

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-149



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 6, 2019, and assigned the case to the Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 20, 2023, 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 Lieutenant Commander (LCDR/O-4) on active duty, asked the Board to correct her military record by removing an Officer Evaluation Report (OER) for the period ending April 30, 2014.

The applicant alleged that her April 30, 2014, OER was erroneous and unjust because she had filed an Equal Employment Opportunity (EEO) complaint against her chain of command for discrimination, harassment, and bullying. She alleged that the officers on her chain of command prepared the disputed OER for the period of June 30, 2013, through April 30, 2014, which she alleged was a violation of EEO processes and Personnel Manual instructions. The applicant further alleged that the numerical marks in this OER were significantly lower than the first one she received from her command. According to the applicant, she received lower marks on her April 30, 2014, OER as reprisal for having filed an EEO complaint against her chain of command on August 13, 2013. Finally, the applicant alleged that she was improperly pressured into signing her April 30, 2014, OER. According to the applicant, "all marks received are erroneous, unjust, and not based on facts or direct observations."

The applicant explained that prior to her departure from the District on June 12, 2014, she received her first OER as a Lieutenant Commander (LCDR). The applicant alleged that this OER was given during her EEO investigation, and the marks were significantly lower than those on the first OER she had received from her chain of command. The applicant alleged that the OER reflects

information that is untrue about her character and work ethic and was in direct reprisal for her reaching out to the EEO office. The applicant stated that the information included and the marks received on this OER were not what she expected. She stated that before receiving her OER, her Command had never informed her that she was performing at a subpar standard. The applicant alleged that her integrity and overall professionalism as a Coast Guardswoman was attacked in the OER due to her EEO complaint. The applicant further alleged that the OER was an unjust evaluation of her performance which sabotaged her promotion potential as an officer. According to the applicant, the OER was derogatory, unsubstantiated, and retaliatory for her EEO complaint against her command. The applicant alleged that her Command evaluated her incorrectly and unfairly, and her complaint was used as an opportunity to discriminate against her, in order to take away any opportunity for future promotion in the United States Coast Guard. According to the applicant, her April 30, 2014, OER was the worst she had received in her 19 years of service.

SUMMARY OF THE RECORD

The applicant enlisted into the Coast Guard on October 26, 1993. She served on active duty and in the Coast Guard Reserve until March 2003, when she- began Officer Candidate School.

On July 9, 2003, the applicant graduated and was commissioned an ensign. She was assigned to various units and continued to promote, becoming a lieutenant junior grade in 2005 and a lieutenant in 2007.

On August 1, 2012, the applicant reported for duty as a controller at a Command Center. On her OER for the rating period of June 1, 2012, through May 31, 2013, she received three 6s, eleven 5s, and four 4s in the various performance categories¹ and a mark in the middle (fourth of 7 spots) on the officer comparison scale. The applicant received the following comments to support these marks:

PERFORMANCE OF DUTIES: Exceptional planning; developed search action plan for contraband that was jettisoned during go-fast chase; provided CGC & MH-65 a drifted area to search; 89 bales of cocaine recovered. Coordinated transportation for member from CGC to U.S. for emergency leave via HC-144 in Great Inagua, BS; efforts praised by family & CGC CO. Arranged flights w/ CBP air branch on 9 drug and migrant telexes; saved scarce CG resource hours. Superb management after multi-nationality migrant interdictions; ensured biometrics and Regional Concurrence Team calls were expeditiously conducted; resulted in accelerated transfer of 6 suspected smugglers for prosecution. Excellent case management and information sharing on 28 drug & migrant telexes; resulted in 522 migrant and 10 smugglers interdicted. Outstanding thought process throughout legally complex boarding of U.S. sailing vessel breaching Cuban Territorial Sea; efforts led to successful unauthorized entry violation. Valuable source of LE expertise in LE case management and boarding execution. Excellent manager in dynamic environment; oversaw interdiction of 2 overloaded Haitian migrant vessels; resulted in 203 lives saved. Fully integrated member of intelligence watch qual board; ensured watchstanders knew their role in CC and how to aid LE watch. Enacted 10 bilateral agreements; 11 [District] statement of no objections (SN Os) issued for LE cases; led to 37,638kgs of cocaine seized worth approximately \$280M & 15 drug traffickers detained.

COMMUNICATION SKILLS: Charismatic and articulate speaker comfortable in any situation, including multiple VIP visitors, interagency partners, US Ambassador to Panama and DHS senior staff; complex cases clearly articulated and tailored to audience at hand. Language skill and cultural awareness fostered robust

¹ On the OER form, lieutenants are rated in 18 different performance categories on a scale from 1 (worst) to 7 (best). A mark of 4 denotes the “standard” level of performance expected of all officers.

relations w/ foreign/interagency partners. Explained sensitive & complex issues w/ ease. Attentive active listener sought feedback & to understand others. Impressive written work & meticulously proofread; composed 187 operational summaries, 185 complex tasking messages and 642 MISLE cases.

LEADERSHIP SKILLS: Promptly recognized and praised exemplary performance; improved morale. Stayed after watch to help during heavy case load; efforts praised by staff. Submitted successful nomination for Guardian of the Quarter; mbr rcvd deserved recognition. Assisted in development of 3 watchstanders, instructed mbrs in PQS and general watchstanding; mbrs qualification expedited. Provided excellent feedback to 6 cutters during aerial use of force (AUF) drills; trained crews on [District] policies and expectations; resulted in better mutual understanding and collaboration on operational goals and priorities. Gave authoritative objectives to WMEC during enactment of right of assistance entry into Colombian seas, expectations of cutter/small boat/helo passed quickly and conveyed w/ clarity; international incident avoided. Liaised with cruise ship during disabled vessel case 80 miles offshore; correlated vsl to [District] overdue & diligently coordinated rescue of two people despite challenging position and logistics; ensured sensitive potential LE nexus was addressed. Championed workplace diversity and adherence to CG's core values; contributed to the development of outreach activities designed to recruit greater number of minorities w/in officer corp and received federal recognition during affinity group conferences and showcased in civil rights online magazine. OER timely, complete and well supported.

PERSONAL & PROFESSIONAL QUALITIES: Helped execute bilateral document process; ensured host nation received forms through multiple channels for timely oversight & response; resulted in continuous U.S. LE case prosecution or host nation hand-off without delay. Expertly shepherd high-profile rescue of 3 persons after their vessel capsized off the east coast of [state]; effectively assisted Sector with coordinating C-130, MH-60 and multiple surface assets. Displayed understanding of practices and policies; during migrant interdiction with CG station and Customs & Border Protection, delicately managed partner agency desires and expectations against disposition process; resulted in flawless turnover of smugglers & migrants. Tactful mgmt of watch communications w/ Sectors; actions taken at lowest level earned respect; ensured everyone abided by policy. Provided foreign government situational awareness of go-fast entering their territorial sea; improved international relations and counter-narcotic response efforts. Provided guidance during CG boarding of a Honduran vsl; knowledge of protocol, bilateral ship-boarding process & policy resulted in a seamless boarding and maintained relations with Honduran govt. Set new physical goals each month and surpassed CG fitness standards; maintained professional physical appearance.

POTENTIAL: Highly dedicated officer; professionalism & hard work evident in strides made to complete demanding Command Duty Officer PQS. Developed solid LE response knowledge and displayed the same under time sensitive optempo pressures; consistently recommended appropriate tactics, techniques and procedures aligned w/ policy and doctrine at critical decision points as member of the watch team. Proudly represented the CG at national level recognition events & inspired others to achieve excellence. Always put team success above self in mission execution. An ideal candidate for assignments that require representational skills and consensus building. Recommended for promotion with peers.

REPORTING ON OFFICER COMMENTS: Humble and dedicated junior officer. Adjusted to demanding [District] CC operations tempo through purposeful and intense study of professional qualification standards. Handled simultaneous law enforcement cases, providing valuable input to MOTR, SNO and other partnership information sharing processes. Staunch advocate for break-in watchstanders and junior member mentorship; tremendous camaraderie when assisting with complex problem solving. Without fail, looked out for shipmates and was particularly adept in interacting with various commands, local, and international partners.

According to documentation of her subsequent EEO complaint, on August 7, 2013, the applicant was placed on a Performance Improvement Plan (PIP), which detailed the applicant's performance deficiencies, excessive absences, and medical appointments. The applicant did not submit a copy of her PIP.

On August 13, 2013, the applicant contacted her local EEO office to initiate a pre-complaint process.

On September 18, 2013, the Coast Guard notified the applicant of the conclusion of her EO counseling and informed the applicant of her right to file a formal complaint.

On September 30, 2013, the applicant filed a formal complaint of discrimination with her local EEO office. The applicant alleged that she was discriminated against on her annual OER for the rating period of June 1, 2012, through May 31, 2013, wherein she received a mark of 4 for Health and Well-Being, down from the rating of 6 she had received on her previous year's OER. The applicant claimed that her command marked her down for Health and Well-Being without explaining the lower rating. The applicant also alleged that she was subsequently issued a PIP on August 7, 2013, detailing her performance, previous absences, and medical appointments. The applicant alleged that she had received these lower marks and the subsequent PIP because she was discriminated against based upon her race (African American), color (brown), national origin (African American), and sex (female).

On March 1, 2014, the applicant promoted to Lieutenant Commander (O-4).

On April 8, 2014, the Coast Guard forwarded the applicant a copy of the Investigative File, providing the applicant with notice of her right to request a Final Agency Decision (FAD), or, alternatively, to withdraw her formal complaint.

On May 8, 2014, the applicant filed a request for a FAD.

On July 2, 2014, the Coast Guard issued its FAD and forwarded it to the applicant. The Coast Guard concluded that the applicant had failed to prove that she was discriminated against as alleged. The Coast Guard provided the applicant with notice of her right to appeal to the Office of Civil Rights and Civil Liberties (CRCL).

On August 2, 2014, the applicant received her OER for the rating period of June 1, 2013, through April 30, 2014. The applicant received two low marks of 3 (for Professional Competence and Professional Presence), eleven 4s, and five 5s in the various performance categories. The applicant also received a mark of "Fair Performer: Recommended for Increased Responsibility" in the second of seven spots on the officer comparison scale. The applicant received the following comments to support the marks:

PERFORMANCE OF DUTIES: Failed to progress as required by COMDT policy to Command Duty Officer (CDO). As an OU-LE and SU watch stander, made preparations and prosecuted 51 LE cases involving complex bilateral agreements with 34 different foreign countries; spent tremendous amount of time preparing for hundreds of morning ops briefs to Flag and senior staff, delivered accurate briefs. Effective use of resources during go-fast pursuit of [redacted]; utilized LE policy, duty DRE, & legal to obtain Flag Statement of No Objection (SNO) for airborne use of force; resulted in interdiction of 4 smugglers, 695 kgs cocaine and \$500K cash. Achieved results through analysis of tactical intel and force lay down; developed viable asset contingency plans with recommendations for join CG and DoD CD ops; enacted 21 bilateral agreements & [District] SNOs; led to interdiction of 201 bales of cocaine and 23K pounds of marijuana valued at \$338M. Adapted to changes in 45 complex interagency migrant interdiction cases; ensured biometrics conducts and facilitated the 10 member Regional Concurrence Team (RCT) conference calls for disposition of 508

migrants and transfer of 16 suspected smugglers for prosecution. Failed to qualify as OU-SAR and CDO as required for Officers and Chiefs; struggled qualifying despite being provided additional time and resources; missed OU-LE qualification deadline by months; continues to struggle with basic quals: 9 months later still working towards OU-SAR qual.

COMMUNICATION: Communicated time-sensitive, complex LE case information for SNO requests, RCT briefs, and notifications to command cadre, [redacted], Response Law Division, MLE, and National Cmd Center. Concise and thorough writer; wrote 23 SNO messages, 90 LE operations summaries, numerous LE/OPS e-mails to command cadre and documented 151 MISLE cases. Committed effort to ensure expectations and intentions to all units under [redacted] were understood. Effective communication and task delegation to Situation Unit and Tactical Intelligence watches.

LEADERSHIP SKILLS: Committed to the personal well-being of others; devoted time to assist member dealing w/ family member attempting suicide; advised about BAP which resulted in child & family receiving proper support and counseling. Advocated for others; provided advice to 12 enlisted members at unit concerning advanced education & advancement opportunities; provided guidance to B-8 during CRSP appeal process and an E-6 applying for DCB; member received commission. Committed to sharing knowledge of OU-LB watch duties; trained 2 new break-in watch standers; shared study guides and tools to accelerate their professional growth. Effectively delegated; provided clear direction to underway cutters on use of force drills; all crews obtained surface & airborne use of force qualifications IAW readiness requirements; provided clear direction and tasking during complex dual LB boarding of a go fast and fishing vessel; quickly sorted conflicting case details to enact foreign bilateral agreement enabling the LEDET to seize contraband. Participatory team member; liaised with 8 interagency partners, U.S. country teams, and [redacted] staffs to ensure effective LE case prosecution. Encouraged positive workplace climate; coordinated Thanksgiving meal for Command Cen watch; emailed staff concerning holiday observance significance. Own OSP on time and generally in compliance.

REPORTING ON OFFICER COMMENTS-CONCUR: Fair performance observed during reporting period. Member failed to qualify as a Command Duty Officer and progress through Command Center professional development levels as required by Commandant policy stated in the Command Center Manual. Struggled with watch standing basics despite being given extra time, formal instruction at schools, OJT, additional pre-boards, training, and a personal mentor. LCDR [applicant] failed to exhibit the necessary industriousness and enthusiasm required to successful in a response oriented job. Professional Qualification Standards not complete.

PERSONAL AND PROFESSIONAL QUALITIES: Initiated process improvements; identified issues with MIS & CENTRIX databases preventing communication and coordination with allied nations during counter drug operations; followed through ensuring connectivity restoration and effective case prosecution. Sound decisions during joint operations w/ Customs Border Protection, Homeland Security Investigations, Caribbean Air Marine Branch. & Puerto Rico Police; managed multi-agency concurrence process during case disposition of 10 mixed nationality migrant interdictions totaling 22 migrants and smugglers; assured all checklists and documentation were completed comedy. Responsible for correct LE case prosecution; committed to conducting migrant and counter drug interdiction ops safely and within policy. Lack of adherence to USCG core values of honor, respect, and devotion to duty; member struggled to meet basic watch obligations, missed watch qualification deadlines, needed extra help in every aspect of watch standing, struggled with basic military and officer protocols, and failed to comply with COMDTs policy for leave, liberty and duty status. Maintains healthy lifestyle; balanced fitness regime and diet including circuit training, cardio & participated in the 2013 American Cancer Society fund-raiser walk or run.

POTENTIAL: Member has reached max potential & is not recommended for promotion. Due to lack of demonstrated proficiency in craft or leadership assign to only those positions that do not require disciplined initiative. Not ready to assume greater leadership roles or responsibilities. Officer was given clearly articulated expectations numerous time; received extra time to meet expectations, including during failed Maritime Search Planning course assessment, yet never developed the necessary fundamental skills that are routinely mastered by peers. Member struggled with consistently upholding highest standards of devotion to duty expected of other officers. Recently promoted to O-4; being reassigned to CG-[redacted].

On August 13, 2014, the Department's Office of Civil Rights and Civil Liberties (CRCL) received the applicant's appeal of the Coast Guard's FAD.

On September 11, 2014, CRCL, based on the full evidentiary record, affirmed the Coast Guard's FAD. Regarding the applicant's claim that she had received a second OER that was worse than the one that was the subject of the investigation, CRCL found that the applicant had offered no additional evidence to demonstrate that her subsequent OER was motivated by her protected class status. Therefore, the CRCL office concluded that the applicant had ultimately failed to establish that a reasonable factfinder could not have arrived at the conclusion reach by the Coast Guard in the FAD. Regarding the applicant's PIP, CRCL found that the applicant provided no evidence to demonstrate that the PIP was motivated by discrimination or retaliation. Regarding the applicant's allegations of harassment, CRCL found that the applicant offered no additional evidence to demonstrate that the alleged unwelcomed conduct was based on her protected class. CRCL, based on the full evidentiary record, affirmed the Coast Guard's FAD.

On September 23, 2014, the applicant again filed a formal complaint with the Coast Guard's EEO office. That complaint was dismissed on October 24, 2014, for failure to timely file her complaint.

VIEWS OF THE COAST GUARD

On January 2, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The JAG recommended the Board deny relief in this case.

The JAG argued that nothing within the Civil Rights Manual, COMDTINST M5350.4C, requires reassignment of a member's chain of command during the pendency of an EEO investigation and/or complaint. According to the JAG, the Civil Rights Manual is silent as to any mandatory actions to be taken by, or with respect to, the rating chain upon receipt of a formal complaint. In addition, the JAG argued that automatic removal or disqualification of a rating chain upon receipt of a complaint would create an untenable personnel policy that would also infringe upon the due process rights of the rating officials in question.

Regarding the applicant's allegations that her April 30, 2014, OER was prepared in violation of the Coast Guard Personnel Manual (PERSMAN), the JAG argued that the applicant failed to specify what policy or procedure was violated. The JAG also noted that in April 2014, the Personnel Manual was no longer in effect, but the final, 2010 version of the Personnel Manual did not address or otherwise contain any provisions pertaining to preparation of an OER during the pendency of an EEO complaint.

The JAG explained that the Coast Guard policy in effect at the time was the Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3A, which provided the applicant with a specific procedure to address the propriety of her rating chain, based on her perception of a personal interest or conflict that would raise a substantial question as to whether she could receive a fair and accurate evaluation. The JAG argued that under that policy, "it was

incumbent” upon the applicant to identify any disqualification concerns to the next senior office in her chain of command, which the applicant failed to do.

The JAG further argued that the applicant failed to submit any evidence that her rating chain was biased or incapable of impartially evaluating her performance. Instead, the JAG argued that the applicant relied upon her filing of an EEO complaint to establish the need for disqualification. According to the JAG, while there are some circumstances where filing a complaint may create a conflict within a rating chain that warrants disqualification, it is not a foregone conclusion and must be evaluated on a case-by-case basis. The JAG claimed that in the current case, the applicant failed to provide any evidence of such bias or lack of impartiality.

The JAG claimed that the applicant failed to provide sufficient evidence that she was improperly pressured into signing her April 30, 2014, OER. In addition, the JAG argued that the applicant’s signature on the OER serves only as a confirmation that she was given the opportunity to review the OER; it is not an indication of approval. The JAG explained that Block 1 of the OER states, “I understand my signature below does not constitute endorsement or disagreement. I acknowledge that I have reviewed this report.” Given this verbiage, the JAG argued that the applicant’s command had no reason to pressure the applicant into signing the April 30, 2014, OER.

Finally, the JAG argued that the applicant has failed to provide any salient details as to what portions of her April 30, 2014, OER were allegedly unjust, or not based on facts and direct observation. Only looking to the applicant’s issues raised in her CRCL appeal, the JAG stated the applicant’s complaints focus upon the language within Block 10: Potential. Specifically, the JAG stated, the applicant complained that she was not maxed out on potential, the information regarding her failed Maritime Search Planning Assessment was inaccurate, and she was not “reassigned” but rather transferring for co-location issues. However, the JAG argued that to establish that her OER was erroneous and unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of statute or regulation.² In addition, the JAG argued that the applicant must provide clear, cogent, and convincing evidence to overcome the presumption of regularity when seeking to amend a written evaluation.³

Here, the JAG argued that the applicant failed to meet that burden. The JAG further argued that the applicant complained about the observations made by her Command characterizing her performance, but these comments are not misstatements of significant hard facts, nor did they violate a statute or regulation. Regarding the comment that the applicant had “[m]axed out” on her potential, the JAG argued that this comment was the opinion of the applicant’s rating chain reviewing her potential to assume greater leadership roles and responsibilities. The JAG stated that while the applicant may disagree with her rating chain’s conclusion, it was not improper for the rating chain to make this comment, and the applicant failed to prove that it was a misstatement of a significant hard fact. Regarding the applicant’s objection to her rating chain’s comments on the applicant’s failure to pass her Maritime Search Planning assessment, the JAG noted that the applicant admitted to failing the assessment. In addition, the JAG argued that the applicant’s claim that other students had failed the same assessment or that the class was not pass/fail does not negate the fact that her Command observed that she had never developed the necessary fundamental skills

² *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992).

³ *Muse v. United States*, 21 Cl. Ct. 592, 601 (1990).

as evidenced by her failed assessment. Finally, regarding the applicant's claim that her Command mischaracterized her transfer, the JAG argued that the applicant was in fact reassigned to a new position.

The JAG concluded by stating that the applicant has failed to establish that her OER was baseless or that her Command made erroneous statements of significant hard fact and the Board should deny relief.

To support its advisory opinion the Coast Guard submitted the following document:

- A July 22, 2019, sworn statement from the applicant's Reporting Officer (RO) for the rating period of June 30, 2013, through April 30, 2014, submitted in response to the BCMR application. The RO stated that while he is empathetic toward the applicant, "the plain things are the main things," and her OER is a factual and honest reflection of the applicant's performance during the rating period. The RO claimed that the applicant's allegations as presented to the Board are defamatory and a last grasp for relief by a "delusional" officer.

The RO stated that the main question is whether or not a rating chain may continue to evaluate and rate an employee's performance if that employee has engaged the EEO process. The RO stated that he is aware of no policy or precedent that disqualified him from remaining within the applicant's rating chain. According to the RO, he could think of numerous situations where it was imperative to good order and discipline for the rating chain to remain intact during an investigation. Although the RO was not afforded the opportunity to review the applicant's appeal before the EEO, he asked the Board to consider the following:

- His recollection is that the applicant filed her first complaint with the EEO office after she received her first OER. The RO argued that he could not retaliate for something that had not yet happened. However, the RO confirmed that the applicant received numerous counseling sessions, extra help, On the Job Training (OJT), mentors, and a performance improvement plan during this same rating period, so the applicant's OER should not have been a surprise to her. However, the RO conceded that the applicant may have already contacted the EEO office prior to receiving her OER, but it would have been unknown to him.
- All of the applicant's EEO complaints and appeals have been exhausted and were all found to be meritless. The RO claimed that had there been merit in the applicant's allegations, the EEO office and OPM would have already been directed to correct the record and make the applicant whole.
- The applicant's OER was never returned to him by OPM informing him the OER was unjustified or contained inappropriate material. As such, if the OER met the evaluation standards in 2014, it still meets those standards today.
- The applicant stated in her application that the date she discovered the alleged error was on September 21, 2018, but she had the OER in her record since at least August

2014.⁴ The applicant stated that it was this OER, not the totality of her record that led to her not being selected for promotion, but while the RO does not dispute that this OER had an impact, it is the totality of a servicemember's record that the selection board takes into account, along with the Commandant's guidance to boards and panels.

- The applicant alleged that she was “ordered to remain working in the hostile working environment and was relocated after receiving the OER two weeks before I was to PSC. I was improperly pressured into signing the OER and all marks received are erroneous, unjust, and not based on facts or direct observations.” This, according to the RO, was complete “libel.” The RO argued that the applicant's working environment was never found to be hostile and all claims by the applicant have been found meritless. In addition, regarding the applicant's reassignment, the RO claimed the applicant had already proven that she did not want to perform the duties of her unit, so her Command worked with OPM to find other opportunities for her. Finally, the RO claimed that signing the OER does not mean one agrees with what is in it; it only indicates that a service member was counseled regarding its content.

The RO concluded by stating that the applicant deliberately chose a performance path that can be summarized as detestable, disobedient, and derelict. According to the RO, petty officers with no operational experience on their first tour of duty were working circles around the applicant.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 6, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. The Board received the applicant's reply on January 23, 2020. The applicant stated that she disagreed with the advisory opinion in its entirety and once again requested that the OER for the rating period of June 30, 2013, through April 30, 2014, be removed from her record. The applicant again alleged that the members in her direct chain of command were involved in the EEO process, while at the same time remaining as rating officials on her OER. The applicant alleged that her April 30, 2014, OER resulted in her being passed over for promotion during the 2018 and 2019 commander selection boards. The applicant further alleged that her non-selection for commander is continued reprisal from the Coast Guard.

According to the applicant, her record was “very” competitive prior to her receiving the April 30, 2014, OER. Without citing any particular policies, the applicant again alleged that this OER was prepared in violation of EEO processes and Personnel Manual instructions. The applicant claimed that her rating chain should not have remained as rating officials on her OER because they were directly involved in the EEO process. The applicant argued that she should have been protected from reprisal from all parties. The applicant alleged that she during the EEO process, she was ordered to remain in a hostile work environment. The applicant claimed that on multiple occasions, while being bullied, harassed, and discriminated against, she asked to be

⁴ The RO speculated that September 21, 2018, was the date the O-5 board results were released.

relocated to a non-hostile, non-discriminating environment, but her requests were denied. The applicant further claimed that she was reassigned by her chain of command, which was directly involved in the EEO process, only after she was given her 2014 OER, which ultimately cost her career. The applicant again alleged that she was pressured into signing the OER and that all the 2014 OER marks are erroneous, unjust, and not based on facts or direct observations.

The applicant stated that the Coast Guard is responsible for ensuring its members are able to work in an environment that does not allow discrimination, bullying, and harassment, all of which she claimed to have endured during her time at her previous unit. The applicant argued that corrective action should have been taken to address the discrimination, harassment, bullying, and retaliation she encountered at her previous unit. The applicant claimed that had action been taken to address these matters, she would have been able to continue to serve her country, instead of being forced to retire due to an erroneous and unjust OER. The applicant alleged that her chain of command was able to use their positional power and violate EEO practices, which, according to the applicant, is proven by her negative OER. The applicant further alleged that the OER reads as though she had committed a violation of the Uniform Code of Military Justice (UCMJ). According to the applicant, she was never formally written up, nor was she counseled on the OER prior to or after receiving it. According to the applicant, the OER was changed from the one she submitted as her OER input.

The applicant stated the Coast Guard, senior leadership, and EEO officials should have taken every step to foster and develop a climate for her that was free from harassment, hostility, discrimination, bullying, and retaliation. The applicant explained that retaliation occurs when an employer takes materially adverse action because an employee has engaged in, or may engage in, EEO activity. According to the applicant, her OER is proof that she was retaliated against, and even now she is still be retaliated against. The applicant argued that she should have been allowed to engage in the EEO process without being subjected to materially adverse actions. The applicant claimed that she had no performance issues before or after the OER. The language about her potential being maxed out was inaccurate, as shown by the fact that she performed exceptionally well after she was removed from the hostile, discriminating, and bullying atmosphere of her previous unit. The applicant alleged that even after being reassigned, her chain of command reached out to her new unit to “intrusively” harass her more by checking in on her to see how she was doing. The applicant claimed that she was told that she would not have to deal with her previous chain of command any longer and that she would be protected from their harassment, discrimination, and bullying, but that was not the case because they still harassed her even after she left.

To further support her claim that she was being retaliated against, the applicant pointed to the failed assessment mentioned in her April 30, 2014, OER. According to the applicant, the assessment was not pass/fail, which proves that she was being bullied and harassed. The applicant claimed that her chain command’s power was far reaching, and it continued to demean her character and bully her even when she left on Temporary Duty Assignment (TDY) orders.

The applicant claimed that the statement in her OER about her being reassigned was erroneous, which again, points to her command retaliating against her. According to the applicant, she was not being reassigned, but given instead given Permanent Change of Station (PCS) orders

along with her husband. The applicant claimed that the information in Direct Access is also incorrect. The applicant stated that her OER states that it is a “regular OER” when it should state it was a “transfer OER.” Again, the applicant alleged that this proves that her command was trying to end her career and continued to retaliate, discriminate, bully, and harass her.

Finally, the applicant addressed the comments made about her by her previous RO in his sworn statement to the Board. The applicant claimed that the verbiage used by the RO, specifically, that she is a “delusional” officer, is continued bullying. The applicant stated that the language and tone of her previous senior leader is very disappointing. She also stated that her RO has caused her to suffer from mental, medical, and anxiety issues since she worked for him for approximately 18 months.

APPLICABLE LAW AND POLICY

Article 1.A.2.b of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C, states the following regarding the responsibilities of the Supervisor in relevant part (emphasis added):

1. Evaluate the performance of the Reported-on Officer in the execution of their duties.

...

2. Encourage the use of the Officer Support Form (OSF), Form CG-5308, ([sic] required for ensigns and lieutenants (junior grade) or other appropriate means, to note important aspects of the Reported-on Officer’s performance during the reported period. Significant events, problems, achievements, shortcomings, or personal qualities should be noted.

Article 1.A.3.b. of the manual states the following regarding the responsibilities of the Reporting Officer in relevant part (emphasis added):

1. Evaluate the Reported-on Officer based on direct observation, the Officer Support Form (OSF), Form CG-5308, *other information provided by the Supervisor*, and *other reliable reports* and records.

2. Prepare Reporting Officer section of the OER and describe the overall potential of the Reported-on Officer for promotion and special assignment such as command.

3. Ensure the Supervisor fully meets responsibilities for administration of the [Officer Evaluation System]. *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 (if applicable). The Reporting Officer shall not *direct* that an evaluation mark or comment be changed, unless the comment is prohibited under Article 5.I. of reference (a) and Article 4.B. of the Manual.

Article 4.B.11. of the manual states the following regarding comments that a member’s rating chain is prohibited from including in relevant part:

Discuss Reported-on Officer’s performance or conduct which occurred outside the reporting period except as provided in Article 5.E.7. and 5.F.3. of Reference (a) and Chapter 10 and Chapter 15 of this Manual.

Article 4.E.2. of the manual states the following regarding Supervisor comments in relevant part:

f. For each evaluation area, the Supervisor reviews the Reported-on Officer's performance and qualities observed and noted during the reporting 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.

...

j. 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 accurately portray the officer's performance and qualities which compares reasonably with the standards defined and marked on the performance dimensions in the evaluation area.

k. Citing weaknesses does not make the OER derogatory. Derogatory OERs are identified in Article 5.H.1. of Reference (a) and Article 6.A. of this Manual.

Article 4.F. of the manual states the following regarding Reporting Officer comments in relevant part:

3. Section 5, Reporting Officer Comments

a. This section provides an opportunity for the Reporting Officer to comment on the Supervisor's evaluation. Reporting Officers are encouraged to cite other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period. By doing so, the Reporting Officer gives a more complete picture of the Reported-on Officer's capabilities.

...

d. No specific comments are required to support the Reporting Officer's judgment for the Comparison, Promotion, and Rating Scales.

e. Comments in this section reflect the judgment of the Reporting Officer and may include, but are not limited to, the following:

[1]. Qualification to assume the duties of the next grade.

[2]. Specialties or types of assignment, such as command, or post-graduate education for which the Reported-on Officer is qualified or shows aptitude.

[3]. Special talents or skills (or lack of) such as military readiness and warfare skills, seamanship or airmanship, etc., as applicable.

Article 5.A.2.d. of the Officer Accessions, Evaluations, and Promotions Manual discusses the responsibilities of the Reported-on Officer in relevant part:

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.

...

k. 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.

Article 5.A.2.e. of the manual states the following regarding unavailable or disqualified rating supervisors:

1. In instances where a supervisor, reporting officer, or reviewer is unavailable or disqualified to carry out their rating chain responsibilities, the commanding officer or the next senior officer in the chain of command shall designate an appropriate substitute suitable for evaluating the reported-on officer. Other members in the rating chain may be adjusted and designated, as appropriate. Commander (CG-PSC-OPM-3) or (CG PSC-RPM-1) shall be advised in writing of the designation(s). The timing of the substitution may preclude full use of the Officer Support Form (OSF), Form CG-5308; however, that fact alone does not invalidate the OER.

2. Definitions. As used within this subparagraph:

(a) "Unavailable" includes illness, injury, death, prolonged absence, transfer, separation from the service, retirement, or any other situation which prevents or substantially hinders the supervisor, reporting officer, or reviewer from properly carrying out their rating chain responsibilities.

(b) "Disqualified" includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the supervisor, reporting officer, or reviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate evaluation.

(c) If not already determined by the commanding officer, it is incumbent on the reported-on officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the reported-on officer during the reporting period or within 30 days after the end of the reporting period.

Article 17.A. of the manual states the following regarding Reported-on Officer replies to OERs in relevant part:

1. The Reported-on Officer may reply to any OER. Replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. A Reported-on Officer OER reply does not constitute a request to correct their record.
2. Content of Replies. Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 5.I. of Reference (a) and Article 4.B. of this Manual apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted her administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

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. All Board members concurred in that recommendation.⁵

3. The application is timely because the applicant remained on active duty between the time she received the disputed OER and the date she filed her application.⁶

4. The applicant did not file a reply to the disputed OER and did not contest it through the PRRB, as she was entitled to do. However, because the applicant filed an EEO complaint within a few months of receiving the OER, the Board will not conclude that her failure to do so is evidence that she considered the OER fair and valid at the time she received it.

5. The applicant alleged that her OER for the rating period of June 1, 2013, through April 30, 2014, was unjust because members of her chain of command remained as her rating officials in violation of EEO and Personnel Manual policies, despite an ongoing EEO investigation into claims of discrimination, harassment, and bullying. The applicant also alleged that her OER was unjust because it reflected retaliation for filing an EEO complaint against her chain of command in August 2013. Finally, the applicant alleged that her OER was erroneous because it contained false and defamatory information by her supervisor. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed evaluation 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 it is erroneous or unjust.⁷ 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.⁸ To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation 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.⁹

⁵ *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).

⁶ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

⁷ 33 C.F.R. § 52.24(b).

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁹ *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).

6. The applicant alleged that her rating chain violated both EEO and Coast Guard policy when they remained as rating officials on her OER for the rating period of June 30, 2013, through April 30, 2014, while they were involved in the EEO process after she filed an EEO complaint against them for discrimination, harassment, and bullying. For the following reasons, the Board disagrees:

- a. The applicant alleged that members of her command were “involved” in the EEO process, while remaining as rating officials on her OER. The record shows that after receiving her complaint in August 2013, the Coast Guard’s EEO office conducted an independent investigation into the applicant’s allegations. While the Coast Guard EEO office is a part of the Coast Guard, it is an independent, neutral office that does not include members of the applicant’s chain of command. After conducting its independent investigation, the Coast Guard EEO office ultimately determined that the applicant’s allegations were meritless and dismissed her complaint. Second, on appeal, the Department’s CRCL office reviewed the allegations and evidence and also found that the applicant’s chain of command did not discriminate or retaliate against her and dismissed her case. The Board begins its analysis by presuming that Coast Guard officials fulfilled their duties “correctly, lawfully, and in good faith,” and the applicant has failed to produce any evidence that Coast Guard officials failed to do so here. The Board therefore finds that while her rating officials were presumably interviewed by the EEO investigators, the applicant has failed to prove, by a preponderance of the evidence, that they had any unauthorized involvement in or influence on the EEO process.
- b. The applicant alleged that her chain of command violated multiple Coast Guard and EEO policies when they remained as rating officials on her OER while participating in the EEO investigation. However, the applicant has failed to provide specific policies from either the EEO Manual or the Personnel Manual, that requires rating officials to be removed from a service member’s rating chain once an EEO complaint has been filed against them. Although Article 5.A.2.e. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, provides guidance on steps that should be taken when a supervisor or rating official is unavailable or disqualified, this policy does not preclude members of a command from remaining as rating officials simply because the Reported-on Officer has filed an EEO complaint against them. The applicant stated countless times throughout her application that multiple policies were violated, but she has failed to present any specific policy within her application and the Board can find none. The applicant bears the burden of proving that Coast Guard officials did not carry out their duties “correctly, lawfully, and in good faith,” and the Board finds that she has failed to do so here. As such, her request to have her April 30, 2014, OER removed from her record based on an alleged policy violation should be denied.

7. The applicant alleged that her April 30, 2014, OER was unjust because it was a direct reprisal for her filing an EEO complaint against her chain of command for discrimination, harassment, and bullying. According to the applicant, this reprisal is proven by the fact that she was never counseled or warned regarding her poor performance. However, the record shows that on August 7, 2013, the applicant’s Command placed her on a PIP for performance deficiencies. This PIP shows that the applicant was counseled and made aware that her Command believed she

was falling behind on her development and performance requirements. Finally, the record also shows that not only was the applicant placed on a PIP, but she was also provided additional resources and time to bring herself into compliance with policy. As of June 3, 2014, the date the applicant's Command signed and finalized her April 30, 2014, OER, the applicant had missed the deadline for her OU-LE qualification by many months and had not completed her OU-SAR qualification, as required by policy. The applicant has submitted nothing to rebut the negative comments in the OER that support the lower marks.

Under, Article 5.A.2.c. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTISNT M1000.3A, "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." Article 5.A.2.k. of the same manual states, that officers, "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." Therefore, the Board finds that even if the applicant had not received adequate warning or counseling (which the evidence shows she did receive), policy makes it clear that the applicant was ultimately responsible for managing her performance, which included ensuring that her performance feedback was thorough. The applicant has not proven by a preponderance of the evidence that she was inadequately warned or counseled about her performance.

8. The applicant argued that her other OERs, wherein she received much higher ratings, prove that her previous Command used her OER as reprisal for her filing of an EEO complaint. However, the fact that an officer has received higher ratings before and after a disputed OER does not prove that the ratings or comments contained in the disputed OER are unjust or erroneous.¹⁰ The preponderance of the evidence shows that the applicant began to struggle in her performance during her first year as a controller at the Command, as evidenced by her August 7, 2013, PIP, and that her Command believed and warned her that she was falling behind. This PIP preceded the applicant's EEO complaint and so could not have been retaliatory for that complaint. Nor has the applicant submitted substantial evidence that rebuts any of the marks or comments in her disputed 2014 OER. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that her subsequent higher OER ratings prove that her Command used her 2014 OER as reprisal for her filing an EEO complaint after she was issued the PIP in August 2013.

9. The applicant alleged that her April 30, 2014, OER contained false and defamatory information about her. Specifically, the applicant alleged that the statement that she was "maxed out" on potential is erroneous. However, the applicant has failed to show that the statement that she was "maxed out" on potential was a misstatement of a significant hard fact, a product of bias or any other factor that should not have been in the rating process, or a clear violation of a statute or regulation, as required by *Hary v. United States*. As argued by the JAG, the statement that the applicant was "maxed out" on potential was merely the opinion of the applicant's rating chain, and

¹⁰ *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) ("[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.").

was their subjective opinion upon reviewing the applicant's potential to assume greater responsibility. The applicant has submitted no evidence to rebut the comments and marks in the disputed OER. Therefore, the Board finds that the applicant has failed to prove, by preponderance of the evidence, that the marks and comments contained within her April 30, 2014, OER are erroneous or unjust.

10. The applicant made numerous allegations with respect to the actions and attitudes of various officers. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.¹¹

11. For the reasons outlined above, the applicant has not met her burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.¹² She has not proven, by a preponderance of the evidence, that her OER for the rating period of June 1, 2013, through April 30, 2014, was erroneous or unjust 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.¹³ The Board finds no grounds for changing or removing the disputed OER. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹¹ 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").

¹² *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

¹³ *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).

