

**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. 2018-205**

██████████  
██████████ CPO

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**FINAL DECISION**

This proceeding was conducted according to 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the application upon receipt of the applicant's completed application on November 26, 2018,<sup>1</sup> and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 6, 2019, 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 chief petty officer (E-7), asked the Board to correct her Enlisted Evaluation Report (EER) dated May 31, 2009, by changing certain marks, which she alleged created a false perception of a pattern of misconduct. Specifically, she asked the Board to correct make the following corrections to the EER:

- Correct Conduct mark from Unsatisfactory to Satisfactory;
- Correct the Advancement Recommendation from Not Recommended to Recommended;
- Raise the mark for Responsibility from a below-standard 3 to a standard 4 (on a scale from 1 to 7); and
- Raise the mark for Judgment from 3 to 4.

The applicant also asked the Board for the following relief:

- An end-of-tour award for her service at the Sector, as her supervisors recommended;

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<sup>1</sup> The applicant's initial DD 149 was received on August 21, 2018, but she amended her application and requested new relief on November 26, 2018.

- Removal of prejudicial, humiliating information and the name of an officer with whom she had had an affair from the Court Memorandum documenting her receipt of non-judicial punishment (NJP) at a captain's mast on April 19, 2010; and
- Either retroactive advancement to Senior Chief (E-8) or retroactive appointment to Chief Warrant Officer (CWO); or
- As an alternative, to be "allowed to compete for the next CWO [chief warrant officer] cycle in AY [appointment year] 20 [which is 2019]."

The applicant explained that her May 2009 EER should be corrected because "a single incident of misconduct was documented in two different EERs, giving the erroneous impression that [she] committed two instances of wrongdoing instead of one." In May 2009, when she was a first-class petty officer (E-6), she reported herself for having engaged in an inappropriate relationship with an officer. She had already voluntarily ended the relationship and aligned her behavior with the laws and standards expected of Coast Guard members. She stated that a subsequent investigation had "revealed that there were some coercive aspects of the relationship concerning the [officer's] conduct toward [her]."

After she made the report, the applicant alleged, the District Chief of Staff, a captain, altered the marks on her May 2009 EER, which was then on his desk for finalization. He changed her Conduct mark and Advancement Recommendation and lowered her marks for Responsibility and Judgment to 3s. But then, after a lengthy investigation, she was punished at mast for her inappropriate relationship and received non-judicial punishment (NJP) and a disciplinary EER dated April 19, 2010, for the same conduct for which the Chief of Staff had already lowered her marks on her May 2009 EER.

The applicant stated that pursuant to the EER Manual, the Chief of Staff should not have lowered her marks in her May 2009 EER because the purpose of a mast and disciplinary EER is to hold a member accountable for misconduct that might have occurred during a prior marking period.

The applicant noted that while her November 30, 2009, EER "was positive, it was not without conflict as evidenced by the Chief of Staff's pen and ink 'suggestions' which were not appropriate given [that] a) [the applicant's] performance was above average despite the stress [she] was under and a PCS [permanent change of station] move and b) [she] had been held accountable and would be again at NJP."

Thus, the applicant claimed, a "single instance of misconduct [was] documented twice, nearly three times, in [her] record." She alleged that this duplication "gives the incorrect impression that [she] demonstrated a pattern of misconduct, which is not the case."

In addition, the applicant stated, when she was leaving the Sector, the Sector Executive Officer (XO) drafted an award for her, but she did not receive it. The applicant stated that the lack of an award for her tour of duty at the Sector and her reduced evaluation marks on the disputed EER lowered her points total and thus adversely affected her competitiveness for advancement through the Servicewide Examination process. She stated that she

was removed from the Chief's List in 2009, tested again in 2010, and was removed once more in 2010 following [the] NJP. While it is unlikely [she] would have advanced off the list before [the] NJP; the points lost did affect [her] advancement to Senior Chief where the competition was exceptionally close in 2016 and a peer was advanced off that list in 2017. It also precluded [her] from competition in the Warrant Officer Selection Board against peers whom [she] was equally qualified and whom in lieu of [she] could have been selected.

Thus, the applicant stated, the false impression of a pattern of misconduct created by the May 2009 EER has negatively affected her career for nearly ten years. She stated that she was disqualified from the Chief Warrant Officer (CWO) Selection Board in both 2013 and 2018 based on an alleged "pattern of misconduct." She stated that the memoranda from the CWO selection boards show that they "erroneously concluded that the two negative sets of marks reflected two separate incidents."

The applicant alleged that she previously tried to correct the alleged inaccuracies through administrative means without success and "only recently learned the BCMR process is the way to pursue said action. This process information came to light after a flag officer discussion with OPM-1 and is not clear in the PSC COMDTINSTs."

The applicant noted that since her inappropriate relationship ended in 2009, she has maintained strict professionalism and strong leadership. She noted that she was selected to teach her specialty rating to Philippines Coast Guard officers and listed several very significant operations in which she played an important role in her specialty.

The applicant stated that she is "competent and qualified well beyond [her] pay grade." She noted that she would be completing a Bachelor of Arts degree in March 2019.

In support of her allegations, the applicant submitted copies of official records, which are included in the Summary of the Record below, and the following statements:

- In a statement dated July 27, 2018, the applicant's supervisor at the Sector in 2009 wrote that the applicant had "self-corrected her behavior and self-reported the incident" but the "command changed her marks after the fact and before a formal investigation was completed or a mast and NJP occurred." The supervisor stated that the two EERs documenting the applicant's misconduct "gives the incorrect impression she had a pattern of misconduct. She should not be precluded from participation in any warrant board based on this single incident, and it has slowed her advancement on the enlisted side unnecessarily." She stated that the May 31, 2009, should be corrected as the applicant requested.
- In a statement dated July 12, 2018, the applicant's most recent supervisor wrote that she had been denied the opportunity to compete for CWO selection "because of a transgression over a decade ago." He stated that he has no personal knowledge of the events in 2009 but "can attest to [the applicant's] integrity, professionalism and ability to serve as a [CWO]." He stated that she is "an exceptional [rating] with strong leadership skills." He also stated that a similar report today—of an "officer who displayed predatory type behavior pursued and engaged in inappropriate relationships with junior officers and petty officers"—might have been handled quite differently.

## SUMMARY OF THE RECORD

The applicant enlisted as a seaman (E-3) in the regular Coast Guard on July 17, 2000. She earned her specialty rating and advanced to E-4 in March 2002; advanced to E-5 in December 2003; and advanced to E-6 in October 2005. She received her first Achievement Medal for superior performance of duty at a District detachment from April 2002 to May 2005.

In May 2005, the applicant was transferred to the main District office. In July 2006, the District command assigned her to a District detachment located at a Sector office. A summary of her semiannual EER marks shows that she received a few standard marks of 4 but mostly above-standard and excellent marks of 5 and 6 on her EERs while working at the Sector. And she was consistently recommended for advancement to chief petty officer (E-7) by the Approving Official for her EERs, who was the District Chief of Staff. On June 9, 2008, she received a Commandant's Letter of Commendation for her performance of duty in 2008.

On the applicant's semiannual EER dated November 30, 2008, she received two "standard" marks of 4, twelve above-standard marks of 5, ten excellent marks of 6, and one superior mark of 7 in the various performance categories; a Satisfactory Conduct mark; and a mark of Recommended for Advancement.

On January 20, 2009, the applicant reenlisted for six years, through January 19, 2015.

The applicant's final EER while assigned to the District detachment at the Sector, dated May 31, 2009, is the disputed EER in this case. She received two below-standard marks of 3 for Responsibility and Judgment, six marks of 4, eleven marks of 5, and five marks of 6 in the various performance categories; an Unsatisfactory Conduct mark; and a Not Recommended for Advancement mark. The comments supporting these marks state that the applicant had failed to conform to or hold herself accountable for rules and standards regarding prohibited romantic relationships. The comment supporting the Advancement mark states, "Not Recommended for advancement at this time due to violation of personnel manual rules and standards regarding prohibited romantic relationships."

In July 2009, the applicant was transferred to another District detachment, where she remained until July 2014. However, before she left the Sector, her supervisor drafted a citation for and recommended that she receive an end-of-tour Commendation Medal for her work at the Sector from June 2006 to June 2009. The citation states the following:

[The applicant] is cited for outstanding achievement while serving detached duty at Sector ... from June 2006 to June 2009. [Her] demonstrated superior performance during numerous high profile ... was exceptional and noteworthy. Her poise and professionalism enabled her to skillfully ... to a wide variety of internal and external stakeholders often demonstrating expertise beyond her pay grade. In 2008 alone, she ... [description of her performance during two major operations]. [Her] dedication, judgment, and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard.

When the draft citation and recommendation for the medal was forwarded to the District command, however, no medal or award was approved. The applicant provided a copy of an

email dated November 24, 2009, in which she asked a chief petty officer about the status of the award and noted that the points would help her compete for advancement in the future. She also noted in this email that because of the pending NJP, which would occur when the investigation of her claims was complete, her name would be removed from a pending advancement list and she would be ineligible to compete for advancement for a year. The applicant did not submit any reply to this email.

On her November 30, 2009, EER, the applicant received eight standard marks of 4, thirteen above-standard marks of 5, and four excellent marks of 6 in the various performance categories, a Satisfactory Conduct mark, and a Recommendation for Advancement. There are handwritten notes on a copy of this EER that was submitted by the applicant. The notes indicate that someone suggested much lower marks—including a mark of 1 for Judgment; marks of 2 for Responsibility and Setting an Example; marks of 3 for Customs and Courtesies, Integrity, and Loyalty; an Unsatisfactory Conduct mark; and a mark of Not Recommended for Advancement. The applicant stated that it was the District Chief of Staff who suggested these lower marks.

On April 19, 2010, the applicant received NJP consisting of an oral reprimand delivered at the mast, forfeiture of half of her monthly basic pay of \$3,051.00 for two months, and a reduction in paygrade to E-5, but the forfeiture and reduction in rate were suspended upon condition of good behavior for six months and never went into effect. The Offense Narrative in the Court Memorandum documenting the NJP states the following (language that the Coast Guard recommends redacting is struck out, and bold type and paragraph breaks are added for clarity):

**Charge I: Violation of the UCMJ, Article 92:** in that [the applicant], an enlisted person, while at Sector ..., on active duty, did at or near [towns] on divers occasions between on or about 23 September 2008 and on or about 12 November 2008, fail to obey a lawful general regulation to wit: paragraph 8.H.2.g., COMDTINST M1000.6A, Personnel Manual, dated 8 January 1988, by wrongfully engaging in a romantic relationship outside of marriage between herself and ~~[rank/name]~~, a commissioned officer, U.S. Coast Guard.

**Charge II: Violation of the UCMJ, Article 120:** In that [the applicant], U.S. Coast Guard, Sector [town], on active duty, did at or near [town] between on or about 27 October 2008 and on or about 29 October 2008, wrongfully commit indecent conduct, to wit: ~~[description redacted]~~ ~~[rank/name]~~, a commissioned officer, U.S. Coast Guard.

**Charge III: Violation of the UCMJ, Article 125:** In that [the applicant] U.S. Coast Guard, Sector [town], on active duty, did at or near [towns] on divers occasions between on or about 23 September 2008 and on or about 30 November 2008, commit sodomy with ~~[rank/name]~~, ~~U.S. Coast Guard~~, a commissioned officer.

**Charge IV: Violation of the UCMJ, Article 134:** In that [the applicant], U.S. Coast Guard, Sector [town], on active duty, an unmarried woman, did at or near [towns], on divers occasions between on or about 23 September 2008 and on or about 12 November 2008, wrongfully have sexual intercourse with ~~[rank/name]~~, ~~U.S. Coast Guard~~, a commissioned officer and a married man, nor her husband.

Also on April 19, 2010, the District Chief of Staff forwarded the report of the NJP to the Coast Guard Investigative Service with a handwritten note about other action taken against the applicant: “Member received an Unsatisfactory Conduct mark and was Not Recommended for Promotion in May 2009 EER. Member received a disciplinary EER on 19 APR 2010 for NJP

awarded on that date; EER included Unsatisfactory Conduct mark and Not Recommended for Promotion.”

The applicant submitted a copy of an email stating that the officer with whom she had had the inappropriate relationship had been charged with several similar offenses committed with other women, as well as with two counts of making a false official statement, two counts of soliciting another to commit an offense, one count of obstructing justice, and seven counts of conduct unbecoming an officer and gentleman. The email states that the total amount of confinement he could receive at court-martial for these offenses was 60 years.

As a result of the NJP, the applicant received a disciplinary EER dated April 19, 2010. The applicant submitted only the last page of this EER (page 3 of 3). She stated that pages 1 and 2, including the written comments explaining the low marks, are not “available due to changes in archive system. Marks visible on EER summary.” The EER summary shows that on the applicant’s disciplinary EER, she received a poor mark of 2 for Judgment; below-standard marks of 3 for Responsibility, Setting an Example, Integrity, and Loyalty; no standard marks of 4; twelve above-standard marks of 5; nine excellent marks of 6; an Unsatisfactory Conduct mark; and a mark of Not Recommended for Advancement. The EER summary also shows that the disputed, May 2009 EER and the disciplinary EER are the only ones on which the applicant has received an Unsatisfactory Conduct mark, a mark of Not Recommended for Advancement, or marks below a standard mark of 4.

On her regular EERs in 2010, 2011, and 2012, the applicant received increasingly higher marks and was recommended for advancement. She received another Commandant’s Letter of Commendation for her performance of duty in July and August 2010. Although the applicant was ineligible to advance for a year after her NJP, she advanced to chief petty officer (E-7) in December 2012.

In 2013, the applicant competed for appointment to CWO and, as part of her application, she included a draft Officer Evaluation Report (OER) dated February 28, 2013, wherein her rating chain highly praised her performance as a chief petty officer. However, the Personnel Service Center (PSC) advised the applicant that the CWO Appointment Board, which had convened on April 9, 2013, had removed her from consideration and not recommended her for appointment because she

was found not fully qualified for appointment to CWO2 due to failure to conform to military rules and regulations as recently documented by conduct marks of “unsatisfactory” on Enlisted Employee Reviews dated 31 May 2009 and 19 April 2010. Specifically, the member repeatedly engaged in prohibited romantic relationships. The Board found that these evaluations revealed evidence of a pattern of misconduct inconsistent with the Coast Guard Core Values. By at least two-thirds majority, the Board determined this behavior to be inconsistent with the definition of a chief warrant officer found in Section 1.D.1.a. of the Officer Accessions, Evaluations, and Promotions [Manual], COMDTINST M1000.3 and paragraph 3 of Memorandum 1401 dated 28 March 2013, PRECEPT CONVENING AN APPOINTMENT BOARD TO CONSIDER PERSONNEL OF THE COAST GUARD FOR APPOINTMENT TO THE GRADE OF CHIEF WARRANT OFFICER, W-2.

On April 5, 2013, the applicant received a Commendation Medal for outstanding achievement while she was assigned to a District detachment from January 2012 to January 2013. On February 26, 2014, the applicant received her second Achievement Medal for superior performance of duty from January 2013 to January 2014 at the District detachment.

ALCOAST 093/14, issued on March 7, 2014, announced new criteria governing eligibility to reenlist, one of which is that the member must have no more than one Unsatisfactory Conduct mark during the enlistment.

In a memorandum to the District Chief of Staff dated March 19, 2014, the applicant asked that the same corrections to her May 2009 EER be made that she has asked the BCMR to make. She stated that having her misconduct documented on two EERs “gives the incorrect impression that [she had] had two instances of misconduct” and that the 2013 CWO Appointment Board had erroneously assumed that she had engaged in more than one inappropriate relationship.

In a memorandum forwarding the applicant’s March 19, 2014, memorandum to PSC, the District Chief of Staff recommended that PSC make the same corrections to the applicant’s May 2009 EER that she has asked the BCMR to make. The Chief of Staff stated that the marks on that EER show that a single incident was documented on two different EERs, “giving the erroneous impression that the member committed two instances of misconduct instead of one.” The District Chief of Staff stated that the applicant was disqualified by the 2013 CWO Appointment Board based on an alleged “pattern of misconduct” because one incidence of misconduct was reflected in two separate EERs. The applicant did not submit PSC’s response to this memorandum.

In July 2014, the applicant was transferred to a different District. When her enlistment ended in January 2015, she was allowed to reenlist for four years, presumably after receiving a waiver of the reenlistment eligibility criteria in ALCOAST 093/14. She subsequently extended that enlistment through August 20, 2020.

In 2015, the applicant competed for appointment to CWO and, as part of her application, she included another draft OER, dated February 28, 2015, wherein her rating chain highly praised her performance as a chief petty officer. She was considered but not selected for appointment.

In May 2015, the applicant was awarded a third Achievement Medal for superior performance while assigned to the new District from July 2014 to June 2015. In July 2015, she was transferred again to another District.

In March 2017, the applicant received a prestigious award in her field and received a Flag Letter with congratulations from a Rear Admiral. She again competed for appointment to CWO in 2017 and, as part of her application, she included another draft OER, dated February 28, 2017, wherein her rating chain highly praised her performance as a chief petty officer. She was considered but not selected for appointment.

On March 14, 2017, the applicant's District Commander sent a memorandum to Commandant, through PSC, in which he asked that the explicit language and the name of the officer with whom she had engaged in a sexual relationship be removed from the Court Memorandum documenting her NJP on April 19, 2010. He stated that the explicit language was unnecessarily humiliating and prejudicial and that the officer's name should be redacted due to the potential "association with his much greater offenses," which would continue to prejudice the applicant. Commander, PSC forwarded the District Commander's memorandum to Commandant on March 16, 2017, with a recommendation that the applicant file a BCMR application to have the Court Memorandum redacted.

On April 12, 2017, a Rear Admiral responded to the District Commander and stated that the applicant should apply to the BCMR to have the Court Memorandum corrected in accordance with the Correcting Military Records Instruction, COMDTINST 1070.1.

In January 2018, the applicant received a fourth Achievement Medal for her performance of duty in November 2017. She again competed for appointment to CWO and, as part of her application, she included another draft OER, dated February 28, 2018, wherein her rating chain highly praised her performance. But on May 22, 2018, PSC advised the applicant that when her record was reviewed by the CWO Appointment Board that convened on April 2, 2018, she had been removed from consideration and not recommended for appointment because the CWO Appointment Board had found that she was

not fully qualified for selection for appointment to CWO2. As documented in Enlisted Employee Review dated May 31, 2009, [she] received a not recommended and an unsatisfactory conduct mark in conduct due to her involvement in a prohibited relationship. As documented in Enlisted Employee Review dated 19 April 2010, [she] received Non-Judicial Punishment for failure to conform to military rules and regulations regarding a prohibited romantic relationship. Member displayed poor judgment and a lack of loyalty, integrity, responsibility, and setting an example. These actions demonstrated a pattern of behavior inconsistent with Coast Guard standards. By at least two-thirds majority, the Board determined this behavior to be inconsistent with the definition of a chief warrant officer found in Section 1.D.1. of the Appointing Warrant Officers [Manual], COMDTINST M1420.1 (series) and paragraph 3 of Memorandum 1401 dated 30 March 2018, PRECEPT CONVENING AN APPOINTMENT BOARD TO CONSIDER PERSONNEL OF THE COAST GUARD FOR APPOINTMENT TO THE GRADE OF CHIEF WARRANT OFFICER, W-2.

2. Per Article 3.E.11. of [the Appointing Warrant Officers Manual], you are not eligible to apply for CWO Appointment until the PY21 CWO Appointment Board.

Having advanced to Chief Petty Officer in 2012, the applicant competed for advancement to Senior Chief by taking the annual Servicewide Examination (SWE) from 2016 to 2019. According to ALCGENL 218/19, following the SWE in 2019, she placed above the "cut" for guaranteed advancement in 2020. Therefore, she is apparently not at risk of involuntary discharge or retirement.

Because of the CWO Appointment Board's decision in 2018, the applicant was not permitted to apply for an appointment in 2019 and will not be permitted to apply for CWO in 2020, pursuant to Article 3.E.11. of the Appointing Warrant Officers guide, COMDTINST M1420.1. According to ALCGPSC 122/19, members must submit a "My Panel Submission" application with a recommendation or endorsement from their commanding officer no later than



December 6, 2019, to be considered for an appointment when that board convenes again on March 30, 2020.

### VIEWS OF THE COAST GUARD

On April 30, 2019, a judge advocate (JAG) submitted an advisory opinion in which she recommended that the Board grant partial relief in this case. The JAG adopted the findings and analysis provided in a memorandum on the case submitted by the Personnel Service Center (PSC).

PSC stated that under Articles 10.B.6.a. and 10.B.8.b. of the Personnel Manual, COMDT-INST M1000.6A, in effect in 2009, the Conduct mark and the numerical marks for the various performance categories in a regular, semiannual EER must be based on the member's performance during the evaluation period. And under Articles 10.A.2.b.c. and 10.B.5.b., misconduct that is subsequently discovered during a later evaluation period can only be evaluated on an unscheduled, disciplinary EER documenting NJP, instead of the member's regular EER.

PSC stated that because the applicant's misconduct was not investigated and did not occur during the evaluation period for her May 31, 2009, EER, it should not have been evaluated or mentioned in that EER. Moreover, PSC concluded, the applicant has shown that the Unsatisfactory Conduct mark and the below-standard marks of 3 for Responsibility and Judgment on her May 31, 2009, EER were erroneous because she was subsequently held accountable for the same misconduct in the required disciplinary EER dated April 19, 2010. PSC also pointed out that under Article 10.B.2.a. of the manual, only low performance marks, including Unsatisfactory Conduct marks and recommendations against advancement, and marks of 7 (highest possible) must be supported by written comments.

Regarding the recommendation against advancement in the disputed EER, PSC stated that it is not incorrect because the applicant admitted to having committed the misconduct during the evaluation period. PSC noted that pursuant to Article 10.B.7.4., a Not Recommended for Advancement mark on an EER is not subject to appeal, but under Article 10.B.10.b., an Approving Official may "change any mark they assigned to members still attached to the unit if the Approving Official receives additional information that applies to the particular employee review period."

Therefore, PSC recommended correcting the applicant's May 31, 2009, EER by changing the Conduct mark to Satisfactory and the two marks of 3 for Responsibility and Judgment to standard marks of 4. But PSC did not recommend that the Board change the advancement recommendation. PSC also recommended that the Board redact the Court Memorandum to remove the name of the officer with whom the applicant had engaged in the sexual relationship, as shown on page 5, above, and in matter of record C attached to PSC's memorandum. PSC did not mention or address the applicant's request for retroactive advancement to Senior Chief Petty Officer (E-8) or CWO.

The JAG included a legal opinion noting that under Article 10.B.7.1. of the Personnel Manual in effect in 2009, to recommend a member for advancement, the EER Approving Offi-

cial is required to consider not only the member's past performance but also "the member's potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service's core values." And Article 10.B.7.2.a. of the manual states that to recommend a member for advancement, the Approving Official must determine that the member "is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade." It also states that to recommend a member for advancement to chief petty officer (E-7) or higher, the Approving Official must include "a supporting remarks entry clearly documenting their present and future leadership potential for greater responsibility."

The JAG stated that a recommendation for advancement "lies solely within the discretion of the Approving Official." In light of the applicant's self-report of misconduct during the evaluation period for the May 2009 EER, the JAG stated, "it was not improper or an error" for the Approving Official to take her misconduct into account when deciding whether to recommend her for advancement to chief petty officer. The JAG noted that while other marks in a regular, semiannual EER must be based only on performance that occurred during the evaluation period, the same is not true of a recommendation for advancement. The JAG stated that policy "not only permits consideration of past performance but permits a more holistic or general reflection on the member's potential." Therefore, the JAG stated, it is not erroneous or unjust for the applicant to have received marks of Not Recommended for Advancement on both her semiannual May 31, 2009, EER and her disciplinary EER dated April 19, 2010, even if they were based on the same misconduct.

Regarding the applicant's request for a Commendation Medal, the JAG stated that the decision to recognize a member's contributions with a departure award "was entirely within the discretion of the Approving Official," and a member is not entitled to any award or medal upon completing a tour of duty. The JAG noted that there are criteria for each medal in COMDTINST M1650.25D, and the fact that her supervisor recommended her for a Commendation Medal did not entitle the applicant to the medal.

The JAG acknowledged in her opinion that the applicant had requested a "retroactive promotion" but neither addressed nor made any recommendation regarding the applicant's request for advancement to Senior Chief (E-8) or CWO or the alternative request to be allowed to compete for CWO in 2019.

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

The applicant requested and was granted an extension of the time to reply to the Coast Guard's advisory opinion and submitted her response on April 5, 2019.

The applicant stated that she would not contest the Coast Guard's opinion regarding the correction of the EER and the Court Memorandum because she wants the Board to issue the decision as fast as possible so that the prejudicial information will no longer hinder her career. The applicant also noted that she had just received her Bachelor's degree and has been accepted into a Master's of Science program.

Regarding her request for retroactive advancement to Senior Chief/E-8 or appointment to CWO, the applicant stated, with respect to the latter, that she

applied for CWO first in 2013 and was rejected as not fully qualified by the board. I applied again in 2015 and was considered, but not selected. I applied in 2017 after arriving at my current billet, and was accepted but again not selected. I applied in 2018 and the board found me not fully qualified. At that time a new rule was instituted, if found not fully qualified the member must wait two years to reapply.

The applicant stated that it was after her removal from consideration in 2018, that a CWO at PSC told her to apply to the BCMR and that had she known, she would have applied to the BCMR much earlier. The applicant argued that it was erroneous for her single transgression in 2008 to be documented on two separate EERs in 2009 and 2010 and unjust for that error to have prevented her advancement for over a decade. She stated that the error misled the CWO Appointment Boards in both 2013 and 2018 to believe that she had shown a “pattern of misconduct” and this erroneous and unjust misperception now makes her ineligible to apply for appointment to CWO for two years. Therefore, she asked the Board to make her eligible to apply for the CWO Appointment Board that convenes in March 2020 and, if selected for the appointment, to backdate her date of promotion to July 1, 2019.

Regarding her advancement to Senior Chief, the applicant stated that because she is “above the cut” on the advancement list resulting from the May 2019 SWE, she will be advanced to E-8 sometime in 2020. But, the applicant noted, she first competed for this advancement by taking the annual SWE in May 2016. She stated that “[o]n the final list, [the E-7] just ahead of me, as I recall from conversations with him ..., we were separated by less than a point in our final multiples. ... [The E-7 just ahead of her on the list] advanced to E-8 on 01 JAN 2017.... Had my record been accurate and an outstanding award [the Commendation Medal drafted in 2009] been applied I would have advanced in [the other E-7’s] place.” Therefore, she asked the Board to backdate her date of advancement to the date the E-7 advanced in 2017.

The applicant concluded that while she does not deny wrongdoing in 2008, she has been held accountable for that misconduct, and “the level of detail in [her] record,” specifically the Court Memorandum, “is egregious.” She submitted copies of the following with her response:

- An announcement of the cutoffs on the May 2019 SWE advancement lists shows that the applicant is “above the cut” on the list for her rating.
- ALCGPSC 122/19 states the procedures and timeline for applying for consideration by the CWO Appointment Board that convenes on March 30, 2020—including an application submission deadline of December 6, 2019.
- An email from the Personnel Officer at the applicant’s current District office states that to receive the District command’s endorsement to apply for appointment to CWO, members should submit an email with a request endorsed by their chain of command by November 15, 2019; undergo an informal CWO Board interview by November 29, 2019; and submit an electronic “My Panel Submissions” application by December 6, 2019.

**APPLICABLE LAW AND POLICIES***Coast Guard Personnel Manual, COMDTINST M1000.6A*

Article 10.B.1.b. of the Personnel Manual in effect in 2009 and 2010 states that “[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely enlisted employee reviews.”

Article 10.B.2.a.1. states that on an EER, “[s]upporting remarks are required to be submitted along with the enlisted employee review, up through the marking chain to address the future leadership potential of all enlisted personnel, E-6 and above, and for any recommended marks of 1, 2, or 7, unsatisfactory conduct mark, or not recommended for advancement.”

Article 10.B.4.c. states that an EER is prepared by a “rating chain” of three superior petty officers or officers, including the Supervisor, who recommends the marks and prepares supporting comments; a Marking Official, who reviews the marks, discusses any unsupported, inaccurate, or inconsistent marks with the Supervisor, and may return the EER to the Supervisor “for further justification or support of any marks”; and an Approving Official, who reviews the marks, discusses any unsupported, inaccurate, or inconsistent marks with the Marking Official, and may return the EER to the Marking Official “to further justify or support any marks.”

Article 10.B.5. provides that members in pay grade E-6 received regular semiannual EERs at the end of each May and November, and an unscheduled, disciplinary EER must be prepared whenever a member receives NJP.

Article 10.B.6.a. states that for a regular EER, “[t]he rating chain will evaluate each enlisted member on the required period ending date to assess his or her actual performance since the last recorded employee review. The rating chain shall base employee reviews on how the member performed in each competency consistently throughout the period, except for conduct, to which the member must adhere every day of the period.”

Article 10.B.6.a.6. states that on an EER, a “mark of 4 represents the expected performance level of all enlisted personnel.” Marks of 1, 2, and 3 reflect performance that is unacceptable, poor, and below-standard, respectively. Marks of 5, 6, and 7 reflect performance that is above average, excellent, and superior, respectively.

Article 10.B.7.1. states, regarding the advancement recommendation, that “[w]hile the rating chain must consider past performance, it must also consider and base the recommendation on the member’s potential to perform satisfactorily the duties and responsibilities of the next higher pay grade, qualities of leadership, and adherence to the Service’s core values.”

Article 10.B.7.2. states that a mark of Recommended for Advancement means that “[t]he member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade. The rating chain should choose this entry regardless of the member’s qualification or eligibility for advancement.” And a mark of Not Recommended means that the “member

is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.”

Article 10.B.7.4. states that an “Approving Official’s decision on the advancement recommendation is final and may not be appealed.”

Article 10.B.9. allows a member to appeal the marks in an EER (except for the advancement recommendation) within 15 days of being counseled about it.

Article 10.B.10.b. allows an Approving Official to change any mark they assigned on an EER while the member is still attached to the unit “if the Approving Official receives additional information that applies to the particular employee review period.”

Article 14.B. has instructions for applying to the Personnel Records Review Board and/or the BCMR by submitting a DD 149 to request a correction of a military record. In September 2011, when the Personnel Manual was canceled, these instructions were transferred to the Correcting Military Records Instruction, COMDTINST 1070.1.

### ***Enlisted Accessions, Evaluations, and Advancements, COMDTINST M1000.2A***

Pursuant to Article 3.A.3. of COMDTINST M1000.2A, members compete for advancement to E-8 by taking an SWE in May of each year, and they must meet all of the eligibility requirements by February 1<sup>st</sup> of that year. An advancement list resulting from the SWE does not go into effect until January 1<sup>st</sup> of the following year. Commander, PSC sets a “cutoff point” on the list

for each rating and rate based upon vacancies anticipated during a specific period of eligibility. Only those members whose name appears at or above the cutoff are guaranteed advancement if they remain eligible. Members who are below the cutoff point are encouraged to participate in subsequent SWEs in order to maintain eligibility.

Article 3.A.3.f. provides that a member’s placement on an advancement list is based on a “final multiple,” which is a number of points earned by the member out of 200 maximum possible points based on these factors:

- The SWE score, which can provide a maximum of 80 points (40% of all possible points);
- The “performance factor,” which can provide a maximum of 50 points and is based on the member’s EER marks during the prior 28 months;
- Time in service, providing 1 point per year (plus 0.083 points per additional full month) for up to a maximum of 20 years/points;
- Time in pay grade in present rating, providing 2 points per year (plus 0.166 points per additional full month) for up to a maximum of 5 years (10 points);
- Medals and awards, providing up to a maximum of 10 points and including, for example, 1 point per Commandant’s Letter of Commendation Ribbon, 2 points per Achievement Medal, and 3 points per Commendation Medal; and

- Amount of sea/surf duty, providing up to a maximum of 30 points earned at a rate of 2 points per full year (or 0.083 points per month) of sea duty and at a rate of 1 point per full year (or 0.083 points per month) for the first fifteen years of of surf duty.

Article 3.A.6.a. states that to be eligible for advancement to E-7, E-8, or E-9, a member must, throughout the prior two years, have been recommended for advancement by her CO and must have no Unsatisfactory Conduct mark, military or civil conviction, or NJP.

### *Appointing Warrant Officers, COMDTINST M1420.1*

Article 1.D. 1.a. states the following about warrant officers:

Warrant Officers are mature individuals with appropriate education and/or specialty experience whose demonstrated initiative and past performance show they have the potential to assume positions of greater responsibility requiring broader conceptual, management, and leadership skills. While administrative and technical expertise is required in many assignments, Warrant Officers must be capable of performing in a wide variety of assignments that require strong leadership skills. Enlisted and officer experience provides these officers a unique perspective in meeting the Coast Guard's roles and missions.

Article 2.D. states that a CO “[i]ssues recommendations for eligible members” and submits a draft OER for the member.

Article 3 provides the minimum eligibility standards for consideration for an appointment and states that the member must, *inter alia*,

- be serving in paygrade E-6 to E-9;
- not have less than 8 nor more than 26 years of service;
- be positively recommended by the CO based on the member's “mental, moral, physical, and professional qualifications for appointment to commissioned status”;
- not be serving on a waiver of the High Year Tenure rules;
- not have an approved retirement date;
- not have any military or civil conviction, NJP, alcohol incident, or Unsatisfactory Conduct mark in the past three years; and
- not have been found not fully qualified for appointment by a CWO Appointment Board within the past two annual cycles.

Article 4.A. states that a CWO Appointment Board “applicant” includes “all eligible members who applied for consideration for appointment to the Warrant Officer Appointment Board,” while the term “candidate” includes “all applicants whose pre-board score qualified them to be considered for appointment by the Warrant Officer Appointment Board.”

Article 4.C. and 4.D. provide that the pre-board score “must not be furnished to the Board” but is determined by Commander, PSC based on “an experience factor and an evaluation factor”:

1. The experience factor accounts for 40 percent of the pre-board score and is calculated by crediting one point for each full month of active service as E-6 and two points for each full month as E-7, E-8, and E-9. Maximum credit for time as E-6 is 100 points. Total maximum credit for time as E-6 through E-9 is 175 points.
2. The evaluation factor accounts for 60 percent of the pre-board score and is computed by Direct Access based on the applicant's performance marks during the four-year period immediately prior to the EDD in Article 3.B. of this Manual. ...

Article 5 states that the boards review the candidates' draft OERs (prepared by their COs), military records, and e-resumes. The e-resumes should include the following:

- a. Limited to a maximum of two pages, single-sided, single-spaced, 12-point text.
- b. Contain a historical summary of units, listing the primary and collateral duties assumed at each. List units in reverse chronological order (i.e., the most recent unit listed first).
- c. Contain a summary of major professional accomplishments including medals, awards and academic achievements.
- d. Contain a summary of reasons for desiring appointment to warrant grade.

Article 6 provides the policies and standards for CWO Appointment Boards. Article 6.G.1. states that the board "must first determine, by specialty, if all primary candidates are fully qualified to become warrant officers based on [the draft OER, e-resume, and military record] and the professional judgment of the board members." Then the board ranks the candidates "on a best-qualified basis." Article 6.G.2. states the following about candidates' prior conduct:

The board must not recommend candidates for appointment whose personal conduct and associations are such that reasonable grounds exist for rejection on the basis of loyalty. Although a candidate may have been considered as meeting the minimum requirements, the board may find trends or patterns of conduct, indebtedness, performance, or behavior which it considers disqualifying and therefore may find the candidate not fully qualified for appointment.

Article 6.H. states that if the board "does not recommend a candidate for appointment, the reasons therefore must be indicated in the board report." And the board's report must certify "that, in the opinion of at least a majority of the members if the board has five members, or in the opinion of at least two-thirds of the members if the board has more than five members, the candidates recommended are the best qualified for appointment to warrant grade." The board's report is then submitted to the Commandant "for approval, modification, or disapproval." PSC must "send a letter, stating the reason(s) for the finding, to each primary candidate found not fully qualified by the board."

Article 9.F. states that members who accept an appointment as a warrant officer are discharged from their enlisted status effective as of the day before the candidate executes the oath of office to be a CWO.

### ***Officer Accessions, Promotions, and Evaluations Manual, COMDTINST M1000.3A***

COMDTINST M1000.3A includes many of the same rules that appear in the Appointing Warrant Officers Manual. Article 1.D.9.e. states that the ranked list of candidates approved by the Command is the Final Eligibility List, which

will normally be effective from 1 June through 31 May of the year following the board. However, if service needs dictate, appointments from a specific warrant specialty list may be made prior to 1 June if all candidates from the previous list of the same specialty have been offered appointments. Candidates above the appointment cutoff remaining on an eligibility list at the time a new list is established will be carried over to the top of the new list. Candidates below the appointment cutoff will not be carried over to a new list and should plan to re compete in the next cycle.

Article 1.D.9.c. of COMDTINST M1000.3A states the following about selected candidates' eligibility for advancement in the enlisted ranks:

Candidates whose names appear at or above the cutoff for appointment to warrant grade or whose names appear below the cutoff but who are subsequently offered appointment to warrant grade are not eligible for advancement to E-7, E-8, or E-9. Recommendation of these members for advancement to E-7, E-8, or E-9 will be invalidated and their names will be removed automatically from established enlisted advancement eligibility lists 60 days after publication of the final eligibility list for appointment to warrant grade unless such members have notified Commander (CG PSC-OPM) and (CG PSC-EPM) of their intention to decline appointment to chief warrant officer.

### ***ALCGPSC 122/19***

ALCGPSC 122/19, issued on October 30, 2019, provides the timeline for the next active duty CWO Appointment Board on March 30, 2020, and included the following deadlines:

- December 6, 2019: The member must submit a "My Panel Submission" e-resume application with a command endorsement.
- January 1, 2020: The member's command must ensure that the latest EER is entered in Direct Access.
- January 3, 2020: The member must log into Direct Access to review and validate their Personal Data Extract (PDE).
- January 21, 2020: All PDE corrections must be made and all waiver requests must be received.
- January 24, 2020: The member can log into Direct Access to view their profile letter.
- February 12, 2020: PSC will publish the pre-board eligibility list.
- March 11, 2020: All recommendation files (OERs) and resumes are due.

### ***Medals and Awards Manual, COMDTINST 1650.25E***

Chapter 2.A.13.a. states that a Commendation Medal

[m]ay be awarded by the Commandant, to a person who, while serving in any capacity with the U.S. Coast Guard, including foreign military personnel, distinguishes him or herself by heroic or meritorious achievement or service. To merit this award, the acts or services must be accomplished or performed in a manner above that normally expected and sufficient to distinguish the individual above others of comparable grade or rating performing similar services, as set forth in the following:



• • •

For meritorious service that is outstanding and worthy of special recognition, but not to the degree required for the Bronze Star Medal or Air Medal when combat is involved; or the Meritorious Service Medal or Air Medal when combat is not involved. The award may cover an extended period of time during which another award may have been recommended or received for a specific act or acts. The criteria, however, should not be the period of service involved, but rather the circumstance and conditions under which the service was performed. The performance should be well above that usually expected to commensurate with an individual's rank or rate. If the meritorious service is not sufficient to warrant the award of a Commendation Medal, the Coast Guard Achievement Medal should be considered.

Chapter 2.A.13.b. and c. state that the opening phrase for the citation for a Commendation Medal should say that the member "is cited for outstanding achievement while ...," and the closing phrase should say that the member's "dedication, judgment, and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard."

Chapter 2.A.14.a. states that an Achievement Medal

[m]ay be awarded to a person who, while serving in any capacity with the Coast Guard, including foreign military personnel, distinguishes themselves for professional and/or leadership achievement in a combat or non-combat situation based on sustained performance or specific achievement of a superlative nature which must be of such merit as to warrant more tangible recognition than the Commandant's Letter of Commendation Ribbon, but which does not warrant a Coast Guard Commendation Medal or higher award.

(1) Professional Achievement. To merit the award, professional achievement must clearly exceed what is normally required or expected, considering the individual's rank or rate, training and experience, and must be an important contribution that is beneficial to the United States and the United States Coast Guard.

Chapter 2.A.14.b. and c. state that the opening phrase on the citation for an Achievement Medal should say that the member "is cited for superior performance of duty while ...," and that the closing phrase should say that the member's "diligence, perseverance, and devotion to duty are most heartily commended and are in keeping with the highest traditions of the United States Coast Guard."

Chapter 2.A.15.a. states that a Commandant's Letter of Commendation (LOC)

[m]ay be awarded to any member of the Armed Forces of the United States including foreign military personnel serving in any capacity with the Coast Guard for an act or service resulting in unusual and/or outstanding achievement but lesser than that required for the Coast Guard Achievement Medal.

Chapter 2.A.15.b. and c. state that the opening phrase on the citation for an LOC should be, "I note with pride and am pleased to commend you for your performance of duty ...," and the closing phrase should state that the member is authorized to wear the LOC Ribbon Bar.

Table 1-1 states that a Commendation Medal may be awarded by the Commandant, Flag officers, including Area and District Commanders, and captains (O-6) serving as COs and Division Chiefs; Achievement Medals may be awarded by those officers plus commanders (O-5)

serving as COs and Headquarters and Area Office Chiefs; and LOCs may be awarded by all those officers and lieutenant commanders (O-4) serving as COs.

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was not filed within three years of the applicant's discovery of the alleged error or injustice, but it is considered timely because she has been on active duty in the interim.<sup>2</sup>

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>3</sup>

3. The applicant alleged that marks and comments in her May 31, 2009, EER; comments on the Court Memorandum documenting her NJP on April 19, 2010; and the negative impact of those marks and comments on her advancement eligibility are erroneous and unjust. 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 her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>4</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>5</sup> In addition, to be entitled to correction of an EER, an applicant must prove by a preponderance of the evidence that the disputed EER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>6</sup>

4. The applicant has proven by a preponderance of the evidence that she was improperly evaluated in her semiannual EER dated May 31, 2009, based on performance that occurred prior to the start of the evaluation period, which was December 1, 2008. Under Article 10.B.6.a. of the Personnel Manual, on a regular, semiannual EER, a rating chain may only evaluate the member's performance since the date of the last EER, and the applicant's prior EER was dated November 30, 2008. The Court Memorandum shows that the applicant's affair with the

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<sup>2</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

<sup>3</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>4</sup> 33 C.F.R. § 52.24(b).

<sup>5</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>6</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

commissioned officer occurred in September, October, and November 2008, and the EER comments show that the below-standard marks were based on her admission that she had engaged in the affair, which had ended by the start of the evaluation period. Therefore, the applicant has proven by a preponderance of the evidence that her May 2009 EER was adversely affected by a prejudicial violation of a regulation.<sup>7</sup>

5. The applicant and the Coast Guard recommended that the Board correct the EER by raising the below-standard marks of 3 and changing the Conduct mark. But the EER also contains several prejudicial comments, and the applicant's marks overall fell substantially in the disputed EER in comparison to her semiannual EER dated November 30, 2008. In that prior EER, she had received two marks of 4, twelve above-standard marks of 5, ten excellent marks of 6, and one superior mark of 7 in the various performance categories, while in the disputed EER, she received two marks of 3, six marks of 4, eleven marks of 5, and five marks of 6. And there is no evidence that she was counseled about a decline in her performance during the evaluation period for the disputed EER. Therefore, the preponderance of the evidence shows that not just three marks but several marks and comments in her May 2009 EER were adversely affected by her admission of her earlier misconduct, contrary to Article 12.B.6.a. of the Personnel Manual. In BCMR Docket No. 151-87, the Board found that a performance evaluation should "not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material." In this case, the Coast Guard has admitted that the applicant's rating chain improperly allowed her admission of misconduct that occurred before the evaluation period to influence their evaluation of her performance in her May 2009 EER. Therefore and because it is impossible for the Board to determine what marks and comments the applicant would have received on her May 2009 EER if her rating chain had not allowed her admission of prior misconduct to adversely affect their evaluation of her performance, the Board finds that the disputed EER should be removed from her record.

6. The Board finds that the applicant has not proven by a preponderance of the evidence that the District command erred by not awarding her a ribbon or medal for her performance during her entire tour of duty at the Sector from July 2006 to June 2009. The draft citation for the Commendation Medal shows that her supervisor recommended the medal because of the applicant's excellent performance pursuant to two significant operations—one in 2006 and the other in 2008—but the applicant had already received an LOC for the latter operation and she had admitted to having had an adulterous affair with a superior officer in September, October, and November 2008. Therefore, the Board is not persuaded that the District command's decision not to award her any kind of medal or ribbon for that three-year tour of duty is erroneous or unjust.

7. The Board agrees with the Coast Guard and the applicant that the Court Memorandum documenting her NJP on April 19, 2010, should be redacted by removing certain embarrassing, unnecessary details from the narrative offenses and the identity of the officer with whom she had the affair. The inclusion of that information is both erroneous under the Privacy Act and

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<sup>7</sup> *Id.*

unjust because it discusses the applicant's indecent acts in embarrassing detail that is not clearly necessary under Rule 307(c) of the Rules for Courts Martial. Therefore, the Court Memorandum should be amended by redacting the language that appears struck-through in the copy of the Court Memorandum submitted to the BCMR with PSC's memorandum for the advisory opinion in this case.

8. The applicant alleged that the erroneous and unjust information in her record has unjustly prevented her from advancing for a decade. She asked the Board to advance her to Senior Chief and backdate her advancement and/or to appoint her to CWO and backdate her date of rank. In the alternative, she asked the Board to make her eligible to compete for appointment to CWO as soon as possible. In the advisory opinion, PSC did not acknowledge these requests for relief in its memorandum, and the JAG acknowledged them but did not express any opinion or make any recommendation about them even though both PSC and the JAG recommended removing the erroneous and unjust information from her record. Regarding these requests for relief, the Board finds as follows:

a. The applicant, who advanced to Chief Petty Officer in 2012 and will advance to Senior Chief in 2020, alleged that when she first competed for advancement to Senior Chief by taking the SWE in May 2016, the person ahead of her on the resulting advancement list was advanced to Senior Chief in 2017, and his final multiple was less than one point higher than her final multiple. Therefore, she stated, if she had received an end-of-tour medal in 2009, the point(s) for that medal would have placed her ahead of him on the advancement list, and she would have advanced to Senior Chief instead of him in 2017. And she asked the Board to correct her record to show that she advanced on that date. But as stated in finding 6 above, the applicant has not proven by a preponderance of the evidence that her lack of receipt of an end-of-tour medal or award in 2009 was erroneous or unjust. Therefore, the Board finds no grounds for backdating her upcoming advancement to Senior Chief.

b. PSC's memoranda to the applicant in 2013 and 2018 stating that those CWO Appointment Boards had removed her from consideration for appointment explain that the boards had done so based on a pattern of misconduct reflected in her records. These memoranda constitute strong, persuasive evidence that the documentation of her brief 2008 affair on both her erroneous May 2009 regular EER and the April 2010 disciplinary EER created an erroneous and unjust appearance of a pattern of misconduct in the applicant's record. Thus, her record was prejudiced by error and injustice before those boards and, presumably, before the CWO Appointment Boards that convened in 2015 and 2017, which considered but did not select her for appointment. The unjust, highly prejudicial information on the Court Memorandum, which the Coast Guard has agreed must be removed, was in her record and would also have been reviewed by the CWO Appointment Boards. Therefore, in the interest of justice, PSC's memoranda and/or other records showing that the applicant was removed from consideration for appointment to CWO in 2013 and 2018 should be removed from her record.

Whether the applicant would have been selected for appointment to CWO if the May 2009 EER and prejudicial language in the Court Memorandum had not been in her record is unknowable given the evidence of record. There are not many CWO billets, and the Board has no information about how many members in her rating competed for appointment to

CWO each year, how many were selected and appointed, or whether the applicant's record was competitive in comparison with the records of those in her rating who were appointed. In this regard, the Board notes that her lack of a Bachelor's degree might have prevented her selection. Moreover, if the applicant had contested the erroneous and unjust information in her record sooner, it could have been removed from her record before she ever applied for appointment to CWO, which would have made her record more competitive. The Board concludes that there is insufficient evidence and information in the record to determine that the applicant would have been selected for appointment to CWO in 2013, 2015, 2017, or 2018, if the erroneous and unjust information had not been in her record when it was reviewed by those CWO Appointment Boards. Therefore, the Board will deny the applicant's request for a retroactive appointment to CWO but finds that if substantial new evidence were submitted on this issue, the request would be reconsidered.

c. In the alternative, the applicant asked the Board to make her eligible to compete for appointment to CWO as soon as possible, and the Board finds that this relief is warranted. PSC's memorandum dated May 22, 2018, proves that the erroneous, unjust, and prejudicial documents in her record caused the 2018 CWO Appointment Board to remove her from consideration based on a misperceived pattern of misconduct. And that removal has caused her to be ineligible to apply for appointment to CWO by the boards convening in 2019 and 2020.<sup>8</sup> Therefore, the applicant has proven by a preponderance of the evidence that her current ineligibility to apply for appointment to CWO because of her removal from consideration in 2018 is erroneous and unjust, and she should be eligible to apply for consideration for appointment by the CWO Appointment Board convening in March 2020.

According to ALCGPSC 122/19, to apply for consideration by the CWO Appointment Board convening on March 30, 2020, a member had to submit an e-resume with a recommendation or "favorable endorsement" for appointment from her commanding officer no later than December 6, 2019—the date of this decision. Because she is erroneously and unjustly ineligible to apply, the applicant could not do so. And if this Final Decision had been issued within ten months of receipt of her completed application in November 2018, she would have been able to do both. Therefore and given that the applicant has been repeatedly recommended for appointment to CWO by her command when she was eligible in the past, the Board finds that if she has been recommended for advancement on all of her EERs since January 1, 2018, the Coast Guard should correct her record to show that she timely received a positive recommendation from her commanding officer, pursuant to paragraph 7 of ALCGPSC 122/19. In addition, the Coast Guard should waive the December 6, 2019, deadline provided in paragraph 8.a. for submitting a "My Panel Submission" e-resume and allow the applicant to submit one within seven calendar days of the date the Coast Guard notifies her that she is entitled to submit one pursuant to this order. And the Coast Guard should promptly make the other record corrections required by this decision so that her record will not contain either the prejudicial language in the Court Memorandum or her May 2009 EER when it is reviewed by the CWO Appointment Board that convenes on March 30, 2020.

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<sup>8</sup> COMDTINST M1420.1, Appointing Warrant Officers, Article 3.E.11.

9. Therefore, the following partial relief should be granted in this case:

- Her May 31, 2009, EER should be promptly removed from her record in its entirety.
- The Court Memorandum documenting her NJP on April 19, 2010, in her records should be promptly amended by redacting (entirely hiding) the language that appears struck through in the copy of the Court Memorandum submitted to the BCMR with the Coast Guard's advisory opinion for this case.
- Her record should be promptly corrected to show that she was not removed from consideration for appointment to CWO in 2013 or 2018 and so is currently eligible to apply for consideration by the CWO Appointment Board scheduled to convene on March 30, 2020.
- The Coast Guard should waive the December 6, 2019, deadline provided in paragraph 8.a. of ALCGPSC 122/19 for submitting a "My Panel Submission" e-resume and allow her to submit a valid one within seven calendar days of the date the Coast Guard notifies her that she is entitled and able to do so pursuant to this order.
- If she has been recommended for advancement on all of her EERs since January 1, 2018, the Coast Guard should ensure that her "My Panel Submission" e-resume includes, or is corrected to show, that she timely received a positive recommendation from her commanding officer, pursuant to paragraph 7 of ALCGPSC 122/19.
- If delays in the Coast Guard's implementation of the BCMR's order cause other deadlines in the processing of her CWO application to be missed, the Coast Guard should waive those deadlines as well.

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

**ORDER**

The application of CPO [REDACTED] USCG, for correction of her military records is granted in part as follows:

- a. The Coast Guard shall promptly remove the EER dated May 31, 2009, from her records.
- b. The Coast Guard shall promptly correct the Court Memorandum dated April 19, 2010, in her records by redacting (entirely hiding) all of the language that appears struck through in the copy of the Court Memorandum submitted to this Board with the Coast Guard’s advisory opinion for this case.
- c. The Coast Guard shall promptly correct her record to show that she was not removed from consideration for appointment to CWO in 2013 or 2018 and so is eligible to apply for consideration by the CWO Appointment Board scheduled to convene on March 30, 2020.
- d. The Coast Guard shall waive the December 6, 2019, deadline provided in paragraph 8.a. of ALCGPSC 122/19 for submitting a “My Panel Submission” e-resume and allow her to submit a valid one within seven calendar days of the date the Coast Guard notifies her that she is entitled and able to do so pursuant to this order.
- e. If she has been recommended for advancement on all of her EERs since January 1, 2018, the Coast Guard shall ensure that her application for appointment to CWO includes, or is corrected to show, that she timely received a positive recommendation from her commanding officer, pursuant to paragraph 7 of ALCGPSC 122/19.
- f. If any delay in the Coast Guard’s implementation of this Order causes other deadlines in the processing of her CWO application to be missed, the Coast Guard shall waive those deadlines as well so that her application will be reviewed by the CWO Appointment Board scheduled to convene on March 30, 2020.

December 6, 2019

