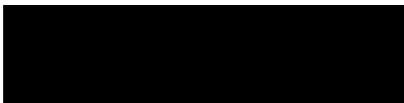


**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2013-053**



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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 January 11, 2013, the Chair docketed the case and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 1, 2014, 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 voluntarily retired from active duty on [REDACTED] asked the Board to correct her record by expunging her 2010 officer evaluation report (OER), upgrading her 2010 end-of-tour award from a Commendation Medal to a Meritorious Service Medal, promoting her to [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and awarding her back pay and allowances due as a result of the promotion. She stated that she chose to retire only after being non-selected for promotion in [REDACTED] as a result of her erroneous and unjust 2010 OER.

The applicant stated that after taking command of a large cutter on May 23, 2008, she was "subject to an insubordinate crew and a chain-of-command ... who purposefully undermined her authority." Although her first annual OER as commanding officer (CO) of the cutter in 2009, was very positive and she was recommended for promotion and command afloat, on her 2010 OER, she received a few less positive marks<sup>1</sup> and was recommended for promotion and for "high visibility, demanding positions," instead of command afloat (see attached OERs). The applicant

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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). The first 13 marks and supporting comments on an OER form are assigned by the designated Supervisor, and the last 5 marks with supporting comments 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."

alleged that when she asked her reporting officer, a captain, why she was not recommended for command afloat again, he told her that he himself would support the recommendation, but the Area Commander would not. When she asked him to include the recommendation anyway, since he was her reporting officer, and to let the Area Commander add a page of reviewer's comments, her reporting officer replied, "you don't want that; that would be worse." The applicant stated that she tried to meet with the Area Commander, a Vice Admiral, but he did not have time to meet with her.

The applicant alleged that the lower marks in her 2010 OER were inaccurate and that there "is nothing in the narrative section of the OER that would indicate she would receive lower score marks." In addition, she alleged, there is nothing that substantiates the Area Commander's decision not to recommend her for command afloat. The applicant alleged that the Area Commander exercised undue influence on her reporting officer to not include this recommendation in her 2010 OER and that this influence violated the Personnel Manual and made the OER inaccurate.

The applicant alleged that if her 2010 OER had accurately included her reporting officer's recommendation for command afloat, she would have been selected for promotion to [REDACTED]. However, she alleged, "due to the hostile work environment she encountered while CO of the [cutter] and because she was unjustly a non-select for promotion in [ul [REDACTED] she] chose to voluntarily retire from the USCG with [REDACTED]' service."

### *Allegations About a Hostile Work Environment*

The applicant stated that as [REDACTED] and, in May 2008, the only female member of the crew, she realized she was entering a "potentially hostile environment." Within a few weeks, she was "subject to behavior that was both inappropriate and intentionally intimidating." For example, a lieutenant advised her that every night during the brief at the Combat Information Center, a procedure word, known as a "proword" was reviewed, and during her first operational brief, the proword reviewed was "hooker." In addition, during her first patrol, a chief warrant officer engaged her in conversation on the fantail in a "get to know you better" sort of conversation, but during the exchange, he asked her if she was "afraid of being the only woman underway with men."

The applicant stated that the first significant incidence of insubordination occurred in January 2009, when her "personal computer files became public without her knowledge." A petty officer advised her of the problem and told her that "numerous Chiefs and Officers had seen her files and took no action to resolve the issue. As a result, two Chiefs were able to view Letters of Censure that had not yet been presented to them." In addition, "portions of her Officer Support Form were printed and left in a printer tray." She learned that some of the Chiefs had viewed this form "because they disrespectfully challenged her on entries." The applicant alleged that this incident illustrates the lack of respect she was shown, which undermined her authority as the CO.

In April 2009, the applicant stated, she discovered a "bridge book" (also known as a "quote book" or "bitch book") on the bridge of the cutter. The book had been in existence since

1998 and contained “references to perverted, disgusting, and unprofessional behavior directly in opposition to Coast Guard core values. The book details sex acts, disrespect from officers to enlisted members and from enlisted members to officers.”

In April 2010, the applicant stated, a female junior officer advised her that she had found a picture of a penis in the cutter’s engine room. When the applicant met with the Executive Officer (XO) and Engineer Officer (EO) and told the XO to conduct an investigation, the XO replied, “Captain, you don’t want to do that ... because everyone will know it’s you.” The investigation “proceeded but led to no accountability.”

The applicant alleged that she was “also subject to harassment and inappropriate behavior by the Office of Cutter Forces” for the Area. An “insulting picture” of the cutter was placed on the bulletin board in that office. She removed the picture and told her supervisor, the Chief of the office, that she was “concern[ed] that the very office that should be an advocate for her command was openly derisive and unprofessional.”

Finally, the applicant alleged, after another officer assumed command on May 11, 2010, someone posted a photograph of the change of command ceremony on Flickr with “derogatory and inappropriate remarks.”

### *Allegations About Lack of Support*

The applicant alleged that the Area Command failed to support her decisions and command. For example, in 2008, a first class petty officer (PO1) began exhibiting symptoms of mental illness, believed his wife was having an affair, and was hospitalized twice for “mental health reasons.” Upon returning from the hospital, the PO1 “turned violent and erratic.” He barricaded himself in his house with weapons and was “forcibly removed and detained by police” and then he “allegedly forced his wife to have sex with him with a weapon under the pillow.” The applicant ordered an investigation into this incident and then consulted the Area Command about initiating court-martial proceedings. The Area Command, however, refused to support court-martial proceedings. After she imposed non-judicial punishment (NJP) at mast on the PO1, and the PO1 appealed, the Area legal advisor told her that he was recommending that the Area Commander grant the appeal because the mast was unjust. When she said she would reconvene the mast based on revised charges, the legal advisor told her that the Area Commander did not want her to re-mast the PO1. After the PO1 prevailed on his appeal of the NJP, his performance evaluation was her “last resort for holding [him] accountable for his actions.” After the evaluation was finalized, the Area Commander sent her a memorandum “wherein he accused her of lacking compassion and ordered her to review the way in which she evaluated enlisted members.” However, at her prior command, the applicant stated, she had awarded NJP twenty-six times, and only one was successfully appealed. One of her OER comments from that command stated, regarding her masts, that she “set the standard for timeliness/fairness due to detailed prep, awarded punishments firm but fair.”

In the fall of 2009, the applicant stated, she met with the Area Commander to discuss her first year as CO. During this meeting, she stated, they discussed the bridge book, and he openly referred to it as a “bitch book.” In addition, she alleged, he “showed no support for her with

regard to the publicizing of her computer files,” asked her why her chiefs did not like her, called her “emotional,” “challenged [her] on her method of evaluating officers and expressed his disappointment with the transfer orders of the officers” on the cutter. The applicant stated that she replied by reminding him that she had always evaluated enlisted members and officers “by the book.” The applicant argued that the Area Commander’s disapproval of how she evaluated her subordinates “appears arbitrary and personally biased when placed in the context of the fact that he signed [her] 2009 and 2010 OERs that affirm her timeliness and objectivity in her evaluations.” The applicant stated that she received no support from the Area Commander during this meeting and “felt attacked and berated” even though she had been a CO for four years and had received “impeccable OERs” with recommendations for promotion. Therefore, his criticism of her method of evaluating subordinates “can only be based in a personal bias.” The Area Commander’s bias, she alleged, resulted in her reporting officer omitting a recommendation for command afloat from her 2010 OER and, thus, to her non-selection for promotion to [REDACTED].

The applicant stated that the Area Commander had previously “exhibited behavior in his career that would suggest that he is resistant to and does not wholly support women in high-ranking military positions.” She described a video shown at an Area all-hands meeting in 2009, which at one point shows a male officer surrounded by women with the text, “The uniform performs wonders,” followed by an image of the same officer with then-Secretary Napolitano and the text, “NOT.” The Area Commander and some of his near subordinates appeared in this video, which she alleged was “disrespectful to women and particularly to Secretary Janet Napolitano.” She argued that the “video is a significant comment on the cultural and gender bias that still exists in USCG leadership” and that the Area Commander’s treatment of her was “a reflection of this bias.”

### *Allegations About Non-Selection for Promotion*

The applicant stated that the outstanding quality of the OERs she received as a [REDACTED] [REDACTED] proves that she met the criteria for promotion to [REDACTED] in Article 14.A. of the Personnel Manual. She argued that if her “promotion candidacy was objectively considered within the clear guidelines [in Article 14.A.,] then she should have been selected for promotion in [REDACTED]. ... With no evidence to support a non-select, the only reasonable justification for non-selection is inappropriate influence by [the Area Commander].” However, the Area Commander became the Commandant on May 25, 2010, and as Commandant he was “in a unique position to influence the promotion of high-level officers.” She argued that because she clearly met the criteria for promotion, “the only logical conclusion for her non-selection was the inappropriate influence” of the Area Commander/Commandant. Therefore, she argued, the Coast Guard “violated binding promotion regulations and prejudiced [her] candidacy for promotion.”

Despite this lack of support from the Area Commander and the crew’s insubordination, the applicant stated, the cutter “was extremely successful in very dangerous missions.” She stated that the cutter interdicted a few thousand pounds of cocaine on two occasions, interdicted more than 150 migrants from an overcrowded vessel, and conducted six safe boardings, 159 helicopter operations, and 50 moorings while she was in command. The applicant concluded that her “20 years of honorable service should be rewarded with promotion to [REDACTED].” She stated that her non-selection inflicted “a significant financial penalty for an officer who was arbitrarily non-

selected for promotion” and calculated the difference in monthly retired pay between a [REDACTED]  
[REDACTED]

In support of her allegations, the applicant submitted copies of some of her OERs and medal citations, which are included in the Summary of the Record below. She also submitted photocopies of pages from the bridge book containing entries during her time as CO and from 2003 and a print-out from flickr.com showing a photograph of the applicant at a change of command ceremony on [REDACTED], with mean comments (see attached).

### SUMMARY OF THE RECORD

The applicant attended the Coast Guard Academy and was commissioned an ensign on [REDACTED] [REDACTED]. She was first assigned to a large cutter as a student engineer, and her OER marks gradually rose from primarily standards marks of 4 to above-standard marks of 5 and 6 in the performance categories. She was recommended for promotion, awarded a Letter of Commendation, and promoted to lieutenant junior grade on [REDACTED] [REDACTED].

From [REDACTED] [REDACTED] the applicant was assigned to a [REDACTED] [REDACTED] [REDACTED]. She began serving as a [REDACTED] for the repair and maintenance of boats and cutters and then became the [REDACTED], responsible for the administration of all commercial repairs. She received primarily marks of 5 on her OERs for this service, with recommendations for promotion. She was selected for assignment to duty under instruction at the [REDACTED] [REDACTED] and promoted to lieutenant on [REDACTED]. She earned a Master's of Science degree in [REDACTED].

From [REDACTED] [REDACTED] the applicant served at a [REDACTED] [REDACTED] [REDACTED] [REDACTED] of the section supporting high endurance cutters. She earned primarily marks of 5 and 6 on her OERs for this service, was recommended for promotion, and was awarded another Letter of Commendation.

From [REDACTED] [REDACTED] the applicant served as the [REDACTED] of a high endurance cutter. She received primarily marks of 6 on her OERs for this service, was strongly recommended for promotion, and was awarded a Commendation Medal.

From [REDACTED] [REDACTED] the applicant was assigned to the [REDACTED] [REDACTED] where she worked on the [REDACTED] [REDACTED]. She was promoted to [REDACTED] on [REDACTED]. On her OERs during this period, she received primarily marks of 6 and was strongly recommended for promotion. On her final OER at this unit, she was recommend for accelerated promotion, and she received another Commendation Medal.

From [REDACTED] [REDACTED] the applicant served as the [REDACTED] of a large cutter. She received all marks of 6 and 7 on her OERs for this service and was strongly recommended for promotion and command afloat or ashore at an [REDACTED]. In addition, she received her third Commendation Medal [REDACTED] [REDACTED]  
[REDACTED] [REDACTED]

From [REDACTED], the applicant served as the [REDACTED] and CO of [REDACTED]. On her OERs for this service, she received primarily marks of 6 and very strong recommendations for command afloat and for promotion to captain “with best of peers.” One OER comment states that she “handled CO-level responsibility w/grit, consistency and utmost professionalism; evinced strongly-held principles, affirmed core values. Adjudicated diverse array of highly sensitive family, perf, discipline, substance use/abuse & medical issues w/absolute discretion.” The applicant was also awarded a Meritorious Service Medal for this service. The citation for this award notes that she “personally adjudicated hundreds of personnel and disciplinary actions with sage wisdom, mature judgment and the utmost professionalism.” She was selected for command afloat.

On May 23, 2008, the applicant assumed command of a large cutter with [REDACTED] crewmembers. Her supervisor was a captain, the Chief of the Area’s Cutter Forces; her reporting officer was another captain, the Chief of Area Response and Enforcement; and the OER reviewer was a vice admiral, the Area Commander. On her OER dated March 31, 2009, the applicant received nine marks of 6 and nine marks of 7 in the various performance categories, a mark in the fifth spot on the Comparison Scale,<sup>2</sup> and a Promotion Scale mark of “Definitely Promote.”<sup>3</sup> This OER contains many laudatory comments, including “empowerment of CPO mess to lead & mentor”; “[f]ostered excellent workplace environment, promptly took action on inappropriate comments”; “[e]vals & OERs always timely”; “performed magnificently during her first year as CO, skillfully executing all mission while creating a highly motivated & exceptionally professional crew”; “[e]nforced highest stds of conduct & performance: 6NJPs, 3 discharges, use of performance probation”; “tremendous operational performance in harsh conditions”; “a highly trained & motivated crew”; and “should be groomed for future CG leadership.” In addition, her reporting officer highly recommended her for command afloat and for promotion to [REDACTED] “with best of peers.”

The applicant’s next OER, dated March 31, 2010, is the disputed OER in this case. It contains three marks of 5 for “Developing Others,” “Directing Others,” and “Workplace Climate,” as well as eleven marks of 6 and four marks of 7 in other performance categories; another mark in the fifth spot on the Comparison Scale; and another mark of “Definitely Promote.” This OER also contains numerous laudatory comments about the applicant’s many accomplishments. The above-standard marks of 5 are supported by positive comments about maintaining high levels of operational readiness, recognizing top performers with awards, having four of the 100 crewmembers reenlist and 18 advance in rate, having an active ombudsman program, keeping the crew well informed, showing her commitment to the welfare of the crew through an innovative use of crew endurance methods, promoting “ownership” among the crew, and ensuring

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<sup>2</sup> A mark in the fifth spot (of seven) on the Comparison Scale on a CDR’s OER form is for an “exceptional performer; give toughest and most visible leadership assignments.” The seven possible marks range from “unsatisfactory performance” to “best officer of this grade.” The reporting officer assigns the mark by comparing the reported-on officer to all other officers of the same rank whom the reporting officer has known throughout his career. Marks in the first or second spot reflect below-average performance; marks in the third, fourth, or fifth spot indicate that the officer is one of the “majority of high performing commanders”; and marks in the sixth or seventh spot are for the “top 10% of all commanders.”

<sup>3</sup> The Promotion Scale on a CDR’s OER form includes the following possible marks: “Do Not Promote”; “Promotion Potential”; “Definitely Promote”; and “Accelerated Promotion/In-Zone Reordering”; as well as “Recently Promoted to O-5” and “Already Selected to O-6.”

that concerns were documented. Her reporting officer “unequivocally recommended [her] for promotion to [REDACTED] [with] best of peers” and gave her his “highest recommendation for “high visibility, demanding positions at CGHQ, OPCOM/FORCECOM or District staff assignments” and for SSS and Department liaison positions. There is no comment about “command afloat.”

[REDACTED], the applicant became “in zone” for promotion to [REDACTED]. The results of the [REDACTED] selection board, announced in ALCGPSC [REDACTED], show that [REDACTED] were selected for promotion, as were [REDACTED] candidates were selected. In addition, [REDACTED]

The applicant chose to retire on [REDACTED], with more than 20 years and 8 months of active service.

### VIEWS OF THE COAST GUARD

On July 18, 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 “has not provided any evidence to support her allegation that her 2010 OER was inaccurate or completed in error.” He noted that the applicant’s claims that the three marks of 5 were inaccurate, that the Area Commander influenced her reporting officer not to recommend her for command afloat, and that the Area Commander was biased against female leadership have been contradicted in declarations submitted by her rating chain (see attached). The JAG argued that the declarations show that the 2010 OER was “more than fair” and that the lack of a recommendation for command afloat in that OER was fair and accurate.<sup>4</sup> Nor, the JAG argued, are there any grounds for upgrading her end-of-tour Commendation Medal to a Meritorious Service Medal.

Relying on *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), the JAG argued that because the applicant has not proven the existence of an error in her record, her non-selection for promotion logically could not have been caused by an error and so there are no grounds for removing her non-selection or promoting her. The JAG argued that the applicant mischaracterized the promotion system as entitling her to a promotion as if [REDACTED] were selected on a “fully qualified” basis (as are lieutenants junior grade/O-2) instead of on a “best qualified” basis (as are all grades above O-2). The JAG objected to the applicant’s claim that her 20 years of service should be “rewarded” with a promotion to [REDACTED]. The JAG stated that every candidate for promotion in 2010 had honorably served the country, but there are not enough [REDACTED] billets to promote every [REDACTED]. The JAG stated that [REDACTED] were selected. The JAG stated that the other [REDACTED] who, like the applicant, were not selected for promotion also may have had “stellar careers and records,” but fell short in comparison to those selected.

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<sup>4</sup> The JAG also argued that certain past BCMR decisions contain evidence related to this case. In accordance with the applicant’s request, however, the Board will consider her case on its own merits and will not review or consider those past decisions before deciding this case.

The JAG speculatively attributed the applicant's non-selection to the fact that her reporting officer assigned her marks in the fifth spot on the Comparison Scale in both her 2009 and 2010 OERs. The JAG concluded that the applicant's non-selection for promotion was a "reasonable outcome"—not arbitrary as the applicant alleged—and "well within regulations and policies."

The JAG stated that there is no evidence to support the applicant's assertion that the Area Commander/Commandant influenced the decision of the [REDACTED] selection board other than by issuing the annual "Guidance to Officer Selection Boards and Panels" with general principles to follow in making selections. The JAG stated that the then-Commandant was not present during the selection board and had no personal involvement.

The JAG noted that the applicant was not forced to retire based on her single non-selection for promotion to [REDACTED] and that she could have remained in the Service and competed in [REDACTED]. Therefore, he argued, her retirement as a [REDACTED] as correct.

The JAG also adopted the findings and analysis provided in a memorandum on the case submitted by the Personnel Service Center (PSC). PSC stated that there is no evidence that the 2010 OER is erroneous or that the applicant suffered an injustice. Based on the rating chain's declarations, PSC stated that they carried out their responsibilities in evaluating the applicant in accordance with policy. In addition, PSC stated that the applicant has not proven that her command failed to support her or neglected their obligations to her.

PSC stated that the Commandant did not participate in the [REDACTED] selection board and did not conduct any briefings for the board. Because the proceedings of selection boards are confidential, "[n]o one but the members of the Selection Board knows the reason(s) for the applicant's failure of selection." PSC stated that there is no evidence that the [REDACTED] selection board did not perform their duties correctly. PSC concluded that the applicant has not submitted sufficient evidence to overcome the presumption of regularity and recommended that the Board deny relief.

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

On July 19, 2013, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited her to respond within 30 days. She was granted extensions and submitted her response on October 31, 2013.

The applicant stated that the Board is not bound by the standards of review espoused by the JAG, such as the *Engels* test, when the Board is acting in equity under its statutory mandate to remove injustices from members' records. The applicant noted that the Board has the "power to grant broad equitable relief," citing *Saad v. Dalton*, 846 F. Supp. 889 (S.D. Cal. 1994); *Bard v. Seamans*, 507 F.2d 765, 769 (C.A. Colo. 1974); and *Kimmel v. United States*, 196 Ct. Cl. 579 (1971). Therefore, she argued, even if the Board finds no technical error in her record, "the Board can assess the totality of the case and grant relief based upon principles of fairness and equity alone."

The applicant also argued that the Board should not rely on the *post hoc* rationalizations in the rating chain's declarations. She noted that although her rating chain now claims that the marks of 5 on her 2010 OER were caused by her allegedly negative effect on the command climate, there is no criticism of the command climate in the OER. She noted that there is no evidence, apart from the declarations, that her effect on the command climate was so negative as to warrant career-damaging marks and omissions in her 2010 OER. In addition, she argued, the fact that her rating officials would have handled the matter of the bridge book differently does not mean that her handling was wrong or that she deserved career-damaging marks because of it. She noted that her rating chain admitted that the bridge book contained inappropriate and unprofessional entries, that she handled the matter not by awarding NJP but in her subordinates' OERs, and that her chain of command was aware of how she decided to handle the matter.<sup>5</sup> She alleged that their declarations criticizing how she handled disciplinary matters and subordinates' evaluations strongly support her allegation that she received no support from her chain of command.<sup>6</sup>

Despite the declarations, the applicant argued, it is clear that her reporting officer did not include the recommendation for command afloat because he knew that the Area Commander would not support it. She argued that the small number of command afloat billets is irrelevant to whether she deserved the recommendation.

The applicant stated that the declarations show that her 2010 OER amounted to a "velvet hammer"—a performance evaluation that does not contain negative marks or comments but conveys negative information more subtly, through omissions, for example, "to damage an officer's career while surviving scrutiny in the event it is contested before an adjudicative body." She noted that her supervisor admitted in his declaration that the marks of 5 and the lack of a recommendation for command afloat or ashore "would be telling." Thus, she alleged, through the marks of 5 and lack of a recommendation for command, the 2010 OER unjustly and erroneously "conveyed just enough [negative information] to result in a non-selection for promotion," which precipitated her retirement [REDACTED]. The applicant argued that given the severity of the errors in her 2010 OER directly promoting her to [REDACTED] so that she will receive the retired pay of an [REDACTED] would constitute the "full and fitting relief" that the Board is supposed to provide, citing *Caddington v. United States*, 178 F. Supp 604, 607 (Ct. Cl. 1959), and *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004).

As additional evidence of the Coast Guard's failure to address sexual harassment, the applicant stated that on December 14, 2012, she received a Christmas card that had been mailed from Norfolk, Virginia, and someone had drawn a hand with the middle finger extended inside. She believes that the card was sent by a chief warrant officer (CWO) aboard the cutter who had filed a discrimination complaint against her and had recently been passed over for promotion.<sup>7</sup>

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<sup>5</sup> The applicant submitted a copy of an email from her reporting officer concerning the bridge book, which he called an "historical artifact," and asked her to call him to discuss it.

<sup>6</sup> The applicant submitted an email listing eight occasions on which she had counseled a chief petty officer. She alleged that she had assigned him a low mark of 2 on his performance evaluation and his appeal resulted in the 2 being raised to a 3. She argued that this email refutes the criticism in her supervisor's declaration about her handling of evaluations and disciplinary issues.

<sup>7</sup> The applicant submitted a copy of a letter of censure she gave the CWO on February 23, 2010, for poor performance.

She believes that the card was intended to threaten, intimidate, and harass her. She contacted Coast Guard Investigative Services (CGIS) to request an investigation, but the agent she spoke to complained of his workload and said, "Aren't you married?," as if she should just let her husband protect her. So she contacted the Assistant Commandant for CGIS, and he sent her a letter that relies on an investigation that was "woefully insufficient," downplays the severity of the situation, and dismisses her concerns. In support of these allegations, the applicant submitted two letters in which she complained about the lack of thoroughness in the investigation of the Christmas card. She also submitted significant new evidence regarding her performance, care for her subordinates, and leadership as CO:

- A photograph shows that upon departing her prior command, the applicant received a paddle from the crew that was engraved to say, "Thank you for your leadership, compassion, and patience. Fair winds and following seas."
- On September 12, 2008, a CO of an [REDACTED] and two other members thanked the applicant by email for taking the procurement staff to lunch and recognizing their support, which "was a first for them and it made a huge impression."
- On October 2, 2008, a chief mechanic sent an email noting that it was "great when the Captain comes over and takes the time to tell the engineers that we are doing a great job! Your efforts do not go unnoticed!!!"
- On February 6, 2009, the CO of an air station stated that it had been an "absolute pleasure working with you during your deployment ... My pilots reported that your boat was very easy to work with, very safety focused, and obvious that you cared about your people."
- On July 9, 2009—after the start of the reporting period for the disputed OER—the applicant sent an email requesting the birthday dates of all the members of the wardroom.
- On July 20, 2009, an engineer thanked the applicant for allowing him to transit to somewhere on the cutter and noted that they had learned a lot and were very impressed with her crew.
- On July 29, 2009, a chief petty officer sent a master chief an email stating, "Morale on [the cutter] is at an all-time high and the communications between all hands is excellent. ... Both the XO and CO stop in the Mess regularly just to chat, which has proved to be priceless in regards to communication and professional relations. Administrative issues are being addressed immediately and at all levels. The Mess has the full support of the Command with dealing with issues at the lowest level and utilizing the Chief's Counsel to its full potential."
- On August 3, 2009, the Area Commander sent the applicant a note acknowledging receipt of a letter from an agent of the Drug Enforcement Administration who complimented the applicant's professionalism and support during an interdiction operation.
- On August 17, 2009, the CO of a cutter in drydock thanked the applicant for giving one of his junior officers a chance to serve on her cutter while it was underway.
- In an email dated August 30, 2009, a crewmember asked the XO to convey his thanks to the applicant and other crewmembers whose efforts allowed him to leave the cutter while it was deployed to attend his grandfather's funeral.

- On October 13, 2009, an assignment officer advised the XO that she had found two female chief petty officers to be transferred to the cutter in 2010. The applicant replied, thanking the assignment officer for helping to “make this crew shift a reality” for the cutter.
- On October 28, 2009, the XO forwarded the applicant an “after action” report stating that the cutter “was an outstanding ship to deploy on. Look forward to the opportunity to deploy with this professional and motivated crew again.”
- In a note dated December 3, 2009, a crewmember thanked the applicant “for all of my positive memories, experiences, and sea stories during my first year aboard [the cutter].”
- In an email dated January 16, 2010, a petty officer thanked the applicant and her crew for their hospitality while he worked aboard the cutter. He complimented the crew’s respect and professionalism and their leadership.
- On February 18, 2010, the applicant sent an email to an LTJG congratulating her for being accepted to a prestigious college.
- On February 23, 2010, the Coast Guard announced that the applicant’s cutter was [REDACTED] [REDACTED] [REDACTED] and her supervisor congratulated her on the achievement.
- On March 4, 2010, the chief petty officer sent the applicant and to others in the command cadre an email thanking them for their help in getting a loan so that his family could have the heat turned back on in their house.
- On March 5, 2010, her reporting officer sent her an email stating that “with great consternation,” he was inserting himself into her correspondence with the Area Commander because he “consider[ed] her a good friend as well as an excellent CO.” He stated that they were having a “philosophical difference of opinion on a perception” and that the Area Commander thought she was “not in line” even though he was a “servant leader.” He offered her a draft document with a different approach. The applicant replied that the Area Commander’s claim that she lacks compassion had “hurt me to my core” and thanked him for the draft. The reporting officer replied that he supported her 100% and that she should “just get this behind you.”
- The applicant’s final underway night orders on the cutter, [REDACTED] [REDACTED] include a quotation about the comfort the sea can provide and her wish, “May the sea be to you, what it has been to me.” She stated that these orders show that she was not prone to acts of retribution, as her supervisor claimed in his declaration.
- On March 25, 2010, her reporting officer sent the applicant and another officer an email in which he congratulated the other officer for making an excellent speech that day. He concluded that he “appreciate[d] what both of you do for our cutter crews and the fleet. I am very proud to call you both shipmates in the truest sense of the word.”
- Also on March 25, 2010, her reporting officer thanked her for nominating a petty officer for a culinary award.

- On April 13, 2010, her reporting officer complimented her for submitting an award nomination for a photography prize for which her subordinate had received an honorable mention.
- An undated photograph shows the applicant attending a “chief’s call to initiation dinner,” which many other COs did not attend.
- An undated “command philosophy” for the cutter, signed by the applicant, states that the crew is a team, depending on each other’s strengths; that respect must be given before it can be expected and that the crew should show respect in their language and actions; that the crew should never forget the mission or let “the immediate” distract them from “the important”; and that the crew should share good ideas and make the most of their opportunities.
- An undated PowerPoint file shows the applicant’s plan for the cutter with a “path to success” using her command philosophy and five strategic objectives to improve readiness and operations, leadership, service, training, support and communications. The applicant stated that she ensured that she developed a way to measure progress and was regularly briefed on the crew’s progress.
- A sign the applicant received from an ombudsman states, “Life isn’t about waiting for the storm to pass ... It’s learning to dance in the rain.” The applicant alleged that the ombudsmen were supportive and aware of how she was being treated.

#### SUPPLEMENTAL ADVISORY OPINION

Because the applicant submitted significant new evidence, her application was considered newly completed on October 31, 2013, in accordance with 33 C.F.R. § 52.26(c). The Chair forwarded her submission to the Coast Guard for a supplemental advisory opinion, which the JAG submitted on January 23, 2014.

The JAG responded by stating that the Coast Guard’s recommendation to deny relief remains unchanged. The JAG argued that the *Engels* test does apply to this case and that the Board has adopted that analysis many times, “which is appropriate and within its discretion.” Regarding the applicant’s claim that the rating chain’s declarations are *post hoc* rationalization, the JAG alleged that the applicant was misstating and misapplying the *post hoc* analysis. The JAG argued that while the Supreme Court has held that *post hoc* rationalizations, standing alone, are an inadequate basis for review, the rating chain’s declarations do not stand alone, but rather “are confirming supplemental statements” in support of her 2010 OER. The JAG argued that the record clearly shows that the rating chain evaluated the applicant’s performance properly and that the fact that she received some lower marks than she thought she deserved does not shock the sense of justice. The JAG stated that the applicant has not proven the existence of an error or injustice in her record and yet is asking the Board to promote her even though she voluntarily retired even though she was eligible to compete for promotion in [REDACTED]

Regarding the Christmas card, the JAG stated that although the applicant claims she knows who sent it to her, the CGIS investigation did not substantiate her claim. The JAG stated

that her claims about the card and the investigation do not overcome the presumption that the Coast Guard properly investigated her complaint.

Regarding the many documents that the applicant submitted that reflect positively on her leadership and care for her crew, the JAG stated that they do not prove that the existence of an error or injustice. The JAG stated that the applicant had a successful career and so it is not surprising that she can submit this type of documentation. The JAG stated that while the evidence shows that she “had a positive impact on some people; there is also evidence that she had a negative impact on others. The two realities are not mutually exclusive.” He stated that the evidence does not show that the marks of 5 on the OER were erroneous or unjust. Therefore, he continued to recommend denying relief.

### **APPLICANT’S RESPONSE TO THE SUPPLEMENTAL ADVISORY OPINION**

On April 14, 2014, the applicant responded to the Coast Guard’s supplemental advisory opinion. She stated that the arbitrary and capricious nature of the disputed OER is proven by the fact that on March 5, 2010, just three weeks before the end of the reporting period for the OER, her reporting officer called her “an excellent CO” and told her that he was supported her “100%.” She also alleged that the Coast Guard did not rebut her claim that her reporting officer failed to include a recommendation for command afloat in the disputed OER only because he knew that the Area Commander would not support such a recommendation.

Regarding the investigation of the Christmas card, the applicant alleged that it “wholly insufficient” and that the Coast Guard has yet to demonstrate that they properly investigated the matter.

The applicant argued that she has submitted sufficient evidence to prove by a preponderance of the evidence that she did not create a negative command climate aboard the cutter as the Coast Guard claims and that, instead, “it was she who was negatively impacted by the unjustified actions of her chain of command.”

### **APPLICABLE LAW AND POLICY**

#### ***Regulations Regarding OERs***

Article 10.A. of the Personnel Manual in effect in March 2010 governed 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.”

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 Offi-

cer'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," such as—

- Qualification to assume the duties of the next grade.
- Specialties or types of assignment, such as command, for which the Reported-on Officer is qualified or shows aptitude.
- Recommendations for selection to a senior service school.
- Special talents or skills (or lack of) such as military readiness and warfare skills, seamanship or airmanship, etc., as applicable.

Article 10.A.4.c.11.g. provides that the OER reviewer may add a page of comments about the officer's "performance, qualities, potential, or value to the Coast Guard if these areas need to be expanded or explained further. ... The Reviewer may explain or reconcile discrepancies or conflicts reflected in the completed report if these inconsistencies cannot be resolved by returning the report to the concerned rating chain members or through personal discussions." The reviewer forwards the OER to the Personnel Command for validation and entry in the officer's record.

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.

The written standards for numerical marks in the categories "Developing Others," "Directing Others," and "Workplace Climate," for which the applicant received marks of 5, instead of 6s or 7s, on her 2010 OER form, are as follows:

<p><u>Developing Others</u></p> <p>Ability to use mentoring, counseling, and training to provide opportunities for others' professional development.</p>	<p>1</p> <p><input type="radio"/></p>	<p>Unreasonably restricted opportunities for professional growth; kept others in narrow roles and discouraged the level of risk taking necessary for learning. Lack of timely feedback left subordinates guessing.</p> <p><input type="radio"/></p>	<p>3</p> <p><input type="radio"/></p>	<p>Supported and provided opportunities for professional growth. Encouraged others to expand their roles, handle important tasks and learn by doing. Allowed the appropriate level of risk-taking necessary for learning and mission accomplishment. Provided timely praise and constructive feedback.</p> <p><input type="radio"/></p>	<p>5</p> <p><input checked="" type="radio"/></p>	<p>Created challenging situations which optimized professional development and maximized opportunity for success. Guided, mentored, and encouraged others to reach new levels of performance. Adeptly counseled others; identified professional potential, strengths and areas for improvement.</p> <p><input type="radio"/></p>	<p>7</p> <p><input type="radio"/></p>
<p><u>Directing Others</u></p> <p>Ability to influence or direct others in accomplishing tasks or missions.</p>	<p>1</p> <p><input type="radio"/></p>	<p>Showed difficulty in directing or influencing others. Low or unclear work standards reduced productivity. Failed to hold subordinates accountable for shoddy work or irresponsible actions. Unwilling to delegate authority to increase efficiency of task accomplishment.</p> <p><input type="radio"/></p>	<p>3</p> <p><input type="radio"/></p>	<p>A leader who earned others' support and commitment. Set high work standards; clearly articulated job requirements, expectations and measurement criteria; held subordinates accountable. When appropriate, delegated authority to those directly responsible for the task.</p> <p><input type="radio"/></p>	<p>5</p> <p><input checked="" type="radio"/></p>	<p>An inspirational leader who motivated others to achieve results not normally attainable. Won people over rather than imposing will. Clearly articulated vision; empowered subordinates to set goals and objectives to accomplish tasks. Modified leadership styles to best meet challenging situations.</p> <p><input type="radio"/></p>	<p>7</p> <p><input type="radio"/></p>
<p><u>Workplace Climate</u></p> <p>Ability to value individual differences and promote an environment of involvement, innovation, open communication, and respect.</p>	<p>1</p> <p><input type="radio"/></p>	<p>Intolerant of individual differences, exhibited discriminatory tendencies toward others. Tolerated or contributed to an uncomfortable or degrading environment. Failed to take responsibility for own words and actions and their impact on others. Failed to support or enforce Coast Guard human resources policies.</p> <p><input type="radio"/></p>	<p>3</p> <p><input type="radio"/></p>	<p>Sensitive to individual differences. Encouraged open communication and respect. Promoted an environment which values fairness, dignity, creativity, and diverse perspectives. Took responsibility for own words and actions and their impact on others. Fully supported and enforced Coast Guard human resources policies.</p> <p><input type="radio"/></p>	<p>5</p> <p><input checked="" type="radio"/></p>	<p>Excelled at creating an environment of fairness, candor, and respect among individuals of diverse backgrounds and positions. Optimized use of different perspectives and opinions. Quickly took action against behavior inconsistent with Coast Guard human resources policies, or which detracted from mission accomplishment.</p> <p><input type="radio"/></p>	<p>7</p> <p><input type="radio"/></p>

***Medals and Awards Manual***

Chapter 2.A. of the Medals and Awards Manual describes a series of personal awards for noncombat military service ranging from a Distinguished Service Medal, through the Legion of Merit, Meritorious Service Medal, Commendation Medal, and Achievement Medal, down to a Commandant's Letter of Commendation. A Distinguished Service Medal (DSM) "[m]ay be awarded to a person who, while serving in any capacity with the Coast Guard, distinguishes him or herself by exceptionally meritorious service to the United States in a duty of great responsibility. To justify this decoration, exceptional performance of duty, clearly above what is normally expected and that has contributed materially to the success of a major command or project, is required. Generally, the DSM is awarded to flag officers in principal commands. ..." Each lesser medal is defined in relation to those above, so that the Legion of Merit (LOM) may be awarded "for service comparable to the DSM in a duty of lesser though considerable responsibility" and the Meritorious Service Medal may be awarded for service "comparable to that required for the LOM but in a duty of lesser, though considerable, responsibility. ... When the

degree of meritorious achievement or service rendered is not sufficient to warrant the award of the MSM, the Coast Guard Commendation Medal (CGCM) should be considered.” The Commendation Medal may be awarded for meritorious achievement or service “that is outstanding and worthy of recognition” and “well above that usually expected commensurate with an individual’s rank or rate. If the meritorious service is not sufficient to warrant the award of a GCCM, the Coast Guard Achievement Medal (CGAM) should be considered.”

### ***Regulations and Policy Regarding Promotion***

Article 14.A.1.c. of the Personnel Manual states that officers are selected to ranks above lieutenant junior grade on a “best-qualified basis, in which the board is limited to a specific number it may select.” Under Article 14.A.3., each selection board develops its own criteria, but the basic criteria for all selections are performance evaluations, professionalism, leadership, and education.

Article 14.A.6.b. states that selection boards selecting officers on a “best-qualified basis” shall compare officers as follows:

In recommending, a board shall compare all officers submitted for consideration and base its recommendations on the extent to which they compare among themselves in accomplishing past assignments and potential for greater responsibility according to the overall criteria the board adopted; however, Article 14.A.10 f. limits below zone promotion selections.

1. Selection on a best-qualified basis embodies three elements; the board:
  - a. *First*, considers all officers impartially and equally.
  - b. *Second*, applies the same criteria to all.
  - c. *Third*, evaluates by comparison, with the most capable officers advancing to positions of higher responsibility.
2. Best-qualified boards consider officers’ records, comparing past performance, their capacity to undertake successfully tasks of progressively greater difficulty involving broader responsibilities, their capability and inclination to study for further professional growth, and their potential to perform creditably those duties to which these officers might be assigned in the next higher grade.

On [REDACTED], the PSC issued a precept convening a [REDACTED] selection board composed of [REDACTED] on [REDACTED] [REDACTED] to select [REDACTED] for promotion. An enclosure to the precept was the Commandant’s Guidance to [REDACTED] Officer Selection Boards and Panels, which stated the Coast Guard needs [REDACTED] who step forward to serve in positions accompanied by risk and rigorous accountability; who take broadening assignments; who create work climates of environments of care, concern, and equity; who “set the bar high” and hold subordinates accountable; who are “mindful of the communities, industries, governments, and citizens that we serve”; “who can sustain key relationships to make our Service more capable and credible”; who can focus on safely and skillfully performing the Service’s missions while prioritizing demands and ensuring mission readiness; who represent a diverse array of professional backgrounds, academic skills, and career experience; who can innovate and incorporate new perspectives and approaches to recognize, manage and resolve problems; who have mastery of the specialty and demonstrate an overarching understanding of the Service; who have strong representational, oral, and written communications skills; who demonstrate the ability to complete major projects and initiatives; and who possess the acumen and savvy to navigate complex situations and ensure compliance with financial and legal requirements.

## 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>8</sup>

3. The applicant alleged that her 2010 OER and end-of-tour Commendation Medal are erroneous and unjust and that she was erroneously and unjustly passed over for selection for promotion because of them and as a result of improper influence by the Commandant. 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 her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>9</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>10</sup> To be entitled to the correction 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>11</sup>

4. The applicant alleged that her OER and non-selection were erroneous and unjust because she was subject to a "hostile work environment" aboard the cutter due to her gender. Although military officers are not protected from hostile work environments under Title VII of the Civil Rights Act of 1964,<sup>12</sup> Chapter 3.A.1.a. of the Equal Opportunity Manual states that

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<sup>8</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"); *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>9</sup> 33 C.F.R. § 52.24(b).

<sup>10</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>11</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).

<sup>12</sup> 42 U.S.C. § 2000e-16; see *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2<sup>nd</sup> Cir. 1987) (finding that "the *Feres* doctrine prevents members of the military from challenging military decisions through actions brought under Title VII"). However, "it is the Coast Guard's policy to apply the same protections [in Title VII] to the military workforce." Equal Opportunity Manual, Chap. 3.A.5.b. "It is incumbent on those in leadership positions to create a workplace environment built on the core values of honor, respect, and devotion to duty, and to ensure that the workplace is free of discrimination or harassment on any prohibited basis." *Id.* at Chap.1.d.

every member of the Coast Guard deserves to be treated with honor, dignity, and respect. The applicant alleged that her command failed to support her decisions as CO and that her crew was insubordinate. She submitted nothing to show that her chain of command arbitrarily or consistently undermined her discipline of the crew or failed to treat her with all due honor, dignity, and respect as a CO. With regards to her subordinates, she was the CO of her cutter and could have disciplined crewmembers for sexual harassment or insubordination. She submitted no evidence showing that she did so or tried to do so frequently, and the only supporting documentation she submitted in this regard consisted of a few pages from a bridge book with a few offensive quotations that had been directed at others and a few offensive comments made *after* she transferred to another unit in response to a photograph of her posted on flickr.com. The strongest evidence of a hostile work environment in the record before the Board is the declaration of her reporting officer, who wrote, “I don’t believe the environment aboard [the cutter] was neutral or even positive for the first female commanding officer aboard that ship.” He noted that the Area command had met with the Chief’s Mess and the Wardroom to ensure they would support her and had assigned her the most supportive Executive Officer possible, but she “chose to handle most incidents aboard [the cutter] in the strictest of manners” and so “alienated many of the individuals in the Wardroom and crew.”

5. Despite the reporting officer’s comments about the cutter’s crew and even assuming that the applicant’s unsupported allegations about specific incidents are true, the Board finds that the evidence is insufficient to prove that she was subject to a “hostile work environment” or unable to command due to disrespect stemming from sexism. For a hostile work environment to exist, occasional hostile or humiliating words and actions are insufficient.<sup>13</sup> Factors that courts consider include the frequency of the conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating or merely offensive; and whether the conduct unreasonably interfered with an employee’s work performance.<sup>14</sup> A “hostile work environment” in the civilian sector exists “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’”<sup>15</sup> The Board finds that the applicant has not proven by a preponderance of the evidence that she was subject to a hostile work environment or accorded insufficient honor, dignity, and respect by her chain of command or her crew as a whole to allow her to perform her job well.

6. The applicant alleged that her rating chain erroneously and unjustly assigned her some lower marks on her 2010 OER because they erroneously believed that she had created a poor command climate aboard the cutter because of how she handled certain disciplinary matters and evaluated her subordinates. In her response to the advisory opinion, the applicant submitted more than a dozen documents reflecting her positive influences on the command climate and certain subordinates’ careers. Marks of 5, however, are not low marks; they are above-standard marks.<sup>16</sup> And the marks of 5 in the 2010 OER are supported by appropriately positive comments

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<sup>13</sup> See *Overton v. N.Y. State Div. of Military and Naval Affairs*, 373 F.3d 83, 99 (2d Cir. 2004) (Pooler, J., concurring).

<sup>14</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

<sup>15</sup> *Id.* (citations omitted).

<sup>16</sup> Personnel Manual, Article 10.A.4.c.4.g.

as required by Articles 10.A.4.c.4. and 10.A.4.c.7. of the Personnel Manual. Whether an officer has so exceeded the expected standard of performance that a mark of 6 or 7 is clearly warranted in a particular category is not easily proven, however, and the Board finds that the applicant has not submitted sufficient evidence to show that her performance met the written standards for marks of 6 in the categories “Developing Others,” “Directing Others,” and “Workplace Climate,” as she alleged. Marks of 5 need not be supported by negative comments just because they are lower than the marks an officer previously received, and the applicant’s 2010 OER would only have been worse if her supervisor had chosen to do so. The Board finds that the applicant has not overcome the presumption of regularity accorded the marks of 5 or proven by a preponderance of the evidence that any of the numerical marks or supporting comments in her 2010 OER are erroneous or unjust or based on a misunderstanding of her performance or the alleged but unproven hostile work environment.

7. The applicant alleged that her reporting officer’s omission of a recommendation for command afloat in her 2010 OER resulted from the Area Commander’s (OER reviewer’s) improper influence on her reporting officer. Her reporting officer, however, stated in his declaration that he did not discuss any of the OER marks or comments with the Area Commander, and the Area Commander did not “say anything to influence the marks or my comments in her OER.” The reporting officer stated that he recommended the applicant for command afloat on her 2009 OER, but “by the time of her departure OER, ... [he] no longer felt that having [the applicant] serve in the position of command afloat was in the best interests of the Coast Guard. [She] performed very well operationally but did not manage to create an environment aboard [the cutter] that was optimal for the training of future Coast Guard men and women. To her credit, she upheld extremely high standards of performance and behavior but that does not always translate into a nurturing command climate. For this reason, and this reason alone, I did not give [her] a further recommendation for command afloat.” The applicant was not entitled to any particular recommendation from her reporting officer, and the Board finds that her allegations about the Area Commander’s undue influence do not overcome the presumption of regularity accorded her reporting officer’s comments regarding her leadership and potential on her 2010 OER.

8. The Board finds that the applicant has submitted insufficient evidence to overcome the presumption of regularity or prove by a preponderance of the evidence that her service and achievements as the CO of the cutter should have been recognized with a Meritorious Service Medal instead of a Commendation Medal. In this regard, the Board notes that the evidence shows that while the cutter’s operations were highly successful during her tenure, her rating chain was clearly unsatisfied with some of her significant decisions that adversely affected the crew’s morale and some officers’ careers.

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>17</sup>

10. The applicant has not proven by a preponderance of the evidence that her 2010 OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no

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<sup>17</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”).

business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>18</sup> She has not proven that either the 2010 OER or the level of award she received in 2010 was erroneous or unjust. With no evidence of error or injustice in the applicant’s record when it reviewed by the selection board in [REDACTED] and no evidence supporting her claim of undue influence by the Commandant on the proceedings of the selection board, the Board finds no grounds for either removing her non-selection for promotion from her record<sup>19</sup> or directly promoting her to [REDACTED]. The record shows that the applicant served honorably and excellently for more than 20 years, but promotion to [REDACTED] is not a reward for excellent military service. In [REDACTED], selection for promotion to [REDACTED] depended upon being among the [REDACTED] in- and above-zone, highly qualified [REDACTED] who were deemed “best qualified” to serve as a [REDACTED] by a selection board of experienced [REDACTED].<sup>20</sup> Although the applicant’s performance record is excellent and she was obviously “fully qualified” for promotion to [REDACTED], the Board is not convinced that her non-selection in [REDACTED] or her retirement in [REDACTED] as a [REDACTED] were erroneous or unjust.

11. Accordingly, the applicant’s requests should be denied.

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

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<sup>18</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).

<sup>19</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982) (holding that in deciding whether to remove a non-selection for promotion, the Board should answer two questions: “First, was [the applicant’s] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?”).

<sup>20</sup> ALCGPSC [REDACTED]

**ORDER**

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

August 1, 2014

