

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2012-202**



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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. After receiving the completed application on August 3, 2012, the Chair docketed the case 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 May 9, 2013, 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, who retired from active duty on [REDACTED] with 27 years, 7 months of service, asked the Board to remove from her record all evidence of and references to her temporary and permanent relief for cause (RFC), including her Officer Evaluations Reports (OERs) for the periods May 1, 2009, through April 30, 2010, and May 1 through June 2, 2010. She also asked the Board to order the Coast Guard to pay her restitution for the additional 2 years, 5 months of active duty she might have served had she been selected for continuation on active duty; to base her retired pay on 30 years of service; and to publicly acknowledge that her record has been corrected in these ways.

The applicant argued that the disputed OERs, RFC, and non-continuation on active duty are erroneous and unjust for three reasons: First, she was not given access to the evidence against her and so could not rebut the allegations. Second, her excellent performance record, including OERs she had received while serving as a commanding officer twice before, show that the allegations are false and could have been rebutted if she was shown the evidence. Third, the Coast Guard publicized her RFC, which has greatly damaged her professional reputation.

Regarding the evidence, the applicant alleged that although she was relieved of command "for cause" based on an investigation, she was denied the opportunity to review all of the evidence, such as witnesses' statements and "anonymous sources," gathered by the investigator and relied on by the Xxxx xxxxxx in deciding to relieve her of command. The applicant alleged that

because she was refused access to the evidence against her, she “could not form a rebuttal or review the basis for relief.” The applicant stated that the summarized documentation that she was shown was “substantially flawed” and hindered her defense. She noted that she was also denied access to the evidence through the FOIA/Privacy Act process.

Regarding her prior service, the applicant noted that before she took command of the XXXXXXX, she was previously the commanding officer of a XXXXXXXXXXXXXXX and then a smaller XXXXXXX, and she received excellent OERs for those tours of duty, as well as for all her non-command tours of duty throughout her career. She also noted that on the first OER she received as the XXXXXXX XXXXXXX, which was prepared by the departing XXXX XXXXXX and XXXXXXX, she received excellent marks. The applicant alleged that the quality of the rest of her performance evaluations is strong evidence that she was relieved for cause based on false accusations which she was prevented from disproving because she was not allowed to see them.

The applicant noted that her professionally reputation has suffered greatly because her RFC was announced in the media, and the XXXX XXXXXX “went to lengths to announce the relief at executive-level leadership forums.” Before her reputation was tarnished, she had been recommended for promotion to flag rank on her prior OERs as a captain. However, because of the RFC, she was not chosen for continuation as a captain and so was forced to retire before she otherwise would have had to upon attaining 30 years of service. The applicant stated that the Coast Guard’s public acknowledgement of the correction of her record is necessary to restore her professional reputation.

In support of her allegations, the applicant submitted many documents, which are included in the summary of the record below.

### SUMMARY OF THE RECORD

On May 23, 1984, upon graduating from the Coast Guard Academy, the applicant was appointed an ensign. Throughout most of her career, the applicant received exceptionally fine OERs,<sup>1</sup> including some with marks in the seventh spot on the comparison scale,<sup>2</sup> indicating that she was the best officer of that rank that her Reporting Officers had ever known. She was regularly promoted with her peer group and was promoted to commander on March 1, 2000.

In June 2003, the applicant began a two-year tour of duty as the commanding officer of a XXXXXXXXXXXXXXXXXXXXXXX with 124 personnel. She received very high marks on her OERs

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<sup>1</sup> Coast Guard officers are evaluated in 18 performance dimensions, such as “Teamwork” and “Judgment,” on a scale of 1 (worst) to 7 (best). A “standard” mark of 4 in a performance dimension means that the officer’s performance met the expected high standards of all Coast Guard officers for that category as described on the OER form. The first 13 marks on an OER form are assigned by the designated Supervisor, and the last 5 marks are assigned by the Reporting Officer, who also assigns a mark on the officer comparison scale. The Supervisor, Reporting Officer, and a Reviewer comprise the reported-on officer’s “rating chain.”

<sup>2</sup> The comparison scale on an OER is not actually numbered, but there are seven possible spots ranging from the first (“performance rarely up to par for a captain; not suitable for most captain briefs”) to the seventh (“recommended for flag selection at next board”). Reporting Officers are instructed to “fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.

and was promoted to captain on October 1, 2005. From April 1, 2005, through June 9, 2006, she served as the commanding officer of a Xxxxxxx with about 310 personnel and received an OER with mostly marks of 7. From June 10, 2006, through April 30, 2008, she served as a xxxxxx Division Chief and received excellent OERs with comparison scale marks in the sixth spot, indicating that she was recommended for promotion to flag officer in the future.

In 2008, the applicant assumed command of a large Xxxxxxx with more than 500 personnel and more than 250 Auxiliary volunteers. On her first OER at this position, dated April 30, 2009, the applicant received mostly marks of 6 and some 7s in the various performance dimensions, including a mark of 6 for “Workplace Climate” but marks of 5 for “Using Resources,” “Speaking and Listening,” “Directing Others,” and “Professional Presence.” She was highly recommended for continuation, and on the comparison scale, she received a mark in the fifth spot for having “flag potential.” This OER was prepared by the departing District Xxxxxxxxxx, who served as her Supervisor, and the departing Xxxx xxxxxx, a rear admiral, who served as her Reporting Officer and Reviewer. (*See Attachment A with OERs from 2009 and 2010.*)

The applicant submitted a copy of a note from the departing Xxxxxxxxxx, dated March 30, 2009, in which he thanked her

for meeting with me last Thursday to discuss your strong suits and areas where we need to improve how we work together. I remain committed to a team-like approach to problem solving, and value your insight on many fronts. Again, thank you for your time and dedication ...

### ***Investigation (Attachment B)***

On March 31, 2010, the new Xxxx xxxxxx (XX), also a rear admiral, appointed CAPT X to conduct an informal investigation of the command climate in the applicant’s Xxxxxxx. The XX told CAPT X that he could interview anyone assigned to the Xxxxxxx; that he could “guarantee confidentiality to any person you interview in order to ensure you obtain accurate and truthful information”; that he was “not required, nor authorized, to obtain signed statements from interviewees”; and that he could not interview the applicant without the XX’s express permission. (*See Attachment B, redacted report of investigation.*)

CAPT X submitted his report on April 10, 2010. He stated that he had interviewed 45 people, including direct subordinates and representatives of State and industry partners. Several interviewees had highly praised her as a brilliant and visionary leader and noted her significant accomplishments; some claimed that a double standard was being applied and that if the applicant were male, there would be no assessment; and some said she was hard on her senior staff because they were not competent and she did not like to be surprised. However, even those who praised her reported that she had a “major leadership flaw” in that she routinely reprimanded senior officers in front of others, humiliated both officers and enlisted members in public, and was “known to ‘lead by fear’ and to use intimidation as a management tool.” CAPT X reported that the applicant micro-managed at every level, which resulted in severe inefficiencies, and many reported that it was “a significant struggle to come to work in the morning because of the ‘climate of despair’ she [had] created.”

CAPT X also reported on certain significant operational incidents. For example, he alleged, the applicant had personally prevented timely notification of the Prevention Department about an engine room fire on a container ship; embarrassed a State employee by erroneously complaining that his agency had delayed responding to the incident; delayed and attempted to stop a “highly coordinated vertical insertion exercise” organized by other Government agencies although she was only an invited observer; wrongfully denied Boarding Officer Ashore qualification to a Vessel Board and Search Team; and sent a team of about 12 personnel to conduct an at-sea boarding of a container ship with some containers evincing an unusual heat signature instead of first sending a helicopter to investigate the vessel.

### *Relief for Cause (Attachment C)*

On April 14, 2010, the XX notified the applicant that he was temporarily relieving her for cause and intended to do so permanently based on “loss of confidence” because of CAPT X’s report of his command climate investigation. The XX advised her that she had a right to submit a statement and to receive the advice of an attorney during the relief for cause process. The XX’s four-page notification explains the reasons he had lost confidence in the applicant. It also has a four-page enclosure, titled “Loss of Confidence Factors,” describing numerous examples of performance grouped under the headings “Failure to Abide by Core Value of Respect,” “Safety Considerations: a. Stifled Communications and Discouraged Initiative,” “Safety Considerations: b. Single Point of Failure for all of Xxxxxxxx ...,” and “Poor Morale and Command Climate.” (Attachment C.)

On April 21, 2010, the applicant responded to the XX’s notification. The applicant requested an “alternative resolution” of reassignment so that her permanent record would not be marred by an RFC. She noted that the XX’s disappointment with her performance would be reflected on her OER, which would presumably prevent her selection for continuation on active duty. (Attachment C.)

On April 30, 2010, the XX sent a letter to the Commandant asking him to relieve the applicant for cause permanently because the XX had lost confidence in her ability to command and lead the Xxxxxxxx. (Attachment C.) The XX cited the command climate investigation conducted by CAPT X, informal interviews conducted by the xxxxxxxxxxxx, and multiple counseling sessions the applicant had had with the prior Xxxx xxxxxx and xxxxxxxxxxxx. The XX attached the applicant’s April 21<sup>st</sup> statement to his request and noted that even if the Commandant chose not to relieve her of command, she should not be returned to the Xxxxxxxx “due to the high probability of retaliation or reprisal against the personnel who reported her and the permanently severed trust between her and her staff.”

On April 30, 2010, the applicant acknowledged receiving an unsigned copy of the XX’s memorandum to the Commandant dated April 30, 2010, and noted that she would submit a statement on her own behalf. In her statement, dated May 7, 2010 (Attachment C), which she called an “interim response,” she complained that she had not been allowed to review the investigations and reports relied on by the XX. She noted that in her April 21<sup>st</sup> memorandum to the XX, she had responded in general to the allegations but was unable to address the allegations in detail

because she was not allowed to see the evidence. She requested an immediate transfer in lieu of an RFC.

On May 11, 2010, Commander, Personnel Service Center (PSC) notified the applicant that he had forwarded the RFC package to the Commandant with her “interim response.” Commander, PSC stated that the XX’s notification letter to her dated May 7, 2010, “provided ample opportunity to respond to those allegations. I believe both [the XX’s notification and the applicant’s ‘interim response’] provide sufficient documentation to allow [Commandant] to make a decision regarding your permanent relief for cause.” (Attachment C.)

On May 17, 2010, the applicant responded to Commander, PSC. She stated that she had not received a copy of the XX’s May 7, 2010, letter to the Commandant nor been given the five working days she should have to respond to it. She also repeated her complaint about not being shown the evidence against her and requested reassignment in lieu of RFC. (Attachment C.)

On May 18, 2010, the applicant received a copy of the XX’s May 7, 2010, letter by email. The text is identical to that of the letter dated April 30, 2010, but it is signed and the date is different. On May 19, 2010, the applicant acknowledged receipt of the May 7<sup>th</sup> letter and stated that she would submit a statement on her own behalf. (Attachment C.)

On May 24, 2010, the applicant submitted her response to the XX’s May 7<sup>th</sup> letter. (Attachment C.) She asked to be reassigned and noted that she had “been severely hindered in my ability to comment on both the temporary and the permanent relief recommendations because I have not been afforded the opportunity to review the investigations and reports used by [the XX].” She noted that when she assumed command at the Xxxxxxxx, she “was given direct tasking to make a drastic change to Xxxxxxxx ... . I not only accomplished an internal sea-change in the professionalism, efficiency, and readiness of Xxxxxxxx ..., I also brought to the region a strong Maritime focus among the public, private, and union entities. [The prior XX] recognized these efforts and the strong internal cohesiveness of Xxxxxxxx ... in my 2009 [OER]. Many of the accusations made with relation to this relief for cause action pertain to that timeframe and conflict with my performance record.”

On May 25, 2010, the Xxxxxxxx, as Acting Xxx xxxxxx, forwarded the applicant’s May 24<sup>th</sup> response to the Commandant. He noted that the XX had reviewed it and commented that the applicant had received everything that was being forwarded to the Commandant and that, contrary to the applicant’s claim that the report of the investigation was based on “ambiguous, anonymous accusations,” the report “includes very specific events by named individuals, whose privacy must be protected.” (Attachment C.) PSC sent the applicant a copy of this letter on May 26, 2010.

On June 2, 2010, the Commandant approved the applicant’s RFC “by reason of loss of confidence” in accordance with Article 4.F.3.c. of the Personnel Manual. (Attachment C.)

*Disputed OERs (Attachment A)*

On May 17, 2010, the applicant submitted 11 pages of input for her regular OER, including numerous bulleted examples of her accomplishments for each performance dimension. She also submitted a draft OER in which she had entered supporting comments but no marks.

The applicant's second regular OER as the Xxxxxxx Xxxxxxx is the first disputed OER in this case and covers her performance from May 1, 2009, through April 30, 2010. It was prepared by the Xxxxxxxx, who served as Supervisor, and the XX, who served as Reporting Officer and Reviewer. The OER contains numerous very low marks, negative comments, a mark in the second spot on the comparison scale, denoting an officer with satisfactory performance but limited assignment potential, and a recommendation against continuation on active duty. (Attachment A) The applicant did not submit an OER Reply for inclusion in her record.

The second disputed OER documents the applicant's permanent RFC and covers only the month from May 1, 2010, until she was relieved of command on June 2, 2010. Most of the performance dimensions are marked "not observed," but low marks were assigned for dimensions such as "Looking Out for Others," "Developing Others," "Directing Others," "Teamwork," "Workplace Climate," "Judgment," "Responsibility," "Professional Presence," and "Health and Well-Being." The XX assigned her another mark in the second spot on the comparison scale and did not recommend her for continuation on active duty. (Attachment A)

Because the second disputed OER documents the applicant's RFC, it is considered derogatory. Therefore, the applicant was allowed to write an addendum for it, and her rating chain was allowed to comment on the addendum. The applicant's addendum states that the marks and comments in the OER are inaccurate and exaggerated. She complained that the RFC process was procedurally flawed because she had not been allowed access to the evidence against her.

*Applicant's Efforts to Review the Evidence*

The applicant submitted copies of correspondence in which she requested copies of the investigation conducted by CAPT X and the memorandum of the xxxxxxxxxxxxxxxxxxx (XXX) about his informal command climate assessment in May 2009. She submitted her first request on April 27, 2010, and the XX denied it on April 29, 2010. The XX stated that the documents in question were pre-decisional in nature, part of the deliberative process, and therefore exempt pursuant to FOIA exemption (b)(5). He provided a Vaughn Index of the denied documents and advised her that she could appeal the denial.

The applicant appealed the decision, arguing that the XX's memorandum to CAPT X dated March 31, 2010, CAPT X's report of his investigation, and the XXX's memorandum were not attorney work product or exempt under (b)(5). Citing *Jordan v. United States Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978), and *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975), the applicant argued that these three documents did not meet the criteria for the deliberative process privilege in (b)(5) because they were not pre-decisional—i.e., not "antecedent to the adoption of agency policy"—and not deliberative—i.e., not "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." The

applicant explained that she was attempting to review the underlying facts—the written “statements or evidence in the reports developed that are the basis for an administrative action.” She noted that any opinions included in the three documents could be redacted. She also complained that the XX’s denial addressed her request only as a FOIA request and not as a request under the Privacy Act.

The applicant submitted copies of correspondence showing that she regularly followed up on her appeal by requesting status updates. In July 2012, the Coast Guard notified the applicant that her appeal had been remanded to the District.

On January 23, 2013, the District advised the applicant that its search of responsive records produced 28 pages of which 14 were withheld and 14 released with some redactions pursuant to exemption (b)(5). The information released included most of CAPT X’s memorandum reporting on his investigation except for his opinions and recommendations; a three-page letter from the State’s Department of Ecology to the applicant dated March 18, 2010, pointing out ways in which their communications and cooperation needed improvement; an excerpt from an email by a lieutenant junior grade who stated that the applicant had reduced junior officers to tears, driven chief warrant officers to retire, and conducted a “reign of terror” both at the Xxxxxxx and during an earlier tour of duty; an excerpt of an email by a junior officer who complimented the applicant’s “visionary improvements” at the Xxxxxxx, denied ever having had a bad experience with her despite working with her often, and stated that most people had problems with “personal interactions” with the applicant because “she does not have the greatest people skills”; and a Vaughn Index of the redacted pages.

### ***Retirement***

Following her RFC, the applicant was assigned to serve as a senior liaison to other federal agencies and industry for a major investigation. On her last OER, dated June 30, 2011, she received ten marks of 7 (highest possible) and eight marks of 6 in the various performance categories; a mark in the fifth spot on the comparison scale, denoting “flag potential”; and strong recommendations for continued Coast Guard work and “retired recall opportunities.” The applicant was retired on June 30, 2011, but recalled the next day and continued serving on active duty until December 23, 2011.

## **VIEWS OF THE COAST GUARD**

On February 8, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the requested relief.

The JAG argued that the applicant’s claim that she was unable to properly rebut the XX’s decision to relieve her for cause because she was not allowed to see the investigation is without merit. The JAG stated that Article 4.F.3.c. of the Personnel Manual provides that “[a]n articulated, fact-supported loss of confidence is sufficient basis for an RFC,” and that the XX’s April 14, 2010, notification memorandum with its enclosure provided the applicant with the fact-supported basis for her RFC.

Regarding the applicant's FOIA request, the JAG stated that the new Xxxx xxxxxx sent responsive material to the applicant on January 23, 2013, including the releasable part of CAPT X's report of his investigation. The JAG stated that a comparison of CAPT X's report with the XX's April 14, 2010, notification memorandum and its enclosure proves that the notification "fairly and adequately synopsisized" the information in the investigation and so gave the applicant proper notice of the factual basis for her RFC in accordance with Article 4.F.4. of the Personnel Manual. The JAG noted that in the memorandum dated May 25, 2010, the XX observed that the applicant had received every document that the XX was forwarding to the Commandant to request her relief for cause. Therefore, the JAG argued, "the Coast Guard complied with all applicable policies at every stage of the Relief for Cause, and followed all necessary steps to effectuate a proper Relief for Cause."

The JAG concluded that the applicant has failed to prove that her Command committed an error or injustice during the RFC process and there are no grounds to remove the RFC or the OERs from her record or to grant any of the other requested relief.

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

On March 12, 2013, the applicant responded to the advisory opinion. She repeated the arguments she made in her application. She stated that she did not even receive the released parts of the investigation in response to her FOIA request until she received the advisory opinion in February 2013, which was much too late to help her rebut her RFC in 2010.

The applicant stated that the released part of the investigation reveals gross mischaracterizations of her leadership, statements, and actions. She noted that the investigator interviewed only 45 of the 500 people under her command and apparently failed to fact-check their claims. She stated that those interviewed were not representative of her subordinates and that if the investigator had asked the xxxxxx Xxxxxxx Xxxxxxx, he would have learned that the negative statements and accusations on pages 3 through 5 and those of the junior officer in the email are all categorically false. The applicant alleged that the descriptions of operational incidents in the report of the investigation "are also misconstrued allegations taken completely out of context and are not factual yet they could easily have been addressed had I been provided the opportunity." She alleged that the withholding of the underlying investigation in 2010 "made it self-evident that I would fail in my ability to respond to the Xxxx xxxxxx's concerns. Therefore, the Coast Guard did not articulate fact-supported reasons for taking action against me but rather reflected the contrived slander of a few disgruntled employees that the investigating individuals did not check prior to presenting them as 'fact'."

Finally, the applicant argued that under Article 4.F.4. of the Personnel Manual, the relieving Xxxx xxxxxx is supposed to "take care to ensure [he has] not set expectations and standards unreasonably high" before requesting RFC. The applicant argued that the XX in her case violated this provision because his expectations were unreasonably high and exacerbated by a general lack of support from the District itself. She was expected to meld two units into one, a consolidation that had been postponed for more than five years because of "strong internal resistance to it from the xxxx staff as well as the unit staffs." The consolidation created a great deal of animosity and she was told to "make it happen in the timeline given. ... I believe the



Xxxx xxxxxx's expectation that a single unsupported leader could succeed in a unit consolidation thwarted in the past by multiple department heads and institutional bias was unreasonable." The applicant alleged that she faced "the extreme animosity of a few individuals in both the xxxxxx and Xxxxxxxx leadership over this change and my focus on its success."

## APPLICABLE LAW

### *Regulations Regarding Relief for Cause (RFC)*

Article 4.F.1.a. of the Personnel Manual states that RFC is "the administrative removal of a commanding officer (CO) or officer in charge (OIC) from his or her current duty assignment before the planned rotation date." It "normally consists of a two-step process: 1. The flag officer in the unit's chain of command orders a temporary RFC; and 2. Commandant ... orders a permanent RFC after reviewing the case." Article 4.F.3. of the Personnel Manual provides that the bases for RFC may be misconduct, unsatisfactory performance, inappropriate relationships, or "loss of confidence." Article 4.F.3.c. states, regarding "loss of confidence," that "[i]t is imperative his or her immediate superiors have full confidence in a member's judgment and ability to command due to the unique position of trust and responsibility he or she occupies; his or her role in shaping morale, good order, and discipline in the command; and his or her influence on mission requirements and command readiness. An articulated, fact-supported loss of confidence is a sufficient basis for RFC."

Article 4.F.1.b.1. states that "[t]he need to Relieve for Cause may arise when a CO's or OIC's performance or conduct adversely affects his or her unit's morale, good order and discipline, and/or mission performance. One of the most severe administrative measures taken against a member in command, an RFC usually has a significant adverse impact on the member's future Coast Guard career, particularly on his or her promotion, advancement, duty and special assignments, and selection for schools. Therefore, the relieving officer must carefully consider the circumstances' gravity and the potential outcome's total implications before initiating the process."

Article 4.F.1.b.2. states that "[r]elieving authorities must perform a temporary RFC and required follow-up actions as expeditiously as possible, so the Commandant can quickly determine if permanent RFC is warranted."

Article 4.F.4. states that relieving authorities "must take care to ensure they have not set expectations and standards unreasonably high" before undertaking RFC. After deciding to institute the temporary RFC process, the relieving authority must notify the member in writing of the "RFC action being taken and the reason for it" and of "[h]is or her right to submit a statement in writing on his or her behalf within five working days." The member is temporarily reassigned while the permanent RFC action is pending. If grounds for a permanent relief for cause are substantiated, the relieving authority should "recommend the CO's or OIC's permanent RFC and send appropriate documentation to the Commandant."

Article 4.F.6.2. prohibits forwarding a request for permanent RFC to the Commandant until the CO being relieved has had five working days to submit a statement on his or her own behalf. Article 4.F.6.3. states that "[t]he command must afford the member the advice of counsel

within the meaning of UCMJ Article 27(b)(1) during the temporary RFC process and in preparing any statement he or she submits about the permanent RFC request.”

### *Regulations Regarding OERs*

Article 10.A. of the Personnel Manual governs the preparation of officers’ OERs. Article 10.A.1.b.1. states that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Captains normally receive a regular, annual OER every April 30<sup>th</sup>. Article 10.A.3.a.1. However, Article 10.A.4.h. requires the preparation of a special, derogatory OER whenever an officer is relieved for cause (RFC) from his or her duty as a commanding officer. When an OER is derogatory, the Reported-on Officer is shown the OER by the Reporting Officer before the OER is forwarded to the Reviewer and is permitted to submit an addendum of comments to explain a failure or to provide an alternate view of his or her performance within 14 days of receiving the OER from the Reporting Officer.

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, except for any comments the Reviewer may choose to add on a separate page):

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.

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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.

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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. Article 10.A.4.c.9. states that in the comment block titled “Potential,” the reporting officer “shall comment on the Reported-on Officer’s potential for greater leadership roles and responsibilities in the Coast Guard.”

Article 10.A.4.g. states that an officer may submit an OER Reply to any OER for inclusion in her record with the OER.

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant's discovery of the alleged error and injustice.

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

3. The applicant alleged that her RFC was conducted erroneously and unjustly in that she was denied access to the evidence against her and so was denied a fair opportunity to rebut it and to challenge the proposed RFC. She asked the Board to remove the RFC and two disputed OERs from her record and to award her the pay and allowances she would have received had she not retired until her 30<sup>th</sup> anniversary on active duty. She also asked the Board to order the Coast Guard to publically announce the correction of her record to help restore her professional reputation. When considering such allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>4</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."<sup>5</sup> To be entitled to the removal of an OER, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove 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.<sup>6</sup>

4. The applicant has not proved by a preponderance of the evidence that she was prevented from adequately rebutting the allegations against her because she was not provided the investigation on which the XX relied in part. The record does show that the XX improperly

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<sup>3</sup> See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at \*21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>4</sup> 33 C.F.R. § 52.24(b).

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

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

denied the applicant releasable information pursuant to her FOIA/Privacy Act request in 2010, but under Articles 4.F.3.c. and 4.F.4. of the Personnel Manual, the RFC was conducted properly if the applicant was provided the reason for it—loss of confidence—which had to be supported by articulated facts. The XX provided the applicant with a four-page memorandum explaining his reasons for relieving her and another four pages describing the incidents of poor performance he apparently credited and relied on. (Attachment C) A comparison of the XX's eight-page notification to the applicant dated April 14, 2010, and the parts of the investigation released in 2013 (Attachment B) shows that the XX credited and relied on most of the information gathered by the investigator, CAPT X, and that the applicant was not denied knowledge of the XX's reasons for the RFC or the "factors" he accepted and relied on in deciding to relieve her for cause.

5. The Board finds that the applicant has not proved by a preponderance of the evidence that the RFC was conducted unfairly or improperly under Article 4.F. of the Personnel Manual. She was afforded due process under that article and had ample opportunity to refute the information the XX relied on and to challenge his reasons for relieving her of command. The Board finds no grounds for expunging the RFC from her record.

6. The applicant argued that her otherwise excellent performance record, including OERs she had received while serving as a commanding officer twice before, shows that the allegations against her are false. However, the fact that the applicant's performance during prior and subsequent tours of duty was deemed excellent or even exceptional does not prove that her performance as Xxxxxxx Xxxxxxx in 2009 and 2010 was acceptable to the XX in certain respects. The XX's notification memorandum shows that, despite her numerous accomplishments, the applicant was counseled several times about certain aspects of her performance but failed to improve. Although the applicant alleged that the XX's expectations were too high, in violation of Article 4.F.4., she did not submit evidence to prove this point.

7. The applicant asked the Board to remove two disputed OERs. However, she has not proven by a preponderance of the evidence that either OER is adversely affected by a "mis-statement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>7</sup> The Board finds no grounds for expunging the disputed OERs.

8. The applicant argued that the Coast Guard maliciously publicized her RFC and thereby damaged her professional reputation. The Board notes that news articles about her RFC are available on the internet. However, the removal of high ranking military officers in positions of authority is of public interest and is normally explained to the public through the media. The mere fact that the applicant's RFC was likewise publicized does not warrant the correction of her record.

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<sup>7</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

9. The applicant made numerous allegations with respect to the actions and attitudes of various Coast Guard personnel. Those allegations not specifically addressed above are considered to be unproven and/or not dispositive of the case.<sup>8</sup>

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

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>8</sup> See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board's ultimate disposition”).

**ORDER**

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

