregable" parts of the evidence in the ROI available to him.



the language attributed to [him] can be said to have been ‘indecent’ under military law.” He alleged that language that is crass or profane is not necessarily indecent, and the language that he actually used, which is not as described in the FAM, was not indecent even if some did not like it. Therefore, the applicant argued, his CO clearly misunderstood the law, and his misunderstanding presumably negatively influenced his decisions about what personnel actions he should take against the applicant. He argued that because of his misunderstanding, the disputed EER and Page 7s should be removed from his record and he should be advanced to master chief as of July 1, 2013.

The applicant argued that his record should be corrected because an unintended consequence of his command’s action is his potential involuntary retirement pursuant to a Career Retention Screening Panel (CRSP). The applicant explained how the CRSP rules governing who is under consideration for retention or retirement have changed from year to year to include more and more members. The applicant stated that in 2014, for the first time, every member except Coast Guard musicians and those already slated for retirement was under consideration. He noted that he himself was not under consideration in 2014 because he did not have at least 19 years of service. However, he placed above the cut-off for advancement on the [REDACTED] advancement list resulting from the May 2015 SWE and so expects to advance in 2016 and will be under consideration by a CRSP if one is convened under new CRSP policies.<sup>6</sup> The applicant stated that although no CRSP was held in 2015, his command’s actions in 2012 and 2013 might unintentionally cause his separation pursuant to a future CRSP.

The applicant argued that it was erroneous and unjust for his command to “predicate potentially career-ending personnel actions on a report of investigation which [he] has never seen and which includes information [he] was never permitted to rebut.” The applicant stated that he filed repeated FOIA requests for the ROI, which were denied. Of 91 responsive pages, 18 were released and 73 were withheld. Although he appealed the withholding, his appeal was denied. He asked the Board to request a copy of the ROI pursuant to its authority at 33 C.F.R. § 52.43(b), and to provide him with a copy.<sup>7</sup>

To support his request, the applicant submitted many records, which are included in the summary below, and an affidavit signed by the Deputy Sector Commander, who wrote that the Sector Commander had delayed the applicant’s EER based on input from himself and others because the alleged misconduct had occurred during the marking period. He stated that the applicant is “exceptionally intelligent and remarkably competent in his field ... and his value to the Coast Guard cannot be overstated. I believed then that [he] could correct his behavior, and once corrected, he would be unlikely to engage in conduct of this nature in the future.” He stated that he and the Sector Command had “felt strongly that [the applicant’s] comments and conduct had a negative impact on the morale and welfare of the unit, and we wanted to correct that behavior. However, we did not intend to take any action that would end [his] career.” The

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<sup>6</sup> The applicant submitted copies of Coast Guard messages reflecting changes in CRSP policies.

<sup>7</sup> On December 8, 2016, the Chair asked the Coast Guard for a copy of the ROI. On December 12, 2016, the JAG’s office informed the Chair that the unit no longer retained a copy of the ROI, but that a copy of it without the enclosures (witness statements) had been obtained from the Convening Authority’s personal files. On December 13, 2016, the Chair provided a redacted copy of this ROI to the applicant, which was apparently the same as the redacted copy he had already received.

Deputy Sector Commander noted that the policy for the CRSPs had recently changed so that all retirement-eligible members would be considered, even those who were above the cut on an advancement list. He stated that had they known the policy would change, they would have tried to ensure that their actions would not trigger consideration by a CRSP. The Deputy Sector Commander concluded that the applicant's record should be corrected to ensure that [REDACTED] retained in the Coast Guard.

### [REDACTED] SUMMARY OF THE RECORD

The applicant enlisted in 1995. After attending [REDACTED] "A" School, he became a [REDACTED], advanced to first class petty officer [REDACTED], and then transferred to the [REDACTED] rating. He advanced to chief petty officer [REDACTED] in 2006 and to senior chief petty officer [REDACTED] in 2009. Significant documents in his prior record include a Letter of Commendation in 2000, Achievement Medals awarded in 2004 and 2010, a Commendation Medal awarded in 2010, Page 7s regarding "alcohol incidents" in 1996 and 1998, and a Page 7 referencing an incident of drinking and driving in 2005 and drinking despite a prior diagnosis of alcohol dependency in 2009, although this Page 7 notes that he had recently been found not to meet the criteria for the diagnosis based on his answers during another alcohol screening.

In June 2010 the applicant reported for duty at the Sector as the SCC Supervisor. On his first annual EER at the Sector, the applicant received primarily marks of 6 and 7 in the various performance categories, and he was recommended for advancement. In May 2012, he placed [REDACTED] on the [REDACTED] advancement eligibility list following the service-wide examination. At [REDACTED] he was above the "cut," meaning that he was slated to advance to master chief in 2013 or 2014 when there was an [REDACTED] vacancy for him.

In a "Decision Paper" dated November 20, 2012, which the applicant submitted, two junior officers proposed a revised structure of the chain of command within the SCC. One of these officer's was the male officer to whom the applicant had allegedly said something about "stuffing her hole" in response to a relayed female officer's request to swap duty in October 2012. The charts in this paper show that under the proposal, junior enlisted members would report to OSCs and "lead petty officers," who would report to junior commissioned officers, who would in turn report to the SSC Chief, the applicant's supervisor. The chart indicates that the applicant, as SCC Supervisor, would report to the SSC Chief but would not directly supervise others.

[REDACTED] disputed Page 7 dated November 29, 2012, and signed by the applicant's CO states that the applicant's behavior and conduct had been unsatisfactory and did not meet the minimum standards for the EER competencies "Working with Others," "Setting an Example," and "Respecting Others." The Page 7 states that in com[REDACTED] had received a complaint about an inappropriate comment the applicant had made "on or near the Command Center watch floor in October of 2012." The applicant had used "offensive language" to indicate that he would not swap duty with another Command Duty Officer (CDO), which w[REDACTED] ard by others and relayed to the officer who was the subject of the comment. The comment showed blatant disrespect toward a Coast Guard Officer, an unwillingness to work with others, and set a poor example. The biggest impact, however, was that you created a perceived hostile work environment for a



fellow CDO. This behavior is unacceptable, especially for somebody of your rank and position.” The CO noted that under Chapter 5.B.1.b. of COMDTINST M1000.2, “a one-time, minor infraction is insufficient to be classified as an adverse remarks entry on an EER. Your comment, however, was extremely inappropriate and you can anticipate lower than normal, not adverse, marks in the competencies listed above.” On November 30, 2012, the CO signed the Page 7 [REDACTED] indicating that the applicant had refused to sign the Page 7 in acknowledgement of the counseling.

**Investigation** [REDACTED]

[REDACTED] 30, 2012, the applicant’s CO designated [REDACTED] tenant (the IO) to investigate [REDACTED] against the applicant. The convening order stated [REDACTED] the Chief of the SCC had counseled the applicant about his alleged misconduct on a Page 7 signed by the CO, but that during the counseling session, the applicant had “denied making any of the alleged statements or actions and refused to sign [the Page 7].” Following further counseling by the Deputy Sector Commander, the investigation was requested “to formally document the facts.”

The ROI, dated December 20, 2012, includes written statements by and summaries of interviews with twenty officers, enlisted members, and civilians assigned to the SCC, which contain the following claims *inter alia*:

- A female petty officer reported that the applicant had repeatedly “made comments” to her [REDACTED] private matter and had “made her feel uncomfortable.” She had told the applicant that it was a private matter, but he had an “abnormal curiosity” about it and made comments in [REDACTED] c. She also told the IO that the applicant had used the phrase “just a cunt hair short” and made her feel uncomfortable while they were cutting a plastic table cover. Other witnesses confirmed that he had made this comment.
- A female enlisted member stated that the applicant “was a good guy, but can say things that come out the wrong way.” She stated that she is short and “top heavy” and that he had once referenced her breasts by saying, “those are nice ... I mean your boots.” She told her husband about it but then “simply tried to just forget about it.” A petty officer also mentioned this incident, and another reported having been told about it at the time by the female enlisted member.
- A petty officer reported hearing the applicant “talk down” to a female junior officer on numerous occasions and also use pet names for junior female enlisted members. The applicant called the female petty officer who was testifying at a court-martial by the name of a candy, which upset that petty officer.
- A junior officer reported that the applicant had said, “Oh, is that the homo car,” after an SCC member bought a Chevy Volt.
- About two months before the investigation, the applicant told a female junior officer who was leaving the SCC to go to the rest room to be sure to [REDACTED] her hands. The applicant said he was just trying to be funny, but the SCC Chief had replied that it was not very funny.

- Four members reported that the applicant had become very upset about a question posed during an all-hands about chiefs' qualifications, which embarrassed him, and he used the word "fuck" in front of another member's daughter. An OSC reported that the applicant had reacted harshly but not inappropriately. The OSC whose daughter was present stated, however, stated that the applicant used no foul language in front of his daughter. [REDACTED] OSC denied that there was any problem with the work climate at the SCC and stated that the applicant did not yell or belittle people but pointed out issues in a "very politically correct manner." [REDACTED]
- Four [REDACTED] members reported that during an all-hands training at the start of the 2012 hurricane season, the applicant had referred to a geographical reason as a clitoris. Another recalled [REDACTED] him comparing it to a vagina. [REDACTED]
- Two members stated [REDACTED] the applicant had once told a lieutenant to "shut the fuck up." The lieutenant in question stated only that the applicant's use of the word "fuck" was excessive.
- An officer and a chief petty officer reported having heard the applicant say "does the carpet match the drapes" while standing with the CO while he was judging the mustache contest.
- According to a male junior officer's statement, "on or around" noon on October 23, 2012, near the chart table in the SCC, the applicant had stated that the female junior officer's scheduling complaints were not fair to the SCC Chief, who would have to decide who [REDACTED] was more important—someone who is married and wants to spend time with [REDACTED] their family or someone who is single and wants to—according to various statements—"fill a hole," "fill [REDACTED] le," "stuff a hole," or "stuff her hole." More than one junior officer reported hearing this comment. The female junior officer in question, who was not present at the time, was the only unmarried member of the CDO watch section. She provided the IO with an email showing that on October 24, 2012, she asked another junior officer to swap watches and noted that four others, including the applicant, had stated that they could not swap. In the reply, the other junior officer stated regarding the applicant and the OSC, "I think it's crap that they don't give you the same sort of help that they give someone with a family. There shouldn't be any difference." According to the ROI, the IO asked the male junior officer to confirm the exact date of this conversation, but he could not and said that it might have occurred on one of his other duty days, such as October 17 or 19, 2012.
- In an email dated October 27, 2012, another junior officer informed the SCC Chief that there was "vast discontent" among the watch-standers at the SCC, stemming primarily from the applicant's "condescending attitude," "the lack of supervisory interest in the crew," several conflicts between the applicant and crewmembers, and tension felt throughout the SCC.
- On November 15, 2012, a junior officer informed the Response Department Head that four members of the SCC had complained to the junior officer [REDACTED] at the applicant had said, with respect to scheduling watches, that time off for people with a family was more important than time off for single people.

- On November 16, 2012, a junior officer informed the Response Department Head that the junior officers who were standing watches at the SCC as a collateral duty were being assigned more watches than the members actually assigned to the SCC and were being assigned more weekend and holiday watches. The junior officer sent an email showing the number of watches each CDO had been standing for several weeks, which applied to support the claim. Another officer assigned to the SCC also supported this claim. However, the SCC Chief denied it and advised the IO that his data showed that the CDOs had stood approximately equal numbers of watches over the past several months.
- On November 16 or 17, 2012, a male junior officer informed a female junior officer that in a conversation with the applicant regarding watch swapping, the applicant had said that he did not think he should have to switch watches and that the female junior officer “can go stuff a hole.”
- On November 17, 2012, a junior officer informed the Response Department Head that the applicant “continually interacts with me in a demeaning manner” and that the junior officer was considering reporting the applicant to the Civil Rights Office.
- On November 20, 2012, a male junior officer informed the Response Department Head that he perceived that women at the SCC—both officers and enlisted—were treated differently than men and had had negative experiences with the applicant. The junior officer “continued to share other observations regarding [the applicant] and his treatment of the junior officers and enlisted members” at the SCC.
- November 26, 2012, the Command Master Chief informed the SCC Chief about the alleged “stuff her hole” remark. The SCC Chief discussed it with the Response Department Head November 28, 2012, and based on his recommendation, they agreed on issuing a Page 7, and the SCC Chief drafted it.
- One junior officer reported that on November 27, 2012, during a discussion of scheduling issues at a meeting, the applicant “went off in an aggressive manner about how [the junior officer was] not a team player,” was not “pulling their weight,” and offered to mentor the junior officer. Two other junior officers stated that their discussion got heated and emotionally charged but that neither said anything unprofessional, outright disrespectful, or discriminatory.
- The SCC Chief reported this incident differently and stated that the female junior officer became upset first after both he and the applicant stated that the watches were to be shared equally and had been shared equally between those assigned to the SCC on a permanent and collateral duty basis. The female junior officer did not agree because she was assigned to another branch, was not an OS, and had other duties. The applicant in turn became angry and told her that none of their billets were designated as CDO watch-standing billets and that the command wanted the junior officers to gain experience by standing watches. They were both “red in the face” and both raised their voices and failed to show appropriate respect for each other. The applicant then stated that he “had the benefit of being involved in command level discussions. He said he wants to be [a] source of experience and knowledge for the JOs when they are over at the Command Center and that’s why he likes to offer his advice.” The SCC Chief did not recall the applicant singling anyone out or telling anyone they did not pull their weight or that they

were not a team player. After the meeting, he told the junior officer that he was upset and disappointed about “her attitude towards standing the watch” but agreed that the applicant had spoken disrespectfully to her as an officer.

- On November 29, 2012, the Command Master Chief and CO concurred with the Page 7 drafted by the SCC Chief. During the afternoon, the SCC Chief discussed the Page 7 with the applicant, who according to the SCC Chief, then “read the Page 7.” The applicant adamantly denied making the “stuff her hole” comment and stated that his words had been misconstrued or entirely made up. The applicant was upset that the Page 7 had been drafted before he was consulted and stated that he had been found guilty without a chance to defend himself. They went to consult the Command Master Chief and the female junior petty officer join them. The applicant acknowledged that they had had a poor working relationship and apologized, not for the alleged comment, but for how she must have felt if she believed he had made the comment. The SCC Chief and the Command Master Chief agreed that the matter required further investigation. The SCC Chief informed the CO of these events, who informed the Deputy Sector Commander that the applicant had refused to sign the Page 7. The applicant went to the CO to discuss the allegations. The Sector command decided to convene an investigation.

Members of the SCC also made the following general observations in their statements to the IO:

- Officers and enlisted members stated that the applicant frequently spoke to them in a condescending, demeaning, or aggressive tone and did so in front of others, instead of in private. A officer stated that the applicant “appears to believe he has the same authority (virtual rank) as the junior officers and will often speak to them in a demeaning and disrespectful manner. [He] can also be dismissive to junior officers in the workplace.” Some stated that the applicant failed to listen and became unnecessarily angry and aggressive on certain occasions. A chief petty officer and a civilian who had worked at the SCC for several years stated that the applicant targeted and challenged the junior officers at the SCC and was disrespectful, condescending, and rude. The civilian stated that the applicant knew whom he could “mess with” and exploited the junior officers’ vulnerabilities.
- Both officers and enlisted members reported that the applicant would not consider others’ suggestions. A junior officer had seen “on many occasions, arguments and disagreements on any number of issues turn for the worse because of [the applicant’s] unwillingness to negotiate or accept other perspectives.” Some enlisted members had complained that the applicant was unwilling to accept proposals not created by him. Another junior officer stated that it was the applicant’s “way or the highway.” A chief petty officer stated that the applicant would throw a fit whenever someone disagreed with him.
- Both officers and enlisted members told the IO that the SCC climate was not positive or healthy. A petty officer stated that “morale is not low, it existent.” Another called it “miserable.” Several junior and senior enlisted members had complained about the applicant to junior officers. Some stated that many if not all junior officers and enlisted members at the SCC had had issues with the applicant and that there were particular conflicts between the applicant and an OSC and between the applicant and a female junior

officer. A junior officer stated that “the enlisted work climate is at its worst due to [the applicant’s] abrasiveness. [He] can be demeaning during work and no one wants to work with [him] on watch.” Another stated that the applicant has “an extremely abrasive personality that could be a catalyst in creating an overall hostile/tense environment for enlisted and officers.” Several enlisted members stated that they tried to avoid █████ assigned to watches with the applicant. Another stated that the “enlisted are very disgruntled and extremely unhappy” and, regarding the applicant, that it is “hard to set an example when you d █████ ad by example.” One enlisted member said he felt “defeated” by the a █████ t and was “just tuning stuff out now.” Another stated that five OS petty officers had claimed that they might not reenlist because of their experience with t █████ █████. █████ enlisted member reported that morale w █████ oticeably higher” when the █████ █████ esent.

- Some witnesses stated that the SCC Chief let the applicant run the SCC and that if they complained to the SCC Chief, they would inevitably hear back about it from the applicant. Several stated that they had stopped objecting to things for fear of “blowback” from the applicant, and all of the SCC enlisted members interviewed expressed “MAJOR concern of blowback from talking to [the IO].” A few expressed fear of workplace violence from the applicant.
- A superior officer told the IO that he was surprised by the allegations against the applicant because the applicant had “never said anything remotely sexist, racist or discriminatory in the past.” However, he noted that the applicant would argue his view about work █████ passionately and was sometimes “losing sight of rank structure,” especially in stressful situations, because of the “rank reversal situation” in the SCC where some of the commission █████ cers had much less experience. The officer stated that the applicant “often finds himself in positions where he believes arguments or heated discussions are necessary. This can make him difficult to work with. He also can come across as brash, hot-headed, and rough around the edges. These qualities make him less than respectful when he is passionately arguing towards the resolution of a work related issue. For these reasons he has had some issues communicating with and showing respect for others. By no means does this make him sexist, racist, or discriminatory in any way. I have never witnessed an instance of [him] treating anybody unfairly.” He stated that the applicant had been abrasive and lacking in tact with both officers and enlisted members at the SCC.
- Those interviewed stated that the junior officer who first reported hearing the “stuff her hole” comment is a credible and reliable person.

On December 13, 2012, the IO sent the applicant an email stating that he was investigating the applicant’s alleged misconduct because he had been counseled by his supervisor on a Page 7, which the CO had signed, but the applicant during the counseling session, the applicant had “denied making any of the alleged statements or actions and refused to sign. Following further counseling by the Deputy Sector Commander, CDR [], an administrative investigation was requested to formally document the facts regarding this alleged incident. Violating Article 89 of the Uniform Code of Military Justice (Article 89—Disrespect toward a superior commissioned officer).”



On December 13, 2012, the applicant acknowledged understanding his rights and signed a statement concerning the allegation that he had violated Article 89 of the UCMJ by disrespecting a superior commissioned officer by saying “stuff a hole” when indicating that he was unwilling to trade duty with a junior officer. The IO’s notes of their interview indicate that the applicant denied ever making a comment about “stuffing a hole,” showed that he had swapped watches with the female junior officer on prior occasions, opined that she did not like him or appreciate his feedback. The applicant expressed surprise about the source of the “stuff a hole” comment and stated that he respected that male junior officer and was “not aware of any reason that [the male junior officer would] fabricate or make up a comment.” The applicant then stated that the male junior officer had changed his demeanor recently, had aligned himself with the enlisted members, and had advocated for them.

The applicant also wrote a statement for the investigation in which he noted that the IO had told him that he had been accused of making this comment on October 23, 2012. The applicant denied having made such a comment and denied having been at work on October 23, 2012. He had stayed home with a sick child that day,<sup>8</sup> and returned to work on October 24. He noted that he had agreed to trade duties with that junior officer on October 17, 2012, and on November 5, 2012, and that he had traded duties with her and others in the past.<sup>9</sup>

The IO reported the following opinions based on the evidence in the ROI:

- The applicant “feels he can make comments either borderline or outright offensive in nature with little regard for punitive action or reporting by subordinates.”
- The applicant is “self-absorbed with authority ... to the point of insubordination when it involves junior officers.”
- The applicant has “an abrasive, intimidating, and condescending demeanor toward all command center personnel (enlisted, officer, and civilian) which discredits his leadership ability, isolates his subordinates and degrades crew morale. These actions have significantly contributed to the formation of a toxic work environment.”
- “[A] majority of command center personnel interviewed expressed significant concern of retaliation by [the applicant] for their part in the investigation, dependent on the outcome. This perception is based on previous examples of personnel attempting to address issues within the [SCC] with [the applicant].”
- “Several command center personnel have utilized their chain of command to present or discuss concerns privately.”
- A majority interviewed reported that the applicant ran the SCC with little oversight or correction by the SCC Chief.

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<sup>8</sup> The applicant submitted a copy of an email he sent at 7:21 a.m. on October 23, 2012, stating that his child became ill after his wife had already left for work and so someone would need to attend a meeting for him that morning. In other emails dated October 23, 2012, he told his wife that they had a 10:20 a.m. appointment with the pediatrician and told his child’s teacher that the child was sick and would be staying home.

<sup>9</sup> The applicant submitted copies of emails showing occasions in October and November when he had agreed to trade duties with the female junior officer.

The IO recommended that the applicant be charged with violating Articles 91, 107, 117, and 134 of the UCMJ and punished at mast; that he be removed from his position and undergo civil rights training; and that he not be recommended for advancement on his EER, which would remove his name from the master chief advancement list.

### *Final Action Memorandum*

On January 8, 2013, the Sector Commander signed the FAM for the investigation. The FAM states [REDACTED] ROI had “revealed a consistent pattern of inappropriate, derogatory and/or sexually oriented comments” by the applicant at the SCC. The FAM expressly ment [REDACTED] at the applicant’s comments about “stuff [REDACTED] le,” the geographical clitoris, [REDACTED] breasts and boots, the cunt hair, and the use of the [REDACTED] “fuck” in front of the OSC’s daughter. The [REDACTED] states that the ROI showed that the applicant had “repeatedly engaged in behavior and comported himself in a manner that is inappropriate, abrasive, demeaning, disrespectful, and detrimental to an effective work environment at the SCC, which had become a “toxic workplace” as a result of his conduct, leadership style, excessive profanity, and inappropriate comments. It states that the ROI showed that inappropriate and vulgar language by the applicant had constituted prohibited harassment and had become the norm at the SCC. It states that he had demonstrated a lack of respect for the command structure through his interactions with junior officers and that he had failed to set a “leadership example.” The FAM states that he had discredited his leadership ability, degraded the crew morale, and failed to instill a sense of cohesion and teamwork. The FAM states that the applicant is easily agitated, quick [REDACTED] anger, [REDACTED] willing to listen to others. It notes that members had not promptly complained about the applicant’s words and conduct due to fear of retaliation because of his influence over the watch schedule [REDACTED] their qualifications.

The FAM states that the applicant had violated policy and in direct violation of the Coast Guard’s core values had contributed to a workplace climate that was not free of harassing behavior and that failed to offer everyone the opportunity to achieve their full potential. It states that he had likely violated Articles 91 (insubordinate conduct toward a non-commissioned or petty officer with disrespectful language); 89 (disrespect toward a superior commissioned officer); 117 (provoking speeches or gestures); and 134 (indecent language).

The FAM concludes that the applicant would be counseled on a Page 7; would have his conduct reflected in his November 30, 2012, EER; would not be recommended for advancement; would lose his qualifications as a CDO and SAR Mission Coordinator; would be removed from the [REDACTED] advancement list; would be relieved of his primary duties and removed from the SCC; would be temporarily assigned to administrative duties; and would then be permanently reassigned.

[REDACTED]

A Page 7 dated January 9, 2013, and signed by the Sector Commander states that the applicant’s recommendation for advancement had been revoked and that as a result, his name had been removed from the advancement list for master chief ([REDACTED]/E-9). The CO cited the information in the FAM dated January 8, 2013, which was based on the ROI, “which documented an unacceptable trend of unprofessional conduct, including offensive and inappropriate comments made by you, that created a hostile work environment in the Sector Command Center. ...

[T]he investigation revealed that your behavior towards subordinates and superiors is not in accordance with the standards expected of a member of our service, much less a Senior Chief Petty Officer in a position of great trust, responsibility and leadership over both junior and senior members. You have engaged in behavior and comported yourself in a manner that is inappropriate, abrasive, demeaning to your shipmates, disrespectful to your superiors, and detrimental to the effective command center environment and cohesive watch team, which is essential to effective execution of a mission where life and death actions and decisions occur on a daily basis.” The CO described the Commandant’s expectations of members and supervisors regarding professionalism and the command center environment. He also noted that “due to a loss of confidence in your ability to effectively lead and manage, you are relieved of all duties for Command Center related to the [redacted] Duty Officer, SAR Mission Coordinator and Command Center Chief. [redacted] and SMC are revoked. You will be temporarily assigned to other duties commensurate with your paygrade pending final decision by Personnel Services Center regarding a permanent change of duty station.” He recommended that he take or retake certain training and seek the counsel of the Sector Command Master Chief. In the block for the applicant’s signature, two officers signed a statement that the applicant had refused to acknowledge the Page 7 with his signature.

The applicant’s regular, annual EER for the period ending November 30, 2012, was completed on January 9, 2013. The EER contains numerous high marks of 5, 6, and 7 (on a scale of 1 to 7, with 7 being best) but below standard marks of 3 for “Respecting Others” and “Human Relations,” an unsatisfactory conduct mark, and a mark of Not Recommended for Advancement. The low mark of 3 for “Respecting Others” is supported by comments concerning “a disturbing trend of unprofessional conduct ..., including disrespectful, harassing and/or offensive comments, which have directly resulted in an extremely unhealthy work environment” and “negatively impacted morale, unit cohesion, and mission effectiveness.” The mark of 3 for “Human Relations” is supported by comments concerning “harassing and/or offensive comments of a sexual nature, which have directly resulted in an extremely unhealthy work environment” and his “demonstrated lack of commitment to the Coast Guard’s Human Relations/Sexual Harassment policy.” The comment for the unsatisfactory conduct mark cites the ROI, “which documented a disturbing trend of unprofessional conduct not in keeping with CG Core Values.” The comment for the mark of Not Recommended for Advancement likewise cites the ROI for revealing “a disturbing trend of unprofessional conduct that has directly contributed to an extremely unhealthy work environment in the Sector Command Center. At this time [he] is not capable of satisfactorily performing the duties and responsibilities of a Master Chief in the USCG.” The applicant acknowledged the EER and his right to appeal it within fifteen days by signing it on January 13, 2013.

On January 13, 2013, the Sector command sent a message to the Personnel Service Center (PSC) removing the applicant’s name from the [redacted] advancement eligibility list pursuant to Article 3.A.13.b. of COMDTINST M1000.2, because the “command has revoked recommendation for advancement” based on the ROI, the FAM, and the Page 7 dated January 9, 2013.

A memorandum to PSC dated January 15, 2013, which bears a signature similar to that of the applicant’s CO, requests the removal of the Page 7 dated November 29, 2012, from the appli-

cant's record. The applicant stated that he received this memorandum when he requested a copy of his record from the unit's Servicing Personnel Office, but it is not in his Headquarters record.

In 2014, the applicant was eligible to compete for advancement because he had been recommended for advancement by the CO at his new unit. He placed first on the [REDACTED] advancement eligibility list resulting from the service-wide examination in May 2014, but the "cut" for advancement was zero. Following the 2015 service-wide examination, the applicant was again first on the [REDACTED] advancement eligibility list, the cut was at #2, and the applicant advanced to [REDACTED] in 2016.

#### VIEWS OF THE COAST GUARD [REDACTED]

On June 23, 2016, [REDACTED]ge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum on the case prepared by PSC.

Based on the records and an affidavit of the CO, which is summarized below, PSC recommended denying relief. PSC stated that the CO acted well within his authority in issuing the Page 7 dated November 29, 2012, and the EER and in revoking his recommendation for advancement. PSC stated that the applicant has not submitted sufficient evidence to suggest that any of the actions in this case were inequitable, unjust, or erroneous and that he has not proven that that he was miscounseled or that his CO requested the removal of the November 29, 20 [REDACTED] Page 7, [REDACTED] he denies. [REDACTED]

Regarding [REDACTED]y of the EER, PSC stated that it should not have been delayed but that the Approving Official for an EER is authorized to change any numerical mark on an EER if the Approving Official receives new information as long as the member is still assigned to the unit. Therefore, even if the rating chain had prepared an EER promptly in December 2012, upon receiving the ROI, the Approving Official could have changed the marks to reflect those he approved in January. Therefore, the applicant would have received the low marks and non-recommendation for advancement on his November 30, 2012, EER whether it was prepared in December 2012 or January 2013. In addition, PSC noted, a member is not permitted to appeal a non-recommendation for advancement. Accordingly, PSC recommended denying all of the requested relief.

#### *Declaration of the CO*

In a declaration dated May 4, 2016, the CO wrote that he does not support the applicant's request and claimed that the applicant had not fully and fairly presented the facts. He stated that the applicant's request for the full ROI was denied [REDACTED]he advice of Coast Guard attorneys to protect the privacy of the witnesses.

The CO stated he signed the November 29, 2012, Page 7 [REDACTED]d by the SCC Chief, and the SCC Chief counseled the applicant about it. The applicant's reactions were later relayed to her. He was told that after reading the Page 7, the applicant had "stormed out and ran into the Command Cadre Suite (Sector Commander, Deputy Sector Commander and Command Master



Chief ...) burst open the door and yelled out “this is crap” (or something to that effect) regarding his objections over the [Page 7]. The Deputy Sector Commander heard the commotion and brought [the applicant and the SCC Chief] in for further discussion in private.” As a result of that discussion, the Sector Commander told the CO to convene an investigation of the allegations. He did so and gave the IO a copy of the Page 7 as it had been presented to the applicant during the counseling session. Then he took the original of the Page 7, noted on it that the applicant had refused to sign it, and signed his note. The CO stated that the applicant’s claim that he was never presented the Page 7 is “not factual” because he read it and refused to sign it.

The CO stated that the investigation of the allegations was “fair and impartial.” The disturbing trend of offensive and/or inappropriate comments, often with a sexual nature, [redacted] applicant].” Such comments were routine and [redacted] not reported due to fear of retaliation. He [redacted] t the applicant had denied making some of the comments, but argued that the EER comments were fully supported by the evidence. He affirmed that the disputed EER is accurate and true.

The CO stated that he finds it “hard to believe” the applicant’s allegation that the Deputy Sector Commander had told him that his EER marks could be lowered if he appealed them. He noted that as a senior chief, the applicant “is well aware of the EER appeals process” and must know that the advancement recommendation is not appealable. He noted that to recommend a member for advancement, a CO must be persuaded that the member is “fully capable of satisfactorily performing the duties and responsibilities of the next higher grade” and that the recommendation must 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 grade.” The CO stated that the applicant had failed to demonstrate qualities of leadership, personal integrity and adherence to core values and so had not been recommended for advancement.

The CO stated that the January 9, 2013, Page 7 was signed by the Sector Commander to document his loss of confidence in the applicant’s leadership ability and the applicant’s loss of his CO’s recommendation for advancement and removal from the advancement list, which was within his authority. The CO noted that a CO may revoke a recommendation for advancement at any time during the evaluation period.

The CO stated that the applicant’s claim that he had not been counseled before January 8, 2013, is not factual because he was counseled on November 29, 2012, but refused to sign that Page 7. The CO stated that the applicant was treated fairly and provided guidance by himself and [redacted] mmand Master Chief throughout the process.

Regarding the memorandum purportedly signed by the CO on January 15, 2009, which requests removal of the Page 7 dated November 29, 2009, the CO stated that he maintains an extensive history of personnel records, including those of the applicant and records of the investigation, and that he has thoroughly searched those records and all of his emails for evidence that he ever prepared or signed a memorandum requesting the removal of the Page 7 dated November 29, 2009, and could find none. Nor does he believe that he ever generated such a request. He noted that the FAM had not directed the removal of the November 29, 2009, Page 7, and he stated that it should remain in the applicant’s military record.



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

The applicant was granted an extension of the time for responding to the advisory opinion and submitted a response on September 16, 2016. [REDACTED]

The applicant repeated the arguments made in his application. He noted that the advisory opinion did not address [REDACTED] of his claims, such as his absence from the SCC on October 23, 2012—the date of his alleged “go stuff a hole” comment; his claim that the credibility of the junior officer who made the allegation was suspect; his claim that he did not make the [REDACTED] [REDACTED] of people; his claim regarding the [REDACTED] of his comment during the [REDACTED] allegation that the CO invited his response by [REDACTED] commenting on the contestant's different hair [REDACTED] or did PSC address his denial that he had made the breasts and boots comment or that he had said “fuck” during an all-hands in the presence of a child, or the denial of the father's own child that he had said “fuck.”

The applicant argued that PSC's claim that the Approving Official could have changed the EER marks when the FAM was finished does not negate the applicant's claim that the command had failed to submit the EER timely as required. The applicant alleged that had his rating chain completed the EER on November 30, 2012, his marks would likely have been substantially different.

[REDACTED] applicant noted that he still has not been shown the full ROI with the witnesses' statements and so he could not rebut the allegations against him. Nor can he know whether the ROI contains information [REDACTED] favorable to him or matters that he could explain if he knew about them.

The applicant argued that because the CO was not present when the SCC Chief counseled him on November 29, 2012, the CO cannot know whether the applicant saw and read the Page 7. Nor can the CO know whether the applicant was familiar with the EER appeal process. The applicant stated that he was just as entitled to accurate EER counseling as any other enlisted member. Moreover, on behalf of the applicant, his attorney claimed that the Deputy Sector Commander told her over the phone that although he cannot recall counseling the applicant about an EER appeal, if he had counseled him, he likely would have told him that his marks could be lowered if he appealed them. He told the applicant's attorney that in his experience, EER marks “are often lowered as a result of an appeal.” However, when he submitted his statement on the applicant's behalf, he omitted this information. The applicant argued that based on his own sworn statement and his counsel's sworn statement, he has proven by a preponderance of the evidence that the Sector Deputy Commander improperly dissuaded him from appealing his EER marks. [REDACTED]

Concerning the memorandum dated January 15, 2013, the applicant argued that while the CO claims that he cannot recall generating it, the simplest answer [REDACTED] that he did in fact sign it but does not remember. She stated that the applicant discovered the memorandum when reviewing the local copy of his military record at the Sector's Servicing Personnel Office (SPO) and had never seen it before. Moreover he was “under a microscope” at the time and would not have

formed such a document. He noted that the memorandum references a first class yeoman (YN1), so it was likely the YN1 who prepared it. The applicant submitted a statement from the YN1 who wrote that the memorandum was likely prepared by him or some other yeoman at the SPO. Moreover, the applicant alleged, the signature is the same as that on other documents signed by the CO. [REDACTED]

The applicant also argued that it makes sense that the November 29, 2012, Page 7 would have been removed by [REDACTED] command because the conduct described therein is included in the Page 7 dated [REDACTED] y 13, 2013. He also noted that the two Page 7s were premised on the same allegations but that one preceded the investigation and on [REDACTED] was completed later. [REDACTED]

### [REDACTED] SUBSEQUENT PROCEEDINGS [REDACTED]

Although the Sector's copy of the ROI had been destroyed since 2012, the Chair obtained a copy of it through the JAG and the Coast Guard's FOIA office, which had retained it pursuant to the applicant's March 2013 FOIA request. The redaction removed the witnesses' names (but not their ranks) and statements. The Chair sent a redacted copy of the eight-page ROI to the applicant's counsel, in accordance with 33 C.F.R. 52.43(c). The applicant submitted a response on February 3, 2017. The applicant's counsel stated that the redacted documents were the same as those that she had been sent by the FOIA office and that because they had not seen an unredacted copy, he could provide no additional substantive comments. He stated that it "would be manifestly unfair to him for the Board to consider the redacted information" that he has r [REDACTED] seen. H [REDACTED] d the Board not to consider information that was not provided to him. [REDACTED]

### [REDACTED] APPLICABLE REGULATIONS

The Enlisted Manual in effect in 2012 and 2013, COMDTINST M1000.2, contains the following provisions regarding EERs and advancement within the enlisted ranks:

Article 5.E.1.b., "General Guidance," states in paragraph (2) that regular EERs "may not be delayed" and the rating chain must ensure that the EER is entered in the Direct Access database for the applicant to acknowledge within 30 days of the evaluation period end date. Senior chiefs, such as the applicant, receive EERs annually every November 30<sup>th</sup>.

Article 5.E.2. concerns "Unscheduled EERs," which may be prepared for administrative reasons not applicable here; upon a member's receipt of non-judicial punishment or conviction in mili [REDACTED] civil court; when a member is reduced in rate; and for the relief-for-cause of a commanding officer or officer in charge. If the need for an unscheduled EER coincides with the end date for a regular EER, the command should prepare a regular EER unless the unscheduled EER is disciplinary. [REDACTED]

Article 5.G.4. states that the "Approving Official's decision on the advancement recommendation is final and may not be appealed," although members [REDACTED] appeal the other marks on an EER.

Article 3.A.4.e.(4) states the following about an advancement recommendation:

The CO/OICs 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 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.5.a. states that “[i]ndividuals recommended for advancement to senior chief petty officer and master chief petty officer must be superior in leadership, military characteristics, technical knowledge, and performance of duty. They must be professionally qualified to fill any chief petty officer billet of their rating.”

Article 3.A.19.d., “Cancellation of Advancement,” states the following:

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.

### 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 10 U.S.C. § 1552. The application was timely.

2. The applicant asked the Board to correct his record by removing two Page 7s and an EER, reinstating his Good Conduct Medal eligibility period, and backdating his date of advancement to ████████ to July 1, 2013, with entitlement to back pay and allowances. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>10</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>11</sup>

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<sup>10</sup> 33 C.F.R. § 52.24(b).

<sup>11</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).

3. The applicant alleged that the disputed Page 7s and EER should be removed from his record because they are based on false accusations. The applicant submitted arguments concerning the six specific alleged incidents that the Approving Official relied on and entered in the FAM. For the reasons stated below, the Board finds that the applicant has not proven by a preponderance of the evidence that the FAM (or the ROI) is erroneous or unjust regarding the six incidents and so the applicant's claims regarding them do not warrant removal of the Page 7s or the EER:

- a. “Go stuff a/her hole”: The Board finds that the applicant has not proven by a preponderance of the evidence that his Approving Official erred in relying on the veracity of the junior officer who made this accusation. Although the applicant denied making any such statement, claimed that he was not present on the day in question, showed that he had recently swapped duty without complaint, and claimed that his accuser made this false accusation because the applicant had objected to the accusers proposal for restructuring the chain of command in the SCC, the ROI shows that everyone questioned supported the credibility and reliability of the junior officer who made the accusation, and the applicant himself told the IO that he did not know of any reason why that officer would have accused him of making this comment. The junior officer stated that the comment was made on or about noon on October 23, 2012, in response to his mentioning a female officer's request to swap duty, when the applicant was home with a sick child, but the junior officer's description of the incident indicates that he was not sure of the exact day or time, although he insisted that the applicant had made the comment. In addition, the junior officer reported the crude comment on November 16 or 17, 2012, before the November 20, 2012, proposal for restructuring the chain of command, and an email shows that the female officer about whom the comment was made was searching for someone to swap duty with her on October 24, 2012, when the applicant was at work. Moreover, the comment is not inconsistent with the tenor of the applicant's abrasive, rude, and condescending language toward the female officer and other junior officers as described in numerous witness statements gathered by the IO.
- b. Calling a geographic region a “clitoris” during an all-hands meeting: Although the applicant denied having made this comment during an all-hands meeting, three petty officers reported to the IO that they had heard him make the comment during an all-hands training at the start of the 2012 hurricane season, and another recalled him comparing the region to a vagina. Therefore, the preponderance of the evidence supports the description of this incident in the FAM.
- c. Asking “Does the carpet match the drapes” during a mustache-growing contest: Although the applicant alleged that he actually asked whether the curtain matches the drapes, instead of the carpet, which refers to pubic hair, a lieutenant and a petty officer as well as the CO told the IO that he had said “does the carpet match the drapes.” Therefore, the preponderance of the evidence supports the FAM's description of this incident. In addition, the Board does not agree that the CO “invited” his comment by holding the contest and mentioning that the color of a contestant's mustache did not match the color of his hair.
- d. “Those look nice ... I mean your boots”: The applicant categorically denied ever making this sexually inappropriate comment to a female non-rate, but her description of the

incident in the ROI is convincing and two other petty officers told the IO that she had told them of the incident soon after it occurred. The Board finds that the preponderance of the evidence supports the FAM's description of this incident.

- e. "A cunt hair away [or short]": The applicant could not deny that he had sometimes used this term and stated that he "regrets that anyone was offended by it." One female petty officer reported that he had made this comment while cutting a plastic table cover. Another petty officer stated that the female petty officer had complained about the applicant's comment at the time, and a third petty officer stated that the applicant had made the same comment regarding the installation of new televisions at the SCC. Therefore, the preponderance of the evidence shows that the applicant had made the comment during the evaluation period for the EER.
- f. Saying "fuck" to a petty officer at an all-hands training in front of a Coast Guard family member: The preponderance of the evidence shows that the applicant made this comment even though the applicant and father of the child who was present at the training deny it. The ROI shows that a few members told the IO that the applicant had used the word "fuck" at the all-hands where the child was present. The alleged use of profanity is not inconsistent with many other witnesses' descriptions of the applicant's temperament and language. One lieutenant told the IO that the applicant's use of the work "fuck" was excessive.

4. Lack of access to witness statements: The applicant argued that it was unjust for the Coast Guard to take administrative action against him based on witness statements that he was not privy to. He also alleged that he could not appeal the EER because he could not see the witness statements. However, federal agencies are not prohibited from taking administrative action based on information that is protected under the Privacy Act or that cannot be revealed for other reasons. In addition, the Board's own rules at 33 C.F.R. 52.43(c) provide that when the Board receives an ROI from the Coast Guard, the applicant receives only a redacted copy of it. The FAM, which was provided to the applicant, describes all of the specific incidents that were reasonably substantiated by witnesses in the ROI. The FAM also summarizes the witnesses' more general comments about the applicant's conduct, language, and demeanor in the SCC. The redacted ROI likewise summarizes the specific and general comments, albeit without identifying the witnesses except by rank and rate. It is clear from the application, moreover, that the applicant has identified several of the witnesses. The Board is not persuaded that the applicant was denied a fair opportunity to appeal the EER based on his lack of access to the witness statements.

5. Toxic work environment: The applicant has not proven by a preponderance of the evidence that his command erred in concluding that he had created or greatly contributed to a toxic work environment with inappropriate, abrasive, disrespectful, and condescending language and conduct. Only two of the twenty witnesses interviewed failed to describe such conduct by the applicant, and most indicated that it was so frequent as to characterize his leadership at the SCC. The ROI strongly supports the claim in the FAM that the applicant had created a toxic workplace in the SCC. The applicant has not proven by a preponderance of the evidence that the description of his conduct in the FAM is erroneous or unjust or that the administrative actions taken based on the FAM were erroneous or unjust because he was not shown the witnesses' names or statements.



6. Delay of EER: The applicant has not proven by a preponderance of the evidence that he would have received a better regular EER if his command had not delayed completing the EER while the investigation was completed. Pursuant to Article 5.E.1.b.(2), a regular EER “may not be delayed” and must be entered in the Direct Access database for the applicant to acknowledge within thirty days of the end of the evaluation period. Therefore, his command should have entered the EER in the database by December 30, 2012, and instead entered it ten days late on January 9, 2013. The applicant’s argument that his marks would have been better had the EER not been delayed ignores the fact that by December 30, 2012, the command was already well aware of many of the allegations against him, as proven by the Page 7 dated on November 29, 2012. This Page 7 notes that his conduct had not met the minimum standards for the EER competencies “Working with Others,” “Setting an Example,” and “Respecting Others.” Because the expected standard is a mark of 4,<sup>12</sup> this Page 7 shows that the command already expected to mark the applicant lower than a 4 in those three categories before the end of the evaluation period. Moreover, the command had the complete ROI by December 20, 2012, and so was fully aware of all the allegations against him before the deadline for completing the EER. Although the FAM for the investigation had not yet been drafted, the Board is not persuaded that he would have received better marks or been recommended for advancement had his rating chain not delayed completion of the EER by ten days. There is no evidence that his rating chain gained new adverse information during the delay from December 30, 2012, to January 9, 2013.

The applicant also alleged that he was prejudiced by his command’s decision to delay the EER for ten days from December 30, 2012, to January 9, 2013, because he would have been entitled to more due process if he had received an “unscheduled” EER after receiving a regular EER for the period ending November 30, 2012. The applicant did not explain but presumably he means that if his command had timely prepared the regular EER and had also decided to prepare an unscheduled EER, the command would have had to take him to mast or court-martial in order to meet the criteria for an unscheduled EER under Article 5.E.2. of the Enlisted Manual. This argument assumes, however, that the regular timely EER would have been much better than the EER completed on January 9, 2013, and so the command would have had to take the applicant to mast in order to document his poor leadership and conduct in an unscheduled EER. As noted above, however, the Page 7 dated November 29, 2012, and the ROI dated December 20, 2012, show that the applicant’s command had all of the adverse information available in the ROI before the thirty-day EER deadline expired on December 30, 2012. Apparently, they chose to wait until the FAM was completed before preparing the EER, but no law or policy actually prohibited them from preparing a timely regular EER by December 30, 2012, with the same marks and comments that he received on the disputed EER based on the information in the ROI. Therefore, the applicant has not proven by a preponderance of the evidence that the delay of his regular EER deprived him of due process that might have altered the content of his EER.

7. EER appeal advice: The applicant has not proven by a preponderance of the evidence that he was denied due process by being prevented from appealing the disputed EER. He alleged that the XO told him that his marks might be lowered if he appealed, and his attorney signed a statement claiming that during a telephone conversation with the XO, he told her that he could not recall discussing an EER appeal with the applicant but that if he did, he would likely

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<sup>12</sup> Enlisted Manual, COMDTINST M1000.2, Article 5.F.1.b.(2) and (3).

have advised the applicant not to appeal the marks because the XO had seen marks lowered on appeal many times. These claims are problematic for a few reasons:

- The XO apparently could not recall discussing the appeal with the applicant and did not sign the statement the applicant's attorney prepared for him.
- While it is somewhat plausible that an officer could be unfamiliar with the enlisted appeal rules, it is not plausible that an officer would have frequently seen EER marks lowered on appeal. The prohibition against lowering marks on appeal in Article 5.I.(3) of the Enlisted Manual is longstanding,<sup>13</sup> and the EER marks must be entered into the member's official record in Direct Access—where the chain of command cannot directly change them—before the appeal period starts. If commands frequently or ever violated this prohibition, members would certainly have complained to the BCMR, but they have not.
- Third, while the Admiral could not have lowered the disputed EER marks on appeal, if the applicant's conduct had been drawn to the Admiral's attention, the Admiral could have directed the command to conduct a mast, which would likely have resulted in a second, unscheduled disciplinary EER for the applicant with lower marks. Therefore, it is possible that, if the applicant had appealed his annual EER, he would have ended up with a disciplinary EER with even lower marks documenting his non-judicial punishment at mast. In this context, the XO's alleged advice that the applicant might receive lower EER marks if he appealed his EER would not be wrong, and the XO might well have seen it happen many times before.

Although the applicant has not proven by a preponderance of the evidence that he was miscounseled about his right to appeal, even assuming *arguendo* that the applicant and the XO discussed an appeal and that the XO told him his marks on his annual EER could be lowered on appeal, the Board finds that the applicant has not shown that he was denied due process despite this erroneous information. As a senior chief who had evaluated numerous subordinates in his seventeen years of service, the applicant would have been knowledgeable—likely more knowledgeable than the XO—of the EER appeal rules. The Enlisted Manual clearly states that EER marks may not be lowered on appeal, and this prohibition has been in effect since long before the applicant enlisted.

8. Page 7s: The applicant alleged that the Page 7s dated November 29, 2012, and January 9, 2013, are erroneous or unjust and that they should be removed from his record. Although he alleged that the first disputed Page 7 was never presented to him, the record shows that the command directed the SCC Chief to draft this Page 7, and then the CO reviewed and signed it and directed the SCC Chief to counsel the applicant on it. The SCC Chief, whose testimony in the ROI is mostly supportive of the applicant, told the IO that the applicant read the Page 7, refused to sign it, and was upset that it had been drafted without consulting him. The CO's second signature on the Page 7 avers that the applicant refused to sign it. The Board finds that the applicant has not proven by a preponderance of the evidence that he was not shown the Page 7 and did not refuse to sign it, just as he later refused to sign the January 9, 2013, Page 7.

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<sup>13</sup> See, e.g., CG-207, Coast Guard Personnel Manual, Article 10-B-7.a. (1967); COMDTINST M1000.6, Coast Guard Personnel Manual, Article 10-B-9.a. (May 1982).

The applicant alleged that the first Page 7 “may have been altered” because he received one copy of it without the notation that he had refused to sign pursuant to a FOIA request for documents from the Sector, whereas the copy in his official record includes the notation. The Board finds, however, that the fact that the Sector or SPO retained a copy of the first Page 7 as it appeared when shown to him and before the CO entered the notation that he had refused to sign it does not prove any impropriety concerning the copy entered in his record.

The applicant alleged that the November 29, 2012, Page 7 should be removed from his record because his unit’s SPO had on file a memorandum dated January 15, 2013, addressed to the Personnel Service Center and requesting the removal of the November 29, 2012, Page 7. The January 15, 2013, memorandum is apparently signed by the CO, although the CO cannot recall having signed the memorandum and does not believe he would have done so. The memorandum was found in the unit SPO’s files and it is not clear why the request to remove the November 29, 2012, Page 7 was not forwarded to PSC. Although the CO cannot recall the Page 7 and does not know why he would have requested its removal, the Board finds that the November 29, 2012, Page 7 significantly contradicts information in the EER for the period ending November 30, 2012, and so should be removed from his record. The Page 7 advised the applicant that his behavior and conduct had been unsatisfactory and did not meet the minimum written standards for the EER competencies “Working with Others,” “Setting an Example,” and “Respecting Others.” On his EER for the period ending November 30, 2012, however, the applicant received below-standard marks only for “Respecting Others” and “Human Relations.” He received above-standard marks of 5 for “Setting an Example” and “Respecting Others.” In reviewing the written standards on the EER form while preparing the EER, the applicant’s rating chain apparently found that his performance and conduct warranted a lower mark for “Human Relations” than they had anticipated when preparing the Page 7, but higher marks for “Working with Others” and “Setting an Example.” Because the Page 7, dated November 29, 2012, contradicts the EER, dated November 30, 2012, by predicting below-standard marks in two performance categories for which the applicant ultimately received above-standard marks, the Board finds that it is erroneous and should be removed from his record.

Although the applicant asked that the Page 7 dated January 9, 2013, be removed from his record, the Board finds that this Page 7 was both required and appropriate to document the applicant’s removal from the advancement list, removal from duties, and loss of CDO and SMC qualifications. The Board finds no grounds for removing the January 9, 2013, Page 7.

9. CO’s understanding: The applicant has not proven by a preponderance of the evidence that the CO’s decisions regarding the Page 7s and the EER were adversely prejudiced by his alleged misunderstanding of the law and Coast Guard community standards. The applicant argued that the conduct and language that he has admitted to are not sufficiently disrespectful toward petty officers to warrant a criminal charge under Article 91 of the UCMJ; that none of the six specific comments listed in the FAM could induce a breach of the peace so as to warrant a charge under Article 117; and that none of his language violated Article 134 because it was not “indecent.” He argued that it was not “indecent” because it was not grossly offensive to modesty, decency, or propriety, and it did not violate military community standards. The Board disagrees with these arguments. As noted in the FAM and the ROI, numerous witnesses accused the applicant of being condescending, disrespectful, and demeaning to petty and commissioned

officers alike. Suggesting that a junior petty officer should “stuff her hole,” commenting on a member’s breasts, and being frequently condescending and demeaning could easily induce a breach of the peace and are “indecent” because they clearly violate the Coast Guard community’s standards.

10. Career Retention Screening Panel (CRSP): The applicant alleged that his record should be corrected because the Coast Guard’s policies of who may be considered for retention or retirement by a CRSP have changed since 2012 and members may now be considered by a CRSP even if they are above the “cut” for promotion. He alleged that his command would not have removed him from the advancement list if they had known he would be potentially subject to separation by CRSP in the future, and the XO supported this claim. Because he was above the cut on the [REDACTED] advancement eligibility list resulting from the May 2012 service-wide examination—which was in effect before the policy changed—he argued that it is unjust that he might be selected for retirement by a CRSP now that he is once again above the cut due to the change in policy. The Board disagrees with the applicant’s analysis. The record shows that in January 2013 the applicant’s command intentionally removed his name from the advancement list and awarded him an unsatisfactory conduct mark, which made him ineligible to compete for advancement for two years and so potentially subject to a CRSP when he became eligible for retirement under the policies then in effect.<sup>14</sup> The changing CRSP policies do not make the actions that the applicant’s command took in 2012 and 2013 erroneous or unjust.

11. The applicant has not proven by a preponderance of the evidence that the disputed Page 7 dated January 9, 2013, or the EER with the unsatisfactory conduct mark and non-recommendation for advancement are erroneous or unjust. He has not shown that his CO’s loss of confidence in his readiness to lead as a master chief was based on misinformation or a misunderstanding about his language and demeanor in the SCC, and he has not shown that his removal from the advancement list was erroneous or unjust. For the reasons stated in finding 8, however, the Board finds that the Page 7 dated November 29, 2012, is erroneous and should be removed from his record. Accordingly, partial relief should be granted by removing the Page 7 dated November 29, 2012, from the applicant’s record, but his other requests for relief should be denied.

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

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<sup>14</sup> Enlisted Manual, COMDTINST M1000.2, Article 3.A.5.b.(3).

**ORDER**

The application of [REDACTED] USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall remove the CG-3307 dated November 29, 2012, from his record.

All other requests for relief are denied.

March 10, 2017

