

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-066

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on February 8, 2008, upon receipt of the applicant's completed application, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 23, 2008, 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 asked the Board to correct her military record by expunging her officer evaluation report (OER) for the period June 1, xxxx, through June 11, xxxx. During this period, she was assigned as the captain of the USCGC XXXX, an xx patrol boat that grounded after the mooring ball to which it was tied broke loose from the sea bed during a storm. The applicant also asked the Board to remove from her record her failure of selection for promotion to lieutenant commander (LCDR) by the LCDR selection board that convened in xxxx and to backdate her LCDR date of rank to what it would have been had she been selected for promotion by that board. (After submitting her application, she was selected for promotion to LCDR in August xxxx.)

The applicant alleged, regarding the Reporting Officer (RO)¹ who prepared the second part of the disputed OER, that "[i]t is an understatement to say that relations between [the RO and herself] were less than satisfactory. From early in her tour, he had done a variety of things that suggested that he distrusted her." The RO was a captain serving as the Group and Sector Commander. She alleged that "[f]rom early in her tour [which began in xxxx, when she was still a lieutenant junior grade (LTJG)], the RO had done a variety of things that suggested that he distrusted her." She stated that her gender may have "played a role" in his reactions to her and noted that she was the only female captain of a patrol boat in the sector.

¹ All Coast Guard officers are evaluated by a "rating chain" of three superior officers, including the Supervisor, who assigns the marks for the first thirteen performance categories on an OER and supports them with written comments; the Reporting Officer, who assigns the last six marks, including the comparison scale mark, and supports them with written comments; and the Reviewer, who reviews the OER for consistency and compliance with regulation and may add a page of comments before forwarding it to the Personnel Command. See OER form CG-5310.

As an example of the RO's behavior toward her, she noted that in xxxx, a fireman apprentice (FA/E-2) under her command was found to have used the cutter's internet access to visit websites concerning fantasies of raping and murdering female military officers and to download and print material from these websites on the cutter's printer. The applicant consulted the XXXX's Executive Petty Officer and two other senior personnel and determined that the FA should be removed from the XXXX, because he posed a threat to her, and taken to mast by the RO. As a captain, the RO's power to impose non-judicial punishment (NJP) exceeded her own as a lieutenant. However, the RO refused to support her decision and argued that she should punish the FA on board herself before removing him from the cutter. The RO came to Xxxxxx and asked to discuss the matter with her over lunch. However, when she met him at the cafeteria, he led her to another building to meet with several senior officers, including the Sector Deputy Commander, a Reserve Commander, and the commanding officer of Station Xxxxxx, who was not even in her chain of command. She alleged that "the assembled officers pounded [her] with questions regarding why she wanted the FA removed from the ship and why she felt any mast should be conducted by [the RO] rather than herself." Ultimately, the RO directed her to conduct the mast herself, and the FA was then transferred to another unit.

In support of her allegations regarding the handling of the FA's misconduct, the applicant submitted a declaration dated January 18, 2008, from LT P, who was the commanding officer of Station Xxxxxx in xxxx. He stated that he remembers being invited by the RO to attend a meeting, which turned out to be a counseling session for the applicant regarding her handling of a sensitive personnel issue on the XXXX. The RO and his deputy questioned the applicant several times about her decision to remove the FA from the cutter. He stated that the applicant "made every effort to explain the holistic approach she took" in deciding what was best for the crew, but was overruled. LT P stated that he did not understand why her decision was questioned and that he himself should not have been invited to the meeting as he was a colleague of the same rank, rather than a member of her chain of command.

The applicant also complained that the RO never responded to inquiries she made when the XXXX and similar patrol boats were deployed to protect Xxxxx Harbor for several months and ended up "being used as tenders for small boats, which was plainly not their highest and best use." He also never apologized for having failed to respond to her inquiries about that deployment.

On December 2, xxxx, the applicant stated, the XXXX was performing a routine fisheries patrol in xxxxxxxxxxxx when the weather turned stormy and the waves grew to more than five feet. She alleged that the XXXX cannot function in seas over five feet, and so she drove the boat to Xxxxxx and moored it to a Navy mooring ball a few hundred yards from the Naval station's pier, which was common practice for Coast Guard patrol boats in the Xxxxxx District. However, twenty hours later, while the "xxxxxx" continued, the chain holding the mooring ball to the sinker on the sea bed broke, and the XXXX began to drift. The XXXX's watchstander noticed the problem promptly, and the crew started to unmoor from the drifting ball and to get underway. "By the time the engines were started, however, it was too late, and Xxx had touched bottom, causing some \$65,000 in damage to the propellers, rudders, and skeg." Thereafter, the Coast Guard forbade any cutter from using the Xxxxxx mooring balls and ultimately removed them.

On December 11, xxxx, the RO visited and spoke to the crew. He told them, in essence, “Shit happens; you were in the wrong place at the wrong time,” and “[h]is plain implication was that the ship was not at fault.” On January 16, xxxx, following an investigation of the grounding, the investigator recommended that the applicant remain in command but be counseled and receive an administrative letter of censure. (Administrative letters of censure are given to the officer but are not entered in the officer’s military record.) On March 11, xxxx, however, she was notified that she had been formally charged with hazarding a vessel in violation of Article 110 of the Uniform Code of Military Justice (UCMJ). The next morning, she reported to the Sector office as directed and was read her rights. When she elected to consult an attorney and not to make a statement, the RO became agitated, turned red in the face, pointed his finger at her, and said in a loud voice that he did not need to get a statement from her and that he would conduct mast against her based on the report of the investigation. The RO told her that the District command was pressuring him to conduct the mast that very day, but a while later agreed to delay the mast for a week, claiming that he had misunderstood the District’s directions. When the mast was rescheduled, the RO quickly sent an email to the crew of the XXXX ordering the XPO and EPO to attend the mast and inviting the rest of the crew to do so as well, instead of holding the mast privately as he had intended.

On March 17, xxxx, two days before the scheduled mast, the District Commander, a rear admiral, took the matter out of the RO’s hands and decided to conduct the mast herself. When the mast was finally held on April 15, xxxx, the District Commander treated the RO as a witness, so that he was summoned for testimony instead of being allowed to observe the entire hearing. Moreover, the District Commander dismissed the charges against the applicant and issued her only an administrative letter of censure, which is never entered in an officer’s record. The applicant alleged that the District Commander’s decision to take the mast out of the RO’s hands, treat him as a regular witness, and dismiss the charges mortified and angered the RO.

In June xxxx, the applicant alleged, the RO prepared an end-of-tour OER for her that lacked objectivity because of his animus against her. The applicant argued that because the RO’s animus raised a substantial question as to whether he could prepare a fair OER, he should have been disqualified from serving on her rating chain, in accordance with Article 10.A.2.g.2.b. of the Personnel Manual. The applicant stated that the disputed OER is unfair because “it contains no fewer than six narrative references to the Xxxxxx grounding, thereby materially blowing that matter way out of proportion, given the fact that [the District Commander] saw nothing in the circumstances that [rose] to the level of a violation of the UCMJ.” The applicant noted that the OER Reviewer included comments in the OER in an attempt to blunt the effect of the RO’s comments, but his attempt did not overcome the prejudicial effect of the RO’s marks and comments.

The applicant argued that it was “fundamentally unfair [for the RO] to take a single incident and refer to it repeatedly, as this OER does, under a multitude of performance categories. Moreover, even where, as this OER purports to do, the matter is mentioned in ways that seem to find something positive in the events, the pervasive references have the effect of distorting the gravity of the matter.” The applicant stated that the RO’s comment about her alleged “[d]efensive, narrow grasp of [leadership] ownership re [the] grounding incident’ is particularly unfair because all he is referring [to] in that comment is her unwillingness to be drawn into a conversation with him about it until such time as she had been afforded an opportunity to consult with an attorney” since she was facing criminal charges. The applicant also argued that this OER comment is strongly contradicted by another comment in the OER, which notes her eager pres-

entation of “lessons learned from [the] event.” She argued that the OER is internally inconsistent as it describes her as both defensive and eagerly open about the grounding. She stated that the comment about defensiveness is also contradicted by the text of the administrative letter of censure she received from the District Commander. In addition, she pointed out that the marks assigned her by the RO in the disputed OER are the worst she has received and are inconsistent with the marks in her other OERs.

The applicant argued that both the District Commander and the Deputy District Commander have “indicated disagreement, in one way or another, with [the RO’s] unfair treatment of [the applicant]. Because the OER system does not permit seniors to exert command influence by instructing subordinates as to how an OER should be couched, the best they could do was register Reviewer disagreement and dispose of the charges [the RO] intended to press under the UCMJ by informal means that were balanced and appropriately recognized her strengths during and after the grounding.”

The applicant stated that the comments about the grounding incident are so pervasive that the entire OER should be removed from her record and replaced with one prepared for continuity purposes only. She also stated that because the disputed OER was relatively recent when her record was reviewed by the LCDR selection board that met in xxxx, her failure of selection should be removed and her date of rank should be back dated to what it would have been had she been selected for promotion in xxxx, instead of xxxx.

In support of her allegations, the applicant submitted a letter from the District Commander to her attorney, dated January 15, 2008. The District Commander, who is now the Deputy Assistant Commandant for xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, wrote the following:

I am personally familiar with the officer’s performance having observed her on a number of occasions while she was in command, which, to the best of my recollection exceeded that of the Sector Commander who was the RO. I fully concur with the reviewer’s comments that I believe more accurately reports the officer’s performance and potential.

I recommend [the applicant] for promotion and command afloat without any hesitation. She was an exceptional Commanding Officer, before, during and after the incident. She learned from her mistakes and that was reflected in her proactive response. I strongly believe that [she] handled herself very appropriately in the most stressful situation. She made changes that not only made her crew safer; those changes were shared fleet-wide with all xx CPBs. Her demeanor during this entire incident reflects our core values of honor, respect, and devotion to duty. ...

In a declaration dated January 17, 2008, CDR L (USCG Retired) stated that on the evening of Thursday, March 11, xxxx, he received a telephone call from the applicant, who said that the Deputy Sector Commander, CAPT G had visited her that afternoon and told her to report to the Sector office the next morning for a mast pursuant to the grounding of the XXXX on December 2, xxxx. The applicant told him that CAPT G had denied her request for more time to prepare for the mast because of alleged pressure from the Xxxxxx District to complete the mast. Therefore, CDR L called a Coast Guard attorney for the Sector, who said that she had already been assigned to help the applicant and that she too had been told by CAPT G that the District office wanted the mast completed by March 12, xxxx. Because she agreed with CDR L that one day was too little notice of the mast, the attorney called the RO, but he refused to allow any delay and said that the District wanted the mast completed by the next day. Therefore, early Friday morning, March 12, xxxx, CDR L called the Reviewer on the applicant’s rating chain, who

supervised RO. The Reviewer said that he did not believe that anyone on the District staff had told the RO to take the applicant to mast or to do so by any date.

According to CDR L, when he, the attorney, and the applicant were escorted into the RO's office at 10:00 a.m. the next day, the RO read the applicant her rights and asked her to initial the form to show that she understood her right to remain silent or make a statement and her right to seek counsel. The applicant indicated on the form that she elected not to make a statement but to consult counsel instead. The RO then announced that he would proceed with the mast based on the report of the investigation and without questioning the applicant. The applicant then mentioned that the person she wanted to serve as her mast representative was underway on a cutter that would be back in port the following Wednesday, March 17, xxxx. The RO responded to this request by stating that the mast representative would have to participate by satellite telephone because he would not delay the mast. However, a short while later, the RO indicated that he had contacted the District office and determined that he had misunderstood his instructions; that "he didn't have to complete a mast on 12 March, he simply had to forward the case investigation to the District by 12 March with a cover memo stating his intentions for disposition of the case"; and that therefore he would convene the mast on Tuesday, March 16, xxxx. When the applicant reminded him how little time she had been given to prepare for the mast and that her mast representative would not be available until March 17, xxxx, the RO "became visibly upset and said words to the effect that if [the applicant], a cutter commanding officer, was indeed not expecting 'to be held accountable' and was not expecting a mast after her ship grounded, then he (the RO) questioned her competency ... He then castigated her for electing to not make a statement or permit questioning of her and for electing to seek legal counsel. He said her election of her rights precluded them ([the RO, the applicant], et al.) from having a discussion on the issues, and that her position complicated things. [The RO] reminded [the applicant] that he had 'gone to bat' for her ... at least twice [since the grounding] despite pressure from the District to relieve her of command." Finally, the RO agreed to hold the mast the following Friday, March 19, xxxx. CDR L stated that as he left the RO's office he thought that in his 29 years of service to the Coast Guard as an enlisted man, officer, and civilian employee, [he had never] seen an officer (particularly a Commanding Officer) treated so poorly, contemptuously, and with such a cavalier attitude, as [the applicant] had been treated by [the RO]."

A chief warrant officer who was the Engineering Petty Officer (EPO) of the XXXX from May xxxx through May xxxx under the applicant's command wrote, in a declaration on her behalf, that in xxxx the disposition of the FA who had misused the cutter's equipment and internet access "became of immediate concern" and caused friction between the applicant and the Sector command. The applicant decided that the FA should be transferred to a unit in another area, but the Sector Command merely transferred him to Station Xxxxxx, the XXXX's homeport. He further stated that after the XXXX was deployed in Xxxxx Harbor for several weeks after the invasion of Iraq, he, the XPO, and the applicant discussed their deployment—which amounted to serving as a mobile pier and bathroom facility for smaller utility boats—and all three felt that the boat could be put to better use. Therefore, he encouraged the applicant to express their concerns to the RO. She made several calls to the Sector office, but her "concerns seemed to go unnoticed," and she received no response.

Regarding the grounding incident on December 2, xxxx, the EPO stated that the mishap "was unfortunate and, like all MISHAPS, could have been avoided." He alleged that the "friction that began following the incident with [the FA's] inappropriate computer use became aggra-

vated after the grounding.” The EPO alleged, in particular, that the Sector’s investigation of the grounding was “a disaster from the start,” which caused tension between the applicant and the Sector office. For example, the urinalyses of the crew, which occurred the day after the grounding, were wrongly conducted by the investigator, a lieutenant from the Sector office, who tried to have the crew sign their sample bottles and the urinalysis roster several days after the samples were taken when they could no longer verify the samples were their own. Also, the statements the investigator gathered the first day were found to be invalid, and the entire crew was asked to write new statements three days later but were not allowed to review their first statements. Then the investigator was removed from the job because she was allegedly having an inappropriate relationship with an enlisted member at the Sector office. The EPO also stated that, on the afternoon of Friday, March 12, xxxx, the crew of the XXXX received emails inviting them to attend an “Open Mast” for the applicant the following Friday. The EPO himself was ordered to attend. He spoke with the applicant that evening, after she returned from the Sector office, and she told him that the RO had become very tense and angry when she asked to consult counsel. The EPO stated that the mast did not occur the following Friday because the District Commander “stepped in and took over.”

A Family Advocacy Specialist for the Coast Guard, Ms. S, wrote in a declaration dated January 17, 2008, that she dealt with the RO on numerous occasions and usually found him to be engaged and supportive of members of his outlying units. However, he did not ask her about the well-being of the crew after the grounding on December 2, xxxx. The applicant, however, asked her to meet with the command and crew of the XXXX on December 4, xxxx. Therefore, she attended the Admiral’s mast for the applicant on April 15, xxxx, to testify about the applicant’s “consistent care and concern” for her crew. While waiting to testify with the RO and other witnesses, she noticed that the RO

appeared very angry and agitated. His face turned various shades of red. He sighed loudly and often. He paced the room and gripped his hands. He discussed his sudden decision to retire with some of the other witnesses. He appeared very agitated as he spoke to a [lieutenant], who I later discovered was one of the investigators. His anger seemed directed at [the applicant] as I occasionally heard him say her name while his face was red. He barely spoke to me, despite our previously harmonious working relationship.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

The applicant enlisted in the Coast Guard in 1992, advanced to second class petty officer, and was appointed an ensign in the Reserve on December 18, 1998, upon graduating from Officer Candidate School. From January 1999 to May xxxx, she served on extended active duty aboard a medium-endurance cutter as a deck watch officer and received high marks on her OERs.² She was promoted to LTJG. From June xxxx to April xxxx, she continued to serve on extended active duty as the Weapons Officer on a high-endurance cutter and received very high marks on her OERs.

In April xxxx, while still an LTJG, the applicant became the commanding officer (CO) of the CGC XXXX, a new xx patrol boat based in XXXXXX, XXXXXX. Her crew consisted of two chief petty officers, six petty officers, and three non-rated enlisted members. On December 18,

² In OERs, Coast Guard officers are evaluated on their performance in various categories, such as “Judgment,” “Teamwork,” and “Using Resources,” on a scale of 1 to 7, with 7 being the highest possible mark.

xxxx, she was promoted to lieutenant and integrated into the regular Coast Guard. On her first OER as captain of the XXXX, which covers the period April 21, xxxx, through March 31, xxxx, the applicant received very high marks, including seven marks of 5, ten marks of 6, and one mark of 7 in the various performance categories and a mark in the fifth spot on the comparison scale.³ The RO commented in this OER that the applicant was a good candidate for advanced education; for appointment to a high-profile billet, such as the White House; or for command of a tactical law enforcement team or marine safety and security team. He “heartily recommend[ed]” her for promotion to LCDR and noted that she “continues to grow in leadership and management judgment and to demonstrate all the attributes necessary for future unlimited success in career path for continued command afloat opportunities.”

Report of the Informal Board of Investigation

After the XXXX grounded during a severe storm on December 2, xxxx, the RO convened an Informal Board of Investigation, which issued a report on January 16, xxxx. The report notes that two sets of written statements and two sets of interviews were required of the crew and that the lieutenant initially assigned to investigate the mishap was relieved of her duties on December 10, xxxx, for reasons unrelated to the investigation. In addition, the investigators contacted several current and former captains of Coast Guard patrol boats in the Xxxxxx District, as well as the Executive Officer of Naval Station Xxxxxx.

The report recounts the following facts regarding the grounding: After encountering 5’ waves and faced with a forecast of 6’ waves in Xxxxxx on November 30, xxxx, the “command cadre” of the XXXX, which consisted of the applicant as CO, the XPO, and the EPO, met and decided to drive the XXXX into xxxxxxxx and tie up to a mooring ball near Naval Station Xxxxxx because the “boat was restricted to seas less than 4 feet.” They did not conduct a risk assessment using the GAR model, as required by the Navigation Standards Manual because, the applicant explained, they had “performed this particular evolution before at mooring balls in this location as well as elsewhere.” The ship’s log showed that they had performed a risk assessment using the GAR model just four hours earlier, before leaving homeport in Xxxxxx. The ship’s log further revealed that the command cadre regularly performed risk assessments in accordance with regulation before leaving a pier, but did not perform them prior to mooring to a pier or mooring ball or before getting underway from a mooring ball. The report notes that the applicant’s standing orders provided that “[w]hen moored to a buoy, the conditions of the buoy chain, cable, and sinker become critical. Since the conditions of most of these items are unknown and beyond our control, the [officer of the deck] must constantly be alert.”

The report states that the XXXX tied up to the mooring ball shortly after midnight on December 1, xxxx, and did not contact Naval Station Xxxxxx Pilot Operations either before or after tying up. Once moored to the ball, the cutter’s distance from shoal water of less than 10’ in depth ranged from 300 to 425 yards, as the shore arced around. The boatswain’s mate who used a small boat to pick up the mooring line from the ball reported that the line and ball had appeared to be in good shape, but he did not inspect the submerged portion of the mooring ball or chain.

³ The comparison scale is not numbered, but the scale has seven possible marks. A reporting officer completes the scale by comparing the reported-on officer with all other officers of the same rank whom the reporting officer has known throughout her career. A mark in the fifth spot means that the applicant, in comparison with all other lieutenants whom the reporting officer had known, was an “Excellent performer; give toughest, most challenging leadership assignments.”

The XXXX had used these mooring balls several times before, and the Navy had never objected. The XXXX had most recently tied up to one of the mooring balls near the Naval station on November 10, xxxx.

After determining that the cutter was holding to the mooring ball, “the XPO, who had the conn, put a perimeter box around the cutter on the Transas Nav Sailor 2400, i.e, the ECDIS. The XPO stated he established the size of the box using ‘seaman’s eye’ that he felt was adequate to ensure CGC XXXX remained in safe water. The XPO also established a safe circle round the cutter’s position on the THE CAPN, i.e., an electronic chart system provided as a back up to the ECDIS/ECINS. The CO then reviewed and approved the perimeter box.” The report noted that the investigator could not determine the size of the perimeter box used, but a boatswain’s mate reported that he normally used a 50-yard radius. In addition, no alarm or visual alert was set on the CAPN, or depth sounder, and no other navigational equipment or technique, such as radar navigation points, the depth finder, a paper chart, or visual bearings, was employed to verify that the XXXX was not drifting. Nor were the swing and drag circles from the mooring ball established. The XPO secured the main diesel engines in a “immediate stand-by” configuration.

While moored, an “at anchor” watch was set, with 3-hour shifts in which a single watchstander was to check the cutter’s position by comparing the current position with the position when first moored once every 15 minutes and by taking radar fixes once every 30 minutes. However, no log of the cutter’s positions during an at anchor watch is kept. The watchstander was also required to make a round of the deck and engine room and to check the mooring line once every 30 minutes. This watchstanding practice had been established under the prior captain. Before retiring to her bunk on the night of December 1, xxxx, the applicant also advised the officer of the deck (OOD) to watch for “dragging and increased winds” and to wake her if the wind exceeded 35 knots, which did not occur.

The XXXX remained moored for about 20 hours without incident. According to the cutter’s ECDIS, which records its position, heading, and speed every 10 minutes, the XXXX was still holding in place at 8:20 a.m. on December 2, xxxx. However, at about 8:30 a.m. on December 2, xxxx, the watchstander, a machinery technician third class (MK3), asked a boatswain’s mate second class (BM2) who happened to be on the bridge whether he thought that the cutter was moving closer to the land. (At that moment, the applicant, the XPO, and the EPO were meeting on the mess deck to make plans for the day.) The BM2 told the MK3 to check the perimeter box on the ECDIS. The MK3 checked the ECDIS and said that the cutter was not within the box. The BM2 checked the ECDIS to confirm this and told the MK3 to sound a “General Emergency,” which was noted in the log as happening at 8:32 a.m. While the MK3 sounded the alarm and “made the pipe ‘XXXX is dragging anchor, Commanding Officer and Executive Petty Officer lay to the bridge,” the BM2 attempted to start the main engines by pressing the key switch and then the start button. The engine lights fluttered, however, and the engines did not start. Because the MK3 was also unable to start the engines, he went to the Engine Room just as the applicant and the XPO arrived on the bridge. The applicant and the XPO asked the BM2 why the engines were not running, and the BM2 explained that they would not start. The XPO assumed the conn and ordered the BM2 to go forward and drop the anchor, “which was at the ready.” The XPO tried unsuccessfully to start the engines, and the anchor was dropped at 8:35 a.m.

Upon hearing the alarm, the EPO went to the Engine Room and “observed that the LOPs were energized as well as that the MDEs were in pilothouse control but were not running.” After seeing the LOPs power off and on again twice, he “proceeded to take engine room control of both MDEs and immediately started them.” Then he transferred control of the engines to the pilothouse and went to the main deck. The log showed that the EPO started the engines at 8:38 a.m.

Upon gaining control of the engines, the XPO told the investigator, he “clutched the port MDE astern” because he thought the cutter was drifting toward the shoals bow first. He immediately heard the propellers strike the bottom, and put the throttle in neutral. (The applicant reported that she thought the cutter was drifting to port and that the XPO clutched ahead; other members of the crew also reported that the cutter was drifting into shoal water on the port side.) The report also notes that after the propeller struck bottom, “no effort was made to free CGC XXXX from the bottom using the MDEs in order to prevent additional damage.” The applicant immediately notified nearby Coast Guard facilities of the grounding and need for help. Group Woods Hole noted receipt of this call at 8:38 a.m. The applicant was told that help would arrive in about one hour. Therefore, to prevent further damage as the tide rose, the command cadre launched a small boat to redeploy the anchor from the stern. The XXXX was “laying port beam to the shore” and when two utility boats arrived from the closest Coast Guard station, they used the XXXX’s towing hawser to pull the cutter into deeper water as the tide rose.

According to the crew, the mooring ball remained tied to the XXXX while it drifted and was not cut loose until after the cutter ran aground. The XXXX was moved to the Naval station pier and, because of damage to the propellers, rudders, and skeg, did not return to service until December 22, xxxx.

The report states that the “command and crew of CGC XXXX were cooperative and professional throughout the investigation.” Testing revealed no alcohol or illegal drug use among the crew. During the investigation, neither the applicant nor her crew were advised of their right against self-incrimination because there was no evidence that the grounding resulted from willful misconduct.

The report notes that prospective captains of xx patrol boats receive “minimal training on the capabilities and use of installed navigation equipment” before reporting aboard, whereas prospective captains of larger cutters receive three weeks of mandatory pipeline training on the ECPINS system before assuming command. The report further noted that before reporting aboard the XXXX, the applicant had submitted a request to attend such training, but her request was denied. However, the crew had successfully completed drill training in special and emergency operations and procedures in October xxxx.

Regarding the mooring ball, the report states that Navy personnel recovered it and found that its chain had broken, detaching the ball from its anchor on the sea bed. The Navy had originally put seven mooring balls in that part of the bay in the early 1990s as “heavy weather moorings” for a program that was moved from the area in 1994. By December 1, xxxx, only three of the seven remained in place, and the Naval station did “not have any records regarding the moorings’ maintenance history, nor do they have established protocols governing their use.” On December 5, xxxx, the Xxxxxx District office issued a broadcast notice prohibiting any vessel from mooring to the two remaining mooring balls, and they were removed by a Coast Guard

buoy tender on December 10, xxxx. A tag on one of the balls removed noted that the next service date was May 9, 1993, but the Navy claimed to have inspected them once every four years. The diameter of the links of the broken chain, which was originally 1.5", had worn down to as little as 0.25". Several COs and OICs of Xxxxxx District vessels stated that they had heard of Coast Guard vessels using the mooring balls in the past, but none stated that they had used them recently.

The report of the investigation further notes that because a prior EPO had begun the practice of de-energizing the LOPs with the key switch while at anchor to eliminate false alarms, instead of leaving them energized, it would have taken the XXXX's engines about 52 seconds to start since they were cold from disuse. There was no policy or standard in place to prohibit this practice when a cutter is in "immediate stand-by."

The report states, based on the ECDIS report of the cutter's position and speed at 8:30 a.m., that the watchstander noticed the cutter was drifting about one or two minutes after the mooring ball broke loose from the sea bed. Given the wind and current at that time, the XXXX would have grounded between 8:35 and 8:38 a.m. The report praises the crew's swift actions in trying to prevent the grounding and to minimize damage afterward.

The report notes that the lack of a risk assessment by the command cadre prior to the mooring was "striking" but that, even if they had conducted one, the applicant might still have chosen to use the mooring ball since the XXXX had used them before. However, if a risk assessment had been conducted, the applicant might have thought to set the XXXX's own anchor or to dock at the pier. The applicant admitted to the investigator that her decision to tie up to the mooring ball, rather than dock at the pier, was influenced by the fact that time spent tied to a mooring ball counts toward a cutter's total operational hours, whereas time spent docked at a pier does not. Other captains interviewed by the investigators admitted that they too had sometimes used mooring balls instead of piers for just this reason.

The report also notes that neither the applicant nor the XPO used all of the available equipment and navigational tools available on the XXXX that might have warned them a minute or two earlier that the vessel was drifting. Their failure in this regard "was likely related to the minimal formal training provided by the Coast Guard to the CO [applicant] and other members of XXXX's navigation team so that they could take maximum advantage" of the alarms available on the equipment. In addition, neither the MK3 nor the BM2 knew how to start the engines from the pilothouse, even though they had qualified as OODs. The report finds that the grounding might have been prevented had the engines been started just a minute or two earlier, which could have happened if the applicant or the XPO had set the alarms; if the LOPs had not been de-energized during the mooring; or if the MK3 or BM2 had been familiar with all the responsibilities of an OOD and thus known how to start the engines from the bridge.

The report notes that the fact that the OOD was on the bridge when the mooring ball broke loose and so quickly noticed the cutter's movement was a lucky circumstance given all of the duties of the OOD. The report found that having only one person on watch under such circumstances was "not prudent" because the OOD could easily have been in the Engine Room and not noticed the cutter's movement.

The board of investigation found that the applicant “negligently caused CGC XXXX to be hazarded” by not completing a risk assessment before mooring; by using the mooring ball based only on prior experience and second-hand knowledge that they had been used by other patrol boats in the past; and by ignoring the standing orders, which explicitly related the safety of the cutter to the material condition of any mooring ball it used. In addition, the board noted that the applicant had to be held accountable because the responsibility of a ship’s captain under paragraph 4-1-2-A of Coast Guard Regulations and longstanding tradition “is absolute.” The board stated that “although the [applicant] could be charged with violating Article 110(b) of the UCMJ, punitive measures may not be the most appropriate means of holding the CO accountable for her negligence in this matter.” The board recommended that the applicant be counseled with an Administrative Letter of Censure but remain in command of the XXXX. The board also recommended a list of changes that should be made in procedures and training aboard the XXXX and on xx vessels and in training throughout the Coast Guard.

The RO’s Action on the Report of the Investigation as the Convening Authority

On March 1, xxxx, the applicant’s Supervisor, who was the Group Operations Officer, charged the applicant with hazarding the XXXX in violation of the UCMJ. On March 19, xxxx, the RO forwarded to the District Commander the report of the investigation into the grounding of the XXXX on December 2, xxxx. In his endorsement of the report, he noted that the cutter was doing work for another command when it stopped in xxxxxx, which was not within his sector’s Area of Operations. He also noted that a cutter’s quarterly quota of operational hours does not take into account weather conditions, which might put pressure on captains to “burn hours” by tying up to mooring balls instead of docking at piers. Regarding the applicant’s decision to use the ball, he noted that the “importance and criticality of a mooring system and the knowledge of its material condition prior to mooring are explicitly underscored in the Commanding Officer’s standing orders”; that one cannot determine the condition of a mooring ball chain from aboard a boat; and that the command cadre should have noticed that of the seven mooring balls shown on the chart they were using, only three remained, which was a “red/amber flag.” The RO stated that in his first telephone call with the applicant after the grounding, he asked her who owned the mooring ball and whether it was Navy or commercial. She replied that she was not sure but thought it belonged to the Navy. When he asked if she had checked with the Navy before using the ball, she said, “No, we’ve used them before and I never had to ask anyone to use them.” The RO also noted that the Navy had been negligent with respect to the mooring balls, which created “an accident waiting to happen.”

Regarding the crew’s actions after tying up, he stated that the reliance of the applicant and the XPO on “seaman’s eye” in setting the perimeter box and their inability to remember the size of the box or the safety circle was disturbing. In addition, he noted that the XXXX had been “gigged” during the October training for not having a written navigation log, and there was still none in use when the cutter grounded. Given the weather conditions and proximity to shoal water, the RO wrote, he found the applicant’s failure to leave written orders for the overnight watch imprudent. He claimed that most of the captains he questioned reported that they maintained two-person anchor watches and that the applicant had never told him that she believed her crew or herself to be inadequately trained. He also opined that there was insufficient explanation for the “apparent 5 to 6 minute delay” in starting the engines from the moment the cutter’s movement was noticed.

The RO recommended that the applicant remain in command because of “her overall effective and productive performance” but disagreed with the recommendation in the report that she be given only an Administrative Letter of Censure. He attributed the grounding to the applicant’s “complacency” and recommended that she “at a minimum” be taken to mast to provide her “the opportunity to formally recognize (and demonstrate) ownership of the full responsibility of command at sea” and to explain her failure to conduct a risk assessment and her decision to use the mooring ball in question given the weather and the proximity to shoal water. He concluded that the applicant

must understand the ultimate accountability for the decision making process employed prior to mooring, for the decision to actually moor where XXXX eventually did, for the potentially weak training posture of her crew, for the inadequate or inattentive shipboard policies, procedures & practices, and for all actions taken—good and bad. As the investigation has documented, numerous issues could have resulted in additional charges of violation of the UCMJ (which will individually need to be addressed, remedied or otherwise corrected). I specifically declined to do so, however, preferring to concentrate on the fundamental and principal issue (and oversight) of the Commanding Officer’s responsibility for decision-making, risk assessment, and the eventual mooring to that mooring ball. ... I am personally and professionally saddened and disappointed that an otherwise capable and still promising officer, under my command, failed to make the right decisions the right way. That is my ultimate and full responsibility, and no one else’s, and for which I fully accept.

Admiral’s Mast and Administrative Letter of Censure

On April 15, xxxx, the District Commander held a mast to address the charge against the applicant of negligently hazarding a vessel. She dismissed the charge with a warning, and on April 19, xxxx, in lieu of any punishment, gave the applicant an “Administrative Letter of Censure,” which is not entered in an officer’s military record. The letter, which was submitted by the applicant, states the following:

1. Commander, Group xxxxxxxxxxxx convened an investigation to determine the causes of the grounding of USCGC XXXX, under your command, in xxxxxxxxxxxxxx on 02 December 03. The cutter grounded while attached to a mooring ball whose anchoring chain parted, causing the cutter to drift shoreward. The report of investigation, the action of the Convening Authority, further investigation action taken by the District staff, and the mast I held on 15 April 03 reveal that several factors contributed to the casualty, including:

a. An inadequate risk assessment conducted by the XXXX command cadre prior to deciding to use the mooring ball off NAVSTA Xxxxxx. The risk assessment did not fully address expected weather conditions, proximity of the mooring ball to shore, and consideration of the worst-case scenario.

b. Minimal knowledge of the true condition of the mooring ball other than dated word of mouth recommendations and a limited visual inspection of the ball, but not its anchoring system, by the cutter’s crew. NAVSTA Xxxxxx, the owners of the mooring ball, was not contacted, and there was no knowledge of the tensile strength of the chain holding the mooring to the bottom. You relied primarily on faith in deciding to use this mooring ball.

c. Once tied to the mooring ball, navigation safeguards in place were minimal, consisting only of a “perimeter box” drawn on the ECDIS system using best-guess estimates on size that did not consider the scope of the chain on the mooring ball. While the radar VRM was also used to determine the cutter’s position relative to shore, other available methods were not used.

d. Establishment of a one-person anchor watch with no written night orders and minimal task direction. Fortunately, the casualty occurred in daylight, when more than one person happened to be on the bridge, and a crewmember using seaman's eye determined the cutter was drifting.

2. In short, complacency clouded your ability to identify and mitigate the risks inherent in this relatively routine mooring. It was only good luck and quick action by members of your crew after the chain parted that kept this casualty from being a true disaster. As the Commanding Officer, it is your job to ensure that complacency does not set in. You should never be satisfied with the answer "it's OK because we've done it before." You must constantly re-evaluate the risks before you, take appropriate action to mitigate risks you identify and, where necessary, go beyond the requirements of "the book" to ensure the safety of your crew and the cutter. I expect nothing less.

3. I am heartened by the corrective action you have taken in the aftermath of the grounding, including acquiring new equipment to ensure greater awareness of the cutter's status from areas other than the bridge, enhanced training, and new procedures to ensure this incident does not recur. I am also impressed with the manner in which you and your crew have performed since the casualty and the state of morale and esprit de corps on your cutter. You must continue moving forward in this manner. As I have told you, I expect you to be the best patrol boat commander in the Xxxxx District. It is up to you to make that happen.

4. Per paragraph 8.E.4. of [the Personnel Manual], this letter is corrective in nature, and is not punishment for an offense. It will not be included in any unit files or official reports, including officer evaluation reports or the final report of investigation, when it is completed.

Action of the Final Reviewing Authority for the Investigation

On June 15, xxxx, the District Commander took final action on the report of the investigation. She added many facts to the report, including the following in pertinent part:

- The XXXX and other xx patrol boats "are authorized to conduct primary missions in conditions up to Sea State 5. Sea State 5 is the equivalent of 16-foot seas."
- Commanding officers are required by the Navigational Standards Manual "to incorporate the principles of effective mission analysis and risk assessment into their navigation planning."
- "There is no specific written procedure for patrol boats regarding the use of mooring balls."
- The crew of the XXXX did not know the length of the chain connecting the mooring ball to its anchor and so could not know its radius action.
- The command cadre did not know "the scope of the mooring" when the perimeter box was established.
- "The x-foot patrol boat fleet utilizes a standard PQS [personnel qualification standard] for 'At-Anchor OOD Watch.' This PQS expands upon the normal in-port OOD watch-standing and includes plotting, starting engines, and emergency procedures. While at anchor or moored, a patrol boat may maintain a one-person watch schedule. While underway, a patrol boat must maintain a two-person bridge watch schedule and an engineering watch."
- Private mooring balls must be permitted by the Coast Guard to provide oversight. "The Department of Defense, however, is specifically exempt from seeking a permit or maintaining the aid as required under the statute. See 14 U.S.C. 83."

The District Commander concluded that “[t]he root cause of the grounding of the USCGC XXXX on 02 Dec 03 was the culture of complacency that existed on board the vessel. This complacency fostered an environment in which tying the vessel to an unsafe mooring ball was determined to be a safe evolution primarily because ‘[the practice] had been done before.’ When routine practice breeds inattention to detail, the ability to identify and mitigate risks becomes clouded. It is inherent in the proper operation of each and every Coast Guard vessel that the Commanding Officer conduct constant evaluations of risks to ensure the safety of the vessel and its crew, even when faced with routine ‘day to day’ operations. A Commanding Officer should remain ever vigilant.”

Disputed OER

The second OER that the applicant received as captain of the XXXX is the disputed OER in this case and covers her service from June 1, xxxx, through June 11, xxxx. The OER contains two mediocre marks of 4 for the categories “Judgment” and “Responsibility,” five marks of 5, eleven marks of 6, and a mark in the fourth (middle) spot on the comparison scale. It also notes her receipt of a Commandant’s Letter of Commendation Ribbon Bar for catching a commercial fishing vessel with a very large, illegal load of xxxxxx hidden on board on March 7, xxxx. The comments concerning the grounding of the XXXX are shaded in the table below:

MARKS AND COMMENTS IN DISPUTED OER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	6	<p>Noteworthy effectiveness w/ multi-agency plng/ops, GUARDING LIBERTY (xxxxx), LIBERTY SHIELD, NOBLE EAGLE & ATLANTIC VENTURE II (DXX). PATCOM & OSC during numerous ops, resp for security zone enf & protecting Tier 1 assets during periods of heightened HLS conditions ... xx building in xx, DXX MDA objectives, xxxx POTUS OPS ... active & overt efforts resulted in fortified MHLS presence & successful mission completion. Outstanding coop w/ & support provided to USSS, CGIS, NMFS, State LE agencies & xxxx, revered for flexibility, work ethic & response. U/W w/ high DXX optempo/skcd completed 3 SAR cases, 25 boardings, 5 LNG escorts, 2 sub escorts & multiple ferry/cruise ship escorts, saved 2 lives & thousands \$\$ in pers property. Successfully coord & prosecuted multiple LMR ops, incl Machias Op, throughout DXX, efforts of unit resulted in revision of WPB tactics during LMR ops across DXX, deterred over-harvest of scallop & xxxx fishery. Conducted largest catch seizure inxxxxxxx’s recent history w/ over 29K lbs of multispecies valued @ \$30+K ... generated huge positive media cvrge ... hi praise rcvd fm DXX. 100% PMS completion across all divs. Following grnding (moored to an unmaintained USN mooring ball whose anchor chain failed) quickly rectified problems, improved SOPs/trg, passed lessons learned to CPB fleet ... resulted in changes to xx CPB pipeline training & revitalization of DXX cutter RFO prgm.</p>
3b	Using Resources	5	
3c	Results/ Effectiveness	6	
3d	Adaptability	6	
3e	Professional Competence	5	
4a	Speaking and Listening	6	<p>Comfortable in all venues, incl spkng w/ USSS & xxxx as liaison. Provided in-depth WPB brief to Royal Malaysian Navy ... positive reception, reflected greatly upon WPB fleet & CG. Presented lessons learned from grounding incident at WPB COs conference ... experience provided others w/ better appreciation for risks and situational preparedness. Well written & comprehensive correspondence, FIRs, AARs, ConOps. Prepared a flawless LMR file package for slam-dunk case, greatly assisted prosecution efforts. Required quality written work from XPO/CPD.</p>
4b	Writing	6	
5a	Looking Out for Others	6	<p>Actively reviewed crews ADCs & frequently engaged EPM, maintained health of assignment process. Sought special opportunities/assignments for crew & championed unit striker program, resulted in 2 advancements, 1 mbr sel for CGIS, 1 mbr sent to & grad OCS & 3 mbrs striking, BM2 completed DWO quals. Assisted mbr during wife’s complicated pregnancy, command representation fostered spirit of ‘CG-family.’ Led highly active morale program ... coordinated ship’s parties, BBQs, sporting events & bowling tournaments ... resulted in improved teamwork. Post mishap, ensured Critical Incident Stress (CIS) tm provided necessary assist to crew, allowed crew to address concerns, yet remain focused on missions. Sought formal recog for subords ... approval of 6 COMDT LOCs, 2 CG Ach Mdls & 2 CG Comm Mdls. Provided sound ldrshp during a myriad of high-optempo MHLS ops ... sector cmdr for OP LIBERTY SHIELD,</p>
5b	Developing Others	6	
5c	Directing Others	5	
5d	Teamwork	6	

5e	Workplace Climate	5	PATCOM for numerous LHG/LNG escorts, key asset during Fleet Week. OSC for SAR case inv F/V xxxxxxxxxxxxxxxx, included MEDEVAC & subsequent disabled vsI tow. Active w/ community relations, nearly 100% participation by unit pers in local blood drives, Salvation Army assist, CGMA & CFC. Implemented EPEF sys ... 11 evals comp & well doc'd w/ no returns, no appeals. Own OER [input] timely and thorough.
5f	Evaluations	6	
6	Signature of the Chief of Group Operations, dated June 7, xxxx		
7	Reporting Officer's Comments	NA	Concur w/ [Supervisor's] comments. Incomplete risk assessment, overfamiliarity with op area led to unfortunate grounding mishap when vsI broke free from an old unmaintained USN mooring ball, costing CG approx \$65K to effect repairs, preventing XXXX fm being fully operational. Aggressively and completely executed all assigned missions in demanding hi WPB optempo environment. Superb execution, prosecution of F/V xxxxxxxxxxxx II xxxxx violation, catch seizure garnered major positive media covrge ... crew received hi praise from District & other federal agencies.
8a	Initiative	6	Key coord/plner for successful LMR pulse op in GRU SW Harbor. Obtained desperately needed SWSIII for ship's ofc, used by crew to complete admin, finance, purchasing & CMPlus tasks. Participated in xx CPB manpower analysis conf, input re watch standing limits resulted in blt structure study. Improved unit security, watchstanding practices by developing policies & brokered for security monitors & cameras to be placed in engine room & mess deck ... initiatives greatly improved watch standing, several ideas adopted by DXX CPB fleet. Defensive, narrow grasp of ldrshp ownership re grounding incident ... but eagerly presented lessons learned from event at WPB conf ... willingness to share exp & better practices/procedures reflected greatly upon personal, professional character. Arranged for DXX TCT expert to conduct trng on RAM principles; active RISK/GAR program. Sustains healthy public affairs program, works well w/ media & freq provides tours of WPB to VIPs, other agencies, sea cadets, prospective Coasties. Well within CG weight standards & adheres to personal fitness regime ... personally coordinated unit fitness activities ... competes regularly in road races, marathons & soccer leagues, 192 mi TOM's Run (11 pers 24 hr relay).
8b	Judgment	4	
8c	Responsibility	4	
8d	Professional Presence	5	
8e	Health & Well-Being	6	
9	Comparison Scale	4	[A mark of 4 means that in comparison with other lieutenants, the RO rated the applicant as a "[g]ood performer; give tough, challenging assignments."]
10	Potential	NA	Considering the grounding of the XXXX and matters following the incident, I was disappointed in [the applicant's] initial grasp/understanding of the respons bilities of leadership and command ... I believe the experience has provided this officer a tremendous invaluable learning, leadership growth opportunity. [She] possesses a wide range of personal and professional qualities and skills commensurate with an officer of unlimited potential ... desires & would be an excellent candidate as a US Embassy CGLO or for pg studies in international affairs. Should be considered for assignments of greater challenge and respons bility ... is fully recommended for promotion to LCDR with peers.
11	Signature of the Sector/Group Commander as the Reporting Officer, dated June 11, xxxx		
12	Signature of the Reviewer, Chief of the Xxxxxx District Office of Search and Rescue, dated July 2, xxxx		
	<p style="text-align: center;">REVIEWER COMMENTS (Optional except when Reporting Officer is not a CG officer or CG SES)</p> <p>Concur with assigned marks. However, I must point out that the marks assigned for judgment and responsibility (both 4) were primarily based upon a single incident (XXXX grounding) and are not indicative of this officer's performance for the vast majority of this reporting period. I do not agree that [the applicant] showed a "defensive, narrow grasp of leadership ownership" after the grounding incident. In fact, [she] worked hard with both the mishap investigator and the administrative investigator to identify causes of the grounding and to propose solutions to prevent recurrence. As a result, XXXX's electronic charting training, and the cutter's watchstanding procedures have been modified. In addition, [she] has shared lessons learned with all DXX patrol boats, increasing their situational awareness and improving readiness fleetwide.</p> <p>[The applicant] learned a hard lesson about complacency during the grounding incident. However, she learned the lesson well and recovered quickly, subsequently earning a Commandant's Letter of Commendation for performance during the largest catch seizure in recent DXX history. I have complete confidence in her seamanship, leadership, responsibility, and integrity. [She] is well qualified and highly recommended for command at sea. As stated by the Reporting Officer, "[the applicant] possesses ... personal and professional qualities and skills commensurate with an officer of unlimited potential." I strongly recommend [her] for promotion to LCDR.</p>		

After completing her tour as captain of the XXXX, the applicant became a training manager for the Coast Guard's Office of xxxxxxxxxxxxxxxxxxxx. On her first two OERs in this position, she received very high marks in the performance categories, a mark in the fifth spot on the comparison scale, and her reporting officer's strong recommendation for promotion and for command assignments ashore and afloat. On her third OER in this position, she received six marks of 7 (best possible mark) in the performance categories, a mark in the fifth spot on the comparison scale, and her reporting officer's highest recommendation for promotion. The

applicant was not selected for promotion to LCDR in August xxxx, when she was “in the zone” for promotion with her peers, but she was selected for promotion in August xxxx after receiving a superb OER with six marks of 6 and twelve marks of 7 in the various performance categories and a mark in the sixth spot on the comparison scale, which means that she was “strongly recommended for accelerated promotion.”

VIEWS OF THE COAST GUARD

On May 29, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request. The JAG argued that the applicant has failed to prove by “clear and convincing” evidence that the disputed OER was erroneous or that the RO should have been disqualified from her rating chain. The JAG argued that the record indicates that “the rating chain carried out their duties fairly and objectively by accurately marking the Applicant in accordance with the Coast Guard’s Personnel Manual.” The JAG argued that the applicant has submitted insufficient evidence to rebut the presumption that the RO acted correctly and in good faith in evaluating her performance or to prove that he should have been disqualified due to bias. The JAG stated that the fact that the RO disagreed with and overruled the applicant regarding how to handle the punishment of a crewmember is not grounds for disqualification of a senior officer of a rating chain. The JAG further stated that while the RO may have been frustrated with the delay in the mast proceedings, his “red face” is due to his diagnosed rosacea,⁴ and not to any animus toward the applicant.

The JAG further stated that the six OER comments about the grounding of the cutter, including the comments about the financial and operational impacts of the grounding, were reasonable, appropriate, and accurate and did not violate any statute or regulation. Because the JAG found no error in the disputed OER, he chose not to make any argument about whether the applicant would be entitled to the removal of her failure of selection for promotion in xxxx if the Board finds that the disputed OER is erroneous.

The JAG attached to his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC noted that the applicant did not exercise her right to apply to the Personnel Records Review Board for correction of the disputed OER within one year of its entry in her record. CGPC sought and submitted declarations from the applicant’s rating chain, which are summarized below.

Declaration of the Reviewer for the Disputed OER

In a declaration dated March 9, 2008, the Reviewer, who is retired from active duty, stated that as Chief of Search and Rescue for the Xxxxxx District, his duties included oversight of all the patrol boats and their commanding officers, including the applicant. He stated that because four years have passed since the XXXX grounded, his “recollection of the events has faded somewhat” but that he stands by the comments he added to the disputed OER on July 2, xxxx. “However,” he also stated, “I did not believe, and I do not now believe, that the OER was inaccurate, unfair, or lacking in objectivity. Had I believed that any of those were true, I would

⁴ Rosacea is “a chronic hyperemic disease of the skin, usually involving the middle third of the face, characterized by persistent erythema” DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, 29th Ed. (2000) p. 1585. Erythema is “redness of the skin produced by congestion of the capillaries.” *Id.* at 617.

have returned the OER to the reporting officer ... for correction.” The Reviewer stated that he is not aware of any animosity between the RO and the applicant, either before or after the grounding. He stated that when he visited Xxxxx Harbor, the applicant discussed with him her belief that the cutter “could be better employed elsewhere. I noted her concerns and discussed them later with the Xxxxxx District staff. ... [The applicant] did not tell me of any concerns with her chain of command or with [the RO].”

The Reviewer stated that he does not believe that the District staff pressured the RO to convene a mast for the applicant, but the District “was, however, anxious to complete the investigation of the incident.” The Reviewer stated that he himself twice asked the RO to expedite the investigation and his endorsement of it. On March 12, xxxx, when CDR L called him and said that the RO had said the mast had to be held right away because of pressure from the District office, the Reviewer called the District Legal Office to ensure that no one was pressuring the RO to convene a mast. Then either he or someone from the Legal Office called the RO and “clarified with him that our desire was to get the endorsed incident investigation, not to hold an immediate mast.” The following week, the District Legal Advisor advised the Reviewer that the District Commander had decided to hold the mast herself. The Reviewer did not attend the mast.

The Reviewer stated that it was not unfair for the rating chain “to use the grounding of a cutter as an example for a multitude of performance categories” since the applicant “was responsible for the safe operation of XXXX.” He noted that the investigation showed that she had failed to perform a risk assessment and “allowed a culture of complacency to exist onboard the vessel.” When he reviewed the disputed OER, he did not believe that the comments regarding the grounding were unfair. The Reviewer concluded his declaration by affirming his own comments in the disputed OER, strongly recommending the applicant for promotion, and denying that the disputed OER was “inaccurate, unfair, or lacked objectivity.”

Declaration of the Reporting Officer for the Disputed OER

The RO, who retired from active duty in June xxxx, stated in a declaration dated February 29, 2008, that because of her performance, complacency, and judgment with respect to the grounding, the applicant received an Administrative Letter of Censure, not from himself, but from the District Commander. The RO stated that he is very disturbed by the District Commander’s insinuations in her January 2008 letter because it was the District Commander herself who first suggested that he relieve the applicant of command during their first telephone conversation after the grounding. At the time, she was not yet the District Commander but was the Chief of the District Operations Division, and as such she was his direct supervisor. However, he did not relieve the applicant of command. Later, the District Chief of Staff also put pressure on him to relieve the applicant of command. The RO stated that his refusal to relieve the applicant of command in the face of this pressure from his direct supervisor and the District Chief of Staff is evidence of his objectivity and fairness toward the applicant. Moreover, the RO stated, the insinuations in the District Commander’s January 2008 letter clearly contradict the OER the District Commander prepared for him and the Meritorious Service Medal she awarded him at his retirement ceremony in June xxxx.

Regarding the applicant’s allegation that he had invited her to lunch to discuss the disposition of the FA’s situation, the RO denied ever inviting her to lunch. He stated that he only asked her to meet him at the Academy and decided that it would be appropriate to include the

Deputy Group Commander; the senior Group Reserve Officer, who was female; and the Station Commanding Officer, who was African American and prior enlisted, like the applicant. The RO stated that the purpose of the meeting

was ENTIRELY in support of [the applicant]. It was a concerted and thoughtful advisory and counseling effort to help and encourage her to recognize the tremendous leadership and command opportunity she had before her to take advantage of with her crew in holding the Fireman Apprentice (also an African American who had been immediately removed from the vessel upon first notice of his alleged offenses) who had visited prohibited and disturbing websites on the ship's computer, accountable [to] herself as the unit Commanding Officer. The easy thing for her and me was to buck the issue up to me ... the more profound, meaningful, and valuable opportunity for her leadership development was for her to take advantage of that opportunity herself. I wanted to provide her with support and perspective from all possible demographic angles for her genuine enlightenment. Once the perceived threat to her well-being by the FA's actions was assessed and resolved, it was the seasoned collective judgment of the "intervention team" I had assembled that having [the applicant] take responsibility for and act upon this leadership issue at her unit was overwhelmingly the best thing for her, her crew, and the FA.

The RO further noted that he himself denied the FA's appeal of the punishment the applicant awarded him.

Regarding the applicant's claim that he ignored the applicant's recommendations concerning the use of patrol boats in Xxxxx Harbor after the invasion of Iraq, the RO stated that the XXXX was not under his operational control when deployed in Xxxxx Harbor because the XXXX was "chopped" to Xxxxx Xxxxx at the time and so he did not have the jurisdiction to make the changes she requested. The RO stated that when he received her comments he forwarded them to the District office and did not feel obliged to inform her of his actions with regard to her suggestions. The RO stated that the applicant was "in no way entitled to any 'apology' from [him] for her mistaken impression that [he] failed to act on her behalf."

Regarding the applicant's allegation that the District Commander took the matter out of his hands, the RO alleged that he had consulted the District Commander and asked her whether she wanted to handle the matter or have him do so, and she initially stated that he should handle it but later changed her mind.

Regarding the allegation of the Family Advocacy Specialist that his face was red while he waited to appear as a witness to the mast and her attribution of the redness to agitation, the RO stated that he suffers from rosacea, "a skin condition that includes significant episodes (which can flare at various times unpredictably) characterized by redness and flushing and blotches."

The RO stated that either the District Commander or CGPC could have returned the disputed OER if they thought it was unfair or the applicant could have challenged it when she received it, but no one questioned his objectivity or fairness. Now, however, four years later, his "actions, performance, motives, attitudes, and reputation [are] being slandered, distorted, and called into question." The RO alleged that the content of the Administrative Letter of Censure prepared by the District Commander supports his assessment of the applicant's accountability was accurate. He noted that he himself was contemplating issuing her such a letter when he was planning the mast. Rather than relieve the applicant of command, as was suggested by the District Commander (when she was his supervisor) and the District Chief of Staff, the RO stated, he showed a "measured, thoughtful, deliberate, and cautious perspective ... throughout this experi-

ence in trying to ensure [he] had the full picture in supporting the imperative of accountability while at the same time trying to salvage the significant potential [he] saw and endeavored to encourage and nurture in [the applicant].” The applicant concluded that in retrospect and after reviewing the records, he is confident that he “performed and executed [his] responsibilities and duties in this regard appropriately, professionally, capably, accurately, soundly, objectively, and fairly. The OER in question, in its entirety (the marks selected and ALL included comments) is wholly accurate, thoroughly reflective of her overall performance for that particular period, and, in [his] humble opinion, should not be expunged from the member’s record.”

Declaration of the Supervisor for the Disputed OER

The Group Operations Officer, who was the applicant’s Supervisor, stated in a declaration dated March 9, 2008, that he thought the relationship between the applicant and the RO was “always professional” and that the RO worked with female officers with “outstanding professionalism and mutual respect.” He was not present in xxxx when the FA was disciplined, and the applicant never told him that the event was of any concern to her. The Supervisor also denied any knowledge of her concerns about the XXXX’s deployment in Xxxxx Harbor in xxxx and stated that he did not attend the mast. Regarding the grounding, the Supervisor stated that the RO

was clearly disappointed with the news of XXXX’s grounding and that [the applicant] did not recognize her overall responsibility as Commanding Officer. [The applicant] never communicated that she was responsible. Instead she seemed to try to avoid the basic tenet of Command. As a previous Commanding Officer of a patrol boat, and permanent Cutterman, I was disappointed with this projected attitude. In a situation when blame & cause were still undetermined [the applicant] seemed to duck her command responsibility rather than accept that responsibility for her cutter & crew. I believe [the RO] was very patient waiting for [the applicant] to accept responsibility for her cutter and crew but it never occurred. Based on the investigation completed by the head of the Prevention department, LCDR ..., I charged [the applicant] with negligently hazarding a vessel.

Regarding the disputed OER, the Supervisor stated that the “marks and associated comments are justified. [The applicant] did a good job recovering from the grounding; however the fact that \$65K in damage was done to her patrol boat, there was operational impact, and decisions and actions made before (failure to conduct a risk assessment) and after the grounding cannot be overlooked.” Regarding the OER comments about the grounding, the Supervisor stated that the applicant herself “submitted officer support information indicating how well she recovered from the event and about how she turned things around on her cutter afterward.” In addition, the Supervisor stated, he “provided supporting information for the Reporting Officer’s blocks of the OER and recall numerous conversations with [the RO] regarding the judgment and responsibility marks and comments. I concur with these blocks and believe that they are justified and without prejudice.”

In light of these declarations, CGPC concluded that “the rating chain carried out its duties” in accordance with the Personnel Manual. CGPC stated that the applicant has failed to prove that there was a conflict or personal interest between her and the RO that would warrant his disqualification from her rating chain. CGPC stated that the fact that the RO did not always agree with the applicant is not a reason to disqualify him from the rating chain. CGPC alleged that the six statements in the disputed OER that refer to the grounding are not unfair as it “was a significant incident that needed to be documented in the OER.” CGPC stated that the each of the six comments about the grounding “is related to a specific performance dimension and supports

the assigned marks. It is a well accepted norm that the same action can support multiple performance dimensions in an OER.” CGPC alleged that the applicant’s rating chain was “in the best position to observe [her] performance and provide a fair, accurate, and objective OER. There is no basis for removing [it] from her record.” CGPC argued that because the OER is valid, there is no reason to remove the applicant’s failure of selection for promotion in xxxx.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 3, 2008, the Board received the applicant’s response to the views of the Coast Guard. She argued that the JAG’s advisory opinion ignores the fact that the Board’s jurisdiction extends to injustices, not just errors. “As the Secretary’s surrogates, the BCMR members have a high responsibility to ensure fairness and to advance the interests of the service. ... Everyone recognizes that [the applicant] is an officer of great value to the service.” Even the RO noted that she is an officer of “unlimited potential.” The applicant stated that the advisory opinion reflects a “narrow, cramped view of the BCMR’s function.” Even if the rating chain did not violate a specific statute or regulation, she argued, there are still strong grounds for granting relief because in light of all the circumstances, the OER is not fair.

The applicant argued that the declarations submitted by members of the rating chain are “self-serving and sufficiently defensive as to cast doubt on their objectivity.” The applicant pointed out that her Supervisor admitted that he has no knowledge of important events that affected her relationship with the RO and failed to explain why he and the RO had “numerous conversations” about the OER marks she received for the “Judgment” and “Responsibility.” Regarding the RO’s declaration, the applicant stated that he “obviously resent[s] the unpleasant things said about him in the application and the supporting statements of disinterested witnesses.” The applicant alleged that the RO’s claim that he never invited her to lunch is “demonstrably wrong” because they met in the parking lot next to the Academy’s café. She got into his car because he said he had errands to run, but he drove to another building where the “so-called ‘leadership intervention meeting’ was conducted.” The applicant alleged that there were no errands and that the meeting was an ambush. She argued that his “denial of essential facts unfortunately casts doubt on his other assertions.” Moreover, she argued, that the RO “displayed remarkable denseness” in concluding that she herself should handle the mast and punishment of a member of her crew who downloaded and printed from the cutter’s equipment “some 50 pages of extremely violent documents regarding fantasies concerning the rape and murder of female officers” and that her resistance to doing so required an ambush by a “leadership intervention team.”

The applicant alleged that when the Sector XO called her on March 11, xxxx, to let her know that she had been charged with hazarding a vessel and should report for a mast the next day, the only advice he gave her was to “go home, have a glass of wine, and put some faith in the Group,” even though she was suddenly “facing a serious legal proceeding with clear career implications.” This cavalier treatment “speaks volumes about the way the command, led by [the RO], approached the matter. It cannot be reconciled with the benign pose struck in his declaration.”

The applicant alleged that the Reviewer’s declaration indicates that he “obviously had misgivings about aspects of the disputed OER. Otherwise, he presumably would not have attached comments.” The applicant stated that the Reviewer’s ignorance of the animosity between her and the RO is not surprising since the Reviewer worked in the District office in

Xxxxxxx, whereas she and the RO were hours away in Xxxxxx and Xxxxxx, respectively. Therefore, it is unlikely that the personality conflict between the applicant and the RO would have come to the Reviewer's attention. The applicant asked for a hearing so that the Board may "ask such questions as they deem appropriate, and may also gauge demeanor evidence" since she is questioning the RO's veracity and impartiality.

The applicant argued that the Board should find the disputed OER to be unfair because to "take and single incident and use it as a hammer in performance dimension after performance dimension—here, no fewer than six times—and also to permit it to influence performance dimensions that truly have nothing to do with the incident at issue (*e.g.*, speaking skills) is unfair." The applicant stated that whether the number of references to the grounding in the OER is unfair is a question of degree for the Board to decide.

In support of her allegations, the applicant submitted three more declarations. In his second declaration on the applicant's behalf, CDR L stated that he has reviewed the declarations from the applicant's rating chain and compared them with the notes of the events that he made in xxxx. He alleged that the RO's claim to having held the leadership development "intervention team" to help and support the applicant when she indicated that she did not want to take the FA to mast in xxxx is inconsistent with the RO's behavior on March 12, xxxx, as he observed it. CDR L stated that on March 12, xxxx, the RO acted as if the applicant's

professional welfare was of little or no concern. He was visibly upset with [her] for simply asserting her basic rights to a fair review of the record and a fair and just administrative proceeding. He questioned her competency because she was asserting right that he clearly felt she should waive. He castigated her when told of her intention to seek legal counsel. He suggested that there was a "quid pro quo" arrangement that she should respect, *i.e.*, because he did not relieve her of command, she should not question his intentions to hold a Captain's Mast with less than 24 hours' notice, with no representation, and no time for her to prepare.

CDR L claimed that the applicant's demand that she be allowed to exercise her rights prior to mast led to the RO "being relieved of his responsibility under the Uniform Code of Military Justice." He further claimed that because the RO "suffer[ed] the professional embarrassment of being relieved of his UCMJ responsibilities, it seems utterly preposterous that anyone (let alone [the RO]) could then produce an unbiased and objective performance evaluation which, in my opinion, the OER in contention clearly is not."

The Family Advocacy Specialist for the Coast Guard, Ms. S, wrote in her second declaration on behalf of the applicant that, the RO's rosacea notwithstanding, his behavior while awaiting to appear as a witness at the applicant's mast "was completely out of character and the opposite of every experience I [had] shared with him" on numerous prior occasions. Whereas previously, he had been calm, professional, and engaging in his interactions with her, on the day of the mast, his body language—which included pacing, wringing his hands, frequent and loud sighing, and changes in his face color—communicated that he "was angry and embarrassed by the experience. He was visibly upset when discussing [the applicant]."

RADM M, a Rear Admiral who served in the Coast Guard for 29 years, reviewed the disputed OER at the applicant's request and wrote that based on his experience, "the OER does overly emphasize one negative event (grounding incident) that occurred during the reporting

period,” which was a year long. Because she was the captain of an operational cutter, he wrote, the rating chain had

a considerable amount of material to cover in the report. However, in every block there is a mention of the grounding incident in one way or another. Certainly, the incident should have been covered in Block 3 (Performance) by the Supervisor and in Blocks 7 and 10 (RO Comments and Potential) by the Reporting Officer, but there is also mention of the incident in every other block (4, 5 & 8) with a negative connotation in each. Additionally, in each reference to the incident in these additional blocks, it appears that the comment is meant to be a positive but by the very nature of mentioning the grounding incident, the reader is left with the impression that the incident was of greater impact to the unit and the member’s overall performance than it may have actually been.

The Rear Admiral further stated that the fact that the Reviewer exercised his discretion to add a page of comments indicates that the OER “was not an accurate reflection of this officer’s actual overall performance during the period in question.”

APPLICABLE REGULATIONS

Coast Guard Regulations

Article 4-1-2. of Coast Guard Regulations states the following: “A. The responsibility of the commanding officer for that command is absolute ... B. A commanding officer who departs from orders or instructions ... takes full responsibility ...” Article 4-2-2.A. states,

The commanding officer of a vessel shall be responsible for the safe navigation of that vessel. This shall include: (1) Utilizing all available information concerning the safe navigation of the vessel. ... (3) Making every effort to obtain from reliable sources, foreign or otherwise, all information that will aid in safely navigating over proposed routes or ports to be visited. ... (6) Requiring the position of the vessel to be known at all times insofar as it is feasible to do so by the utilization of navigational methods, devices, and equipment in accordance with the highest standards of navigation and seamanship. (7) Having the anchors ready for letting go when the depth of water is such that they may be used for the prevention or minimization of grounding or collision. (8) ... It shall also include insuring that reasonable precautions to maintain the safety and security of the vessel while at anchor are taken; and that personnel on watch are familiar with the safeguards available, such as the use of the anchor buoy, drift lead, weather observations and reports, bearing changes, use of engines, radar etc. ... (14) Keeping a night order book, when the vessel is at sea, containing standing orders and all other orders affecting the navigation and operation of the vessel. When the vessel is in port, a similar book shall be kept in which are entered all important orders given by the commanding or executive officer to the officer of the deck. (15) Require the use of radar ... when it is necessary for the safety of the vessel.

Article 4-2-6 of Coast Guard Regulations states that “the commanding officer may assign watch, divisional and other duties to personnel (including cadets) attached to the vessel. However, a person shall not be assigned duty as officer of the deck or as engineering officer of the watch unless in the opinion of the commanding officer that person is qualified for such duty.” Article 4-1-12 states that the “commanding officer is responsible for maintaining discipline on board the unit.”

Coast Guard Personnel Manual

Article 10.A. of the Personnel Manual in effect in xxxx governs the preparation of OERs. Article 10.A.1.b.1. provides that “Commanding officers must ensure accurate, fair, and objective

evaluations are provided to all officers under their command.” Every officer normally has a “rating chain” of three senior personnel, including a Supervisor, the Reporting Officer, and the Reviewer. Personnel Manual, Article 10.A.2.e.1.e. Article 10.A.1.c.4. states that the Supervisor is “[n]ormally, the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements.” The Reporting Officer is normally the Supervisor’s supervisor, and the Reviewer is normally the Reporting Officer’s supervisor.

Article 10.A.2.c.2.e. states that a reported-on officer initiates an OER prior to the end of a reporting period and “[m]ay submit to the Supervisor not later than 21 days before the end of the reporting period a listing of significant achievements or aspects of performance which occurred during the period.”

Article 10.A.2.d.2.a. states that it is the responsibility of the Supervisor to evaluate the reported-on officer in the execution of her duties and to prepare the Supervisor’s portion of the OER form.

Article 10.A.2.e.2.a. states that it is the responsibility of the Reporting Officer (RO) to evaluate the reported-on officer based on direct observation, reports of the Supervisor, and other reliable reports and to prepare the RO’s portion of the OER form. Article 10.A.2.e.2.c. states that an RO

[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed.

Article 10.A.2.f.2.a. states that the Reviewer “[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.” Article 10.A.2.f.2.b. states that the Reviewer “[a]dds comments as necessary, using form CG-5315 (series), that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer.” Article 10.A.2.f.2.c. states that the Reviewer “[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer may not direct in what manner an evaluation mark or comment be changed.” Article 10.A.2.f.2.d. states that the Reviewer “[c]ounsels Reporting Officers whose evaluation habits deviate significantly from the prescribed procedures. Deficiencies in OES performance on the part of Reporting Officers and Supervisors should be noted for performance feedback and considered in the respective officers’ OERs.”

Instructions for Preparing an OER

Article 10.A.4.c.4. instructs Supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for Reporting Officers, who complete the rest of the OER):

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

• • •

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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

• • •

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

Article 10.A.4.c.8.a. instructs the reporting officer to complete the comparison scale on an OER by filling in the circle that most accurately reflects his or her ranking of the reported-on officer in comparison to all other officers of the same grade whom the reporting officer has known.

Articles 10.A.4.g.1. and 2. of the Personnel Manual provide that a "Reported-on Officer may reply to any OER regardless of its content and have this reply filed with the OER. Replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. ... Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. ... Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted." Article 10.A.4.g.4. requires that such replies be submitted within fourteen days of the day the Reported-on Officer receives an official copy of the OER from CGPC.

Article 10.A.2.g.1. states that if a member of the rating chain is unavailable or disqualified, another officer must be appointed to prepare the OER. Article 10.A.2.g.2. states the following:

b. "Disqualified" includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.

c. If not already determined by the commanding officer, it is incumbent on the Reported-on Officer to identify to the next senior officer in the chain-of command that an exception to the designated

rating chain may exist. This issue should be raised by the Reported-on Officer during the reporting period or within 30 days after the end of the reporting period.

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 over this matter pursuant to 10 U.S.C. § 1552. The application was timely.⁵

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without one. The Board concurs in that recommendation.

3. The applicant did not submit a reply to the OER within fourteen days of receiving it, as allowed under Article 10.A.4.g. of the Personnel Manual, and did not apply to the Personnel Records Review Board for correction of the disputed OER within one year of receiving it, as allowed under Article 14.B.3. However, under 10 U.S.C. § 1552, Congress established a three-year statute of limitations for this Board, which is tolled while the member serves on active duty,⁶ and a member's failure to exercise expired administrative remedies does not waive the member's right to seek a record correction via this Board.

4. Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.⁷ Once an applicant has rebutted the presumption of regularity⁸ by presenting at least some evidence that "specifically and convincingly contradicts his rating officials' marks and comments,"⁹ the Board weighs the evidence in the record to determine whether the applicant has met her burden of proof—the preponderance of the evidence—with respect to the challenged OER.¹⁰ To be entitled to relief, the applicant must prove by a preponderance of the evidence that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹¹

5. The applicant alleged that the OER should be removed from her record because her RO should have been disqualified from serving on her rating chain in accordance with Article 10.A.2.g. of the Personnel Manual, which requires disqualification when a personal conflict "raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate

⁵ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty").

⁶ *Id.*

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ 33 C.F.R. § 52.24(b).

⁹ Final Decision, BCMR Docket No. 2000-194.

¹⁰ 33 C.F.R. § 52.24(b). In determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain's assessment even though the presumption of regularity has been rebutted. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

¹¹ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

evaluation.” The Board notes that the applicant apparently did not request the RO’s removal from her rating chain during the reporting period, as allowed under Article 10.A.2.g.2.c., but realizes that she may have believed that doing so could harm her career, especially if her request were not granted.

6. The applicant alleged that the RO was biased against her and could not objectively evaluate her performance for the following reasons, which will be addressed in order below:

(a) The applicant was female and the only female CO of a patrol boat assigned to his Sector. Therefore, the RO did not trust her as much as he should have, which created tension between them.

(b) In xxxx, the RO overruled her decision to have him conduct the mast of a fireman apprentice on her crew who had printed pornography regarding the rape of female officers on the cutter’s printer and made her conduct the mast herself.

(c) When the XXXX was temporarily “chopped” to a different command in Xxxxx Harbor after the invasion of Iraq in xxxx and the applicant believed the cutter could be put to better use, the RO did not respond to her comments and never apologized to her for not responding.

(d) The RO’s judgment in requiring the applicant to exercise her own authority as the CO of the XXXX by conducting the mast of the fireman apprentice was unreasonable. His denial of the fact that he asked her to lunch to discuss the matter and then ambushed her with an “intervention” and, later, his repeated false assertions that the District office required him to complete the mast by March 12, xxxx, show a lack of integrity and a bias against her.

(e) When the applicant arrived at his office on March 12, xxxx, for mast, she angered the RO merely by exercising her right to remain silent and to consult counsel and by asking to delay the proceedings.

(f) The RO was angered and humiliated when the District Commander took the mast out of his hands by conducting the mast herself.

7. The applicant was a LTJG when she was given command of the XXXX and was promoted to lieutenant about eight months later. Although the applicant did not prove that the RO distrusted her, it may well be true given her rank and lack of experience. She was an inexperienced officer in charge of a very expensive piece of equipment and the lives of several subordinates. If he did not trust her to the extent she apparently believes she was entitled to, the record bears out his wisdom since her poor decision-making in tying up to an old mooring ball of unknown safety, instead of the nearby Navy pier, and in failing to set the cutter’s own anchor during a significant storm resulted in the grounding of the cutter. There is no evidence whatsoever that he treated similarly inexperienced male LTJGs and LTs in command of patrol boats differently than he treated her. Therefore, the Board finds that she has not proved that her gender played any role in the RO’s treatment and assessment of her.

8. The applicant has proved by a preponderance of the evidence that the RO disagreed with and in essence overruled her decision to avoid taking a subordinate to mast herself after he downloaded and printed pornography about raping female officers on the cutter’s printer. This incident apparently occurred in xxxx, during the prior reporting period, for which the applicant received very high marks from the RO in her OER. While the applicant may have been angered by the RO’s decision and handling of the matter, there is no evidence whatsoever that he had any reason to be biased against her because of their disagreement on this matter.

9. Given the RO's admission, the applicant has proved that he did not reply to her calls or emails concerning her dissatisfaction with the use of the XXXX in Xxxxx Harbor by Xxxxx Xxxxx after the invasion of Iraq in xxxx and did not apologize to her for failing to reply. While it might have been kind of the RO to acknowledge her concerns or to apologize later for not replying, the Board is not persuaded that his failure to do so proves that he was unreasonable or biased against her. While his lack of reply might have irritated her, there is no reason it would have biased him against her.

10. The RO's desire to have the applicant handle the mast of the FA herself was a judgment call balancing the potential benefit of her visibly exercising her disciplinary authority in front of her crew as their captain against the potential increase in the FA's anger and threat to her well-being. The RO's decision was apparently supported by other officers at the meeting, including a female Reserve commander. Therefore, it is impossible for the Board to find, as the applicant suggests, that the RO acted unreasonably in having her conduct the mast herself. Nor do the applicant's allegations of how what she thought was to be a discussion over lunch became an "intervention" or their inconsistent memories of the events more than five years after the fact persuade the Board that the RO was biased against her and could not objectively evaluate her performance in xxxx. In addition, while the applicant makes much of the fact that the CO repeatedly stated that the District office wanted him to complete the mast proceedings by March 12, xxxx, CDR L's declaration shows that after the applicant requested a delay, the RO spoke to the District office and learned that he had been mistaken and that the deadline was for forwarding the report of the investigation with a cover letter stating how he intended to dispose of the matter (which was to hold mast) and that it was not necessary for him to have completed disposition of the matter. The Reviewer admitted in his declaration that he was pressuring the RO to expedite the investigation and endorsement of it and that the District clarified the deadline for the RO on the afternoon of March 12, xxxx. Therefore, the Board is not persuaded that the RO was knowingly lying on March 11 and 12, xxxx, when he repeatedly stated that he had to hold the mast that Friday since he apparently believed that the District office wanted the entire matter to be completed that day and he wanted to complete it by holding a mast.

11. In light of CDR L's assessment of the RO's behavior on March 12, xxxx, when the applicant exercised her right to remain silent and consult an attorney; the EPO's statement about receiving an email on March 12, xxxx, inviting the crew to attend a public mast the following Friday; and the Family Advocacy Specialist's description of the RO's agitation, pacing, and loud sighing while he waited to testify at the Admiral's mast on April 15, xxxx, the Board finds that the applicant has proved by a preponderance of the evidence that the RO was quite irritated and angry about her refusal to waive her rights so that he could conduct the mast on March 12, xxxx, and determine her "punishment," such as the proposed Administrative Letter of Censure, himself; and, perhaps, he was angered by the District Commander's decision to conduct the mast herself although he had earlier asked the District Commander if she would do so.

12. A superior officer's anger, however, even if unjustified, is not sufficient, *per se*, to warrant disqualification from a rating chain. Under Article 10.A.2.g. of the Personnel Manual, the question is whether the RO's anger about the applicant's apparent distrust of him on March 12, xxxx, and inconvenient (to him) insistence on exercising her rights created "a personal interest or conflict on [his part that] raise[d] a substantial question as to whether [she] receive[d] a fair, accurate evaluation" in June xxxx. In this regard, the Board notes that the RO retired in

June xxxx, and so any difficulty the applicant's actions may have caused him could not harm his career. In addition, there is no evidence in the record that the RO was incapable of setting aside his anger over that matter and preparing her a fair and objective OER. Although the applicant alleged that the numerous references to the grounding in the disputed OER and the RO's characterization of her attitude as defensive and unaccepting of responsibility reflect the RO's lack of objectivity, for the reasons stated below, the Board finds that there is insufficient evidence in the record to prove that the marks and comments in the disputed OER were not prepared fairly and objectively by all the members of the applicant's rating chain.

13. The applicant alleged that the very number of references to the grounding in each of the comment blocks rendered the disputed OER unfair and reflected the RO's lack of objectivity. The RO, of course, was responsible for only half of those comments, since her Supervisor was responsible for the first thirteen performance marks and their supporting comments. In addition, the Board notes that the OER itself states that the applicant's input for her own OER was "thorough." Pursuant to Article 10.A.2.c.2.e. of the Personnel Manual, Coast Guard officers often essentially draft their own OER comments either on a draft of the OER form or by writing numerous "bullets" highlighting their performance under each category. In his declaration to the Board, the Supervisor indicated that the comments about the grounding in the disputed OER (presumably the positive ones) were submitted by the applicant herself in her OER input, and the applicant did not submit a copy of her OER input to rebut this claim.

14. There is no regulation in the Personnel Manual that prohibits a single, highly significant event, such as the grounding of a captain's cutter, to be mentioned several times in an OER. As RADM M stated in his declaration on behalf of the applicant, one would expect such an event to be mentioned in blocks 3, 7, and 10 of an OER, which are supposed to concern the Supervisor's assessment of her professional performance, the RO's agreement or disagreement with that assessment, and the RO's discussion of her potential for future leadership positions. The disputed OER, however, also mentions the grounding in block 4, where a comment positively discusses her presentation of "lessons learned" from the grounding at the at the WPB COs' conference in support of her high mark for "Speaking and Listening"; in block 5, where a comment positively discusses her care and guidance of her crew following the grounding in support of her high marks for "Looking Out for Others" and "Directing Others"; and in block 8, where both positive and negative comments about her performance with respect to the grounding support the average marks of 4 for "Judgment" and "Responsibility." None of these comments is gratuitous; each serves a purpose in supporting one or more of the assigned marks, as required by Articles 10.A.4.c.4. and 10.A.4.c.7. of the Personnel Manual, by revealing aspects of her performance related to a highly significant event. The Board finds that the mere number of references to the grounding in the dispute OER is not erroneous, not unfair, and not evidence that the Reporting Officer could not, or failed to, carry out his duty to prepare an "accurate, fair, and objective evaluation" for her as required by Article 10.A.1.b.1. of the Personnel Manual.

15. The applicant argued that the RO's characterization of her attitude after the grounding as defensive and unaccepting of the responsibility of command is erroneous, unfair, and probative of the RO's lack of objectivity in evaluating her performance. In support of this contention, she cited (a) the fact that the RO was unfairly angered by her decision to exercise her rights prior to mast; (b) her work with the administrative and mishap investigators; (c) her "eager" presentation of "lessons learned" as stated in the OER; (d) the Reviewer's disagreement with the comment in his own page of comments, which was based on her work with the investi-

gators and presentation of “lessons learned” at the WPB COs’ conference; and (e) the District Commander’s commentary in her letter dated January 15, 2008, about the applicant’s leadership after the grounding. The applicant’s Supervisor, however, strongly supported the RO’s characterization of the applicant’s attitude in his declaration. He wrote that she “never communicated that she was responsible. Instead she seemed to try to avoid the basic tenet of Command. As a previous Commanding Officer of a patrol boat, and permanent Cutterman, I was disappointed with this projected attitude. In a situation when blame & cause were still undetermined [the applicant] seemed to duck her command responsibility rather than accept that responsibility for her cutter & crew. I believe [the RO] was very patient waiting for [the applicant] to accept responsibility for her cutter and crew but it never occurred.” The Supervisor and the RO were the superior officers to whom the applicant reported the grounding and with whom she would have discussed it in the aftermath. Although the applicant argues that their characterization of her attitude is inconsistent with her other behavior, it is perfectly possible that she displayed a different attitude when discussing the grounding with them than when she discussed it with the investigators or, months later, with the Admiral at mast, and it is perfectly possible that she abandoned her defensive attitude at some point when she realized she should, in essence, make lemonade out of lemons by claiming responsibility and sharing her experience in a positive manner. The perception of the investigators, the Admiral, and the Reviewer of her attitude is clearly different than that of the Supervisor and the RO, but that does not mean that the applicant’s attitude was not defensive when she was talking to her Supervisor and the RO. Given the Supervisor’s strong support of the RO’s comments, the Board finds that she has not proved by a preponderance of the evidence that the RO’s negative comments about her attitude and leadership and the three marks of 4 he assigned her are based solely on her assertion of her rights on March 12, xxxx, or are erroneous, unfair, or indicative of any bias or lack of objectivity on the part of the RO. The Board notes that although the Reviewer’s perception of her attitude differed from that of the RO and the Supervisor, in his declaration regarding the disputed OER, he strongly affirmed its accuracy, fairness, and objectivity. In addition, the Board notes that in the District Commander’s letter on behalf of the applicant, dated January 15, 2008, she highly praised the applicant’s performance and attitude after the grounding; concurred with the Reviewer’s OER comments as being “more accurate”; and vaguely criticized the RO’s own conduct; but she did not state that the disputed OER was a product of bias or recommend its removal.

16. The Board concludes that although the RO was angry at the applicant when she exercised her right to remain silent and seek counsel on March 12, xxxx, and perhaps when the District Commander decided to conduct the mast herself, there is insufficient evidence to show that the Coast Guard violated Article 10.A.2.g. of the Personnel Manual by not disqualifying the RO from the applicant’s rating chain. Given the Supervisor’s strong support for the RO’s comments in the OER and the Reviewer’s affirmation of its accuracy and fairness, the Board is not persuaded that there is a “substantial question as to whether the [applicant] receive[d] a fair, accurate evaluation,” as required by Article 10.A.2.g.

17. The applicant made numerous allegations with respect to the actions and attitude of the RO. Those allegations not specifically addressed above are considered to be unproved and/or not dispositive of the case.

18. The applicant has not proved that marks and comments in the disputed OER are either erroneous or unjust.¹² Nor has she proved that the RO should have been disqualified due to alleged bias. Therefore, the applicant has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors (such as bias or sexism) “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.¹³ Because the Board finds no error or injustice in her record that requires correction, there is no basis for considering the removal of the applicant’s failure of selection for promotion in xxxx or the backdating of her promotion to LCDR. The Board’s review of the record indicates that, with respect to the disputed OER, her record was accurate and fair when it was reviewed by the LCDR selection board in xxxx.

19. Accordingly, the applicant’s request should be denied. Because this decision includes the text of the Administrative Letter of Censure she received from the District Commander on April 19, xxxx, and under Article 8.E.4.b. of the Personnel Manual, such letters may not be entered in an officer’s record, no copy of this decision should be entered in any part of the applicant’s PDR (personnel data record).

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹² *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is “treatment by military authorities that shocks the sense of justice, but is not technically illegal”); *see* Decision of the Deputy General Counsel in BCMR Docket No. 2002-040 (holding that the Board has authority to find that “injustice” has occurred on a “case-by-case basis”).

¹³ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

ORDER

The application of LT xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied. No copy of this decision shall be included in any part of her PDR.

