

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-269



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on September 1, 2017, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated August 17, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a retired [REDACTED] asked the Board to correct her record by making the following changes to her May 19, 2015, Officer Evaluation Report (OER):

- Change mark in Developing Others from 3 to a 6;
- Change mark in Responsibility from 4 to a 6;
- Change Comparison Scale mark from 3 to a 5;
- Remove the underlined portion of this comment: “Instinctively adjusted to customer service hurdles, but struggled to adjust own strict mgmt style to accommodate cmd vision & own division’s inadequate skills.”
- Remove this comment: “Struggled to patiently mentor E7 struggling w/performance & leadership competencies; challenged to id key motivators for success; tried to reassign rather than coach long term.”
- Remove this comment: “Held onto own ideals rather than embracing/carrying out Command Philosophies, despite counseling, coaching by supervisors/peers. Recently became disenfranchised as div officer/leader.”
- Remove the underlined portion of this comment: “Support for LDAC is much appreciated, but the innovative leadership activities lose credibility as they are not practiced w/subordinates in the Admin Div. A decline in ldrship prf this pd had resulted from disagreement w/Command & COMDT calls for servant ldrship & strong mentorship”

of subordinates. Work life adjustments along w/embracing leadership philosophies counter to own are required for continued grown & success in the organization. Upon correction of these deficiencies, will be ready for promotion to CWO3 w/peers.”

The applicant asked that the comments be replaced with more positive language. She requested that once these changes are made she be considered for promotion to CWO3. She provided a nineteen-page brief detailing her requests for relief. The three overarching reasons she believes she is entitled to relief are (1) her Supervisor and Reviewer should have been disqualified from rating her on the OER because she had filed a harassment complaint against them before the end of the rating period; (2) the OER does not accurately reflect her service during the rating period; and (3) the comments on the OER are vague and she has been unable to obtain specific information regarding these comments.

APPLICANT’S ALLEGATIONS

Harassment Complaint

The applicant argued that according to the Officer Accessions, Evaluations, and Promotions manual (“Officer Manual”), her rating chain should have been disqualified from rating her on an OER because they were interested parties to an investigation.¹ Members must be disqualified when they are an “interested party to an investigation ... or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.” She stated that the Civil Rights Service Provider initiated a harassment complaint based upon allegations she had made against her Supervisor and Reviewer. The applicant argued that it is clear that both her Supervisor and Reviewer should have been disqualified from rating her as they were both named in her harassment complaint a month before the end of the marking period. She asserted that this definitely “raises a substantial question” as to whether she received a fair and accurate evaluation. She stated that there “is an obvious conflict in this situation which illustrates exactly why this type of exception exists for the rating chain.”

In addition to the applicant’s harassment complaint against her Supervisor and Reviewer, her Supervisor was appointed as the investigating officer in a complaint that was initiated against her, which was completed on March 16, 2015. She claimed that her Supervisor had informed her entire Division of the complaint, which she argued was at odds with the Civil Rights Manual, COMDTINST M5350.4C. The applicant stated that she was never informed of the exact allegations nor was she given an opportunity to respond to the allegations against her. She stressed the fact that at no point in this process has she been able to obtain a copy of the investigation and that if she had, she would have been able to more thoroughly prove the inaccuracy of the OER. The applicant stated that she filed a Freedom of Information Act (FOIA) request and was denied and had filed an appeal “over a year ago” at the time she submitted her application. She stated that she was unable to gather statements and fully defend herself against the offending OER because she does not know the contents or the purpose of the investigation. She emphasized that this investigation provided another example of why her Supervisor had a conflict that made him unable to

¹ Article 5.A.2.e.(2)(b).

provide a fair and accurate evaluation of the applicant. The applicant requested the Board's assistance in obtaining the investigation against her.

The applicant stated that during the investigation of the allegations against her, she had several conversations with her Supervisor. She stated that her Supervisor told her that he had difficulty getting the complainant "to articulate what his actual complaint was." She stated that her Supervisor had to read the complainant "the manual" and "ask numerous questions about what his complaint was." The applicant alleged that her Supervisor stated that he believed the complainant filed the complaint because she was holding him accountable for his actions and that he was not used to it.

Workplace Climate

The applicant stated that there were several changes in the office between the previous rating period and the rating period in question. The most important change was a new Chief Yeoman (YNC) "who displayed serious problems from the beginning. Not only was he incapable of performing his duties, he was also insubordinate and defiant." The applicant provided an email that she sent to her Supervisor that detailed many of the problems she had experienced with the YNC (*see* Summary of the Record). She stated that because YNC "fell so short of expectations," she spent a great deal of time working with him in order to counsel, mentor, and train him. She stated that he was disrespectful towards her at times, to the point where he would yell at her. The applicant stated that in January 2015, she had drafted a negative Page 7 for the YNC, which was ultimately never signed, and around the same time he filed the harassment complaint against her.

In addition, the applicant stated that she had a Yeoman First Class (YN1) who was frequently absent. The applicant stated that the YN1 was a strong performer when she arrived at work, but she frequently called or texted out of work at the last minute for a variety of reasons. The applicant stated that the YN1 would complain to the Chain of Command that the applicant was not giving YN1 enough time off or was making her "feel guilty." The applicant gave some examples of the YN1's reasons for calling out of work as "losing her dog the night before, going glasses shopping, needing to take a shower because the power was out where she lived, sick kids, stress, not sleeping well, medical issues, snow or bad weather." The applicant stated that some reasons were legitimate reasons to call out of work, while others were not. She also stated that the YN1 regularly showed up late to work "with no excuse but never stayed late to make up for it."

When the YN1 was at work, the YNC relied on her for many of his questions and asked her for assistance with his tasks. In November 2014, the YN1 was transferred out of the applicant's division because the XO felt that the YNC was leaning on the YN1 too heavily. The applicant stated that she had a meeting with her Supervisor and the CO about this change and she told them about YNC's disrespectful behavior towards her and she stated that the Command was not supportive of her efforts in trying to hold him accountable. She gave examples of various Page 7s she had attempted to have placed in the YNC's record, but ultimately none were signed. In one instance the applicant stated, she was told that she "needed to stay with the YNC until he completed the task rather than just giving him the task and expecting him to follow through."

Officer Evaluation Report

The applicant first noted that her previous OER, dated June 30, 2014, was signed by the same Reporting Officer and Reviewer. On that OER she received no marks lower than a 5 and a mark in the fifth spot on the comparison scale.

Regarding the comment, “Instinctively adjusted to customer service hurdles, but struggled to adjust own strict mgmt style to accommodate cmd vision & own division’s inadequate skills,” the applicant stated that she did not object to the first clause of the sentence. She asserted that she was not aware of the Command’s “vision” until March 2015. She stated that at that time she was told by the XO that because they worked on a Base their mission was not as important as an operational unit’s mission. She claimed that the XO stated that her primary concern “needed to be the happiness of [her] crew over getting results.” She stated that she found this strange as it “seemed to be in direct contradiction with the Command’s published philosophy as well as the current Commandant’s personal leadership philosophy.” The applicant provided a copy of the Commandant’s personal leadership philosophy and stated that she did her best to balance the conflicting guidance by making happiness more of a priority, although it was not noted in her OER.

Regarding the language on her “own strict management style,” the applicant stated that her management style was not strict. She argued that her style was in accordance with the Commandant’s leadership philosophy. She stated that prior to the YNC’s harassment complaint against her she had done everything her Command had asked her to do for and with him. The applicant stated that she frequently discussed issues regarding the YNC, the YN1’s absenteeism, issues regarding another member, and at “no time during these lengthy discussions did [her] Supervisor express that he felt [she] was being too strict.” She stated that she did not hold her crew back from liberty, her crew attended all Command-sanctioned morale events and parties, all members were able to attend medical appoints for themselves, their dependents and their pets, and her crew was always permitted to attend welcome breakfasts and going away luncheons during the work day. She stated that she always used mistakes as an opportunity for growth and learning and not as an opportunity for punishment. As an example, she stated that her enlisted members were struggling with writing evaluation bullets so she provided training to her whole crew on the topic. She provided several other examples of individualized training she would offer when a member struggled with a task or concept. She asserted that this was how she used her “management style” to address problems and that she did not get upset with her crew.

Regarding the phrase “own divisions’ inadequate skills,” she stated that this was the only piece that was removed by the PRRB. However, she stated that she wanted to discuss this portion of the OER to “show the inaccuracy of the OER and another reason that [her] chain of command should have been disqualified” from rating her. She asserted that her division did not have inadequate skills. She had two members who struggled at times to perform, but she argued that this did not mean her entire division was inadequate. The applicant stated that her division was able to provide “outstanding administrative support to hundreds of Coast Guard members and dependents,” one of her civilian subordinates [REDACTED], one of her members received the [REDACTED] and one of her members received a cash award. She asserted that her division possessed outstanding skills and that they always “received positive comments” from members.

Regarding the comment “struggled to patiently mentor E7 struggling w/performance & leadership competencies,” the applicant stated that she mentored the YNC “extremely patiently.” She claimed that any failings were “due to his lack of effort and that [she] lacked command support” that she needed to keep him accountable. She stated that despite her counseling him numerous times and her attempt to put him on performance probation, his performance did not improve. She provided an email that she sent him outlining what is expected of a YNC, but she stated that he did not work on any of these expectations. She stated that the YNC “would argue about anything and everything” whether it was her idea or a Coast Guard policy. She provided several examples of times when the applicant took time to train the YNC and he argued with her and did not retain the information she had taught him. The applicant claimed that because of the YNC’s shortcomings, the Command Senior Chief recommended that she meet with the YNC at least weekly to provide training and mentoring. She stated that she implemented this plan, but the YNC “argued with [her] during these meetings and blamed [her] for his failures, saying [she] was not teaching him how to do his job, despite the fact that [she] was spending a minimum of one hour per day teaching him how to manage programs, people or projects.” She stated that he was consistently unable to complete even the simplest tasks without constant supervision and reminders. The applicant stated that she was having regular conversations with the YNC regarding his performance. She stated that sometimes he was fine during the conversations but other times he would become belligerent and yell at her.

Regarding the comment “tried to reassign rather than coach long term,” the applicant said that she did not try to reassign the YNC and she did not have the authority to do so. She stated that at one point she considered moving him into a YN1 billet because “the Command was not supporting [her] in holding YNC accountable.” However, the YN1 billet reported to her as well so it would not have been reassigning him outside of her division. She asserted that she never even thought about transferring him away from the Base. She stated that she felt performance probation was the necessary step, but she did not have support from the Command to go through with that action. She stated that she has covered how she did, in fact, spend ample time coaching YNC in the long term. She therefore requested that the whole comment be redacted.

Regarding the comment “committed to hard work & high perf, evidenced by glowing [REDACTED] compliance inspection, however it is often at the expense of a good worklife balance of own & subordinates. Held onto own ideals rather than embracing/carrying out Command Philosophies, despite counseling, coaching by supervisors/peers. Recently became disenfranchised as dev officer/leader,” the applicant stated that she did not object to the beginning portion up through “compliance inspection” but requested that the rest be removed. Regarding the work-life comment, she stated that she took many steps to ensure that her members had a healthy work-life balance. She claimed that her own work-life balance was “not negatively impacted by [her] strong work ethic, and neither was [her] team’s.” She admitted that there were days when she had to work long hours in order to make up for the YN1’s absence or the YNC’s “unwillingness to complete taskings.” She stated that she maintained a strong marriage and social life and worked out regularly. Regarding her subordinates, the applicant stated that she never held her crew back after the work day and they frequently received early liberty, to the point that the applicant actually believed it was too much. She stated that she thought this comment in her OER was largely because of the YN1. She stated that YN1 would frequently complain about being stressed out

because the YNC would often come to her asking her to teach him his job to the point that she was having trouble finishing her responsibilities. The applicant stated that she tried to cover some of the tasks but it was difficult because of how often the YN1 called out of work.

Regarding the portion of the comment “held on to own ideals rather than embracing/ carrying out Command Philosophies, despite counseling, coaching by supervisors/peers,” the applicant stated aside from one counseling session she received from the XO in March 2015, any counseling she received “was conflicting.” She stated that at times her Supervisor seemed to understand the problems that she was facing, but at other times would require her to go back on a policy change she had instituted. She stated that she and her Supervisor had “discussed numerous times how the Command seemed to accept another CWO’s leadership style that was similar to [hers], but was not as willing to accept [hers]. The only difference between [her] and the other CWO was that he was male.” She stated that she did not recall any coaching by peers other than by one other CWO. She stated that he had asked to speak with her in December 2013 which she found odd, because they were not in the same Division and they “had never really talked” before. She claimed that he told her that people would be more motivated if she granted more liberty and she told him that she had learned that too much liberty can actually have the opposite effect because people come to expect it. However, she also stated that she had given YN1 to ability to grant as much liberty as she thought was appropriate. The applicant stated that this CWO and XO were friends and she claimed that the CWO was included on one meeting discussing the applicant. After receiving the PRRB declarations, the applicant reached out to the named CWOs “to see where the disconnect was” and neither could recall the interactions the CO had described in his declaration.

Regarding the comment “recently became disenfranchised as div officer/leader,” the applicant stated that the only word she really disagreed with was “recently” as her “disenfranchisement ha[d] been taking place for well over a year.” However, she requested that the whole comment be redacted. She claimed that her Supervisor had stated that she was in a tough position because she was expected to run her Division but was given none of the authority needed to run it. She claimed that when they had these conversations, her Supervisor would hold up two fingers in a V, trace the first finger and talk about responsibility, trace the second finger and talk about authority, and then point to the space in the middle and say that was where she was. She argued that this is the definition of disenfranchised, deprived of power and marginalized, so she requested that this comment be redacted.

The applicant also addressed the comment “support for ██████ is much appreciated, but the innovative leadership activities lose credibility as they are not practiced w/subordinates in the Admin Div. A decline in ldrship prf this pd has resulted from disagreement w/Command & COMDT calls for servant ldrship & strong mentorship of subordinates. Work life adjustments along w/embracing leadership philosophies counter to own are required for continued growth & success in the organization. Upon correction of these deficiencies, will be ready for promotion to CWO3 w/peers.” She stated that she was unaware of a decline in her leadership performance during this period. She stated that as evidenced by the rest of the OER she was “very effective in completing all tasking, some even above and beyond [her] job description.” The applicant believed that this comment was “clearly in retaliation” to her expressing her disagreement with the Command. When she did express disagreement, though, she claimed that she always did it respectfully. She stated that she had filed an Article 138 Complaint against her Command in an

attempt to resolve some of the issues she was having, which led to mediation sessions. She argued that many of these comments, including this one, are simply retaliation for the Complaint. She asserted that “the Command has no basis or ability to point to anything specific to show that [she] had a decline in performance or leadership.”

The applicant stated that there is nothing wrong with servant leadership and she claimed that she practiced this as well under the previous Commandant. She stated that the previous Commandant’s philosophy used servant leadership. However, she asserted that the new and current Commandant has a different leadership philosophy, which she has tried to adhere to in addition to the Command’s leadership style. She stated that this showed that she is adaptable to different leadership visions. She stated that she provided strong mentorship to her subordinates, spent a lot of time working with the previously mentioned members who warranted additional attention, and she always took time to train newly transferred members.

The applicant argued that her Command also never proved that she had “deficiencies.” She claimed that the “bare assertions in the OER are unsupported by the facts laid out [by the applicant] and contrary to USCG leadership principles.” The applicant stated that at mediation her Supervisor stated he was shocked what her crew said about her, she asked what it was and he stated that they said “the crew told him [she] held them accountable and that they *felt* like [she] might make them stay late if they didn’t finish their work” (emphasis in original). The applicant argued that this does not show a deficiency.

In place of the redacted comments, the applicant did not provide specific comments she would like to be entered in their place. She discussed three accomplishments that she requested be discussed in their place, though, which were leading the [REDACTED] event, receiving a CG Commendation Medal for ensuring [REDACTED] and voluntarily standing as Officer of the Day once a month to lighten the load for other officers (including on Thanksgiving and Christmas).

Regarding the mark in Developing Others, the applicant received a 3 and she asked the Board to raise the mark to a 6. She argued that she met the description of a 6 “to the letter.”² She stated that she created challenging opportunities for her Division by having a Memorandum of Understanding with all of the units in the Region that her Base would handle their administrative needs. She stated that this created challenges by providing her members with a “wide range of situations to address and problems to solve.” She provided additional examples of ways in which she challenged her crew. The applicant asserted that she adeptly counseled others regularly. She pointed to how she regularly counseled and trained the YNC as discussed previously. She discussed other personnel whom she counseled in a one-on-one capacity at various times throughout the rating period. The applicant also argued that this low mark of 3 is in direct contradiction to the comment that she “shifted division personnel transportation/admin roles to accommodate individual aptitude; resulted in both mbrs becoming highly productive & successful in new roles; gained

² The description of a mark of 6 in Developing Others states “Created challenging situations which optimized professional development and maximized opportunity for success. Guided, mentored, and encouraged others to reach new levels of performance. Adeptly counseled others; identified professional potential, strengths and areas for improvement.

valuable YN rate training/experience.” She stated that with all of these examples in mind she should have received no less than a 6 in Developing Others.

Regarding the mark in Responsibility, the applicant received a 4 and she asked the Board to raise her mark to no less than a 6.³ She argued that taken as a whole, the comments in the OER make the case that she should have received a 6 in this category. She stated that she practiced strong leadership in her Division by providing positive rewards for those that performed well and attempting to hold those accountable that did not. She again stated that she was not aware of any decline in her performance and that she was never counseled of any such deficiency.

Regarding the comparison scale rating, the applicant asked the Board to change her rating of 3 to no lower than a 5, which she noted is what she had received on her previous OER. She argued that she “certainly did not decline in her ability” over the year. She claimed that her Command showed “great animosity” toward her during the rating period, though, particularly after she filed her Complaint. As an example, she stated that the CO had threatened her “with an unwarranted command ordered psychological evaluation after [she] tried to express disagreement with him that [she] had harassed the YNC by attempting to hold [him] responsible.” She stated that during the investigation following her Complaint it became apparent that the CO and XO did not know a lot of what was going on in her Division and that a lot of their information was “piecemeal and one-sided.” She asserted that this “lack of knowledge on the part of the CO and XO shows that the comments and Comparison Scale marking are woefully inaccurate.” She argued that her rating chain retaliated against her and took the vague complaints of a few disgruntled subordinates to effectively end her career, which had been “nothing short of stellar to that point.”

The applicant stated that at the conclusion of her Complaint, the Officer Exercising General Court-Martial Jurisdiction “ordered a new investigation after the findings of the biased investigation by [her] Supervisor.” It had been found that the applicant did not engage in prohibited harassment, but she stated that her CO told her that she engaged in “perceived” harassment. She stated that her Command was unwilling to accept a finding that she had not engaged in harassment. The applicant stated that another example of how her Command retaliated against her was that she was not treated the same as her peers in preparing the OER for this rating period. She stated that the same CWO who had counseled her was “given the opportunity to write his own potential block for his OER” and she was not. She claimed that “even the YNC had the opportunity to appeal his enlisted evaluations, and the CO ended up raising a couple of the marks.” She stated that she asked to speak with the XO about this and the XO stated that the YNC met with the CO at least five times. The applicant complained that she did not receive any chances to speak with anyone in her chain of command about her OER. She stated that when she asked to speak to her Supervisor, he told her that he was not the right person to discuss it.

The applicant argued that the “final reason this OER should be redacted is that the comments are vague, and the ratings are incomprehensible based on those comments.” Article 5.A.7.h. of the Officer Manual states that “comments in the OER must be sufficiently specific to present a

³ The description of a mark of 6 in Responsibility states “integrity and ethics beyond reproach. Always held self and subordinates to highest standards of personal and professional accountability. Did the right thing even when it was difficult. Succeeded in making even unpopular policies or decisions work. Actions demonstrated unwavering commitment to achievement of organizational goals.”

complete picture of the reported-on officer's performance and qualities during the reporting period." The applicant argued that in her disputed OER there are "no adverse comments citing specific aspects of [her] performance and behavior." Instead, she asserted, there are merely vague references to her "ideals" as opposed to "Command philosophies." She stated that without knowing any specific problems, she cannot change her behavior. More importantly, a promotion board would "be left wondering exactly what this vague language means" she argued.

Personnel Records Review Board

The applicant complained about the PRRB's process of obtaining statements from her Chain of Command and not providing her with a copy of these statements and an opportunity to reply. She stated that she provided this Board with a copy of the PRRB's decision and the statements but that she would like the opportunity to reply to those statements here. The applicant had many specific responses to her XO's declaration, including:

- The XO spoke of the applicant's leadership abilities and ability to adapt to philosophies different from her own and stated that this ability decreased over time. The applicant stated that she did not disagree with the Command philosophy as written and asserted that she did follow the philosophy. However, she stated that she disagreed that the crew's happiness should come before their mission.
- The XO stated that the applicant wanted to place the YNC on performance probation weeks after he arrived. The applicant stated that YNC arrived in July and the first time she considered putting him on performance probation was in December. She did not initiate a performance probation until January, which was never implemented.
- The XO had stated that the applicant assumed YNC was competent and that she handed the reigns over without explanation. The applicant asserted that no one in the Division would corroborate this statement "because it is simply untrue." She stated that in September 2014 was the first time she and YNC began to discuss his performance and she told him that she "would be closely overseeing [him] until he got the hang of it." She stated that he called in sick the following day.
- The XO described the Page 7s that the applicant drafted as demoralizing. The applicant stated that the XO never spoke to her about the language used in the Page 7s, nor did her Supervisor. She stated that the XO would simply mark a few edits in green ink and route it back to her and "repeat the cycle until [she] understood that the [Page 7] would never be pushed forward."
- The XO stated that he did not recall any Page 7s addressing YNC yelling at the applicant. She stated that this is true because she did not draft any for this specific reason. She stated that after the first time it happened, she told several members in her Command. When it happened a second time, she "knew the Command was unwilling to sign any negative documentation [she] submitted based on what [she] had already been through."
- The XO stated that there was no YN1 billet in the applicant's Division. She stated that this is correct, but she got a YN1 differently than he stated. The applicant stated that the YN1 was assigned to her the day after the YN1 reported. The applicant was told that the XO

didn't feel that the position the YN1 would have been in was a full time job so she was moved to the applicant's division for "better professional development."

- Regarding the comment describing the YN1 as a "master manipulator," the applicant stated that the XO was not a part of that conversation so she was not "sure why he would comment." However, she stated that the comment had nothing to do with the YN1, because she had no problems working with the YN1 when she arrived at work.
- The XO made "a very vague accusation" that the applicant repeatedly challenged or attempted to change Command decisions. She stated that he provided no examples of this and she cannot recall any instances of this happening. She also stated that she did not know the Command "to be open to candid discussions. In fact, it was just the opposite."
- The XO stated that the applicant attempted to move a struggling YN2 to the SPO. The applicant stated that she did not know what the XO was talking about because she did not do this and only two Page 7s were drafted, not a "constant flow." One was drafted by YN1 and the applicant drafted the other one.
- The XO stated that he and the CO had explained the complaints to the applicant, however, the applicant stated that they did not. She claimed that all they said was that "there were complaints and that people were unhappy working for [her]." The applicant asserted that this was another example of a vague comment that did not allow her an opportunity to adjust her actions or behavior.
- The XO stated that the applicant had said on several occasions that she regretted becoming a Warrant Officer. The applicant stated that she said this once outside of the rating period (during her first year on this Base).
- The XO spoke of the applicant closing her office door in reaction to a bad meeting with the Command. She alleged that she has since learned that the XO had "a strange fascination with the door and shades." The applicant stated that her blinds have always been closed because otherwise she feels like she is in a fishbowl. She stated her office has two doors so she keeps one closed to make it feel like a normal office. She stated that she often closed the other door when the YNC was present so that her crew would go to him instead of to her; she asserted that closing her door never had anything to do with meeting with the Command.
- The applicant stated that the XO's discussion of her talk with the other CWOs proves that the XO considered that talk as "coaching." She argued that the discussion should have had no bearing on her OER.
- The applicant disputed the XO's assertion that she did not take lead in putting together the [REDACTED] event. She pointed to the emails she provided as proof.

Given all of these specific points, the applicant argued that the XO "was unbendingly caught up on his perceptions and negative feelings about her and even when he was confronted with facts or reality, he refused to see them." She asserted that this "illustrates the inaccuracy of the OER and the fact that [the XO] could not objectively rate [her]."

Regarding her CO's declaration, the applicant disagreed with the statement concerning the Command philosophy on "duty to people." She argued that this was a "gross and deliberate misrepresentation of what [she had] said." She claimed that during mediation she had said she did not understand why the Command granted so much liberty for reasons outside those stated in Coast Guard policy. The CO responded "by giving [her] an example of saying when it rains in [city] for two weeks straight, his belief was that giving early liberty on a Friday after a couple weeks like that should help boost morale." That applicant stated that she told him she did not think this reasoning was in line with the Command philosophy. She stated that she believed this is what the CO was referring to in his reference to "duty to people" in his PRRB declaration.

Attorney's Memorandum

In addition to the applicant's nineteen-page brief, she submitted a three-page memorandum from her attorney. He argued that the applicant has exhausted her administrative remedies and has submitted her application to this Board timely. He stated that the applicant addressed many of the factual issues in her case, but he wished to address the Board separately to address two legal issues. First, the applicant was denied her FOIA request and second, the comments in the OER are in fact vague and the PRRB used the wrong standard in deciding the case.

The attorney stated that there are not many BCMR decisions that discuss FOIA requests. He stated that one decision, BCMR Docket No. 2000-163 held that the applicant could not get relief for a denied FOIA request. However, the applicant argued that the dissenting opinion included a sound, logical argument for the production of such information. That decision pertained to an OER and the applicant had received a redacted investigation that did not include information that was the basis of the OER. The dissenting opinion acknowledged that the redacted information was the only information that would allow that applicant to refute the allegations in the poor OER. The dissenting opinion stated that the majority decision was "so fundamentally unfair, such an open and blatant denial of the most basic requirements of due process, that it cannot be permitted to stand. The Board has a responsibility to correct injustice, and it should do so here." The attorney stated that his client, this Board's applicant, is also only asking for "information that is her only means of refuting what has in fact become a career ending document." He stated that the dissenting opinion in the quoted case made a legally sound argument and stated that his client is suffering an injustice by not being able to fully and properly refute her OER. He asserted that not granting her FOIA request creates "an extremely unjust outcome where the government can use 'secret files' to justify adverse actions against an employee and citizen."

The attorney agreed with the dissenting opinion's recommendation of what course of action the majority should have taken: 1) Board order the Coast Guard to provide the applicant with full, un-redacted copy of the investigation and report and give the applicant 90 days to respond to the allegations therein. The Coast Guard would then consider the applicant's response and recommend to this Board corrective action, if any. 2) This Board would retain jurisdiction. If the applicant failed to reply to the allegations within 90 days, the Board would affirm the Coast Guard's recommendation for denial. 3) If the Coast Guard declined to provide an un-redacted copy of the investigation, then the Board would order removal of the OER and failures of selection. Here, the applicant's attorney asked that the Board take the same steps.

The second issue is in regards to the nature of the comments on the disputed OER. The attorney stated that while the applicant's brief addressed this issue, he wrote separately to address the PRRB's decision. He stated that the PRRB correctly listed the applicable section of Coast Guard policy which stated that OERs should cite "specific aspects of the [Officer's] performance and behavior... [OER comments] must be sufficiently specific to paint a succinct picture of the officer's performance and qualities." The attorney argued that neither of these principles is met in the OER and further, that the PRRB used the wrong standard in deciding the case. The PRRB concluded that they did not find that the comments were "overly vague." The attorney argued that nowhere in Coast Guard policy does it state that OER comments must not be overly vague; instead the standard is that they must cite "specific aspects" and must be "sufficiently specific." As an example, the attorney pointed to the comment "struggled to adjust own strict mgmt. style to accommodate cmd vision." He argued that this begs the question "how she struggled" and "what the command vision was?" He provided additional examples of allegedly vague comments in the OER. He asserted that the vagueness of the comments would leave promotion boards with more questions than answers.

The attorney argued that given these two arguments, in addition to the factual background laid out by the applicant, there is a great injustice and an erroneous OER in the applicant's record. He requested that the Board grant the requested relief.

Additional Documents

In support of her application, the applicant provided many documents, most of which have been described in the Summary of the Record. In addition, she provided a copy of the memorandum her attorney sent to the Coast Guard on January 27, 2016, appealing the FOIA decision. The original request was made on November 12, 2015, for "all reports, notes, and any information related" to the investigations of harassment against her. The three-page memorandum argued why the exemptions cited in the government's denial letter did not apply and why the applicant should be granted her FOIA request.

The applicant provided a statement from a former [REDACTED] in the applicant's Division who worked there from October 2011 to October 2014. She stated that while she was there, she received a [REDACTED] award for the work she did moving military and civilian employees. She stated that she has known the applicant for three years and that all of their interactions have been professional. The applicant was her Supervisor at the Division. She stated that the applicant was always professional and pleasant in dealing with her and other personnel in the office. She also stated that the applicant "was always professional" with both the YNC and YN1. However, she stated she was never privy to private conversations or meetings, but stated that she did not feel that there was a "stressed atmosphere." She described the applicant as dedicated and caring about the well-being of her staff. She spoke highly of the applicant and her mentorship abilities.

The applicant provided an email dated October 5, 2016, from CWO O, whom the XO claimed "attempted to work with" the applicant. CWO O stated that she "still [did] not know why he would even use [her] name, as if [they] were seeing eye to eye." The applicant also provided an Instant Message conversation between herself and CWO W, the other CWO whom the XO had

claimed had “attempted to advise and assist [the applicant] in leading and mentoring her division and ultimately stopped trying as she was unreceptive.” The applicant told CWO W what the XO said and asked if the XO had gotten that from him. CWO W said that he suggested that the applicant not close the door to her office but she continued to do it after they spoke. He stated that “just because [she] didn’t take [his] advice doesn’t mean [she was] unreceptive.” The applicant stated that she agreed and that she was receptive to his input. CWO W stated that that was the only thing he could recall saying as far as offering advice.

The applicant provided a copy of both Page 7s she had drafted for the YNC, one placing him on performance probation and one for negligence causing a billing issue.

The applicant also provided multiple emails to show that she had worked with other CWOs in planning and preparing for the [REDACTED] night event.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on October 25, 1995. She was commissioned as a CWO on [REDACTED]. The applicant was assigned as a [REDACTED] for her first assignment as a CWO and was still in that position during the marking period for the disputed OER. In that position, she led and oversaw the Coast Guard’s personnel services in a region, not just at her Base, and was “responsible for pay, personnel, travel, and entitlements for 140+ CG mbrs.” She also handled issues regarding members’ transportation, dependents, lodging, the weight program, urinalysis, Government Travel Card program, Military IDs, and overseas entry.

The applicant’s first OER is for the period from [REDACTED]. She received seven 5s and eleven 6s (on a scale of 1 (worst) to 7 (best)). She received a mark in the fifth spot on the comparison scale, denoting an “excellent officer.” The OER was signed by the same Reporting Officer, who was the Executive Officer (XO), and Reviewer, who was the Commanding Officer (CO), who signed the subsequent, disputed OER. The Supervisor was not the same officer.

The applicant received a Commendation Medal for her outstanding achievement from [REDACTED]. She received this award for overseeing household goods transfer to and from the Base, handling issues with personal vehicle transports, and other administrative successes.

On November 4, 2014, the applicant sent an email to a reportedly struggling chief yeoman (YNC) with the subject line “EXPECTATIONS OF A CHIEF.” She stated that the email was a follow-up to their “lengthy discussion” that day in order to memorialize his roles and responsibilities. She listed some of the duties and responsibilities she expected him to begin to cover. She stated that she would do “whatever [she] can to support [him] in meeting the Coast Guard’s and [her] expectations of a Chief.”

The disputed OER covers the period from July 1, 2014, to May 19, 2015. In the eighteen performance dimensions, she received one 3, seven 4s, four 5s, five 6s, and one 7. She received a

low mark of three on the comparison scale, denoting a “fair performer.” In addition to the contested marks and comments, this OER contains many positive comments supporting the marks of 4 (standard) and above, such as “strategically implemented Base Admin process improvements”; “performed admirably as hiring official thru [REDACTED]”; “instinctively adjusted to customer service hurdles”; “effectively conducted training, from personalized individuals to large groups”; “partnered w/ Base ... to overcome repeated overseas errors on [transfer] orders CG wide”; “committed to hard work & high perf”; “demonstrated proactive approach to CG wide fitness”; “proactively sought opportunities to improve customer service & support to ops”; and the applicant’s “technical proficiency & experience are great assets to this Command.”

The report of an investigation of the applicant’s report of harassment was released on May 28, 2015. It states that she made her report on April 10, 2015, against her Supervisor and CO and an “Administrative Investigation was immediately initiated.” The investigation was completed on May 26, 2015. It was determined that “both of the responsible parties and the aggrieved have contributed in different measure to an unhealthy workplace climate and degraded workplace productivity due to some leadership issues and poor communication.” The investigator found that the allegations of harassment were unsubstantiated based on the formal definition of harassment. However, he stated that he intended to take further actions to remedy the situation.

The applicant provided a nine-page email she sent to her Supervisor on October 13, 2015, regarding incidents that she had documented regarding the struggling YNC.⁴ The email details specific instances when the YNC had difficulty with tasks or concepts and the applicant trained or coached him. She described several times when he yelled at her or became disrespectful towards her. She discussed in detail many of the tasks he failed to do, some simply because he refused to do them. Many of these issues, according to the email, took place during the rating period, and the applicant stated that she often performed extra work either by way of training the YNC or performing his tasks.

On October 22, 2015, the applicant received the decision of the Officer Exercising General Courts-Martial Jurisdiction (OEGCMJ) on her harassment complaint. She had requested that she receive a new investigation because, she alleged, the previous investigation was biased. She also requested a transfer because the “toxic command climate” made it impossible for her to perform her duties. The OEGCMJ found that the events did not make it impossible for the applicant to perform her assigned duties. He directed mediation and leadership training to “rebuild trust, improve communications, and facilitate conflict resolution among leadership” at the Base. He stated that he did not have the authority to grant or deny a transfer, so that request was routed to the proper office.

The applicant received an OER from the same Base for the period of May 20, 2015, through June 30, 2016. She had the same Supervisor and Reviewer (CO), but a different Reporting Officer (XO). She received nine 6s and nine 7s and a mark in the fifth spot on the comparison scale. She received many very positive comments.

⁴ The applicant acknowledged that the email was sent after the rating period, but stated that many of the incidents happened during the rating period in question. She also claimed that her Supervisor was “well aware of the YNC’s limitations as [they] had frequent discussions regarding all of his issues.”

Personnel Records Review Board

The applicant received a decision from the Personnel Records Review Board (PRRB) on September 23, 2016. The PRRB did not agree that her Supervisor and XO should have been disqualified from rating her due to being interested parties in an investigation. The PRRB noted that the harassment complaint had been deemed unsubstantiated before the end of the rating period.⁵ The applicant did not request a rating chain exception until October 20, 2015, whereas she should have done so within thirty days per Coast Guard policy.⁶ At that time, though, the CO had contacted the Director of Operational Logistics and Legal Service Command, and both determined that there was “insufficient justification to create a rating chain exception.”⁷ The PRRB also noted that the applicant did not ask for her rating chain to be removed, but only for the derogatory comments to be redacted. The PRRB did not find the comments to be “overly vague” and found that the additional information and evidence the applicant provided did not rise to the level needed to overcome the presumption of regularity. The PRRB did find, however, that the comment “own division’s inadequate skills” was erroneous because “certain members of the applicant’s division performed very well, as evidenced by numerous awards.” The PRRB ordered this comment to be redacted and no other relief.

Supervisor’s Declaration

The PRRB obtained declarations from the applicant’s rating chain. The applicant’s Supervisor provided a declaration dated June 8, 2016. He stated, “I neither agree nor disagree with the information as presented. The record stands as is – I have no further comments.”

Executive Officer’s Declaration

The applicant’s XO provided a five-page declaration to the PRRB dated June 15, 2016. He stated that he was the applicant’s XO and Reporting Officer during the entire rating period in question. He stated that the rating period ended early because of his transfer from the unit as the Reporting Officer. He asserted that “first and foremost” the OER was “a true and accurate representation of [the applicant’s] performance” over the rating period.⁸ He stated that throughout the time in question, the applicant became increasingly difficult to work with. He attributed this to her having a new Supervisor and a new YNC during the reporting period. He stated that the applicant was “very technically competent and ha[d] great knowledge in all aspects of the vast personnel specialties.” However, he stated, when her Supervisor changed, the applicant’s “overall leadership abilities and ability to adapt to philosophies that differed from her own almost immediately decreased and continued to decline throughout the period.”

The XO stated that the new YNC’s knowledge and skills were weak in the technical and leadership realms. The XO claimed that the applicant wanted to place the YNC on performance probation “just a few weeks” after his arrival in her Division. He stated that he denied the request because there had been no informal or documented counseling. He stated that the applicant had

⁵ The report of the investigation was not final until after the end of the rating period.

⁶ Officer Manual, Article 5.A.2.e.(2)(c).

⁷ The underlying documentation is not available to the Board.

⁸ He stated that his declaration was from memory because he did not have access to his email from that Base.

“assumed the YNC to be competent and simply handed over the responsibilities of running the division without much explanation. This method might have worked with a YNC that was fully competent.” The XO stated that the Page 7s⁹ the applicant was drafting were not properly addressing the YNC’s deficiencies and claimed that he worked with the applicant on the language. He stated that he did not recall any Page 7s addressing the YNC yelling at the applicant or being disrespectful to her because that “would have been dealt with very differently.”

Regarding some issues with a YN1, the XO stated that the applicant’s assertions in her PRRB application were not accurate.¹⁰ He stated that there was no YN1 billet in the applicant’s Division and that the YN1 she was referring to was an assistant who worked directly for the CO (he attached an organizational chart). He stated that there was an informal agreement to allow the YN1 to assist the applicant’s Division due to a member’s early retirement, but the informal agreement was terminated because the YNC was relying too heavily on the YN1 to accomplish his work. The XO also stated that the applicant made it sound as if the YN1 was receiving extra time off, but the YN1 was using her leave days. The XO stated that the “master manipulator” the applicant had referred to in her PRRB application was a different YN1 than the one referred to in the rest of the document. The XO also referenced a struggling YN2. He stated that there was a “constant flow” of negative Page 7s and the applicant had tried to move the YN2 to another office. He stated that once he convinced the applicant to change training tactics, the YN2’s performance significantly improved.

The XO stated that when the Command did not follow a recommendation of the applicant’s, she would challenge and question the decision rather than carry out the CO’s decision. He stated that he and the CO were both “open to candid discussion and gathered as much information as [they] could prior to making a decision.” He stated that he was present at some of the meetings regarding the Command climate. He stated that complaints from her crew were explained to her and he and other members of her Chain of Command “tried to talk through strategies to assist [the applicant] with improving the overall climate and the perception that the junior personnel had of [her].” The XO stated that the applicant maintained a professional and respectful demeanor during the meetings but told the CO that “she did not believe that she could change her leadership style to fulfill the Commandant and Command philosophies.” The XO claimed there were “several instances” when the applicant expressed regret at becoming a Warrant Officer because “she did not believe she could learn the leadership tools” she was be asked to utilize. He stated that after “many of these meetings,” the applicant would keep the door and blinds to her office closed.

The XO stated that the applicant routinely expressed the feeling that the Command had taken away all of her authority to run her Division. The XO stated that the applicant separated herself from the rest of the CWOs assigned to the Command. He mentioned another CWO who tried to “work with her as a peer.” He became more heavily involved in the applicant’s Division because he was married to a YN3 in her Division. The XO stated that CWO W “attempted to advise and assist [the applicant] in leading and mentoring her division and ultimately stopped

⁹ An Administrative Remarks record entry, form CG-3307, better known as a “Page 7,” is used to document a member’s notification of important information, achievements, or counseling about positive or negative aspects of a member’s performance in the member’s military record.

¹⁰ The applicant’s PRRB application is not before the Board.

trying as she was unreceptive.” Another CWO, CWO O, also “attempted to work with [the applicant].” The XO stated that the applicant did put together a well done [REDACTED] but that she did so alone and “not as a leader of the CWOs.” The XO concluded by stating again that he believed the OER was an accurate reflection of the applicant’s performance during the rating period.

Commanding Officer’s Declaration

The applicant’s CO provided a three-page declaration dated June 23, 2016. He stated that he believed the OER marks and comments reflect a “reasonably consistent picture of the [applicant’s] performance during the marking period in question.” He stated that the applicant was “very skilled in her administrative duties and [was] regularly applauded and awarded by [the] command and units outside of [the] command for her administrative expertise.” However, he stated, during this marking period he noticed that communications between her and her newly reported Supervisor suffered, which affected the climate of the whole Division.

The CO stated that beginning in the Fall of 2014, he began to receive reports that there was an influx of complaints that the environment within the Division was “uncomfortable and many members no longer felt comfortable coming to work, and that [the applicant] was increasingly tough to work for and very demanding.” The CO stated that the applicant’s new Supervisor had a different leadership style than her previous Supervisor and “they struggled with communication from the onset.” The CO stated that the new YNC struggled when he arrived and was not well prepared for his responsibilities. Over the next few months, the applicant routed two Page 7s through the Chain of Command, one for negligence and one for performance probation. The CO stated that in February 2015, the YNC submitted a harassment complaint against the applicant and the CO was directed to open an inquiry into the allegations. The XO recommended that the applicant’s Supervisor handle the investigation into the YNC’s complaint against the applicant. Although the CO did not think this was the best course of action, the Supervisor did conduct the inquiry. At the conclusion, the applicant’s Supervisor “incorrectly thinking he was doing the right thing pulled the entire Division together to discuss the results.”

The CO stated that the applicant requested on October 20, 2015—after the end of the reporting period for the disputed OER—for her Supervisor to be disqualified and removed from her rating chain. He stated that he was unaware of any request to remove himself from the rating chain, but her request to remove her Supervisor was denied because there was insufficient justification. Regarding the Command philosophy, the CO stated that he did not recall anyone saying that the crew’s happiness came before the mission. He stated that his philosophy has always been to conduct their “mission support role as [they] would expect to be supported if [they] were assigned to an operational unit.” The CO pointed out that the applicant made a statement during mediation that she did not agree with his Command philosophy nor the Commandant’s principle of “Duty to People.” He acknowledged that this statement was made outside of the evaluation period, but stated that it is important and related to the issues involved.

The CO stated that everyone was welcome to speak with him about their OERs and his door was always open. Officers were encouraged to supply information for their OERs and he stated that at no time did he tell anyone they could not provide input for their OER. He concluded

by adding that the applicant did “some great work including putting together [the] annual welcome ... night, volunteering to stand duty on holidays, and acting as [a] subject matter expert with a working group ... to improve the overseas screening process.”

Final OER

The applicant’s final OER is for the period from July 1, 2016, through May 13, 2017. She was at the same Base but had an entirely different rating chain. She received six 6s and twelve 7s. She received a mark in the sixth spot on the comparison scale. She received many very positive comments and was very highly recommended for promotion.

VIEWS OF THE COAST GUARD

On February 8, 2018, the Judge Advocate General of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and therefore should be considered on the merits. PSC noted that the applicant did not file a Reported-on Officer reply to the OER as she was authorized to do per Coast Guard policy. However, she did submit an application to the PRRB and was granted partial relief. PSC argued that there was no need for the applicant’s Supervisor or CO to have been disqualified from her rating chain due to her filing a harassment complaint. The investigation concluded that the complaint was unsubstantiated and the applicant did not request a rating chain exception until October 20, 2015, which was well outside of the thirty day window allowed for by policy. According to the CO’s declaration, he had ensured that there was no need for a rating chain exception despite the fact that the applicant had waited so long to make the request. PSC also stated that the XO made clear that the marks and comments were a true and accurate representation of the applicant’s performance during the reporting period. PSC also argued that none of the comments should be redacted because the applicant “failed to provide substantial evidence that shows the above mentioned comments were not a true assessment of the performance observed.” Therefore, PSC recommended that the Board deny all relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 12, 2018, the Chair sent the applicant’s attorney a copy of the Coast Guard’s views and invited him to respond within 30 days. On March 13, 2018, the applicant’s attorney responded and stated that the applicant disagreed with the Coast Guard’s recommended findings.

First, the applicant, through her attorney, stated that the Coast Guard relied heavily on the same two people whom she had brought the harassment complaint against.¹¹ Second, the opinion relies heavily on the fact that applicant did not request a change of rater at the time the OER was created. And third, the Coast Guard’s opinion never addresses “the lack of due process as [the

¹¹ The applicant brought the harassment complaint against her Supervisor and the CO. The Coast Guard’s advisory opinion relies heavily on the declarations of the XO and CO.

applicant] still has not been provided with the underlying evidence that served as the basis for her adverse OER.”

Regarding the first argument, the applicant stated that much like the PRRB, the Coast Guard relied on the declarations. She argued that these are the very people she made her harassment complaint against. She stated that it is true that the harassment claim was ultimately found to be unsubstantiated, but that does not speak to “the animosity created when [the applicant] initiated the investigation.” She stated that once the investigation was initiated, her “unit used it to give her a poor OER, the PRRB ignored it in not providing any relief, and now the CG Opinion has used the same people to support their position in recommending denial.” She asserted that at some point her unbiased evidence must be weighed against the extremely biased evidence of the rating chain members who were the subject of the investigation. She asked that the Board look at the PRRB declarations “with a critical and eye and see that they are both biased and contrary to the observations of the witnesses.” The applicant also pointed out that neither of the declarations pointed out how much they actually observed the behavior that they claimed she displayed. She stated that they both had “very little first-hand knowledge” of the applicant’s actions; therefore the information “could only have come from” the applicant’s Supervisor, the “chief subject of the harassment investigation.” The applicant complained that not only do PRRB and Coast Guard rely heavily on these declarations, but they “did so uncritically and without any thought to the accuracy or lack of information contained” therein. She therefore requested that the Board reject the declarations as biased and the product of people who had reason to show animosity towards the applicant.

The second item relied on by both the PRRB and the Coast Guard’s recommendation was that the applicant did not request a change of rater within thirty days. The applicant acknowledged that she did not make this request within this time frame. However, she argued that this should not be the end of the analysis. She stated that just because “she missed one step in the process should not allow the chain of command to do whatever they please to her.” She stated that she did not know within the prescribed time frame that her rating chain should have recused themselves, but she argued that they should have known that they were unfit and should have recused themselves.

Finally, the applicant noted that throughout this process she has done everything in her power to obtain all of the evidence against her that was used as the basis for the disputed OER. She stated that she remains in the dark about “who said what about her during this reporting period.” She argued that this is “an extreme example of a lack of due process.” The applicant stated that she was not afforded an opportunity to rebut the vague allegations during the investigations, when she disputed the OER, when she petitioned the PRRB, or now before this Board. Both the PRRB’s decision and the Coast Guard’s advisory opinion were completely silent on this issue. She argued that the PRRB took the vague comments at face value and rubber stamped her Chain of Command. She asserted that without more specificity in the OER the comments “are meaningless to anyone. Because she was never provided with the underlying evidence against her, she argued this OER is a gross violation of basic due process.”

The applicant added that while this application was pending she was passed over promotion a second time. She has since been forced to retire due to two non-selections for promotion.

APPLICABLE REGULATIONS

According to the Officer Manual, Article 5.A.2.c.1., COs 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.” Article 5.A.2.c.2. states that COs must ensure that “members of the rating chain carry out their OES [Officer Evaluation System (OES)] responsibilities.”

Article 5.A.2.d.(1)(c) states that 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.” Subsection (k) states that the individual officer is ultimately responsible for 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.”

Article 5.A.2.d.(2)(b)[1] states that the Supervisor must evaluate “the performance of the reported-on officer in the execution of their duties.” Subsection [5] states that the Supervisor must 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.”

Article 5.A.2.d.(3)(b)[1] states that the Reporting Officer shall base an “evaluation on direct observation[s], the Officer Support Form (OSF), ... other information provided by the supervisor, and other reliable reports and records.” Subsection [2] states that the Reporting Officer must “describe the demonstrated leadership ability and the overall potential of the reported-on officer for promotion and special assignment such as command.” Subsection [3] states that the Reporting Officer must ensure that “the supervisor fully meets responsibilities for administration of the OES. Reporting officers are expected to hold designated supervisors accountable for timely and accurate evaluations. The reporting officer shall return a report for correction or reconsideration, if the supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments.” However, the Reporting Officer may not direct that a mark or comment be changed unless the comment is prohibited. Subsection [6] states that the Reporting Officer must 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.”

Article 5.A.2.d.(4)(b)[1] states that the Reviewer shall ensure that the “OER reflects a reasonably consistent picture of the reported-on officer’s performance and potential.” Subsection [3] states that the Reviewer must ensure the “supervisor and reporting officer have adequately executed their responsibilities under the OES and meet all submission schedules. The reviewer shall return an OER to the reporting officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments (as applicable).” However a Reviewer cannot direct how the mark or comment is to be changed unless a comment is prohibited.

Article 5.A.2.e. discusses rating chain exceptions. Subsection (2)(b) defines “disqualified” as including “being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the supervisor, reporting officer, or reviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation.” Subsection (2)(c) states that if the CO has not already determined that a rating chain exception is required, then it is “incumbent on the reported-on officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the reported-on officer during the reporting period or within 30 days after the end of the reporting period.”

The Officer Evaluation System Procedure Manual, PSCINST M1611.1A, Article 2.E.4.b., states:

For each evaluation area the Supervisor reviews the Reported-on Officer’s performance and qualities observed and noted during the reported period. Then, for each of the performance dimensions, the Supervisor must carefully read the standards and compare the Reported-on Officer’s performance to the level of performance described by the standards. The Supervisor must take care to compare the officer’s performance and qualities against the standards – not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Report-on Officer’s performance and qualities during the marking period, the Supervisor selects the appropriate circle on the form.

Article 2.E.4.d. states that in the comments block, the Supervisor must include “comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four (if applicable). The Supervisor draws on their observations, those of any secondary Supervisors, and other information accumulated during the reporting period.” Article 2.E.4.e. states that the comments “should amplify and be consistent with the numerical evaluations (if applicable). They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards on the performance dimensions.”

Article 2.F.2.b. states that Reporting Officers must follow largely the same rules as Supervisors (Article 2.E.4.b.) when assigning marks. Article 2.F.2.d. states that in the comments block a Reporting Officer must include comments “citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a four. The Reporting Officer draws on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period.”

FINDINGS AND CONCLUSIONS

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

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

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.¹²

3. The applicant alleged that her OER for the period July 1, 2014, to May 19, 2015, should be corrected because it is erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.¹³ Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.¹⁴ To be entitled to correction of an OER, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹⁵

4. The applicant alleged that the marks and comments in the disputed OER are factually erroneous. She submitted her own thorough brief, emails, a statement from a civilian who worked at the Base until October 2014, and other evidence in an attempt to prove that her rating chain made factual errors on the OER. The evidence provided does not persuade the Board that the rating chain's assessment of the applicant's performance was erroneous, however. The OER itself and the XO's and CO's declarations provide numerous examples of incidents of performance that support the numerical ratings assigned by the rating chain for the performance dimensions Developing Others, Responsibility, and on the officer comparison scale.

5. The applicant alleged that the comments in the disputed OER are overly vague. The Board disagrees. The comments adhere to the Officer Manual Articles 2.E.4.d., 2.E.4.e., and 2.F.2.d. The comments include many specifics and align with the numerical rating assigned in each category.

6. The applicant alleged that her rating chain evaluated her performance in the OER in retaliation for the complaint she filed in April 2015 and that they should have been disqualified from evaluating her pursuant to Article 5.A.2.e.(2)(b) of the Officer Manual, which states that a rating chain member is disqualified if the officer is "an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the supervisor, reporting officer, or reviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation." The Board has long held, however, that an officer cannot disqualify her own rating chain simply by filing a complaint against them because then all officers anticipating a poor OER could disqualify their rating chain. The applicant clearly complained about members of her rating chain, but she has not shown that they were named "parties" by an

¹² *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).

¹³ 33 C.F.R. § 52.24(b).

¹⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁵ *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).

investigative body or court of inquiry in accordance with the Military Justice Manual. The applicant did not timely request disqualification of her rating chain, and the declarations provided by her XO and CO provided many examples of performance by the applicant that justified the marks and comments. The Board finds that the applicant has not cast substantial doubt on her rating chain's ability to evaluate her accurately. Based even on the applicant's own explanation, much of the turmoil during this rating period was caused by the addition of a new, less competent YNC, whom she struggled to lead, and a new Supervisor, whose leadership philosophy she disliked and struggled to embrace. Therefore, the Board finds that she has not proved by a preponderance of the evidence that the disputed OER was retaliatory or that her rating chain should have been disqualified.

7. The applicant alleged that the OER is unjust because her rating chain failed to counsel her during the reporting period regarding any of her "deficiencies." The applicant's rating chain, however, states that she was verbally counseled. The applicant herself mentioned frequent meetings with members of her chain of command. Article 5.A.2.d.(2)(b)[1] of the Officer Manual does not require performance feedback for an officer to be formal or written. The Board finds that the applicant has failed to prove by a preponderance of the evidence that she was denied adequate performance feedback during the reporting period.

8. The applicant asked the Board to assist her with her FOIA appeal. The Board has no authority to direct the Coast Guard how to respond to a FOIA request. The Board may request a copy of a report of investigation under 33 C.F.R. § 52.43(b) but then may provide the applicant only with the parts "that would be released to the applicant by the Coast Guard" pursuant to FOIA and the Privacy Act. Moreover, the XO stated in his declaration that they had verbally explained the complaints to her, so she was told the gist of the complaints if not the specifics. The Board cannot conclude that the applicant was denied due process in the OER process based on the Coast Guard's response to her FOIA request. She was entitled to submit an OER Reply in response to the marks and negative comments in the OER, but she did not do so. In addition, the Board notes that in their declarations, the applicant's XO and CO provided ample examples and evidence of her performance during the evaluation period to support the marks and comments in the disputed OER without relying on the investigation at issue in the FOIA appeal. The OER comments and the XO's and CO's declarations show that the evaluation was based primarily if not entirely on their own observations of her inability or unwillingness to adapt to and implement the new leadership philosophy, rather than on the report of the investigation of the YNC's claims, which were found to be unsubstantiated.

9. The applicant asked that her record be reviewed by a Special Selection Board for promotion to CWO3. Although this Board has not found any error or injustice in the disputed OER, the PRRB did find that the comment "own division's inadequate skills" was erroneous because "certain members of the applicant's division performed very well, as evidenced by numerous awards." However, CWOs are not entitled to Special Selection Boards under 14 U.S.C.

§ 263 or 10 U.S.C. § 628,¹⁶ so the Board must apply the *Engels* test.¹⁷ Under *Engels*, to determine if the applicant is entitled to relief, the Board must answer the following 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 [she] would have been [selected for promotion in 2015] in any event?”¹⁸ 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.¹⁹ To grant relief, 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.”²⁰

10. The Board finds that the applicant has not proven by a preponderance of the evidence that her record was *prejudiced* by errors when it was reviewed for promotion to CWO3. Although the selection board made its decision before the PRRB ordered the removal of the OER comment, the Board cannot conclude that the phrase “own division’s inadequate skills” actually prejudiced her record before the selection board. The PRRB removed the comment because it was factually erroneous: While some members of her division lacked skills, other members of her division were very skilled. But the removed comment did not reflect badly on the applicant. If anything, it showed a challenge that the applicant faced and had to deal with and overcome—unskilled staff—not an inadequacy on her own part. If it had any impact, the removed comment would have tended to mitigate the other comments critical of her performance in the OER. Therefore, the Board finds that the comment removed by the PRRB did not reflect negatively on her performance and did not prejudice her record when it was reviewed by the selection board. As the applicant has failed to meet her burden of showing that her record contained a *prejudicial* error when it was reviewed by the selection boards, as required by the first question of the *Engels* test, the Board finds no grounds for removing her non-selections.

11. Accordingly, the applicant’s request for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁶ 14 U.S.C. §§ 263, 215 (authorizing SSBs only for officers in grades LTJG through Captain); 10 U.S.C. §§ 101, 628 101 (authorizing SSBs for the “military departments,” which are defined as the Departments of the Army, Navy, and Air Force).

¹⁷ *Quinton v. United States*, 64 Fed. Cl. 118, 125 n3 (2005) (noting that the Board correctly applied the *Engels* because the SSB statute did not apply and so did not supersede *Engels*).

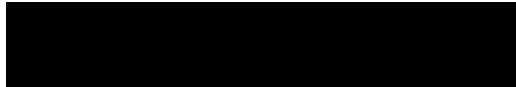
¹⁸ *Engels*, 678 F.2d 173, 176 (Ct. Cl. 1982).

¹⁹ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), *citing Engels*, 678 F.2d at 175; *Quinton v. United States*, 64 Fed. Cl. at 125 (2005).

²⁰ *Engels*, 678 F.2d at 175.

ORDER

The application of
military record is denied.



USCG, for correction of her

August 17, 2018

