

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2023-052


LT/O-3

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 July 20, 2023 and assigned the case to a Staff Attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated October 17, 2024 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 Lieutenant Junior Grade (LTJG/O-2)¹ at the time of her application to the Board, who was twice passed over for promotion to Lieutenant (LT) asked the Board to correct her record by removing her Officer Evaluation Report (OER) for the October 1, 2019 through April 9, 2020 rating period. The applicant further requested that her separation for twice failing to promote be abated and that she be permitted to go before the next Lieutenant Selection Board.

Through counsel the applicant alleged that her April 9, 2020 OER was based on a discriminatory basis that she was not aware of until January 29, 2021 when, in response to her OER comments, her supervisor, Lieutenant Commander (LCDR) R, admitted that his numbers were based in large part on the applicant's maternity leave.

The applicant explained that the Coast Guard's Civil Right Directorate has published its Vision Statement as being "A discrimination-free workplace where every member...has the opportunity to reach his/her full potential, and believes it is possible to do so without regard to: race; color; national origin; religion; sex (including gender identity, sexual harassment, pregnancy, and sexual orientation); age; disability; genetic information; marital status; parental status; political affiliation; engagement in a protected Equal Employment Opportunity (EEO)/Equal Opportunity

¹ At the time of her application for relief, the applicant was a Lieutenant Junior Grade, but was promoted to Lieutenant on February 11, 2024. Her requests for relief involve her initial non-selections to LT.

(EO) activity or any other basis protected by the law.” The applicant stated that the Coast Guard has then engendered that vision through implementing policy through the publication of the U.S. Coast Guard Civil Rights Manual (COMDINST M5350.4E) (the “Civil Rights Manual”) which expressly prohibits discrimination based on i) sex (including pregnancy), and ii) status as a parent. The applicant explained that the Civil Rights Manual provides direction to commanding officers in supporting the anti-discrimination policies and includes a requirement that Commanding Officers i) ensure that leaders promote the importance of diversity, and ii) ensure equal opportunity for promotion and advancement for all personnel, among others.

The applicant further explained that the Officer Accession, Evaluations and Advancements Manual (COMDTINST M1000.3A) makes clear that a Coast Guard officer shall not be evaluated on or mention gender. The applicant stated that this prohibition is found specifically in Section I of Chapter 5 of the OAEA Manual which prohibits i) mentions [of] pregnancy, and ii) expressly evaluate, compare, or emphasize gender. The applicant contended that what cannot be done or written expressly, cannot be done silently but for the same prohibited reason. The applicant argued that it is clear from the Civil Rights policies and the evaluations policies that the Coast Guard does not want to hinder a female’s advancement opportunity based on her gender, pregnancy, or parental status (the need to care for a dependent). The applicant alleged that had she not commented on her OER it is quite likely we would never have known the basis for her numbers were the discriminatory actions of her rating chain.

The applicant stated that specifically, in replying to her OER, LCDR R shockingly stated, “The [Reported-on Officer (ROO)] had a lot occurring in the ROO’s personal life and I believe I accommodated it, but the absence from the office meant more work for others and meant the ROO contributed less (See Exhibit A). The marks take these factors and more into consideration.” CDR S, the Reporting Officer, concurred with LCDR R’s reply to the applicant’s OER reply. According to the applicant, LCDR R and CDR S knew the things going on in her “personal life” and the “absence from the office” were certainly both in relation to her pregnancy and maternity leave. The applicant contended that both male senior officers in her rating chain felt it appropriate to mark her lower based on her gender, pregnancy, and parental care duties because of her maternity leave. The applicant further contended that even though it was not expressly mentioned in her OER, or not directly stated in the comment reply, the two male officer’s made it clear that the applicant’s pregnancy, birthing experience, and authorized parental leave was the most important factor in giving her lower marks than other officers in the command. This is exactly the behavior the Coast Guard policies prohibit.

The applicant argued that not only are LCDR R’s comments wrong and patently discriminatory, but it is quite clear from the additional statements from LCDR that his actions were discriminatory. The applicant stated that CDR M, who is now retired, indicated that LCDR R was not a good leader. Further, CDR M, LCDR R, and MSTCS G all attest to the exceptional performance from the applicant and corroborate the fact that it was wildly known that her extended absence was for maternity leave resulted in her poor OER. The applicant contended that it is further notable that each member was astounded that LCDR R and CDR S would base the evaluation marks in part based on that maternity leave.

For the foregoing reasons outlined above, the applicant claimed that she is entitled to have

her OER separation date abated, that her OER be adjusted upward, and that she be permitted to re compete in the next promotion board.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on April 3, 2012 where she trained as an Operations Support Specialist (OS) and advanced to a Second Class OS before being commissioned on November 21, 2021. Upon her commissioning, the applicant was released from active duty and entered the Coast Guard Reserve as an Ensign and received Extended Active Duty Orders.

On July 1, 2019, the applicant began bedrest for her pregnancy until she delivered on August 5, 2019. Upon giving birth, the applicant began parental leave until October 28, 2019.

On October 31, 2019, the applicant received her semi-annual OER for the April 1, 2019 through September 30, 2019 rating period wherein she received two marks of 4 (on a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), eleven marks of 5, and five marks of 6. The applicant also received a mark of 5 (“One of many high performing officers who form the majority of this grade”) out of 7 on the Comparison Scale. This was the applicant’s last OER as an Ensign/O-1.

On June 17, 2020, the applicant received her contested semi-annual OER for the October 1, 2019 through April 9, 2020 rating period. This was the applicant’s first semi-annual OER as a LTJG/O-2. The applicant received twelve marks of 4 and six marks of 5. The applicant also received a mark of 4 out of 7 on the Comparison Scale. In addition to her numerical marks, the applicant received the following comments:

Performance of Duties. Commendable preparation, teamwork, and initiative; member was selected to stand-up a newly implemented Marine Transportation System (MTS) division. Remarkable team player; instrumental in the organization and execution of a \$77K MTS scouting operation titled Operation Zone Coverage. Member leveraged various resources from six Coast Guard units and fifteen port partners to conduct surveys by land, sea, and air to identify and prioritize hazards impacting critical marine infrastructure and the safe navigation of waterways over 75,000 square miles of AOR. Contributed to the development of a robust data collection program, where the information was captured in CG Portal and shared in real-time between three Coast Guard units, allowing critical navigational safety decisions to be made in a timely, decisive manner amongst all interested parties. Poised speaker; at a multi-agency MTS Recovery and Safety Committee, member presented implementation of MTS division to diverse audience. Topics included the overview of Operation Zone Coverage at two MTS Recovery and Safety meetings, provided feedback to interested parties, and earned valuable buy-in from stakeholders, contributed to cohesive success of division goals.

Reporting Officer Comments: Well deserving of recent selection to LTJG. Member demonstrates the ability to take on increased roles and responsibilities. Team player; driven and motivating leader who regularly exhibits an upbeat and positive attitude. Commendable performer; demonstrated continuous growth in technical, managerial, and operational expertise. Embraced increased leadership role within the newly formed MTS division. Member is reporting to District 13 WWM and is recommended for follow-on positions of greater responsibility and leadership; Marine Safety Unit, Sector WWM, Facilities Division, or Command Center.

On January 21, 2021, the applicant submitted a Reported-on Officer Reply to her OER as

authorized by the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A.² In her OER Reply, the applicant stated that she felt her marks “Results and Effectiveness,” “Speaking and Listening,” and “Developing Others” were deserving of higher marks.

On January 29, 2021, LCDR R replied to the applicant’s OER reply with the following:

...³

2. For paragraph 3.b, it is common for expectations to rise as a member proceeds through the ranks. This was LTJG [Applicant’s] first OER as an O2. It is common for expectations of performance and marks to differ from supervisor to supervisor. This was the ROO’s first OER in a new division with a new supervisor. I did say that OERs can reset as members are promoted. Meaning more is expected of an O2 vice an O1. My choice of words are only regrettable in that I should have spoken more plainly and relayed the ROO’s performance was lacking. I thought I was being positive and motivational. I gave the ROO the benefit of the doubt. The ROO had a lot occurring in the ROO’s personal life and I believe I accommodated it, but the absence from the office meant more work for others and meant that the ROO contributed less. The marks take these factors and more into consideration.

3. For paragraph 4.a., 4.b, and 4.c, the ROO received 4s in Results/Effectiveness, Adaptability, Speaking and Listening, Developing Others, and Professional Competence. The information provided in the OER reply paragraphs was considered as part of the totality of the member’s performance and 4s are the appropriate mark. The ROO provided an OSF [Officer Support Form] for the April 2020 OER with bullets that were exact cut and paste copies of bullets provided for the previous OER. I do not see any new information in these paragraphs that would convince me to reconsider and change the marks.

4. In preparing for the referenced Operation Zone Coverage, I had a meeting in the morning with LTJG [Applicant] and a second JO [Junior Officer]. There was heated debate on the approach to the mission. I said we would break for lunch and then reconvene in the afternoon. LTJG Matha sought permission from the MSTC to go home and skip the meeting. The ROO didn’t come to me, but rather went to a junior subordinate and then went home and missed the meeting without letting me know [redacted] planned to skip it. That is not the type of inspirational leadership needed in the officer corps.

On January 29, 2021, the applicant’s Reporting Officer, CDR S, filed a concurrence to LCDR R’s First Endorsement, and stated the following:

² Article 5.K. Replies to OERs. 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.

1. 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 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.

2. Corrections. Reported-on officer replies do not constitute a request to correct a record. An officer who believes their OER contains a major administrative or substantive error should follow the procedures to correct military records as outlined in Article 5.N. of this Manual. This includes requests to have the OER, or a part thereof, removed from the record. Members of the rating chain who, in their review of a reported-on officer’s reply, concur with the reported-on officer that an error may be present in the OER, must return the reply to the reported-on officer and assist that officer in following the procedures of Article 5.N. of this Manual.

³ Significant parts of the document were redacted and the Board could not provide a clear recording of the statements made in the first paragraph.

1. [I] concur with LCDR [R's] assessment of LTJG [Applicant's] performance, OER marks, and potential. MSU [redacted].
2. I will add this member exhibited traits of failing to adjust to performing as an officer while assigned to MSU [redacted]. That failure occurred under the previous CO, XO, and Prevention Department Head. The new rating chain and command made a concerted effort to accommodate the member; which culminated in the allowance of an early April 2020 departure [redacted in copy provided to the Board]. To get to that point, the XO pushed OPM to assign the ROO to [redacted in copy provided to the Board] and then to cut orders early for the ROO to facilitate that move. The ROO needed the orders to get the household goods moved and this was occurring just as COVID-19 was setting in with new restrictions on PCS moves. It might sound simple in retrospect, but it involved significant coordination and time that was viewed as being of a benefit to the ROO from a work life perspective. The whole rating chain put in the effort to get the ROO positioned for promotion to O-2 and the whole Command rallied to support an early PCS departure. To insinuate now that the Command was anything less than supportive of [her] situation, is not indicative of the effort involved.
3. The Reply memo is the perfect example of the ROO's provided administrative work that was subpar. The memo includes comments specifically prohibited by OPM in an OER reply. Additionally, the memo contains numerous formatting and grammatical errors that do not correlate to correspondence expectations of a junior officer.
4. [Redacted in copy provided to the Board] if not, it does not refer to items either included in or in addition to the OSF provided to the rating chain by the ROO to demonstrate performance not included in the evaluation.
5. The MSU [redacted] Command looks out for its members, praises in public, and works with its members that are struggling to find their niche. The Command wants its members to be as successful as possible both personally and professionally, but that does not mean that we will not hold members to standards. The ROO had difficulties in the ROO's personal life and the unit accommodated. The OER the ROO received is very consistent with the level of results achieved as interpreted by MSU [redacted]. If anything, it is a generous OER that was intended not to judge a member on their worst days and set the ROO up for a continued future in the Coast Guard.

On February 5, 2021, the applicant received her semi-annual OER for the April 10, 2020 through July 31, 2020 rating period, wherein she received fifteen marks of 5 and three marks of 6. The applicant also received a mark of 5 out of 7 on the Comparison Scale. In addition to her numerical marks, the applicant received the following comments:

Performance of Duties. Exceptional integration and immediate positive impact to new unit/role during turbulent period in support of D13 Covid Project Officer: formalized SITL watch, reporting procedures, & coordinated watch schedule for 15 mbrs to provide full coverage while also support needs to maximize work life balance. Sought out by 2 retiring mbrs as project officer to plan/execute ceremonies in unique environment that exceeded expectations of mbrs and expertly captured over 40 years of service in memorable fashion for individuals & loved ones. Quickly recognized 85% of WAMs reports exceeded CG time requirements: developed long term plan to address delinquency rate, initiated survey on most critical region, & began building key relationships throughout the AOR to ensure valuable feedback from key stakeholders would be provided for analysis. Built resilient team to meet ATON trng needs at 7 units despite gap in BMC position, travel restrictions, and inability of mbrs to attend C schools. Tracked certification shortfalls by unit & trng type, provided awareness to ldrship, & coordinated opportunities that enabled units to operate & maintain 98.5% Aid Availability Rate, minimized Covid related impacts, & navigate transfer season. Exemplary contributions and adaptability.

Reporting Officer Comments: Mbr exhibited outstanding leadership/competence within the D13 waterways staff and as an integral member of the D13 COVID watch team that tracked cases, status of CG units &

enabled efficient comm's with 3 Sectors. Quickly acclimated to unit & made positive impact on LDAC and Morale committee. Took initiative and is pursuing T-boat qual at Sector which aligns with follow-on assignment at Sector/MSU inspections dept. Highly recommended for future post grad prgm in Org Leadership and Performance Technology. High performing officer; excellent candidate for any hi-vis position. Promote w/ very best of peers.

On June 10, 2021, the applicant received her semi-annual OER for the August 1, 2020 through January 31, 2021 rating period wherein she received nine marks of 5, eight marks of 6, and one mark of 7. The applicant also received a mark of 5 out of 7 on the Comparison Scale.

On August 12, 2021, the applicant received her semi-annual OER for the February 1, 2021 through June 30, 2021 rating period, wherein she received four marks of 5, eleven marks of 6, and three marks of 7. The applicant also received a mark of 6 ("One of few distinguished officers") out of 7 on the Comparison Scale.

On June 13, 2023, the applicant filed a Report of Harassment with the Coast Guard and alleged that she had been subjected to harassing behavior by her chain of command.

On June 28, 2023, a Convening Order was issued wherein an investigation was convened to investigate the facts surrounding the applicant's allegations of harassing behavior by members of her chain of command.

On December 13, 2023, the Investigating Officer (IO) submitted his report on investigation wherein he provided the following:

Findings of Facts: Harassment Parental Status

1. LTJG [Applicant] was pregnant from November 2018 to 05 August 2019. (Exhibit 1)
2. On 01 July 2019, LTJG [Applicant] began bedrest status for the remainder of her pregnancy. She delivered a baby on 05 August 2019, took parental leave, and then returned to duty on or about 28 October 2019. (Exhibit 1)
3. Upon returning from parental leave, LTJG [Applicant] returned to her role as the Waterways Management Chief. In addition, she was placed on the Marine Transportation System (MTS) team with LCDR [R] as the supervisor. According to LTJG [Applicant], she was exposed to a hostile workspace and verbally harassed by LCDR [R], being exposed to such outbursts as "go punch yourself in the face" when asked to clarify parts of the project she was working on. When asked to clarify, LTJG [Applicant] indicated she believed these comments were made in a joking manor, in an attempt by LCDR [R] to be part of the crew, however she did not receive these comments as such, rather viewed them as condescending, rude, belittling, and cruel. She indicated it greatly (negatively) impacted her workplace experience, leaving her wanting to avoid LCDR [R] at all costs. LTJG [Applicant] reported these comments to CDR [S] twice, however she never reported them as harassment. (Exhibit 1,8 and 9)
4. On 07 July 2020, LTJG [Applicant] received her final OER from MSU [redacted] with straight fours. She discussed her marks with LCDR [R]. She then spoke to CDR [S], who informed her that the majority of her supporting bullets were from her previous OER and to provide new supporting documentation to LCDR [R] for consideration. LTJG [Applicant] provided additional information to LCDR [R], who informed CDR [S] that based on the supporting documentation, he adjusted Using Resources, Writing, Looking Out for Others, Directing Others, Evaluations, and Responsibility to all reflect a five (5). (Exhibit 5, 9, 11 and Enclosure 1)
5. On 21 January 2021, LTJG [Applicant] forwarded a Reported-On Officer OER Reply Memo to supervisory

chain of command at MSU [redacted], per reference (g). (Enclosure 3)

6. On 29 January 2021, LCDR [R] provided the following written comments in his First Endorsement to LTJG [Applicant]'s memo, "The ROO had a lot occurring in the ROO's personal life and I believe I accommodated it, but the absence from the office meant more work for others meant that the ROO contributed less. The marks take these factors and more into consideration." (Enclosure 3)

7. On 29 January 2021, CDR [S], in his Second Endorsement, concurred with LCDR [R]'s statements and added amplifying information. (Enclosure 3)

8. 11 July 2023, CDR [S] was asked to explain further upon his comment of "The ROO had difficulties in the ROO's personal life and the unit accommodated." He indicated the statement referenced the personal difficulties associated with LTJG [Applicant] being a geo-bachelor, first time pregnancy, and no local family support. When asked to expound, he indicated LCDR [R] and he spoke often on how best to accommodate LTJG [Applicant]'s challenges (first time pregnancy, geo-bachelor with no family support). In doing so, changes to staffing were made to accommodate the increased appointments associated with pregnancy as was maximizing leeway on late arrivals/early departures. The crew did work additionally to cover, however they did so willingly (offering to volunteer to ensure maximized care for LTJG [Applicant]). These movements were done to maximize LTJG [Applicant]'s care and were not factors in her last OER, her marks were performance-based only, as per reference (f). LTJG [Applicant]'s first OER reflected straight fours in her marks due to substandard support material (which consisted of information from her last marking period). After receiving the April 2020 OER, LTJG [Applicant] called LCDR [R] and then CDR [S] to dispute the marks. She provided amplifying information, to which LCDR [R] adjusted those marks appropriately. (Exhibit 9)

9. On 12 July 2023, CDR [M] explained the unit never held time outside of the job as a metric to gauge performance and in the case with LTJG [Applicant], he stated LCDR [R] implied the time away from her job meant she had a compressed timeline to perform her duties and her OER accurately reflected her performance for the time while at work. Doctor appointments or parental leave were not factors reflected in her marks. Rather, his comment was inserted to prove what actions he (and the command) were taking to ensure LTJG [Applicant] received all the time she required to maintain a healthy pregnancy. CDR [M] indicated that he and CAPT [R] reviewed the First and Second Endorsements and never interpreted LCDR [R]'s or CDR [S]'s statements as punitive or harassment of a protected class via reprisal associated with marks. (Exhibit 11)

10. When interviewed on 13 July 2023, LCDR [R] said he could not recall what statements he made in the First Endorsement to LTJG [Applicant]'s Reply to OER. He still failed to recall the statements even after being read to him by the undersigned Investigating Officer. From what he could recall, the marks LTJG [Applicant] had earned were decent and reflected her performance. When asked if the marks considered the additional time away from work for parental leave or doctor's appointments, he stated absolutely not. (Exhibit 12)

11. LTJG [Applicant]'s OER record fluctuated greatly, earning thirteen 4's and five 5's on her first OER, follow-on OER marks were slightly down; fourteen 4's, three 5's and one 6. Her next OER increased with six 4's and twelve 5's as did her next OER with two 4's, eleven 5's and five 6's. Her final (and contested OER) dipped with twelve 4's and six 5's. Every OER had different supervisors and only her first two OERs had the same reporting officer. LTJG [Applicant]'s highest OER contained then LCDR [S] as the supervisor. (Enclosure 1)

Harassment: Intimidation/Bullying

1. Predating the alleged harassment from October 2019 to April 2020, LTJG [Applicant] reported to MSU [redacted] on 01 December 2017 to fulfill the role of an Apprentice Marine Inspector (AMI). During her ten (10) months as an AMI, she claims she experienced harassment, from comments such as "are you on your period" and "would you run in the rain in a white T-shirt" carried out by the Chief Warrant Officers of the Inspections bullpen. The training officers also ran four to five-hour inspections boards with the goal of breaking down the AMI. LTJG [Applicant] did not report these issues to the command as she had previously

experienced a situation as a petty officer when it only created greater difficulties within her work environment after she reported the issues up her chain of command. She indicated she was ostracized and made fun of at the prior unit, thus she chose to not report this behavior. Over this period, LTJG [Applicant's] performance faltered and she failed to gain any inspections qualifications. LTJG [Applicant] indicated she felt belittled during the inspections and just wanted to get out of the situation. She submitted a request to transfer out of inspections into Incident Management Division in October of 2018.

2. In October 2018, LTJG [Applicant] was transferred to the Incident Management Division (IMD) under the supervision of the Planning Chief, LCDR [R]. (Exhibit 1)

3. In November 2018, LTJG [Applicant] was transferred to the Prevention Department, under the supervision of CDR [M]. This move facilitated the fulfillment of the newly created Chief of Waterways Management (WWM) position. It was also believed this would be a better fit for LTJG [Applicant]'s strengths. (Exhibit 1 and 6)

4. During the spring of 2019, Captain [W], Commanding Officer, directed that LCDR [R] be relieved of supervisory duties of the IMD division and solely supervise the Planning Department. He also ordered LCDR [R] to physically relocate his workspace to a location closer to the command. The relief of supervisory duties and the physical move were done in response to complaints that LCDR [R] was harassing the IMD Petty Officers and exercised overall poor leadership. The harassing behavior and poor leadership included microaggressions, such as targeting petty officers (physically cornering them and questioning them if they wrote negative comments within the DEOMI survey about him), telling people "the CO owned the air they breathed (implying they needed to do what he ordered them to do)", "I will take all your pie...and pie is your happiness", and threatening members with negative action against their OERs if they did not follow his orders. These actions were reported to the command by MST1 [G], CWO4 [F] and LT [M] (Incident Management Chief). The command also considered the negative reviews by multiple respondents within the 16 December 2019 DEOMI Organizational Climate Survey DEOCS Report. (Exhibits 1, 5, 6, 7, 10, and Enclosure 6)

5. In June 2019, Captain [W] (Commanding Officer), Commander [B] (Executive Officer) and Commander [M] (Prevention Dept Head) departed. The incoming command consisted of Captain [R] (Commanding Officer), Commander [M] (Executive Officer) and Commander [S] (Prevention Dept Head). (Exhibit 1)

6. Shortly after taking Command, Captain [R] created the MTS team and placed LCDR [R] as the supervisor. The team was composed of LTJG [Applicant], LTJG [V] and LTJG [B] who worked the special projects developed under the MTS. (Exhibits 1, 3, 4, and 8)

7. During a conversation between LTJG [Applicant] and LCDR [R] where LTJG [Applicant] was questioning why LCDR [R] gave credit to someone else, verses LT [Applicant] and LTJG [H], LTJG [Applicant] became frustrated and began to cry after trying to explain that she and LT [H] had completed most of the work. LCDR [R] made the comment, "you need to learn to compartmentalize your feelings." When asked if he ever said this to LTJG [Applicant], with knowledge of her experiencing postpartum depression (PPD), LCDR [R] stated he was never aware of LTJG [Applicant] suffering from PPD and never told her to, "compartmentalize her feelings as it pertains to PPD. That would just be uncaring." (Exhibit 1 and 12)

8. In the fall of 2019, LTJG [Applicant] indicated that she brought LCDR [R]'s behavior issues to the attention of CDR [S] twice but that only resulted in the behavior increasing. (Exhibit 1 and 9)

9. CDR [S] acknowledged LCDR [R]'s challenges and believed they centered around communications. As such, CDR [S] encouraged LTJG [Applicant] to report these instances directly to him vs. confronting LCDR [R] which she did approximately two times. This allowed CDR [S] to better address LCDR [R]'s communications challenges. During those discussions, LTJG [Applicant] never indicated the behavior was harassment, nor did any other crewmember report being or felt like being harassed by LCDR [R]. LTJG [Applicant] did report the bizarre comments made by LCDR [R] such as "go punch yourself in the face" and the negative effect it had upon her and the crew. CDR [S] diagnosed the conflict between LCDR [R] and LTJG [Applicant] as personality and communicative in nature. (Exhibit 1 and 9)

10. CDR [S] counseled LCDR [R] roughly 3-5 times on these issues working to point out his blunt style conflicted with LTJG [Applicant's] desired to know the why behind their work required a different, more in-depth and timely communications technique and was causing friction. CDR [S's] feedback (post-counseling LCDR [R]) from other subordinates who worked for LCDR [R] varied widely, from LTJG [Applicant's] opinion that there had been no improvement to that of other crewmembers stating he genuinely respected the personal and professional needs of his division from other crewmembers. (Exhibit 1 and 9)

11. CDR [S] discussed these personnel challenges surrounding LCDR [R] at length with CDR [M], using the Executive Officer as a sounding board to ensure he was not missing anything when attempting to address the issues between LCDR [R] and LTJG [Applicant]. In each discussion, CDRs [S] and [M] never determined LCDR [R]'s actions as harassing in nature. LTJG [Applicant] ceased reporting the behavior in part due to COVID removing interaction between members as well as to prevent any further escalation. (Exhibit 1 and 9)

12. On 09 April 2020, LTJG [Applicant] executed PCS orders to District 13 earlier than the usual summer rotational season, citing impending COVID lockdowns, a newborn baby/family hardships, and issues with LCDR [R] (harassing behavior that continued/increased when reported). (Exhibit 1)

On February 11, 2024, the applicant was promoted to Lieutenant/O-3.

On February 29, 2024, the Sector Captain (CAPT), CAPT B, issued a memorandum, "Final Notification Memo Regarding Report of Prohibited Harassment," wherein he found that the investigation substantiated the applicant's claims of harassment by LCDR R. Specifically, CAPT B found that LCDR R committed acts of reprisal against people he believed made negative comments about him on the Command Climate Survey that was completed on the unit. In addition, CAPT B stated that LCDR R had committed acts of harassment against the applicant based on her parental status by intentionally citing her absence from the workplace as justification for marks given on the applicant's OER. However, CAPT B was unable to substantiate, by a preponderance of the evidence, whether or not the applicant's claims of harassing behavior by CDR S were substantiated. CAPT B stated that while CDR S did provide an endorsement that concurred with LCDR R's written reply to the applicant's OER reply, it appeared that he made every attempt to stabilize the difficult situation, to include counseling from the chain of command.

VIEWS OF THE COAST GUARD

On April 15, 2024, 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 grant alternate relief in this case.

PSC stated that the applicant requested that her OER for the period ending on April 9, 2020 be corrected as per her appeal. PSC explained that the applicant submitted an OER Reply but then withdrew it on February 10, 2022. PSC stated that the removed OER reply text was provided as part of the BCMR application, but does not specify what corrections the applicant asserts should be made to the affected OER other than the marks of Results and Effectiveness, Adaptability, Speaking and Listening and Developing Others should "be marked higher." PSC argued that the applicant claimed that she was given lower marks on her OER due to her parental leave and PSC agrees with the applicant's contentions.

PSC stated that an investigation determined by a preponderance of the evidence that the applicant was the victim of harassment based on her parental status when her supervisor intentionally cited her absence from the workplace as justification for marks given in an OER and PSC agrees with the finding. PSC further agreed with the applicant that the OER was discriminatory and led to administrative actions and pending separation. PSC stipulated to the fact that the OER was not completed in accordance with policy. However, according to PSC, pursuant to Article 5.E.9 of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3 a Continuity OER may be submitted in cases where full documentation is impractical, impossible to obtain, or does not meet Officer Evaluation System (OES) goals. This Article also states that Commander (CG PSC) may issue a continuity OER in lieu of a biennial, annual, or semiannual OER if the officer was unobserved for the entire period of report (Ch.5.9.E.b), or to implement judicial and administrative adjudications (Ch. 5.E.9.e).

Accordingly, PSC argued that a Continuity OER would be the most appropriate vehicle to implement the corrective action mentioned in MOR D, which was an administrative adjudication of her harassment claims. PSC further argued that due to the substantiated harassing behavior by her Supervisor and his subsequent retirement from the Coast Guard, it is difficult to gauge what the applicant's marks should be on a Regular OER, making her effectively unobserved for the period of report. Therefore, PSC stated that the applicant should also be awarded a Special Selection Board (SSB) to mitigate any injustice she may have suffered before her previous promotion board by having an OER negatively affected by her parental status.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 21, 2014, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. As of the date of this decision no response has been received.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 2120(b) provides the following guidance on Special Selection Boards:

...

(b) Officers considered but not selected; material error.

(1) In general. In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 2106, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that –

(A) an action of the selection board that considered the officer or former officer –

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

(2) Effect of failure to recommend for promotion. If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered –

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

(c) Requirements for special selection boards. Each special selection board convened under this section shall–

(1) be composed in accordance with section 2107 and the members of the board shall be required to swear the oaths described in section 2109;

(2) consider the record of an applicable officer or former officer as that record, if corrected, would have appeared to the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board and that record shall be compared with a sampling of the records of –

(A) those officers of the same grade who were recommended for promotion by such prior selection board; and

(B) those officers of the same grade who were not recommended for promotion by such prior selection board; and

(3) submit to the Secretary a written report in a manner consistent with sections 2117 and 2118.

(d) Appointment of officers recommended for promotion—

(1) In general. An officer or former officer whose name is placed on a promotion list as a result of the recommendation of a special selection board convened under this section shall be appointed, as soon as practicable, to the next higher grade in accordance with the law and policies that would have been applicable to the officer or former officer had the officer or former officer been recommended for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(2) Effect. An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(3) Record correction.--If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer not eligible for promotion or a former officer whose name was referred to the board for consideration, the Secretary may act under section 1552 of title 10 to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from the officer or former officer not being selected for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(e) Application process and time limits. The Secretary shall issue regulations regarding the process by which an officer or former officer may apply to have a matter considered by a special selection board convened under this section, including time limits related to such applications. ...

Article 3 of the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, provides the following guidance on bullying:

3.A.1.c. Bullying. Subjecting an individual military member to harassment or ridicule for the purposes of “exclusion” is prohibited and will not be tolerated. No service member may engage bullying. Its prevention is an all-hands responsibility.

3.A.1.d. Prevention. Hazing and bullying serve no useful purpose and are contrary to our core values of honor, respect, and devotion to duty and have no place in our organization. The demeaning, abusive activities associated with hazing and bullying inhibit performance, debase personal dignity, and can result in serious injury. To prevent hazing and bullying, we must be aware of what constitutes hazing and bullying and understand these activities’ negative impact. Our success as an organization depends on the positive and productive attitude and performance of our people. A healthy, positive, professional work environment is essential to enable all our personnel to contribute to mission success.

...

3.A.1.f. Investigations and Administrative/Disciplinary Action. The Coast Guard has no place for dehumanizing treatment. Commands must investigate any hazing or bullying incident and initiate appropriate administrative or disciplinary action against the perpetrators and those in the chain of command who are determined to have tacitly condoned such practices, either by inaction or neglecting to investigate reported incidents.

...

3.B.3. Definition of Bullying. Bullying is abusive conduct by a military member or members which harms a military member or any other persons, either physically or psychologically, without a proper military or other governmental purpose and with intent to exclude the member. Bullying is threatening, humiliating, or intimidating. Bullying can also be work interference, undermining performance, or verbal abuse. Individuals are often targeted because they may be perceived to be weak, different, or pose a threat to the bully. Bullying may also be described as psychological abuse, psychological harassment, ‘status-blind’ harassment, and mobbing. It often involves an imbalance of power between the aggressor and the victim. Bullying includes, but is not limited to:

...

2. Intimidating,
3. Teasing,
4. Taunting,
5. Oral or written berating of another for the purpose of belittling or humiliating,

...

10. Degrading or damaging the person or his or her property or reputation.

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (September 2013), provides the following guidance on the Officer Evaluation System (OES):

Article 5.B.5. For this Chapter, commanding officers include area and district commanders, commanders of logistics/service centers, commanding officers of Headquarters units and subordinate units or organizations, and cutters. Commanding officers must:

- a. Ensure accurate, fair, and objective evaluations are provided to all officers under their command. In using the OER, strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

...

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 her 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 application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. 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.⁴

4. The applicant alleged that she was subjected to a harassing work environment by her supervisor, LCDR R, who ultimately used her OER for the October 1, 2019 through April 9, 2020 rating period to retaliate against her for being on bedrest during the last month of her pregnancy and then taking her parental leave after she gave birth. 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.⁵ 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.⁶ To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in

⁴ *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).

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.⁷

5. October 1, 2019 through April 9, 2020 OER. The applicant has alleged that not only was she subjected to a hostile work environment by her supervisor, LCDR R, but LCDR R used her OER to retaliate against her for taking parental leave after having a baby. The Board’s review of the record shows that the applicant filed a complaint of harassment on June 13, 2023 wherein she reported LCDR R’s harassment. A review of the record further shows that following the investigation CAPT B issued a memorandum wherein he substantiated the applicant’s claims of harassment. Specifically, CAPT B stated that LCDR B, “committed an act of harassment against you based on your parental status by intentionally citing your absence from the workplace as justification for marks given in an Officer Evaluation Report (OER).”

The Coast Guard stipulated to the applicant’s allegations and acknowledged that the contested OER was not completed in accordance with Coast Guard policy. LCDR R and the applicant’s reporting officer, CDR S, submitted sworn declarations in response to the applicant’s Reply to her OER, wherein they stood by the evaluation marks given to the applicant on the contested OER. CDR S stated, “I will add this member exhibited traits of failing to adjust to performing as an officer while assigned to MSU [redacted]. That failure occurred under the previous CO, XO, and Prevention Department Head.” CDR R’s comments are a direct contradiction to his comments made on the applicant’s OER, wherein he stated, “Well deserving of recent selection to LTJG. Member demonstrates the ability to take on increased roles and responsibilities. Team player; driven and motivating leader who regularly exhibits an upbeat and positive attitude. Commendable performer; demonstrated continuous growth in technical, managerial, and operational expertise. Embraced increased leadership role within the newly formed MTS division.” Given the contradiction in his sworn statement and his statements contained in the applicant’s OER, the Board finds CDR S’s statements unpersuasive and unsupported by the records and facts in this case.

As stated above, 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.⁸ Here, the applicant has established that her rating chain used “factors which had no business being in the rating process” when it used her bedrest and parental leave as factors in evaluating her performance. The evidence also suggests that the applicant’s supervisor may have also used the applicant’s OER as a means of retaliation for her speaking out during a Command Climate Survey. In any event, the applicant’s supervisor violated Coast Guard policy when he failed to provide the applicant with fair and accurate ratings based solely on her performance and nothing else. For those reasons, the Board finds that the applicant has proven, by a preponderance of the evidence that her OER for the October 1, 2019 through April 9, 2020 rating period was erroneous and unjust. Accordingly, the Coast Guard should remove the contested OER and replace

⁷ *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).

⁸ *Id.*

it with a Continuity OER. The Coast Guard should also convene a Special Selection Board for every Lieutenant selection board that reviewed the applicant's record with the contested OER and failed to select her for promotion. If the Special Selection Board selects the applicant for promotion to Lieutenant, the Coast Guard should backdate the applicant's date of rank in connection with that specific Special Selection Board and reimburse her for all backpay and allowances that flow from this correction. However, if all of the Special Selection Boards fail to select the applicant for promotion to LT, no further action is required from the Coast Guard.

6. For the reasons outlined above, the applicant has 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.⁹ She has proven, by a preponderance of the evidence, that her October 1, 2019 through April 9, 2020 OER was infected by factors that had no business being in the rating process, specifically, her bedrest and parental leave. Therefore, the Coast Guard should provide the relief as outlined in the Order Page.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁹ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of [REDACTED], USCG, for the correction of her military record is granted. The Coast Guard shall —

- Remove the applicant’s October 1, 2019 through April 9, 2020 OER and replace it with a Continuity OER.
- Once the derogatory OER has been replaced with a Continuity OER, convene Special Selection Boards for all Lieutenant boards that reviewed the applicant’s record with the erroneous and unjust OER. If the applicant is selected for promotion to Lieutenant by any one of the Special Selection Boards, backdate the applicant’s date of rank in accordance with the Special Selection Board and provide her with all backpay and allowances that flow from that correction. If none of the Special Selection Boards select the applicant for promotion the Coast Guard does not need to take any further action.

October 17, 2024

