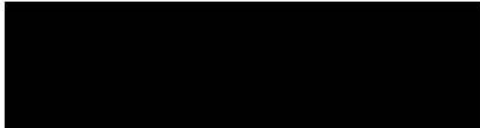


**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-170



FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on July 24, 2015, 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 July 8, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a [REDACTED] asked the Board to remove from her record a Special Officer Evaluation Report (SOER) for her service from April 1, 2013 through January 6, 2014. She requested that the SOER be removed and replaced with a Continuity OER. Alternatively, the applicant asked that a Concurrent OER form be entered into her record with marks and comparison scale changes. The applicant also requested two additional opportunities to appear before the O-6 selection board without the SOER in her record. If selected by a future board, she asked that she be awarded a commensurate Captain date of rank and back pay and allowances as if she had been selected for a promotion by the 2014 selection board.

The applicant alleged error and injustice on the following three grounds, which will be addressed in detail:

1. Procedural errors, irregularities, undue delay and deviations from Coast Guard policy on the part of her rating chain at [REDACTED] which resulted in a denial of due process,
2. Substantive and factual errors in the SOER, and
3. Willful omissions of performance from the SOER to such a degree that the SOER does not accurately reflect the period of performance.

Allegations of Procedural Errors

The applicant stated that from 2011 until 2013 she was assigned as Commanding Officer (CO) of the Coast Guard cutter [REDACTED] (the cutter). She stated that during her tenure as CO, the cutter completed every assigned mission successfully and received several awards.¹ On August 8, 2013, her tour of duty as the CO ended.

The Officer of Personnel Management branch (OPM) of the Coast Guard Personnel Service Center (PSC) then asked the applicant if she would take a position as [REDACTED]

The applicant alleged that she told OPM that she was concerned she would not be a good fit since she did not have a background in [REDACTED] and that the position was clearly intended for someone with that career specialty. OPM told her that her leadership skills were more important than her background. She was provided with names of people to connect with upon her arrival in [REDACTED] who were considered to be [REDACTED] experts and was recommended to spend time with these people in order to receive an orientation upon her arrival. Her concerns subsided, she accepted the position, and she reported to [REDACTED] on August 26, 2013.

When the applicant reported to [REDACTED], the incumbent officer and the Chief of Staff (the incumbent officer's supervisor) were both absent. CDR W, the incumbent officer, was away and not consistently available by phone during officer hours during the transition. CAPT N, the Chief of Staff, was on leave for two weeks in Washington, D.C. The applicant stated that there was no planned agenda or organized method for relief upon her arrival. Further, the senior leadership did not exercise oversight over the transition process. The applicant did not receive any type of formal orientation process and did not receive any physical files, notebooks, manuals, or records instructing her on her duties. The applicant alleged that there was no formal orientation during her job transfer. She claimed that when she assumed her new position there was no proper guidance for her and therefore she should not have been subjected to such abrupt career-ending action just four months later.

The applicant stated that CDR W took leave for several days during the first week of the relief process. The applicant declined to relieve CDR W at the end of the first week because he had failed to provide her with sufficient information. He did review three or four PowerPoint presentations with the applicant. The PowerPoints used many acronyms that she was unfamiliar with and when she asked him what they stood for, he had trouble defining some of them. After repeated insistence, the applicant was given an acronym list and organization chart by CDR W. During the next week, the applicant still did not get much more information. During that week, she was also tasked with many business matters that needed immediate attention, and she never had time to receive any [REDACTED] training or orientation.

CDR W agreed to meet the applicant in California during the third week of September to hand off pertinent information. The applicant alleged that before the visit, CDR W changed the schedule several times. Further, during the visit, CDR W did not meet with the applicant in

¹ [REDACTED]
[REDACTED]

Petaluma as was originally scheduled, he was absent from his office when applicant was in Alameda, and he was late to the applicant's visit at another unit in San Diego, cutting their meeting to discuss important topics short.

Roughly a month after the applicant became [REDACTED], the government shut down for several weeks. She alleged that her civilian employees were furloughed and routine work was curtailed. Many initiatives were delayed or redistributed.

In November 2013, the applicant alleged, she launched the Coast Guard's [REDACTED] program. The applicant also led an extensive re-drafting and alignment of an Organizational Modification Request (OMR) package that had languished since April. This package was essential to the creation of the [REDACTED]. The applicant also edited [REDACTED] working group projects and coached the group's co-chairs toward production of a final report. The brief captured Phase I efforts, but did not meet the Rear Admiral's (RADM) expectations due to the Headquarters transition, the government shutdown, and lack of participation from her branch.

In December 2013, the applicant alleged, she identified a voluntary program that was underutilized and recommended transferring funds from this program into [REDACTED] accounts. The transfer enabled several higher priority inspections and assessment activities to occur that had been previously postponed. In support of this, the applicant submitted a written declaration from LCDR K, who worked for the applicant as her Logistics and Budget officer during her time at [REDACTED]. He stated that he enjoyed working with her because she was professional, capable, and steadfast in her devotion to duty. He further stated that the applicant dealt with the budget cuts appropriately. The applicant's determination of funding priorities enabled ATO groups to "maintain full operations" and "promote safety at sea." The applicant was able to get funding cuts reduced and to save [REDACTED] \$150,000 when implementing the [REDACTED] program. Finally, \$438,000 was reallocated to support [REDACTED] assessments. LCDR K stated that without the applicant's efforts, [REDACTED] would not have had these funds.

On January 6, 2014, the applicant attended a meeting with CAPT N thinking that the purpose of the meeting was to receive constructive performance feedback. At the meeting, no performance feedback was given. Instead, the applicant was relieved of her [REDACTED] duties after being in the position for four months. The applicant alleged that four months was not an adequate time period to show that she could competently perform her duties. She also stated that she was not afforded performance counseling and was not mentored or coached before being removed. Present at the meeting were the applicant, CAPT N, and Dr. B. The applicant was told to clear out her desk, turn in her badge, and report to Base [REDACTED] for the remainder of the week. CAPT N told the applicant that she should report to the [REDACTED] on January 13, and was told that this plan had been coordinated with other commands one month prior to the meeting.

According to the applicant, CAPT N told the applicant that she was being relieved of her [REDACTED] duties for three reasons: (1) the applicant had not moved the [REDACTED] initiative and other multi-phase projects along quickly enough (although what constituted an acceptable rate of progress was never discussed); (2) the applicant did not appear to be happy at work; and (3) the

applicant had had difficulty recalling another captain's name during a routine [REDACTED] weekly meeting a few weeks earlier.

The applicant alleged that CAPT N and Dr. B conveyed conflicting messages during the meeting on January 6, 2014. Dr. B acknowledged that progress was being made. Further, Dr. B stated that the applicant's work the preceding month had driven forward momentum on several major projects and initiatives, indicating her awareness of the applicant's positive performance and leadership action. The applicant alleged that the contradictions between the supervisor's and Dr. B's views demonstrated the dubious nature of the removal action. Further, the applicant alleged that she was not given proper written notice of removal from her primary duties or a chance to submit a written reply, in accordance with Coast Guard policy.²

When the applicant was relieved of her [REDACTED] duties, she was issued an SOER, written by Dr. B and signed by CAPT N covering the period since her last OER dated March 21, 2013. However, her four months of performance from April 1, 2013 to August 8, 2013 as CO of the cutter were not included in the SOER. The applicant alleged that the willful omissions of performance affected the marks and comparison scale on the SOER, which therefore does not accurately reflect her performance during the entire period from April 1, 2013, through January 6, 2014. The applicant told CAPT N that continuity was necessary and the applicant brought this concern to CAPT G at OPM. CAPT G agreed that there could be no gaps in documentation and said he would address this with [REDACTED]; however, it was never addressed.

The applicant received a draft of the SOER which only addressed her months of performance at [REDACTED]. The applicant filed an addendum which challenged many of the errors and omissions, stating that her final four months as CO of the [REDACTED] were not included in the report. The applicant received an updated draft, which corrected the applicant's name and [REDACTED] start date, but the updated SOER did not correct any of the substantive errors. The applicant again filed another addendum. The applicant stated that she did not receive an updated draft or response from [REDACTED]; instead, the SOER was finalized and placed in her record without her approval. She alleged that it took 133 days from the date that [REDACTED] relieved the applicant for the report to be filed in her permanent record by PSC. The applicant alleged that the delay in processing the SOER left her with insufficient time to appeal the report through the Personal Records Review Board (PRRB) prior to the O-6 Selection board convening. The applicant alleged that her chain of command submitted the SOER late and did not correctly present it to her after completion. [REDACTED] was not held accountable for the late SOER. Further, the applicant alleged that the PRRB website was confusing and therefore she did not think that she had any avenues to pursue redress until a year had passed when she was able to apply to the BCMR.

After the applicant was relieved of her [REDACTED] duties at [REDACTED], she was sent to the [REDACTED] ([REDACTED]). While there, she worked under CAPT S, who was the [REDACTED] Chief of Staff. The applicant submitted a letter from CAPT S that detailed her time at [REDACTED]. CAPT S stated that since her arrival, the applicant's performance was consistently exemplary. He was impressed by her professionalism, work ethic, breadth of knowledge, and willingness to acquire and apply new skills. He has also relied on her leadership

² Applicant cites COMDTINST M1000.8A, Article 1.F.1., which addresses relieving a CO of command.

and presentation skills for many tasks.³ The applicant's OER from [REDACTED] covered January 1 through April 30, 2014, and had all marks of 5, 6, and 7.

On July 7, 2014, the CAPT selection board convened, which was the applicant's second chance for promotion to CAPT.⁴ The applicant alleged that the board was not impartial because her supervisor, CAPT N, was one of the board members. Since selection board deliberations are private, the applicant does not know whether or not CAPT N was biased or influenced the other board members. The SOER was in her record and she was again not selected for promotion.

The applicant alleged that she would have been forced to retire no later than February 1, 2016 due to failure of promotion. The applicant voluntarily retired after 20 years and 3 months with the Coast Guard on October 31, 2015. She alleged that she would not have submitted a retirement request if she had been selected by the 2014 board. Further, the applicant planned to withdraw her retirement request if she was selected for O-6 at the 2015 board. The applicant was non-selected by the 2015 board and retired on October 31, 2015. For these reasons, the applicant requested that the SOER be removed from her record, or at least that a concurrent OER covering her last months aboard the [REDACTED] be added. Further, she requested that she be considered for promotion before two more selection boards with a corrected record.

In support of these allegations, the applicant submitted multiple written declarations from her subordinates at [REDACTED] as well as subordinates prior to her time at [REDACTED]. The declarations stated that the applicant's "professionalism, leadership, and service reputation were exemplary."⁵ Others stated that the applicant was easy to work with and for, was respectful both personally and professionally, and was competent. One stated that his interactions with the applicant as a subordinate were "more than satisfactory."⁶ He stated that she was extremely professional, concerned with mission accomplishment, and offered support where needed. The applicant's performance was never concerning and she was professional and appropriate at all times.⁷

Allegations of Substantive and Factual Errors

The applicant alleged that the SOER failed to report her positive performance on projects, initiatives, and working groups. The applicant challenged the following comment in Block 3:

As [REDACTED], despite coaching by [REDACTED] CDR, Deputy, and Chief of Staff (CoS), slow to meet deadlines or provide updates & deliverables, including status of [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].

³ The applicant cited a letter from CAPT S dated March 31, 2015.

⁴ On July 8, 2013, the CAPT selection board convened and the applicant was not selected for promotion. This was the applicant's first chance for promotion to CAPT.

⁵ The applicant cited a letter from CAPT D dated November 20, 2014.

⁶ The applicant cited a letter from CDR T, undated but received in October 2014.

⁷ The applicant cited a letter from CAPT W dated October 20, 2014.

The applicant alleged that she provided weekly updates in writing on Fridays regarding [REDACTED], [REDACTED] and other initiatives.⁸ She also attended flag briefs with RADM B on Mondays. The applicant alleged that each initiative mentioned progressed during the marking period, albeit some more substantially than others. The applicant alleged that cross-cutting initiatives, such as these, often take years to complete. Completing one or two initiatives in a three- or four-year staff tour is often considered “successful.” She alleged that it is unrealistic to expect or demand quick progress on large projects like these.

The applicant stated that she was not the lead on the [REDACTED] initiatives.⁹ CAPT C led the project and often left the applicant out of email chains regarding meetings and important information. Further, CAPT N did not forward or share information that she acquired about the project with the applicant. The applicant alleged that she missed several key meetings and was excluded from key information.

Regarding the [REDACTED] project, the applicant alleged that her working group produced a Phase I Final Report and briefed RADM B on it. RADM B was not satisfied with the final report – he asked for additional information. The research took several months to complete, especially since the senior officers on the project were also tasked with other working group responsibilities in addition to their primary duties. The applicant alleged that the project lacked sufficient manpower to support it.

The applicant alleged that before she took over the [REDACTED], it was led by CDR W. He had missed submission deadlines and the program idled under his purview. He was not held responsible for failing to complete it before the applicant took over. The applicant alleged that her rating chain was either unaware of this lapse¹⁰ or they did not view it as a priority. The project was never mentioned to the applicant during the [REDACTED] relief process, the purpose of which was to ensure a seamless transfer of duties.¹¹ Once the applicant had gathered more information, she coordinated a brief for RADM B and helped to prepare the briefer. The brief was well received by RADM B. On November 19, 2013, the OMR was signed by the RADM and forwarded for further action and approval. The OMR was not approved by Headquarters until September 24, 2014.

The applicant then challenged the following comment in Block 3:

As [REDACTED], failed to provide realistic courses of action requested by [REDACTED] Cdr to make risk based decisions on scaling back [REDACTED] activity due to budget cuts and communicate impacts to CG Leadership – instead, unilaterally decided to cease admin inspections and audits.

⁸ The applicant cited a copy of the Friday weekly reports that she submitted.

⁹ The applicant cited the Friday weekly reports that she submitted and her [REDACTED] initiative emails and documentation.

¹⁰ The applicant stated that Dr. B mistakenly thought that the OMR was already signed because she listed it as a “success” in a draft annual report. As evidence, the applicant cited her emails about the [REDACTED] brief.

¹¹ Coast Guard Regulations, COMDINST M5000.3, Chapter 4-1-17 directs commanding officers to require the officer detaching from duty as the head of a major subdivision of the command to point out defects and the conditions of files and records pertaining to the division to the officer who is relieving him or her.

The applicant alleged that this statement is false. The applicant did not cancel any [REDACTED] activities. [REDACTED] abruptly reduced travel funding by \$450,000 in November 2013 and the applicant developed and executed a plan based on the Commander's guidance. Some [REDACTED] visits were postponed and others conducted pursuant to the [REDACTED] program rather than in person. However, she alleged, none of the adjustments to the activities violated law, policy, or the [REDACTED] Commander's guidance and no programs were ceased.

The applicant then challenged the following comment in Block 3:

As [REDACTED], did not easily adapt to challenging requirements/duties as Chief of large geographically dispersed div (2 branches, 2 divisions).

The applicant stated that she was the only new Division Chief at [REDACTED] in 2013. She was also the most junior in rank of all the division chiefs. The applicant alleged that her supervisor unfairly expected her to perform on a par with other Division Chiefs immediately after arrival. Dr. B did acknowledge her progress because she commented on the applicant's recent success with [REDACTED] during their meeting on January 6, 2014.

The applicant then challenged the following comment in Block 3:

Overreacted to tasking/feedback on several occasions, including screaming at CoS & an O6 div chief & overly emotional responses during meetings w/sr leadership.

The applicant conceded that there was one time that she yelled at CAPT N. It was behind closed doors in CAPT N's office and the two of them were alone. She alleged that CAPT N was probing into the conduct of certain officers and considering bringing disciplinary action against them for actions that another officer had taken. The applicant eventually told CAPT N that if she wanted to hold someone responsible, she should hold the applicant responsible. The applicant alleged that she never screamed at CAPT N. In addition, she noted, there were a few times that she came close to crying in RADM B's office. She was frustrated on these occasions, but instead of leaving the room to collect herself, she remained in the room and worked through the moment.

The applicant generally challenged the comments in Block 4 because, she alleged, her supervisor failed to report any of the applicant's positive performance in the dimensions of speaking, listening, or writing. The supervisor failed to credit the applicant for actual work including a speech she gave at a retirement ceremony for a member retiring after over 30 years of service, her participation on a women's leadership panel in August 2013, and an email the applicant sent to a Coast Guard-wide audience announcing the commencement of the [REDACTED] Program. The applicant also specifically challenged the following comment in Block 4:

Did not carefully listen to direction provided by [REDACTED] Commander, Deputy, CoS, resulting in missed deadlines, rework, and products that did not meet requirements, including [REDACTED]...never provided Commander with a briefing.

The applicant alleged that this comment is redundant with a comment in Block 3. Further, the applicant alleged that she provided several briefs, only to have them rebuffed and told they were not good enough, were no longer wanted, or the reporting requirements had changed, etc.¹²

The applicant also challenged the following comment in Block 4:

Staff work was often sent back for rework or proper routing and below standards of what is expected from a senior officer.

The applicant alleged that she completed staff work on a par with other senior officers. Her work was circulated up and down the chain for input and editorial changes as is normal for staff work.

The applicant generally challenged the comments in Block 5 because her supervisor failed to report any of her positive performance in the area of leadership skills. Further, she made no comments about five of the nine months covered by the report and she failed to credit the applicant for actual work. The applicant also specifically challenged the following comment in Block 5:

...directed officer to report to work despite approved leave for spouse's surgery, causing unnecessary hardship for family without pressing mission requirement.

The applicant alleged that this comment is false. The officer was cooperative and positive as the applicant had taken the time to understand his family situation. Further, upon his return to work, the applicant afforded him the opportunity to create a compressed work schedule and allowed him to telework when possible. The applicant submitted a letter from the officer who wrote that "in no way did [the applicant] cause any unjust harm to me or my family or place my family in any type of hardship." The officer stated that the use of this situation to justify the removal of the applicant was unjust and not right. He stated that the conversation between the two of them was a misunderstanding on his part, and that the applicant is a great, compassionate leader, who always looked out for her subordinates.¹³

The applicant also challenged the following comment in Block 5:

...did not provide proper direction and oversight to Branch Chief with challenging personnel issues, resulting in the firing of a CWO3 and CWO4 and ordering them to report to MCPOs in front of their subordinates.

According to the applicant, the CWO3's relief was not warranted. The applicant communicated this and ensured he was reinstated. However, the applicant alleged, the CWO4's relief was warranted. She stated that the CWO4's performance had been marginal for years, as documented by two annual OERs and a memorandum of formal counseling. After being relieved,

¹² The applicant cited her Enclosure 2, which is her draft OER and binder with performance bullets; her Enclosure 24, which is her [REDACTED] emails and documentation showing that she produced work for the project and later was told that the goals had changed; and her Enclosure 27, which are emails between the applicant and Dr. B.

¹³ The applicant cited a letter from LCDR C dated September 22, 2014, and related emails from him stating that the applicant did not cause hardship to him or his family.

the CWO4 filed multiple complaints against the members of [REDACTED] which required responses in accordance with established procedures. The applicant argued that she should not have received a low mark on her SOER because another officer was relieved due to his poor performance and filed multiple appeals which the applicant had no part in.

The applicant generally challenged the comments in Block 7 because the reporting officer, Dr. B, failed to report any positive feedback even though she had knowledge of the applicant's work ethic and dedication. Moreover, the applicant alleged, Dr. B had even acknowledged at their January 6, 2014, meeting that the applicant had positively advanced many projects.

The applicant also challenged the comment in Block 8 that states that she lacks staff experience. She alleged that this statement is false because, before her assignment to [REDACTED], she had a total of eight years of Coast Guard staff experience. She stated that she had performed successful tours at Headquarters, [REDACTED]. The applicant had experience overseeing the writing of Coast Guard manuals, evaluating records by serving on officer promotion boards, and writing/approving hundreds of OERs.¹⁴

The applicant then challenged the comment in Block 8 regarding her judgment, which states, "Poor judgment displayed when ROO made unilateral decision to cancel a number of inspections and audits due to budget cuts rather than provide requested recommendations with risk analysis to [REDACTED] Commander for determination." The applicant argued that this comment repeats, almost verbatim, a comment made in Block 3. She argued that OERs are not supposed to repeat dimensions and should avoid excess words. Further, the applicant was vested with the authority and given responsibility for adjudicating risk-based decisions for all major cutters. [REDACTED] was fully aware that the applicant held this responsibility, since RADM B asked who held the authority during a staff meeting in mid-October and the applicant stated in front of the group that she did.

The applicant also challenged the comment in Block 8 that says she "[f]ailed to uphold good order and discipline, recommended against standard administrative investigation or NJP for E5." The applicant stated that she was on temporary duty at [REDACTED] when a disciplinary issue arose regarding an E-5 who allegedly used a government credit card for personal use. She alleged that her involvement in the matter was minimal. She was simply copied on emails that included that branch manager Chief's recommendation to forgo a formal investigation and issue a negative CG-3307 instead. The applicant stated that she contacted LCDR K to discuss the matter. She advised him that key facts must be verified first. The relevant documents were collected and forwarded to CAPT N. The matter was wholly within CAPT N's discretion. All approving parties understood that they were simply supporting the GM2's chain of command.

In support of this allegation, the applicant submitted a written declaration from LCDR K. In the letter, he stated that the applicant provided guidance and recommendations to senior

¹⁴ In support of this allegation, the applicant submitted her Coast Guard record, containing previous assignments and OERs.

command members. After this, the CoS sent an email to both the applicant and LCDR K recommending that they do not assign an investigating officer to the case, and rather present the GM2 with a CG-3307. LCDR K stated that the applicant supported ■■■'s initiatives and kept the command well informed. Finally, he stated that the applicant's untimely relief was unwarranted as she was a model officer who possessed the "highest ethical and leadership competencies."¹⁵

The applicant generally challenged the comments in Block 10 because, she alleged, the reporting officer referred to matters that occurred outside the marking period and did not consider her performance as CO. Further, in the assessment of the applicant's potential, the reporting officer stated that the applicant had an abrupt leadership style, that she was not ready to assume greater responsibility, and that her self-report of performance did not match the views of superiors, peers, and subordinates. The applicant alleged that these comments were cryptic and disingenuous. She stated that her reporting officer, Dr. B, had only known her for a few months and therefore was unfit to make preemptive judgments about the applicant's professional experience, character, and future value to the Coast Guard.

Allegations of Omissions of Performance from the SOER

The applicant alleged that Block 3 (Performance of Duties section) ignores half of the SOER reporting period. The reporting period was from April 1, 2013, through January 6, 2014. However, the section only discusses activities that occurred from the end of August 2013 through January 2014.

The applicant alleged that Block 4 (Communications section) ignores significant and relevant conduct and performance, and her written and spoken work product is never addressed. Instead, the comments focus on timeliness and routing. Further, she argued, the comments are completely unsupported.

The applicant alleged that Block 5 (Leadership Skills section) fails to address half of the performance period. Most of the performance items regarding her time on the cutter were omitted.¹⁶

The applicant alleged that Block 7 (Reporting Officer's Comments section) did not gather input from the applicant's previous command to ensure that the SOER reflected the entire marking period. She stated that there were only two comments regarding her service as CO of the cutter in the entire report, even though there is much more evidence of the applicant's performance during that time. In addition, the awards she won while aboard the cutter were not included in the SOER.

In support of this allegation, the applicant submitted a letter from CAPT V, who was the applicant's supervisor while CO of the cutter from April 1 through June 2, 2013. CAPT V had been asked by CAPT N to validate certain information for the SOER. He told CAPT N that the

¹⁵ The applicant cited a letter from LCDR K dated December 26, 2014.

¹⁶ The applicant cited letters from her previous COs suggesting additions that could be made to the SOER and a CG-3307 that documents her performance on the cutter from April 1 to August 8, 2013. It states that the applicant was dedicated, flexible, exercised excellent judgment, and completed vital operations. It also acknowledges the two awards that the cutter received while she was the CO.

applicant's unit had won awards and those should be added into the SOER. He also emphasized the applicant's management of a Tactical Law Enforcement Team during a counter-narcotics patrol and how she provided valuable feedback during the operation. However, these matters were not included in the comments in the SOER. The applicant stated that [REDACTED] omitted a lot of positive performance from the SOER and told her there was no room to include it. However, she argued, there was some blank space left in blocks 7, 8, and 10 where more input from her previous command could have been included.

SUMMARY OF THE RECORD

On July 5, 1995, the applicant accepted a commission as an officer in the Coast Guard Reserve serving on extended active duty as staff judge advocate (SJA). She served in various legal offices, was promoted to lieutenant on January 5, 1997, and integrated into the regular Coast Guard on July 5, 1998. She received marks of 4, 5, and 6 on her OERs. Her subsequent assignments are as follows:

- In 1999, the applicant was transferred to a large Coast Guard cutter, where she served as the Weapons Officer and received all marks of 4, 5, and 6 on her OERs.
- In 2002, she was transferred to a [REDACTED] to serve as a Command Duty Officer. There she received all marks of 4, 5, and 6 on her OERs, and she was promoted to lieutenant commander on July 1, 2003.
- In 2004, the applicant was transferred to the [REDACTED] to serve as an SJA, and she received all marks of 5, 6, and 7 on her OERs.
- In 2006, she was transferred to a cutter where she served as the Executive Officer and received all marks of 6 and 7 on her OERs.
- In 2008, the applicant was promoted to commander and attended the [REDACTED] [REDACTED] to receive a degree in [REDACTED]. While there, she received all marks of 5, 6, and 7 on her OER.
- After completing her studies in 2009, the applicant was transferred to the [REDACTED] [REDACTED]. She received all marks of 5 and 6 on her OERs.
- In July 2011, the applicant assumed command of the Coast Guard cutter [REDACTED]. She served as the CO until August 8, 2013, when another officer assumed command, and the applicant was transferred to [REDACTED] to serve as the [REDACTED] beginning on August 26, 2013. The applicant was awarded a Meritorious Service Medal for her performance as the CO, and she received all marks of 5, 6, and 7 on her annual OERs dated March 31, 2012 and 2013. She was highly recommended for promotion on her OERs but was not selected for promotion in July 2013.

On August 26, 2013, the applicant reported for duty as Chief of [REDACTED] [REDACTED]. Block 2 of the SOER shows that she had many responsibilities and led a staff of 166 people, including 27 officers, 131 enlisted members, 4 civilian employees, and 4 contractors. The staff administered six functional assessment programs. These included the [REDACTED]

[REDACTED], which was still being developed and tested.

The applicant served as the [REDACTED] for a little over four months, until January 6, 2014. The SOER documenting her removal as the F [REDACTED] contains all marks of 3 and 4, with the exception of one mark of 6 for preparing evaluations. In addition, her reporting officer assigned marks of “do not promote” on the promotion scale and “steady performer,” “below the majority of commanders” on the officer comparison scale. The supervisor and reporting officer signed the SOER on February 28 and March 5, 2014, respectively; the applicant submitted an SOER addendum on March 14, 2014; the supervisor and reporting officer endorsed the addendum with comments on March 28 and April 9, 2014, respectively; and the OER reviewer signed it on April 11, 2014, and submitted it to the Personnel Service Center for her record.

On July 1, 2014, the applicant’s prior command entered Page 7 in her record to document her performance as CO of the cutter from April 1 through August 8, 2013. The Page 7 lists numerous accomplishments and awards.

The applicant submitted a communication to the CAPT selection board in 2014 regarding her removal and SOER but was again not selected for promotion. Based on her two non-selections, she would have been separated on June 30, 2015, except that she had more than 18 years of service toward retirement and so was entitled to remain on active duty until she could retire with 20 years of service.

VIEWS OF THE COAST GUARD

On December 23, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case. The JAG attached to the advisory opinion a memorandum by PSC, which recommended granting no relief.

PSC stated the applicant failed to submit an application to the PRRB in order to correct her record. This submission is authorized by the Correcting Military Records Manual, COMDT-INST 1070.1, Article 7.c.(1) and applications must be received within one year of the date on which the contested information was entered or should have been entered in the official record. PSC also noted that officers eligible for consideration by a selection board may communicate with the board through the officer’s chain of command. The applicant did communicate directly with the 2014 selection board. The communication stated that the applicant contested the SOER.¹⁷

In response to the applicant’s allegation that she was not given a formal orientation or proper guidance on her duties when assuming her new position, PSC stated that there is no

¹⁷ The applicant cited her communication to the CAPT selection board dated July 1, 2014, which explains that she contested the SOER.

requirement for a formal orientation during job transfer. PSC noted that the applicant had nearly 20 years of organizational experience and should have been able to accomplish necessary tasks and manage her own performance.¹⁸

In response to the allegation that the applicant was removed from her primary duties after only four months, which was not an adequate time period to demonstrate that she could excel in the position, PSC stated that while the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, Article 1.F.2.b, states that an officer may be removed “after an adequate amount of time at the unit (normally at least six months),” there is no requirement that a unit wait six months before removing an officer. PSC found that the applicant’s rating chain’s statements, which are summarized below, supported permanent removal from primary duties because the applicant’s performance hindered mission accomplishment and undermined leadership authority. PSC noted that the declarations signed by the applicant’s rating chain stated that the applicant was often abrasive to [REDACTED] staff, was unnecessarily confrontational, and once yelled at her supervisor within others’ hearing.

In response to the allegation that the applicant was not afforded performance counseling and was not mentored before she was removed from her primary duties, PSC noted that individual officers are responsible for managing their own performance. The member’s supervisor and reporting officer (RO) are responsible for providing timely feedback to the reported-on officer (ROO) during the reporting period upon the member’s request. Further, the supervisor shall counsel the ROO at the end of the reporting period.¹⁹ Based on the rating chain’s declarations, PSC found that the applicant’s supervisor and RO met these requirements as they tried to coach and mentor the applicant on numerous occasions to no avail.

PSC noted that according to the declaration written by CAPT N for the advisory opinion, the applicant was relieved of her [REDACTED] duties for three reasons: (1) she repeatedly failed to prioritize initiatives; (2) she was unnecessarily confrontational and formed unconstructive relationships with subordinates, peers, and colleagues; and (3) she did not appropriately engage on several large projects and, when she did engage, did so inadequately by either exceeding authority or failing to embrace her responsibilities.

In response to the applicant’s allegation that her command did not follow proper procedure in issuing the SOER and removing her from her duties and that she received no written notice of removal from her primary duties or a chance to submit a reply within five days, PSC stated that there is no written notice requirement when removing a member from primary duties.²⁰ In response to the applicant’s complaint about the delay in the preparation of the SOER, PSC stated that while there was a delay in the SOER delivery, it does not negate its content. Furthermore, PSC noted, an officer who wishes to have their record corrected prior to the date of a selection board may still apply to the PRRB for relief. If they state the date that the selection board will convene, the PRRB will make every reasonable effort to act before that date. Therefore, the applicant should have still applied to the PRRB, which had authority to remove her non-selection.

¹⁸ Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, Article 5.A.2.d.1.c.

¹⁹ Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, Article 5.A.2.d.

²⁰ Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A.

In response to the applicant's complaint that willful omissions of performance from her time as CO of the cutter affected the marks and comparison scale on the SOER, which therefore did not accurately reflect her performance during the entire period, PSC stated that the declarations submitted by the applicant's supervisor and reporting officer show that the SOER accurately reflected the applicant's performance. PSC concluded that the applicant failed to provide clear and convincing evidence that the marks and comments assigned were not fair and accurate.

In response to the applicant's allegation that her record was not fairly reviewed during the PY2015 Captain selection board in 2014 because her supervisor was a board member, PSC stated that since deliberations of selection boards are by statute confidential, there is no way to know if the supervisor's participation influenced the board. However, the selection board relies on the integrity of the board members and there is a supposition that they have done their duty fairly. PSC stated that there is no evidence to the contrary that overcomes the presumption of regularity accorded the selection board.

PSC concluded that the applicant did not adequately show that the SOER should be removed. The applicant failed to show that her command did not fairly evaluate her performance during the rating period, and therefore that removal, alteration, or the addition of a Continuity OER are all inappropriate. Further, PSC concluded that the applicant's request for additional opportunities to appear before a selection board should be denied because she was non-selected for CAPT in 2013 by without the SOER in her record and there is no evidence to prove that the SOER was the cause of her non-selection in 2014. Overall, PSC claimed, the applicant failed to produce clear and convincing evidence to show that an error or injustice has occurred.

The JAG supplemented the PSC's findings but concluded that partial relief should be granted. The JAG stated that administrative corrections should be made to the SOER, but that these corrections do not invalidate the SOER as a whole and do not warrant relief from the applicant's 2014 non-selection for promotion.

The JAG stated that the applicant bears the burden of proving error or injustice by a preponderance of the evidence. To establish that the disputed SOER is unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. To be entitled to relief, the applicant must then make a prima facie showing of harm to her record as a result of that error.²¹ In order to establish a nexus between the error and the applicant's failure of selection, the applicant must prove that (1) the service committed a legal error, and (2) the applicant's record was prejudiced by the errors in the sense that the record appears worse than it would in the absence of errors.²²

The JAG stated that the applicant did provide sufficient evidence to prove by a preponderance of the available evidence that a few comments in the SOER were factually inaccurate or did not properly relate to the sections of the SOER in which they were contained. The JAG concluded that the factually inaccurate statements should be removed. However, the

²¹ *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992).

²² *Engels v. United States*, 678 F.2d 173 (Ct. Cl. 1982).

JAG found that the inaccurate comments do not rise to the level of misstatements of a significant hard fact that overcomes the presumption of correctness. The JAG argued that, even if the SOER contained statements of significant hard fact, in order to receive further relief, the applicant must make a prima facie showing of a causal nexus between the error and the applicant's non-selection. To show the nexus, the applicant would have to show that the applicant's record was prejudiced by the errors. If the applicant was able to demonstrate prejudice, then the question becomes whether it is unlikely that the applicant would have been promoted in any event.²³ The JAG concluded that the applicant failed to show that that her record appeared worse than it would have in the absence of error. The applicant had already been non-selected for promotion in 2013 before the SOER was entered in her record, and she failed to show that she would have been promoted had the SOER not been on her record.

The JAG recommended removing the comment in block 3 of the SOER stating "...including screaming at CoS & an O6 div chief & overly emotional responses during meetings w/sr leadership." This statement is information that was already included in another section of the SOER and thus does not need to be repeated. Furthermore, this statement does not evaluate performance of duties (which is what block 3 is for).

The JAG recommended removing the word "comms" in block 3 of the SOER because it referenced division chief competencies and did not reference a performance dimension.

The JAG recommended removing the bcomment in block 5 of the SOER stating "...causing unnecessary hardship for family..." The JAG found this comment to be a misstatement of fact. In Enclosure 8, the applicant provided a letter from the subject officer who stated that his return to work did not cause hardship for his family. The JAG found that the remainder of the comment was accurate and so argued that this was not a significant misstatement of fact.

The JAG recommended removing the comment in block 8 of the SOER stating "...own lack of staff experience..." The comment conveys that the Reporting Officer thought the applicant lacked staff experience. However, Enclosure 35 included evidence that the applicant had compiled from eight years of assignments to various staffs. The JAG found this statement to not be a misstatement of significant fact, but rather a statement that warrants removal.

The JAG recommended removing the comment in block 10 of the SOER stating "...peers, and subordinates" because the applicant provided evidence in her Enclosures 5, 6, 7, 8, 10, and 11 showing that some peers and subordinates were supportive.

In regard to the applicant's allegation that the 2014 CAPT selection board was not impartial, the JAG found that there is no evidence showing that the applicant was not fairly and impartially evaluated or that her non-selection was improper. Therefore, the JAG concluded that the selection board results were fair.

²³ *Id.*

Rating Chain's Declarations

In support of its allegations, PSC submitted statements from the applicant's rating chain.²⁴ A declaration from the applicant's supervisor, CAPT N, stated that the CAPT repeatedly tried to mentor and coach the applicant and the applicant resisted her guidance. The applicant required more direction, supervision, and leadership than she expected of a senior O-5. CAPT N stated that she felt it would not be constructive or necessary to refute all of the applicant's assertions line-by-line, but she stood by her previous recommendation to remove the applicant from her primary duties.

A declaration from the applicant's reporting officer, Dr. B, stated that she also tried to mentor and coach the applicant. Dr. B stated that she regularly provided the applicant with helpful guidance. Despite this, the applicant was seemingly unable or unwilling to make significant progress on initiatives that were [REDACTED] priorities. She exceeded her authority on at least one occasion by implementing the VI program when her task was really just to provide [REDACTED] Commander with a menu of options that he could choose from; but she was not supposed to have the final say. Dr. B stated that, simply put, the applicant failed to execute her duties in a manner that she would have expected of a senior O-5.

A declaration from the applicant's SOER reviewer, RADM B, stated that throughout his Coast Guard career, he could not recall another time where he had seen so much mentoring and guidance needed by a senior officer. Regarding the applicant's emotional outburst with CAPT N, RADM B stated that he could hear the applicant yelling at CAPT N from two offices away, behind closed doors. Finally, RADM B stated that the SOER processing took longer than the policy provides but that he does not believe the delay in processing the SOER prejudiced the applicant in front of the 2014 CAPT selection board because she was able to submit an addendum to the OER with ample time for consideration by the selection board.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 11, 2016, the Chair sent the applicant a copy of the views of the Coast Guard and invited her to submit a written response within thirty days. The applicant responded on February 8, 2016.

The applicant agreed with the portions of the advisory opinion that found certain words and phrases in the SOER to be erroneous. The applicant agreed with the JAG advisory opinion, which recommended removal of these words and phrases. However, the applicant argued that simply removing these words and phrases would not sufficiently remedy the additional errors and omissions of the SOER. The applicant alleged that simply removing these errors would not adequately redress the injustice and harm caused.

The applicant began by clarifying the number of times she has appeared in front of an O6/CAPT selection board. She appeared in front of three selection boards – July 2013, July 2014, and July 2015. She was non-selected all three times, and was non-selected twice with the

²⁴ The Coast Guard advisory opinion cited the declarations written by CAPT N, Dr. B, and RADM B discussing the applicant's negative performance.

SOER on her record. She alleged that each member's record is a living document that evolves. She stated that she had more awards on her record in 2014 and 2015 than she did in 2013. Further, the person who was responsible for making sure she SOER was objective, accurate, complete, and had failed to meet this responsibility, participated in the 2014 selection board.

The applicant then stated that the policy regarding whether an active duty Coast Guard member is required to file for relief with the PRRB before applying to the BCMR is confusing. She did not apply to the BCMR sooner because the website stated that applicant must exhaust all other administrative remedies the Coast Guard provides before applying to the BCMR. The applicant contacted headquarters-level program offices in an effort to ascertain what the Coast Guard's policy was.

The applicant then addressed a comment from RADM B's declaration stating that the applicant "was provided a fellow Division Chief, an O-6, to serve as a mentor." This was the first time the applicant heard of this mentor. She stated that there were only two people in her that fit this description and could have been assigned to her as possible mentors. However, her rating chain never told her that she had a mentor and no one ever reached out to her telling her that they were assigned to be her mentor.

The applicant then discussed a phrase used by CAPT N (now a RADM) in her declaration dated September 28, 2015. CAPT N alleged that the applicant had "generally unconstructive relationships with...subordinates, peers, and colleagues in and out of [REDACTED]" However, the Coast Guard advisory opinion found a similar type of comment in block 10 to be in error. Therefore, the applicant argued that this comment should also be found erroneous since the evidence showed that she had generally positive, productive relationships with people both inside and outside of [REDACTED].

The applicant stated that since board deliberations are confidential, she does not have access to definitive proof of what a biased board member possibly said or did. She can only point to facts that demonstrate the author of the statement could not possibly have been an objective member of the CAPT selection board in 2014. CAPT N was an active participant in the board deliberations months after rendering negative judgments about the applicant. Even if she did contain her comments to matters of record, the record at the time consisted of the disputed SOER, which she had written herself and which contained errors. The disputed SOER omitted numerous examples of positive performance, several of which had been verified to then-CAPT N by CAPT V and CDR W.²⁵ The applicant argued that the SOER combined with the participation of CAPT N on the board eliminated any chance she had of being selected.

The SOER stated that the applicant was viewed negatively by the circle of people in her workplace. The applicant asserted that this statement was erroneous, as demonstrated by the evidence. Further, she alleged, the RO even admitted that this was an error before the report was finalized. However, the statement was still included in the final version in the applicant's record.

²⁵ The applicant cited her Enclosures 13 and 14, which are letters from her previous COs suggesting additions that should be made to the SOER to highlight the applicant's positive performance.

The applicant concluded that deleting certain words or phrases from the record would not be enough to redress the harm caused. The applicant asserted that the bulk of the damage arose from the fact that the SOER omitted a large period of time and many of the applicant's accomplishments. The proper redress, according to the applicant, would be to remove the SOER altogether and allow her to appear in front of two more selection boards.

APPLICABLE REGULATIONS

The Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, states the following in relevant part:

1.F.2.b. Circumstances that may Warrant Removal from Primary Duties. An officer may be considered for permanent removal from primary duties under the following circumstances:

- (1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or
- (2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, or
- (3) The officer's actions significantly undermine their leadership authority.

The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, states the following in relevant part:

Article 5.A.3.e.(1)(b) states the following regarding an SOER:

A special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority's final action on a permanent relief for cause request per by Article 1.F. of reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)). The OER will be defined as derogatory and shall follow the procedures for derogatory OER submission in accordance with Article 5.A.7.c. of this Manual. This OER will count for continuity.

5.A.7.c. Derogatory Reports

(1) Definition. Derogatory reports are OERs that indicate the reported-on officer has failed in the accomplishment of assigned duties. Section 2 of the OER shall clearly state "Per Article 5.A.7.c. of Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), this OER is a derogatory report." Rating chains are strongly encouraged to contact Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) for guidance in derogatory OER preparations. Derogatory OERs should be completed by the rating chain and received by Commander (CG PSC) no later than 45 days after the OER was initiated by the rating chain. Derogatory reports are only those OERs which:

- (a) Contain a numerical mark of one in any performance dimension, and/or
- (b) Contain an "unsatisfactory" mark by the reporting officer in comparison scale or rating scale, and/or
- (c) Documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position.

(2) Responsibilities. Derogatory OERs are processed as follows:

- (a) Reporting Officer. The reporting officer shall provide an authenticated copy to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum. The supervisor and the reporting officer shall be afforded the opportunity to address the reported-on

officer's addendum via individual one-page signed endorsements to the reported-on officer's addendum. The reporting officer will then forward the OER and attachments to the reviewer.

(b) Reported-on Officer. The reported-on officer has the option to prepare an addendum using Coast Guard Memorandum limited to two pages with no enclosures. The addendum must be submitted to the supervisor within 14 days of receipt of the OER unless an extension is specifically requested from Commander (CG PSC- OPM-3) or (CG PSC- RPM-1).

[1] The reported-on officer's addendum does not constitute an official request for correction of a record but provides the reported-on officer an opportunity to explain the failure or provide their views of the performance in question. Commenting or declining comment does not preclude the reported-on officer from an official request for correction of the record under Article 5.B. of this Manual or submitting an OER Reply under Article 5.A.7.e. of this Manual. ...

(c) Reviewer. The reviewer shall ensure that the evaluation of the reported-on officer is consistent and that the derogatory information is substantiated. If the reviewer finds otherwise, they shall return the report to the reporting officer for additional information and/or clarifying comments. Substantive changes to the OER require its return to the reported-on officer to provide another 14-day opportunity for the reported-on officer to revise the addendum.

CG-5210C, the OER form for evaluating commanders, includes the following instructions for completing the OER:

Performance Evaluation (Sections 3 – 5 and 7 – 8):

- Marks [should be] assigned according to standards [which are printed on the form], which most closely describe Reported-on Officer's performance during the period.
- Specific examples [should be] cited for each mark which deviates from "4". ...

Comparison or Rating Scale and Potential (Sections 9 and 10):

- Section 9 mark [should be] assigned according to the instructive clause on the form.
- Comments [should] describe Reported-on Officer's overall potential for greater responsibility (include, as appropriate, recommendations for promotion, special assignment, and command).

3.A.4.f. Communicating with the Selection board

(1) Background and Authority. Each officer eligible for consideration by a selection board may communicate with the board through the officer's chain of command by letter, inviting attention to any matter in their Coast Guard record that will be before the selection board. A letter sent under this paragraph may not criticize any officer or reflect on any officer's character, conduct, or motive. (See 14 U.S.C. § 253(b).) The letter must arrive prior to the commencement of the board.

5.A.2.c. Commanding Officers

(1). Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers. In using the Officer Evaluation Report (OER), Form CG-5310 (series), strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

5.A.2.d. The Rating Chain

(1)(c). Individual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance

feedback from the supervisor during the period, and using that information to meet or exceed standards.

(1)(k). The reported-on officer shall assume ultimate responsibility for managing their own performance, notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough, and that OERs and associated documentation are timely and accurate.

(2)(b)[5]. The supervisor shall provide timely performance feedback to the reported-on officer upon that officer's request during the period, at the end of each reporting period, and at such other times as the supervisor deems appropriate.

(2)(b)[6]. The supervisor shall counsel the reported-on officer at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discusses duties and responsibilities for the subsequent reporting period and makes suggestions for improvement and development.

(3)(b)[6]. The reporting officer shall provide timely performance feedback to the reported-on officer at the end of each reporting period and at such other times as the reporting officer deems appropriate.

(4)(b)[6]. The reviewer shall expedite the reviewed report in a reasonable time to ensure the OER is received by Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) no more than 45 days after the end of the reporting period.

5.A.4. Concurrent OERs

(a). Definition A concurrent OER is an OER submitted outside of the regular submission schedule in addition to a regular or special OER and thus does not count for continuity. The unit to which the reported-on officer is permanently attached is always responsible for ensuring that OER continuity is maintained with either regular or special OERs. The permanent unit's OER is never considered a concurrent report.

(b). Reasons for Submission Concurrent reports may be submitted only when the officer is:

- (1) Filling separate or distinct billets or command functions under different commanding officers.

The Correcting Military Records Manual, COMDTINST M1070.1, states the following in relevant part:

7.c. Personnel Records Review Board.

(1) Policy. The Coast Guard has established the Personnel Records Review Board (PRRB) to provide a more formalized method for members to seek correction of entries in their personnel records.

(3) Mission of the Board.

- (a) The PRRB acts initially on applications for correction of error in personnel records within its purview before such applications are submitted to the Board for Correction of Military Records of the Coast Guard (see 10 U.S.C. Section 1552; 33 CFR part 52; paragraph 5.g.).

(b) The PRRB recommends to the Director of Personnel Management, or the Director of Reserve and Leadership, action to be taken on applications for correction of error. The foremost duty of the PRRB is to protect both the interests of the Coast Guard and the applicant by ensuring accurate and reliable personnel records. All contested records will be accorded a presumption that they are administratively correct and prepared in accordance with applicable laws and regulations unless the PRRB is persuaded that the presumption has been overcome after considering all the reliable evidence in the record before them. ...

(6) Time Restrictions. PRRB applications must be received by Commandant (CG-12) within 1 year of the date on which the contested information was entered or should have been entered into the official record. Applications which exceed these time restrictions will not be considered by the PRRB and may be submitted directly to the Board for Correction of Military Records of the Coast Guard (CGBCMR) in accordance with 33 CFR part 52.

(7)(h) Applicants desiring to have a record corrected prior to the date of a selection or promotion board should clearly state that desire on their application and should ensure that the application is submitted well in advance of the scheduled convening date of the particular board. The PRRB will make every reasonable effort to act prior to the board's convening date.

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.

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.²⁶

3. The applicant alleged that the SOER in her record is erroneous and unjust and should be corrected or removed from her record. She also alleged that her non-selections for promotion in 2014 and 2015 are erroneous and unjust because her SOER was in her record when the selection boards reviewed it. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.²⁷ 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."²⁸ In addition, to be entitled to removal of an OER, an officer cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that a disputed OER was adversely

²⁶ *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).

²⁷ 33 C.F.R. § 52.24(b).

²⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.²⁹

4. The applicant alleged that there was no formal orientation during her job transfer and she received no counseling before being removed. She claimed that she did not receive proper guidance and therefore she should not have been subjected to such “abrupt career-ending action.” She has not shown, however, that law, policy, or even tradition demands that a senior officer receive a formal orientation or training when transferring jobs. The relief process in August 2013 was apparently extended at her request, and the declarations from her rating chain, CAPT N, Dr. B, and the RADM, state that she was provided guidance and counseling on numerous occasions. The Board finds that the applicant has not proven by a preponderance of the evidence that she received so little guidance that she could not be expected to succeed as the [REDACTED]. Although the applicant was apparently unsatisfied with the amount of information she received from her predecessor during the relief process, she has not proven that given her prior leadership and staff experience, she could not be expected to succeed in her assignment as [REDACTED] with 166 subordinates.

5. The applicant alleged that four months was not an adequate time period to show that she could competently perform her duties. The applicant began her duties at [REDACTED] on August 26, 2013, and was removed from her duties on January 6, 2014. During this time, the government shutdown occurred, and the applicant alleged that the loss of her civilian subordinates during the shutdown, as well as holiday leave, hampered work. The shutdown lasted for more than half of the month of October, but the SOER shows that only four of the applicant’s 166 subordinates were civilians and another four were contractors, who would likely have stopped working during the shutdown. Therefore, at most 5% of her subordinates would have stopped working during the shutdown. In addition, Article 1.F.2.b. of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, states that an officer may be considered for removal from her primary duties if—

- (1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, **or**
- (2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, **or**
- (3) The officer’s actions significantly undermine their leadership authority.
[Emphasis added.]

The record shows that the rating chain’s complaints regarding the applicant’s lack of progress and screaming at her superiors fell under paragraph (1) of Article 1.F.2.b., not subparagraph (2), and so the four-month norm in paragraph (2) is inapplicable. Moreover, while the applicant was removed after just four months, the Board cannot conclude based on the preponderance of the evidence in the record that her rating chain acted precipitously and unfairly in removing her as

²⁹ *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).

████ before the six-month mark, especially given her screaming/yelling at her supervisor and another division chief, which was heard in other offices.

6. The applicant alleged that the conflicting reasons that CAPT N and Dr. B gave for her removal during the January 6, 2014 meeting demonstrate the dubious nature of the removal. However, even assuming their individual reasons for removing the applicant were entirely different, which the applicant has not shown and which is contrary to information in their declarations and the SOER, that would not show that her removal was improper or unjustified.

7. The applicant alleged that she was not given proper written notice of removal from her primary duties or a chance to submit a written reply in accordance with Coast Guard policy. However, there is no requirement for written notice or a specific timeline for a member to reply to notice of removal of primary duties. The applicant cited COMDTINST M1000.8A, Article 1.F.1., which applies only to the relief-for-cause of a CO being relieved of command, not to any officer's removal from primary duties. The applicant has not shown that she was denied any due process in her removal from her primary duties.

8. The applicant alleged that her four months of performance on the cutter were not considered or included in the SOER and that the omission of this performance adversely affected her marks on the SOER, which therefore did not accurately reflect her performance during the entire marking period. The SOER includes the following comments regarding the applicant's service as CO during the first half of the reporting period and the rating chain's consideration thereof:

- "As CO, thorough planning/preps for 45-day CD patrol & crew swap w/ B-class WMEC in support of █████ multi-crew initiative."
- "As CO, shipboard 'train the trainer' program resulted in safe ops at cutter's first Fueling at Sea (FAS) in 3 years; completed 150+ training requirements, resulting in fully qualified/proficient crew & safe to sail cutter that met mission objectives, great results at TSTA, achieved score of 99% on FAS & 100% on emergency breakaway drills."
- "Rating chain gathered input from ROO's previous command to ensure evaluation reflects entire marking period. Input collected through conversations with officer's rating chain on specific performance dimensions and review of ROO's OSF input. In the best interest of the ROO, we ensured positive performance and highlights from ROO's command tour were reflected and captured in this evaluation."

In light of these comments in the SOER, the Board is not persuaded that the applicant's █████ rating chain failed to gather input from her prior rating chain or to consider it in assigning her marks and comments in the SOER. While there are more comments about her performance as █████ in the SOER than about her performance as CO, this imbalance is explained and justified by the role of comments on an OER form, as well as by the fact that the SOER was prepared expressly to document the applicant's removal as █████. As provided in the instructions for completing an OER form, after reviewing the written standards for each performance dimension on the OER form and picking the most accurate numerical marks, the supervisor or reporting officer is supposed to add a comment or two describing an example of performance that supports and explains why each numerical mark was assigned. Therefore, OER

comments are supposed to explain and support the assigned numerical marks and are not required to be a compendium of the officer's achievements during the reporting period, which would be impossible given the very limited space for comments on an OER form. Thus, it is neither surprising nor erroneous that the low marks of 3 in the SOER are supported by examples of poor performance in her role as [REDACTED], rather than examples of her good performance as CO. And although the applicant alleged that her rating chain failed to consider her performance as CO in assigning the numerical marks, the comments in block 7, which are quoted above, strongly contradict this claim. While the marks are low in the SOER, there is no evidence that the rating chain would not have assigned her even lower marks if they had not taken her performance as CO of the cutter into account, as Block 7 expressly states they did.

9. The applicant alleged that a delay in her command's preparation of the SOER left her with insufficient time to appeal the report through the PRRB prior to the date the CAPT selection board convened. The applicant's command took 95 days, from January 6 to April 11, 2014, to complete the SOER and forward it to PSC. According to the reviewer's endorsement to the addendum, the 95 days included "additional days ending 14 March 2014 [for the applicant] to submit a revised addendum." Under Article 5.A.7.c.(1) of COMDTINST M1000.3A, the reviewer "should" ensure that a derogatory SOER is prepared within 45 days, which is the same amount of time allowed for preparation of a regular OER. Therefore, there was no 45-day deadline by which her rating chain was required to submit the SOER. Moreover, completion of the SOER required time not only for preparation of the addendum, the endorsements, and amendment of the addendum, but first for requesting and receiving detailed input from her prior rating chain and consulting PSC, which it is "strongly encouraged" to do under Article 5.A.7.c. In light of these circumstances and requirements, the Board is not persuaded that the applicant's rating chain unduly or unjustly delayed preparation of the SOER. Nor did the alleged delay prevent the applicant from filing an application with the PRRB. The Correcting Military Records Manual, COMDTINST M1070.1, Section 7.c., states that PRRB "[a]pplicants desiring to have a record corrected prior to the date of a selection or promotion board should clearly state that desire on their application and should ensure that the application is submitted well in advance of the scheduled convening date of the particular board. The PRRB will make every reasonable effort to act prior to the board's convening date." Therefore, the Board is not persuaded that the timing of the SOER preparation prevented the applicant from applying to the PRRB. She did not apply to the PRRB to correct the SOER even though she could have within a year of receiving it.

10. The applicant also challenged specific comments in the SOER. As noted above, the applicant bears the burden of proving that the SOER comments are 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.³⁰ The applicant began by challenging the Block 3 SOER comment, "As [REDACTED], despite coaching by [REDACTED] CDR, Deputy, and Chief of Staff (CoS), slow to meet deadlines or provide updates & deliverables, including status of [REDACTED]."
[REDACTED]."
She submitted evidence showing that she was not the lead on the [REDACTED] initiatives, but this does not mean that she did not have deadlines or deliverables or need to provide updates on

³⁰ *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).

these initiatives. She showed that her group made some progress regarding the [REDACTED] project and that she provided weekly updates to RADM B, which RADM B told her were unsatisfactory.³¹ Regarding the [REDACTED] project, the applicant stated that she was not told about it upon her transfer to [REDACTED] and that the project had missed many deadlines before the applicant arrived. While it is not clear to the Board why the rating chain found the applicant's weekly [REDACTED] updates unsatisfactory, the applicant's allegations and evidence do not convince the Board that her rating chain committed an error or injustice in stating that they found her "slow to meet deadlines or provide updates & deliverables" with respect to the [REDACTED] projects.

11. The applicant challenged the Block 3 comment, "As [REDACTED], failed to provide realistic courses of action requested by [REDACTED] Cdr to make risk based decisions on scaling back [REDACTED] activity due to budget cuts and communicate impacts to CG Leadership – instead, unilaterally decided to cease admin inspections and audits." The applicant stated that she did not cancel any [REDACTED] activities and submitted emails, memoranda, and reports demonstrating that she rearranged and streamlined the [REDACTED] initiative to be more in line with the [REDACTED] initiative. The Board notes, however, that she did not refute this comment in her addendum to the OER and believes that she would have if it were not reasonably accurate. And in her declaration, Dr. B affirmed that the applicant had exceeded her authority. The Board finds that the applicant has not proven that this comment is a misstatement of significant hard fact.

12. The applicant challenged the Block 3 comment, "As [REDACTED], did not easily adapt to challenging requirements/duties as Chief of large geographically dispersed div (2 branches, 2 divisions)." The applicant stated that she was the most junior division chief at [REDACTED]. However, this assertion does not rebut the comment stating that she did not adjust well. Therefore, the Board finds no grounds for removing this comment.

13. The applicant challenged the Block 3 comment, "Overreacted to tasking/feedback on several occasions, including screaming at CoS & an O6 div chief & overly emotional responses during meetings w/sr leadership." She conceded that she once yelled at CAPT N and almost cried in front of RADM B on multiple occasions. In her endorsement to the SOER addendum, CAPT N stated that she included this comment to support the mark of 3 she assigned for "Adaptability" because the written standard for a higher mark of 4 in this performance dimension includes "Effectively dealt with pressure and ambiguity." The JAG noted that the written standard for a mark of 2 for "Adaptability" does include the phrase "Overreacted or responded slowly to change in direction or environment" but recommended removing this comment because a similar comment is included elsewhere in the SOER and because the primary issue in this comment is conduct, rather than performance of duties, which Block 3 focuses on. The JAG stated that the repetition of this information overemphasizes it, and the information "is better captured within the performance dimensions of Personal and Professional Qualities." The issue is not, however, whether the comment more appropriately appears in another block on the OER but whether the comment is a misstatement of fact or violates a policy or regulation. The comment has not been shown to be false and it conforms to policy because it reflects an apparent overreaction and failure to deal with pressure effectively and thus clearly supports the mark of 3 for "Adaptability." Moreover, there is no prohibition on using one example of performance or

³¹ The applicant cited her Enclosure 19, which is a copy of the Friday weekly reports that she submitted.

behavior to support more than one mark in an OER. The Board finds no grounds to remove this comment.

14. The applicant challenged the Block 4 comment, “Did not carefully listen to direction provided by [REDACTED] Commander, Deputy, CoS, resulting in missed deadlines, rework, and products that did not meet requirements, including [REDACTED]. Despite multiple and lengthy meetings on the subject, never provided [REDACTED] Commander with a briefing he could share with senior leaders on [REDACTED] activities that were cancelled or replaced with [REDACTED] and steps taken to mitigate the impact.” The applicant alleged that this comment repeated information already stated in Block 3. While the comment is similar to information in Block 3, it specifically addresses her listening skills, and there is no prohibition on using one achievement or example of performance or behavior to support a mark in more than one dimension on an OER. The applicant also submitted evidence showing that she submitted the [REDACTED] to RADM B on November 19, 2013, and that it was routed up the chain for approval, but she did not refute this comment in her addendum. She also showed that she briefed RADM B on the [REDACTED] project, but this does not contradict the comment that she “never provided [REDACTED] Commander with a briefing he could share with senior leaders on [REDACTED] activities that were cancelled or replaced with [REDACTED] and steps taken to mitigate the impact.” Therefore, the Board finds that the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that this comment is a misstatement of significant hard fact or that it violates a policy or regulation.

15. The applicant challenged the Block 4 comment, “Staff work was often sent back for rework or proper routing and below standards of what is expected from a senior officer.” The applicant claimed that her work was treated the same as other staff members’ work in that it was circulated up and down the command chain for input, which she alleged is the normal procedure followed for all staff work. Further, she received oral and written feedback from her chain of command commenting positively on some of her work. Her supervisor’s assessment of whether the amount of rework required was more than expected for a senior officer is entitled to a strong presumption of regularity, however, and the applicant has not submitted sufficient evidence to show that her supervisor’s judgment in this regard constitutes a misstatement of significant hard fact.

16. The applicant challenged the Block 5 comment that states that the applicant “directed officer to report to work despite approved leave for spouse’s surgery, causing unnecessary hardship for family without pressing mission requirement.” The applicant alleged that this comment is false and she refuted the comment in her addendum as well. In support of that allegation, she submitted a written declaration from the officer, who attributed the problem to a “misunderstanding” on his part and stated that “in no way did [the applicant] cause any unjust harm to me or my family or place my family in any type of hardship.” CAPT N stated in her endorsement to the addendum that the officer “did express his concerns to [the applicant] about leaving his wife, who was in pain after surgery, having to ask his mother-in-law to leave work and drive four hours to take care of her, and subsequently driving six hours to meet [the applicant’s] requirement to be physically present in spite of the fact that he was already remotely handling [REDACTED] issues. Her actions inappropriately and unnecessarily influenced this officer to believe that he had to sacrifice being with his wife during surgery to please his superiors. If she had sought the command’s guidance, we would have assured her that it was not necessary to

bring him back to the office.” Thus, the record shows that the officer has absolved the applicant and blames a miscommunication although she unnecessarily required him to stop teleworking and leave his wife while she was recovering from surgery, which also required his mother-in-law to leave work and drive four hours to take care of his wife. The JAG argued that the words “causing unnecessary hardship for family” should be removed based on the officer’s statement but that the remainder of this comment is accurate. Given CAPT N’s description of the circumstances, finding that the applicant’s actions did not cause hardship presupposes that the officer’s wife was not harmed by his departure and that his mother-in-law was not harmed by having to leave work early and drive four hours to take care of her daughter. However, sudden changes in plans and inconvenience are not necessarily “hardship,” and the officer’s statement denying hardship is quite emphatic. Therefore, the Board finds that the applicant has proven by a preponderance of the evidence that the phrase “causing unnecessary hardship for family” is a misstatement of fact that should be removed from the SOER.

17. The applicant challenged the Block 5 comment that she “did not provide proper direction and oversight to Branch Chief with challenging personnel issues, resulting in the firing of a CWO3 and CWO4 and ordering them to report to MCPOs in front of their subordinates.” The applicant stated that the CWO3’s relief was not warranted. She communicated this and later had him reinstated. The applicant alleged that she did not oversee this relief closely because she had arrived at [REDACTED] only a few days earlier. In addition, the way in which the relief was communicated happened outside of the applicant’s presence. The applicant did not show that she provided proper direction and oversight under the circumstances, however, and so the Board finds that she has not proven by a preponderance of the evidence that this comment is a misstatement of significant hard fact.

18. The applicant challenged the Block 8 comment that she had a “lack of staff experience.” The applicant alleged that this statement is false and that before reporting to [REDACTED], she had eight years of Coast Guard staff experience. She stated that she had successful tours at Headquarters, [REDACTED] and that her success was proven by her positive OERs. The record supports the applicants claim that she had several years of staff experience, even though it was not recent staff experience. The Board notes that the comment does not state that she had no staff experience, just that she lacked staff experience, which is more of a subjective assessment of the extent of her staff experience. The JAG concluded that the comment is therefore not a misstatement of significant hard fact but recommended its removal anyway because “without clarification within the comment, the discrepancy between number of years served in staff assignments and the message conveyed by the comment warrants removal.” The Board notes that the addition of the word “recent” would make the comment clearly accurate, but the Board cannot be certain whether it would then reflect the reporting officer’s intended meaning accurately. In light of these considerations, the Board finds that the words “own lack of staff experience” should be removed from the OER because the applicant has proven by a preponderance of the evidence that, taken literally, it is a misstatement of fact.

19. The applicant challenged the Block 8 comment, “Poor judgment displayed when ROO made unilateral decision to cancel a number of inspections and audits due to budget cuts rather than provide requested recommendations with risk analysis to [REDACTED] Commander for determination.” The applicant alleged that this comment repeats a comment in Block 3, but there

is no prohibition on using one example of performance to support more than one mark. The applicant reiterated that she did not cancel any inspections or audits. She alleged that she reworked many of the dates and procedures to create a more efficient program, but did not cut any part of the initiative. She stated that instead, she decided to use the [REDACTED] program that was under development to conduct many of the inspections because of budget cuts. Further, the applicant alleged, as [REDACTED] she was given the responsibility to adjudicate risk-based decisions for all major cutters. Therefore, she argued, adjusting the program unilaterally was within her purview. Moreover, she alleged, during a staff meeting in October 2013, RADM B asked who had the authority to adjust these programs and the applicant replied that she did. The applicant has not shown, however, that she was actually delegated this authority or that RADM B did not request recommendations with risk analysis from her and retain the final decision-making authority himself. Nor did she dispute this comment in her addendum to the SOER. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that this comment is a misstatement of significant hard fact.

20. The applicant challenged the Block 8 comment, “Failed to uphold good order and discipline, recommended against standard administrative investigation or NJP for E5 who misused government travel credit card in excess of \$4K over the period of a year.” She alleged that she was on temporary duty at [REDACTED] when the E-5 disciplinary issue arose, and so she had minimal involvement in the issue and simply supported the GM2’s chain of command. To support this statement, the applicant submitted a written declaration from LCDR K, who wrote that the applicant provided guidance and recommendations to senior command members, supported [REDACTED]’s initiatives, and kept the command well informed during the process. The Board notes that the applicant also disputed this comment in her addendum to the SOER and stated that she had concurred with the recommended disposition (no investigation but preparation of a Page 7) “contingent upon verification of key facts.” In her endorsement to the addendum, however, Dr. B stated that the applicant “strongly supported” her subordinate’s recommendation not to investigate the E-5’s misuse of his government travel credit card. Given that the applicant’s subordinate “misused [his] government travel card in excess of \$4K over the period of a year” and that she recommended against an investigation and punishment, the Board finds that the applicant has failed to prove by a preponderance of the evidence that this comment is a misstatement of significant hard fact. Whether she was elsewhere on temporary duty and concurring or agreeing with a subordinate’s recommendation by email does not refute the comment that she made this recommendation.

21. The applicant challenged all the comments in Block 10 and specifically alleged that the reporting officer had referred to matters that occurred outside the marking period. The applicant noted that, in her endorsement to the SOER addendum, Dr. B indicated that the comment “ROO’s self-reporting of performance does not match the view of superiors, peers, and subordinates” refers to the applicant’s own input for the SOER. Because the applicant was not informed of her removal until January 6, 2014—the last day of the marking period—must have submitted her input for the SOER after the marking period ended. OER comments may not address an officer’s performance outside of the reporting period,³² but an officer is normally

³² Article 5.A.7.f. of COMDTINST M1000.3A states that rating chain members shall not “Discuss reported-on officer’s performance or conduct which occurred outside the reporting period except as provided in Article 5.A.3.c. of this Manual.”

required to submit her OER input 21 days before the end of the reporting period³³ so that the quality of the officer's OER input can be evaluated in the OER itself, rather than in a subsequent OER. This issue has been raised before in prior BCMR cases. For example, in BCMR Docket No. 2004-185, the applicant was transferred to another unit suddenly and so could not have submitted his OER input before the end of the marking period. His rating chain criticized him in the OER for delaying submitting his OER input, but all of his delay occurred after the end of the marking period. The Board concluded that the rating chain had violated the prohibition against commenting on performance that occurs outside of the marking period for the OER and granted partial relief by removing the comment about the applicant's delay. In light of this decision and the reporting officer's admission that the disputed comment concerns the applicant's input for the SOER, which was submitted after the marking period ended, the Board finds that this disputed comment—"ROO's self-reporting of performance does not match the view of superiors, peers, and subordinates."—violates the rules for preparing OERs and must be removed from the SOER. Because the Board is removing the entire comment, whether to remove the words "peers, and subordinates," as the JAG recommended, is moot.

22. The applicant has not submitted sufficient evidence to show that the remaining comments in Block 10 constitute misstatements of significant hard fact or violations of a policy or regulation. She alleged that she exercised excellent leadership as [REDACTED], and she submitted some statements supporting this allegation. However, in light of the presumption of regularity afforded these comments by her reporting officer, other comments in the SOER, and her rating chain's declarations, the Board is not persuaded that the other Block 10 comments are erroneous or unjust.

23. The JAG recommended removing the word "comms"—i.e., communications—from the comment "Accounting for background and nature of work, div chief competencies (comms, planning, people skills) not at level expected for a senior O-5." He argued that it reflects on the applicant's competency at communication and so would appropriately appear in Block 4, but not in Block 3, which is for "Performance of Duties." As the last comment in Block 3, this comment was apparently intended to support the mark of 3 for "Professional Competence." The written standards for this performance dimension do not include the word "communications," but they do include the "ability to ... share technical and administrative knowledge and skill," to "share[] knowledge and information with others clearly and simply," and to "vigorously convey[] knowledge." Therefore, the Board finds that the inclusion of "comms" in this comment is not inappropriate or contrary to the instructions for preparing OER comments.

24. The applicant has proven by a preponderance of the evidence that three short phrases should be removed from the comment blocks of the SOER, as explained in findings 16, 18, and 21 above. The removal of these comments does not warrant a change in any of the marks, which are amply supported by other comments in the SOER. The applicant has not shown that the OER as a whole should be removed and replaced with a Continuity OER. In this regard, the Board notes that she has neither alleged nor proven that her rating chain was biased against her or that their low opinion and assessment of her performance arose from any prohibited grounds—or any grounds other than her performance. Nor has she proven by a

³³ COMDTINST M1000.3A, Article 5.A.2.c.2.d.

preponderance of the evidence that her rating chain failed to consider her performance during her final four months as CO of the cutter in preparing the SOER. Therefore, the lack of a separate, concurrent OER covering that period is not erroneous or unjust.

25. The applicant asked the Board to remove her non-selections for promotion and to give her two more chances for selection. The applicant has not proven that there was any error in her record when she was non-selected in 2013 and so there are no grounds for removing her 2013 non-selection. With regard to her 2014 non-selection, when an applicant proves that her military record contained an error when it was reviewed by a selection board, this Board must determine whether the applicant's non-selection should be removed by answering 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?"³⁴ When an officer shows that her record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case, there was no substantial nexus or connection" between the prejudicial error and the failure of selection.³⁵ To void a failure of selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."³⁶

26. The applicant has proven by a preponderance of the evidence that the following three phrases/comments constitute errors and should be removed from the SOER:

- "causing unnecessary hardship for family";
- "own lack of staff experience"; and
- "ROO's self-reporting of performance does not match the view of superiors, peers, and subordinates."

The removal of these three phrases does not noticeably improve the SOER given the plethora of other, very negative comments in the SOER. Therefore, the Board finds that the three phrases did not prejudice her record before the CAPT selection board in 2014 (or 2015). Even assuming *arguendo* that they did slightly prejudice her record, the Board finds that it is very unlikely that she would have been promoted even if these three phrases had not been in the SOER. In this regard, the Board notes that the applicant was first non-selected in 2013—even before the SOER was entered in her record. Her 2013 non-selection shows that, even without the SOER in her record, the quality of her prior OERs did not persuade the 2013 CAPT selection board members to select her. Given the very low marks, the negative comments, and particularly the mark of "do not promote" in the SOER, which are not erroneous, and the low selection rate, the Board finds that even if the three phrases had not been in the SOER in 2014 (or 2015), the applicant definitely would not have been selected for promotion. Therefore, the Board finds no grounds for removing the applicant's non-selections for promotion from her record.

³⁴ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

³⁵ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), *citing Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

³⁶ *Engels*, 678 F.2d at 175.

27. The applicant alleged that the 2015 CAPT selection board was not impartial because CAPT N, who signed the SOER as supervisor, was one of the selection board members. Because the deliberations of selection boards are confidential by statute, there is no way to know whether CAPT N's participation on the selection board adversely influenced the decision of the selection board with regard to the applicant. However, there is no evidence that CAPT N was prejudiced against the applicant for any impermissible reason, such as race or gender. Moreover, given the relatively small size of the Coast Guard officer corps, if officers were prohibited from serving on selection boards if they had previously supervised any of the candidates for promotion, it would be impossible to find officers eligible to serve on selection boards. The applicant has not shown that having CAPT N serve on the CAPT selection board was erroneous or unjust. The Board finds that CAPT N's membership on the CAPT selection board is not grounds for removing the applicant's non-selection.

28. The applicant made numerous allegations with respect to the actions and attitudes of various officers at [REDACTED], particularly those involved in the preparation of the SOER. Those allegations not specifically addressed above are either not dispositive of the case or are not supported by substantial evidence sufficient to overcome the presumption of regularity.³⁷

29. Accordingly, partial relief should be granted by removing the three comments listed in finding 26 above from the SOER. No other relief is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

³⁷ 33 C.F.R. § 52.24(b); 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 granted in part in that the Coast Guard shall remove from her Special OER for the period April 1, 2013, to January 6, 2014, the following three phrases:

- From the Block 5 comments, “causing unnecessary hardship for family”;
- From the Block 8 comments, “own lack of staff experience”; and
- From Block 10, “ROO’s self-reporting of performance does not match the views of superiors, peers, and subordinates.”

No other relief is granted.

July 8, 2016

