


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-083


MSTC/E-7 (Retired)
Chief Warrant Officer (CWO-2)(Former)

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 August 24, 2022 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 3, 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 former Chief Warrant Officer (CWO-2) who was twice passed over for promotion to CWO-3 and subsequently took a demotion to Chief Marine Scientist Technician (MSTC/E-7) so that she could achieve twenty years of service and retire, asked the Board to correct her record by removing her Officer Evaluation Reports (OER) for the July 1, 2014 through June 30, 2015 and July 1, 2015 through May 13, 2016 rating periods. The applicant further requested that she be promoted to CWO-3 or be given Special Selection Boards to review her record absent the erroneous and unjust OERs, that her date of rank be backdated to the date she would have promoted absent these errors, and that she be awarded all backpay and allowances that flow from these corrections.

A summary of the applicant's allegations are provided below the Summary of the Record.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 15, 2001 where she trained as a Marine Scientist Technician (MST) and advanced to MSTC on December 1, 2011.

On June 1, 2013, the applicant was commissioned a CWO-2 after which she began to train as a Marine Inspector.

On July 31, 2013, the Chief of the Inspections Division issued the applicant a memorandum wherein he laid out his qualification expectations for the applicant. The applicant was informed that she had until February 1, 2014 to pass her Port State Control Examiner (PSCE) and Foreign Freight Vessel Examiner (FFVE) qualifications and until August 1, 2014 to pass her Foreign Tank Vessel Examiner (FTVE) and Foreign Chemical Tanker Examiner (FCTE) qualifications.

On April 1, 2014, the applicant was notified by the Sector Commander, Captain (CAPT) M, that she had completed all training requirements necessary to perform the duties of a Port State Control Examiner.

On August 20, 2015, the applicant received her annual OER for the July 1, 2014 through June 30, 2015 rating period wherein she received three marks of 4 (out of a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), thirteen marks of 5, and one mark of 6. The applicant also received a mark of 5 (“One of the many high performing officers who form the majority of this grade”) out of 7 on the Comparison Scale.

On June 13, 2016, the applicant received her annual OER for the July 1, 2015 through May 13, 2016 rating period wherein she received three marks of 4, eleven marks of 5, and four marks 6. The applicant also received a mark of 5 out of 7 on the Comparison Scale.

On August 28, 2018, the applicant initiated an official complaint with the Office of the Inspector General (OIG) who transferred the complaint to the Coast Guard for investigation.

On December 6, 2018, the applicant’s previous sector’s Commander issued a memorandum wherein he appointed a single Investigating Officer (IO) to investigate allegations of non-criminal misconduct and abuse of authority. The IO was instructed to complete his investigation and final report before December 21, 2018.

On December 11, 2018, the IO submitted his final report of investigation and provided the following “Findings of Fact,” “Opinions,” and “Recommendations:”¹

FINDINGS OF FACT

1. On Friday, 28 August 2018, MSTC [Applicant] filed a complaint Sector [redacted]. The abuse of authority is alleged to have occurred in June 2016, as Mr. [C], a member outside of MSTC [Applicant’s] published rating chain, was believed by MSTC [Applicant] to have improperly reviewed her Officer Evaluation Report (OER) for Chief Warrant Officer (W2) (Exhibits (1) and (2)).

2. Mr. [C] was invited by CDR [redacted] Prevention Department Head (PDH), to sit with him and LCDR [redacted] Chief of the Inspections Division (CID), to verify qualifications claims made by all marine inspections officers, and to advise on how the timelines of the inspector’s qualifications aligned with the expectations letters Mr. [C] provided them on CDR [redacted] behalf. Mr. [C] provided this type of input for MSTC [Applicant’s] qualification timelines, and claims to have had no review or further involvement in the OER process. CDR [redacted] and LCDR [redacted] also attested that Mr. [C] had no further involvement in the OER process [Exhibits (1)-(5)].

¹ The Coast Guard did not provide the Board with an unredacted copy of the investigation so it was not clear which members of the chain of command the investigation was referencing.

3. On Friday, 28 August 2018, MSTC [Applicant] filed a complaint alleging Mr. [C] treated female members, specifically enlisted, prior enlisted, and MARGRAD unfairly [Exhibits (1) and (2)].
4. CDR [redacted] advised that he had previously counseled Mr. [C] on his treatment of MSTG [Applicant] as he believed Mr. [C] did treat female inspectors differently. CDR [redacted] specifically recalled an incident in which Mr. [C] would not allow MSTC [Applicant] to attend a seasonal inspection necessary for her T-boat qualification, which CDR [redacted] counseled him on and overruled his decision. LT [redacted], a Marine Inspector, advised that she observed that Mr. [C] required CWO [redacted] to complete additional steps to obtain her Hull qualification not required of the Lieutenants (irrespective of gender) in the division. LT [redacted], a Marine Inspector, advised that she was told by Mr. [C] that she wouldn't be allowed to receive a qualification due to the PDH not wishing to sign off on a qualification for a departing member. She advised that she was later allowed to receive the qualification when she made the CID aware, and that the implication was that the discussion about the PDH not wishing to sign off on the letter was not true. LTJG [redacted], a marine inspector, advised that she was removed from inspections on the calendar, and felt that Mr. [C] would not allow her on inspections after it was learned that she was seeking (undisclosed to him) medical treatment. Multiple members also indicated that Mr. [C] appeared to treat members differently if he favored them, or if they were not on his "good side." [Exhibits (2)-(15)].
5. On Friday, 28 August 2018, MSTC [Applicant] filed a complaint alleging Mr. [C] made comments which she believed indicated that he might attempt to contact the prevention assignment officer to relay negative information about LT [redacted] potentially impacting her future assignment. MSTC [Applicant] also alleged that Mr. [C] inappropriately attempted to access LT [redacted] medical records [Exhibits (1) and (2)].
6. There was no direct claim by Mr. [C] that he intended to or attempted to contact LT [redacted] assignment officer to relay negative information impacting her future assignment. There was no explicit communication to MSTC [Applicant] indicating that Mr. [C's] alleged comments were directed towards LT [redacted] or MSTC [Applicant]. It was alleged in an interview with LT [redacted] and again by LCDR [redacted] that Mr. [C] may have called Sector [redacted] to discuss negative information about LT [redacted]. These allegations did not involve MSTC [Applicant] or LT [redacted] and there was no person identified at Sector [redacted] to corroborate LT [redacted] or LCDR [redacted] claims. It was determined that Mr. [C] did not attempt to access LT [redacted] medical record, but that he did speak with HS1 [redacted] about LT [redacted] duty status which is authorized to supervisors and appropriate personnel, which in this case was Mr. [C] for the purpose of scheduling inspections [Exhibits (1), (2), (8), (10), (13), (14), and (16)].
7. On Friday, 28 August 2018, MSTC [Applicant] filed a complaint alleging Mr. [C] improperly withheld her qualification letter designating her a qualified T-boat inspector. She stated that she contacted Mr. [C] about the absence of her letter and further alleged that on 12 August 2016, Mr. [C] contacted CDR [redacted] to advise that MSTC [Applicant] was not a qualified T-boat inspector, two months after her qualification letter was signed [Exhibits (1) and (2)].
8. MSTC [Applicant's] T-boat qualification was confirmed to be documented in Direct Access, but Mr. [C] advised that he never entered the qualification into Direct Access or the Training Management Tool. Mr. [C] did not receive definitive word that the follow up actions that were stipulated after MSTC [Applicant's] qualification board were met, or that her outstanding casework had been completed. Withholding a certification until follow-up actions are completed is a common practice, though withholding a letter due to a backlog of casework is atypical, as it is common for inspectors to have a backlog of casework. Mr. [C] never provided a signed letter to MSTC [Applicant] or to Sector [redacted] to be entered into Direct Access or Training Management Tool. The letter was provided to MSTC [Applicant] by CWO [redacted] who advised she found it on a communal officer scanner. This type of poor documentation and handling of an initial qualification is not common [Exhibits (2)-(6), and (15)].

OPINIONS

1. There is insufficient evidence to suggest that [Mr. C] abused his authority by providing improper OER

input on MSTC [Applicant's] qualifications and expectations timeline. All input Mr. [C] provided was given after being requested by CDR [C] LCDR [redacted] both of whom were in her OER rating chain, and both of whom had the authority to craft MSTC [Applicant's OER Per CDR [C] LCDR [redacted] and Mr. [C]. Mr. [C] provided qualified input and did not review MSTC [Applicant's] OER [Findings (1) and(2)].

2. There is sufficient evidence to determine that Mr.[C] treated MSTC [Applicant] differently than other Marine Inspectors, specifically in the case of his restricting her ability to go out on seasonal inspections. This treatment was observed and confirmed to have occurred by CDR [C] and it is this officer's opinion that this treatment constitutes bullying in the workplace per reference (d). In this instruction, bullying is prohibited, and defined as follows: "Subjecting an individual military member to harassment or ridicule for the purposes of "exclusion" is prohibited and will not be tolerated" [Findings (3) and (4)].

3. There is sufficient evidence through numerous officers' accounts to suggest that Mr. [C] may have more broadly engaged in disparate treatment of female members of the inspections division. All instances of disparate treatment alleged during this investigation involved female members, and consulting with the CDR [C] and LCDR [redacted] there are no known male members that experienced disparate treatment during the timeframe of alleged mistreatment. It is this officer's opinion that this disparate treatment constituted bias, and is indicative of systematic disparate treatment and exclusion of female members in the workplace. Discrimination predicated on the basis of sex is counter to the Coast Guard's stated core values, and unacceptable behavior in the workplace per reference (c) [Findings (3) and (4)].

4. There is sufficient evidence through numerous officers' accounts to suggest Mr. [C] treated those he favored better than those he did not. It is this officer's opinion that this treatment constituted bias, and is indicative of systematic exclusion in the workplace, and counter to the Coast Guard's stated core. Values and unacceptable behavior in the workplace [Findings (3) and (4)].

5. There is insufficient evidence to suggest that Mr. [C] threatened to or attempted to contact MSTC [Applicant] or LT [redacted] assignment officers to relay negative information, and affect their future assignments. Though it was mentioned that Mr. [C] may have claimed to have done this in the past, there was no direct mention of his intention to do this to LT [redacted] or MSTC [Applicant]. There is allegation that he contacted Sector [redacted] to pass negative information about LT [redacted] but this was not corroborated by anyone at Sector [redacted], and the mention did not directly pertain to LT [redacted] and MSTC [Applicant], their new commands, or their assignment officers [Findings (5) and (6)].

6. There is insufficient evidence to suggest that Mr. [C] called CDR [C] to tell him that MSTC [Applicant] should not be conducting inspections at Sector [redacted]. CDR [C] advised that he recalled initiating a call to Mr. [C]. He stated that the two spoke about follow-up board actions and incomplete casework assigned to MSTC [Applicant] while she was assigned to Sector [redacted]. CDR [C] advised Mr. [C] that MSTC [Applicant] was on an extended absence at the time of the call, and that he would follow-up with her upon her return. Mr. [C] later called back and further advised CDR [C] that MSTC [Applicant] was listed as qualified in Direct Access, though he informed CDR [C] that he had never presented her the qualification letter or entered it into Direct Access or Training Management Tool himself due to the previously discussed outstanding board actions and casework [Findings (7) and (8)].

7. There is insufficient evidence to suggest that Mr. [C] maliciously withheld MSTC [Applicant's] qualification letter, as it was stated that the letter was withheld due to outstanding board follow-up and casework which were never formally documented or verified as having been completed. This combination of follow-up board actions and casework makes it difficult to determine if the letter was withheld due to retaliation by Mr. [C], poor communication of expectations by the qualification board, or a lack of follow-up by MSTC [Applicant] [Findings (7) and (8)].

RECOMMENDATIONS

1. Having explored all elements of the complaint lodged in the OIG referral, I recommend that Mr. [C] formally counseled and reprimanded on his treatment of Marine Inspector Trainees. Specifically, he should be advised that his treatment of MSTC [Applicant] was improper, and though the policy did not exist at the

time of the incident, constituted bullying under current policy per reference (d). He should also be advised that the allegations of disparate treatment of female members of the inspections division are troubling, and constituted bias on the basis of sex per reference (d). He should further be advised that any future complaints of this nature may result in further investigation, administrative action, and/or punitive action [Opinions (1)-(5)].

2. I recommend that a standard process be established in the Prevention Department to formally document the follow-up board actions members are expected to complete in the event that a qualification is not issued upon the conclusion of a qualification board. This documentation should be written in memo format, indicating actions to be taken by the board participant, and a timeline for completion of those actions. This memo should be signed by the board president, and routed through the Prevention Department head to the member that sat for the board. Once signed, this memo should be captured in the member's training record to be called upon if future questions or concerns arise [Opinions (6) and (7)].

Following the applicant's time at the troubled unit she went on to be twice non-selected for promotion to CWO-3. Her second non-selection took place just shy of the applicant reaching seventeen years of service. In order to secure her ability to retire, the applicant took a reduction in rate to E-7 and retired with twenty years of service on September 1, 2021 as an E-7.

APPLICANT'S ALLEGATIONS

Marine Inspector Training Officer

The applicant explained that all training for marine inspectors at the unit was generally overseen and controlled by a civilian Marine Inspector Training Officer (MITO), Mr. C, who controlled the ability of training officers to gain qualifications or certifications necessary to advance in rank and also maintained the applicant's training folder. The applicant claimed that one of her unit member observed that "Mr. [C] had a lot of power as the Training Officer," while another unit member observed that "Mr. [C] liked to share his opinion about the performance of inspections personnel, and that at times, it appeared he had an outsized influence, almost as if he ran the department." The applicant stated that with respect to her PSCE and FFVE, as of January 15, 2014, she had "taken all steps for qualification within her perview [sic]" according to her training mentor. Supported by her PSC officer course scheduled for mid-February with a March 7, 2014 completion date. She noted that she completed the oral board as scheduled on February 14, 2014.

The applicant contended that despite her favorable first OER, there were deep command climate problems within her sector, driven primarily by Mr. C's conduct, which would be substantiated by an independent investigation. According to the applicant, the investigation revealed that Mr. C routinely "engaged in disparate treatment of female officers in the inspections division." Such mistreatment included: forcing a female officer to complete additional qualification steps he did not require of other officers; wrongfully withholding a qualification of another female officer and engaging in hostility toward the officer thereafter; removing a female officer from the inspections calendar after learning she was seeking medical treatment; and generally playing favorites with various unit members. The applicant stated that Mr. C's conduct was significant enough that CDR Dennis Miller, then Prevention Department Head, felt compelled to "remind Mr. C of generational changes, and that it was important for him to not allow his personal opinions to affect professional decisions."

The applicant alleged that she bore the brunt of Mr. C's bullying. She claimed that Mr. C restricted her ability to go out on seasonal inspections necessary for her qualifications and despite being a civilian and outside of her rating chain, Mr. C played a significant role in the contents and markings in her OERs. The applicant stated that as later substantiated by the investigation, LCDR C and CDR M invited him "to provide input into the training and qualifications timelines that members were on, and whether they were failing, meeting or exceeding the set qualifications." The applicant stated that LCDR C explained that Mr. C was "included ... to verify OER training and qualifications expectations, and to ensure equity of claims." During the same investigation LT R, who was the applicant's supervisor for a portion of her time at sector, detailed a more significant role for Mr. C. LT R explained that:

OERs were given to an individual who did not draft or sign the OER [(Mr. C)]. Then the discussion would go "round robin" reading the mark associated [with] the write up to ensure one person was not being marked high/low relative to the marks and work effort of others being marked at the same pay grade. *Mr. C often had a lot of opinions in this meeting and could easily influence the marks even though he was not in the rating chain.* (Emphasis added by Applicant.)

The applicant noted that LT R opined that the process was sometimes unfair to the individual because input was often based purely on Mr. C's opinion of the individual since the actual rating-chain members did not observe the individuals themselves. The applicant claimed that LT R expressed concern that Mr. C's involvement in the OER process "gave an opportunity for those not involved in the rating chain to have an impact on the officer's career." The applicant pointed to another division member, LCDR W, who attested to the poor command climate and Mr. C's central role. LCDR Wallace described Mr. C as "often ... the most vocal and prominent component of the division. He oversaw and managed the division's daily routine." The applicant explained that LCDR W stated that there was "an in-crowd and an out-crowd with respect to the treatment from [Mr. C] and senior staff." She continued to state:

I witnessed the ill treatment of other members within the division when they were not accepted by [Mr. C]...The complaints from the Training Officer regarding some of these out-crowd men could only go so far. The women, however, often did not have such allies and their OERs were not rescued from the perceptions of the Training Officer. Qualifications were withheld for trivial reasons even after successful completion of oral boards. Qualifications in the Inspections Division are a key element to evaluations and are the foundation of a well-written OER, and subsequent ability to promote.

The applicant stated that during the July 1, 2015 through May 13, 2016 rating period she was working to acquire a T-Boat inspection (TI) qualification. She explained that as with every qualification, becoming a qualified TI was essential to her professional advancement, including the ability to contribute to future assignments, OER quality, and promotion. Her OER reflected that she had "[o]btained T-Boat Inspector...qual." The applicant claimed that she initially did not pass her first TI board, in large part due to the impacts of a high-risk pregnancy, but she passed her second board on or around May 6, 2016, although she still required "deliverables." Specifically, the deliverables entailed reaching out to Marine Inspector Mr. C for her outstanding Marine Information for Safety and Law Enforcement (MISLE) cases. Mr. C, however, had a considerable backlog. The applicant explained that she departed from the troubled unit on May 13, 2016 to report to a new sector and when she transferred in May 2016, she was immediately expected to conduct inspections but Mr. C had refused to issue her TI qualification letter, so she was not able to do so, which consequently forced other members of the unit to perform extra duties.

The applicant alleged that in June 2016 she relayed her concerns to CWO S, who was still stationed at the troubled unit, and the applicant was told that her TI qualification letter had not been signed but when CWO S went looking through the shared public folder that contained scanned documents, she discovered the letter had been signed. CWO S sent the applicant an electronic copy of the letter “so she knew to expect the hard copy.” The applicant stated that evidently after her command inquired about the letter and after Mr. C had discovered the letter was entered into direct access, Mr. C deliberately held up filing the letter and called CWO S into his office insinuating that she had gone through his files. The applicant alleged that Mr. C also confronted CWO S in August 2016 and insinuated that he believed CWO S had looked through his office files when she had not. The applicant claimed that Mr. C claimed that “cases were left open upon her departure” which, as noted above, were due to a casework backlog on the other Mr. C’s desk. The applicant stated that as the investigation would later confirm, however, “withholding a letter due to a backlog of casework is atypical, as it is common for inspectors to have a backlog of casework.” The applicant stated that according to CWO S, “To my knowledge, this was a rule applied specifically to [Applicant] and not universally true. I was never required to complete casework prior to receiving an inspections qualification.”

2015 OER

Through counsel, the applicant alleged that her 2015 OER was lethal to her career. She claimed that the OER contained obvious downgrades in several competency categories from the previous OER that rendered it mediocre. The applicant stated that after she failed selection, she was told that the 2015 OER would be a “point of contention” and she ended up not being selected for promotion in 2016. The applicant contended that given her otherwise strong performance, all competent evidence suggests that her OER was a primary reason for her non-selection. The applicant cited to Article 5.A.2.c. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, which states, “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” The applicant argued that for several reasons there is a substantial question as to whether she received a fair, accurate evaluation the system is designed and required to provide.

First, the applicant alleged that the OER erroneously indicated that LT G was her supervisor, but as the rating chain of her unit indicates, LT G was not her supervisor for the marking period, nor was LT G in her rating chain during that marking period. The applicant stated that her supervisor was listed as LT F.

Next, the applicant’s 2015 OER was tainted by Mr. C’s involvement in the OER drafting process and an overall toxic command climate. As detailed in previous parts of the decision, the applicant explained that an independent investigation substantiated numerous instances of Mr. C engaging in bullying and discriminatory behavior, particularly toward female inspectors within her Sector, and specifically toward her. The applicant stated that witnesses testified that Mr. C treated certain Sector members differently, “targeted” certain members, and acted with hostility to at least one member who rightfully challenged his behavior. The applicant claimed that Mr. C’s behavior was so severe that a Commander (CDR), CDR M, counseled him on his treatment of the applicant because “he believed Mr. [C] did treat female inspectors differently.” The applicant

contended that evidence demonstrates that Mr. C targeted and bullied the applicant specifically, restricting her ability to gain qualifications, deliberately withholding her T-Boat qualification letter and generally engaging in a pattern of bias and systematic exclusion that was also at variance with Coast Guard core values and “unacceptable behavior in the workplace.”

The applicant further contended that given Mr. C’s conduct, his integral role in her OER drafting process casts substantial doubt on its fairness, accuracy, and objectivity. Although the investigation claimed the evidence did not substantiate that Mr. C provided improper input on her OER, the applicant alleged that the investigation’s reasoning is faulty because it does not properly account for the degree to which Mr. C was involved in key aspects of the OER drafting process. The applicant claimed that there is no dispute that, despite being a civilian and not in anyone’s rating chain, Mr. C’s input was considered during the OER drafting process. The applicant stated that the fact that Mr. C was not formally in her rating chain and did not actually sign the applicant’s OER, does not necessarily mean that her ratings were not the product of Mr. C’s improper involvement. The applicant contended, on the contrary, the evidence shows that one member observed that “Mr. C liked to share his opinion about the performance of inspections personnel, and that at times, it appeared he had an outsized influence, almost as if he ran the department.” The applicant noted that LT R, who was not interviewed during the investigation, notes that Mr. C was part of the OER drafting process and “often had a lot of opinions in this meeting and *could easily influence the marks even though he was not in the rating chain.*” (Emphasis added by Applicant.)

The applicant stated that LT R claimed that Mr. C played a significant role in the contents of OERs because certain input was based purely on Mr. C’s opinion of the individual because the rating chain members did not observe the individuals themselves. The applicant alleged that because LT G, who fulfilled the duties of the applicant’s supervisor for the purposes of the OER, was not in the applicant’s rating chain nor was LT G her direct supervisor so there was a significant likelihood her assessment of the applicant’s performance was negatively influenced by Mr. C.

Next, the applicant alleged that the recent investigation findings reveal that LCDR C, the listed reporting officer on the OER, likely was biased against the applicant or was otherwise misinformed about key aspects of the applicant’s performance. The applicant stated that in LCDR C’s interview, he referred to the applicant derogatorily as a “boot” warrant officer, although she was not. He further viewed the applicant as a “very junior” officer who “didn’t have many qualifications” and “had trouble meeting...expectations.” The applicant contended that the evidence contradicts LCDR C’s claims. The applicant claimed that she met all of the expectations regarding her PSCE and FFVE qualifications, which she completed and became qualified on April 1, 2014, which was the rating period before the 2015 OER. The applicant explained that she was in substantial compliance with the expectations because she completed her qualifications and all other necessary items, within 6 months. The applicant argued that clearly, LCDR C’s unfounded negative view of her performance, whether the product of Mr. C’s improper influence, the overall command climate, or LCDR C’s animus, it is unfair and casts substantial doubt on the fairness of her 2015 OER and therefore relief is warranted in her case.

2016 OER

The applicant contended that her 2016 OER is similar unjust because it too was the product of a command climate and OER process that was tainted by Mr. C's improper involvement. The applicant stated that much like her 2015 OER, the 2016 OER is mediocre and nearly all the previously downgraded competencies remained unchanged. However, it too is tainted because it is the product of an OER process that was influenced by Mr. C, who was not in her rating chain and was found to have bullied and disparately treated the applicant.

The applicant alleged that the 2016 OER contains inaccurate, prejudicial commentary that undermines its overall fairness. For example, the applicant explained that the 2016 OER states that she "co-led 45+ pax vsl insps as break-in during 4 mo period." The applicant alleged that the phrase "co-led" is effectively derogatory because it implies a lack of competence in the described task. The applicant stated that all beak-ins are co-led inspections as part of becoming competent to lead but including such a statement only serves to give the readers of the OER a negative impression of the applicant's performance. The applicant alleged that such commentary does not appear to be common as evidenced by the fact that the applicant went through a break-in period during the 2013-2014 rating period yet her OER did not contain any "co-led" reference because it is not a positive remark. The applicant claimed that the fact that the remark was included in her 2016 OER is problematic, especially considering the context of a poor command climate and Mr. C's behavior. The applicant contended that considering the circumstances, the Board has ample justification to remove the 2016 OER and grant additional relief.

To support her application, the applicant submitted multiple personal statements in support of her application for relief. These letters confirmed the difficult situation the applicant was forced to train under, including the disparate treatment from not just Mr. C, but the chain of command in general. These letters spoke of the applicant's work ethic and dedication. They also highlighted the poor command climate and the special treatment some individuals in the "in crowd" received.

VIEWS OF THE COAST GUARD

On March 28, 2023, 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.

2015 OER

The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for correction or removal for the OER for the July 1, 2014 through June 30, 2015 rating period. The JAG argued that as outlined in *Hary v. United States*,² the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The applicant must demonstrate, by competent evidence that 1) a misstatement of a significant hard fact, (2) a clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.

² *Hary v. United States*, 223 Cl. Ct. 10, 18,618 F.2d. 704, 708 (1981).

The JAG argued that here the applicant implicated the first *Hary* factor when she alleged an erroneous misstatement within the 2015 OER claiming that the supervisor listed was erroneous. However, the JAG claimed that the applicant failed to sufficiently prove that the supervisor listed on the OER is a misstatement. The JAG stated that as seen in the supervisor's declaration, the supervisor listed on the OER was properly filling that role during the marking period, albeit at the end. The JAG contended that although another supervisor oversaw the applicant for a majority of the rating period, policy did not require that supervisor to be listed on the OER. The JAG explained that the supervisor listed on the OER was able to obtain all necessary information about the applicant's performance throughout the period in order to accurately complete the OER. The JAG noted that the applicant did not take certain key steps afforded by policy to officers to challenge comments or marks contained within an OER. The JAG contended that the applicant did not utilize the procedures to submit an OER Reply, nor did she submit a timely application to the Personnel Records Review Board (PRRB). The JAG explained that the PRRB is an avenue for members to seek correction of entries in their service record. Consequently, the applicant has failed to prove an erroneous misstatement of fact within the 2015 OER.

Next, the JAG stated that the applicant implicated the second *Hary* factor for her 2015 OER, but she failed to sufficiently support it. The JAG explained that the applicant alleged that the command violated policy contained in Article 5.A.2.c. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, Article 5.A.2.c., because the command failed to insure a fair and accurate OER and a civilian training officer improperly influenced her evaluation. However, the JAG argued that the applicant also expressly acknowledged that the investigation, upon which the applicant relies, does not substantiate that the civilian training officer improperly influenced her OER. The JAG stated that additionally, the investigation discussed actions during the period covered in the 2016 OER, not the 2015 OER. According to the JAG, relevant to this evaluation, the applicant's supervisor acknowledged that all policies were properly followed, and the reporting officer declared that the evaluation was accurate as written.

Regarding the third *Hary* factor, the JAG stated that the applicant implicated the third *Hary* prong by alleging her OER involved factors that adversely affected her rating which had no business being in the rating process. The JAG explained that case law is relatively sparse on enumerating what particular "factors" count for purposes of this prong; however, at least one case has stated that bias and personal animosity are such factors. In this instance, the JAG stated that the applicant alleged the reporting officer was biased against her, however, the applicant failed to sufficiently support these allegations. The JAG stated that while the applicant may disagree with how the reporting officer described her experience and efforts, these do not rise to bias on the part of the reporting officer. The JAG argued that the investigation that the applicant uses as evidence does not substantiate any bias on the part of the reporting officer or any member of her rating chain involved in writing her OER. Accordingly, the JAG contended that the applicant failed to prove that her 2015 OER was the product of bias or that there were any factors which had no business being in the rating process.

2016 OER

Unlike the applicant's 2015 OER, the JAG argued that the applicant did provide sufficient

evidence to meet the standard to have her 2016 OER corrected or removed. However, the JAG contended that the applicant failed to provide sufficient evidence to invoke the first *Hary* standard. The JAG stated that although the applicant alleged that the 2016 OER contained inaccurate commentary through the use of the term “co-led” because the use of the phrase was inaccurate and derogatory and implied a lack of competence, the applicant’s derogatory view is the applicant’s subjective interpretation. The JAG argued that a logical alternative interpretation of the use of “co-led,” is that the rating chain attempted to positively highlight the applicant’s actions by emphasizing her leadership role even though she was in a “break-in” status. The JAG stated based on this the applicant failed to prove any erroneous misstatements in the 2016 OER.

The JAG explained that although the applicant failed to support the first *Hary* factor, the second *Hary* factor is successfully supported for the applicant’s 2016 OER. The JAG further explained that similar to the 2015 OER, the applicant claimed that bias from the civilian training officer and evaluation processes unfairly influenced her 2016 OER. However, the JAG stated that in contrast to the 2015 OER, where this argument was unpersuasive because the rating chain specifically noted that all policies and procedures were followed, here, the rating chain conceded that the evaluation was unjustly and unfairly influenced by the processes in place. The JAG contended that although the investigation did not substantiate that the claim that the civilian training officer improperly influenced senior members of the rating chain; the supervisor—a junior member in the rating chain of the contested OER—stated differently.

The JAG explained that the supervisor acknowledged that including the civilian training officer within the rating process, at least during his tenure as the applicant’s supervisor, negatively affected his ability to accurately mark the applicant. Specifically, the applicant’s supervisor stated, “It was always stressed that the supervisor had final say on how the individual was marked but if the supervisor was not willing to defend a member’s performance out of fear or lack of confidence the officer’s evaluations could suffer.” The JAG noted that the supervisor also stated that the evaluation processes in place, which included the biased civilian training officer, had an effect on the supervisor’s ability to provide accurate marks and the reporting officer also agreed with the Supervisor’s declaration.

The JAG explained that it is the supervisor’s and reporting officer’s responsibility to accurately assess and report on the applicant’s performance, but in this case, the supervisor was seemingly unable to provide marks which he thought the applicant should have received either due to fear or lack of confidence. Therefore, the JAG argued, the supervisor was unable to accurately rate the applicant’s performance and qualities in accordance with requirements in Officer Evaluation Systems Program Manual, PSCINST M 1611.1. Consequently, the JAG stated that there is satisfactory evidence that the supervisor did not properly fulfill the requirements set out within policy.

In regard to the third *Hary* prong, the JAG argued that similar to the 2015 OER, the applicant failed to provide sufficient evidence that anyone within the applicant’s rating chain had any bias or personal animosity toward the applicant. However, the JAG stated that because the applicant has proven that at least one of the *Hary* prongs has been offended, the applicant has sufficiently demonstrated error in her 2016 OER. Despite this, the JAG contended that the applicant’s requested relief, to remove the OER entirely, is inappropriate and would result in a gap

in the applicant's service record because the applicant does not qualify for a continuity OER. The JAG contended that the appropriate relief is not removal of the OER, but amending the OER.

Special Selection Board

The JAG argued that although the Secretary of the Department of Homeland Security has the authority to convene a Special Selection Board (SSB) pursuant to 14 U.S.C. § 2120, this statute is only applicable to selection boards originally convened under 14 U.S.C. § 2106, which are selection boards for an officer in the rank of Lieutenant Junior Grade (LTJG) through Captain (CAPT). The JAG explained that 14 U.S.C. § 2120 does not provide the Secretary with the authority to conduct a SSB for Chief Warrant Officers. The JAG stated that the Coast Guard is not aware of any statutory authority to convene a SSB for the applicant and her request for a SSB should be denied.

To support its opinion, the Coast Guard submitted the following sworn declarations from the applicant's chain of command:

- As I, LCDR [G], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code § 1746:
 1. I am currently serving as the Assistant Division Chief in the Vessel and Facility Operating Standards Division (CG-OES-2) under the Office of Operating and Environmental Standards. I was the Port State Control Branch Chief at Sector [redacted] from June 1, 2015 till approximately May 2016.
 2. I was MSTC [Applicant's] direct supervisor as Chief, Port State Control Branch from June 1, 2015 till such time she transferred from the Port State Control Branch to the Small Passenger Vessel Branch on or around September 2015. At the time, MSTC [Applicant] was CWO2 [Applicant]; the member is referred to by her rank and name at time retirement throughout this declaration.
 3. The application is incorrect in its assertions that I was not the supervisor of MSTC [Applicant] during the marking period of 01JUL14 to 30JUN15, and not in her rating chain during that period. I was the Port State Control Branch Chief starting on June 1, 2015, which was part of the marking period referenced. Although LT [F] was her supervisor for most of the marking period, he departed the unit in late May or early June 2015 prior to the end of the marking period, and at such time I took over his position and supervision of MSTC [Applicant].
 4. As per COMDTINST M1000.3(series), an OER did not need to be conducted prior to LT [F's] departure since he was her supervisor and not her reporting officer. Therefore, a regular annual OER was processed for MSTC [Applicant] per the schedule in COMDTINST M1000.3(series) and PSCINST M1611.1D and her marking period ended 30JUN15.
 5. Of note, based on my recollection of events, prior to and following his departure, LT [F] and myself communicated about all OERs in the Port State Control Branch that were upcoming. These discussions included the wording of the comments and marks of several members in that branch, including the MSTC [Applicant's] OER for the marking period of 01JUL14 to 30JUN15. Therefore, his input into the marks was captured in the process as intended according to the responsibilities of a supervisor in PSCINST M1611.1D.
 6. Although there were miscommunications on my part concerning counseling of the MSTC [Applicant's] OER, I did fulfil the responsibilities of a supervisor as outlined in PSCINST M1611.1D with regards to the processing of the OER and counseling MSTC [Applicant] on her performance.
 7. The application stated that the decision to not honor the CID Memo (CID Memo O 1-12) was made by

myself. However, the decision regarding the use and application of the CID Memo was made by the Chief, Inspections Division, who was then LCDR Trevor Cowan. This decision was applied across all members of the Inspection Division at Sector Delaware Bay as a whole and did not apply solely to MSTC [Applicant] and her OER.

8. The application stated that none of the marks for the OER covering the marking period of 01JUL14 to 30JUN15, were changed after MSTC [Applicant] provided additional input to her officer support form following the OER counseling. This is incorrect. Based on my records and recollection, MSTC [Applicant] provided additional support for the Results/Effectiveness section and with concurrence from LCDR [C], I moved her mark from a "5" to a "6" due to that input. I also considered all additional input from MSTC [Applicant] for other sections and determined at the time that the input did not warrant adjusting the marks further.

9. Upon reflection of the investigation findings presented in the application and my records of the officer support form provided by MSTC [Applicant], the OER for the 01JUL14 to 30JUN15 should be adjusted. I recommend changing the Directing Others mark from a "4" to a "5." Her exceptional performance with regards to scheduling 100+ port state control examinations, leading over 40 port state control exam teams of 2-5 members through challenging situations, as well as directing junior officers and enlisted members while on duty through unique and trying marine casualties, warrant this change. This was not well considered or captured in her marks for this period due to the climate issues detailed in the investigation findings.

10. Based on my review of the evidence presented in the application, my own records, and my recollection of the member's performance during that time, the rest of MSTC [Applicant's] OER for the 01JUL14 to 30JUN15 marking period remains accurate and consistent with policy in COMDTINST M1000.3(series) and PSCINST MI61 I.ID.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of December 2022.

- I, LCDR [R], United States Coast Guard Reserve, declare as follows, pursuant to Title 28 United States Code § 1746:

1. Present Assignment: Engineer Officer, [redacted]. Assignment at time of Observation: Assistant Port State Control Branch Chief and Small Passenger Vessel Branch Chief, Sector [redacted].

2. I was MSTC [Applicant's] direct supervisor for the OER from 01JUL2015 to 01MAY2016. I was also the Assistant Port State Control Branch Chief from 01JUN2014 to 01JAN2015.

3. I support the allegation that MSTC [Applicant's] evaluations from 01JUL2015 to 13MAY2016 were unfair and unjust due to the evaluation practice as described in The Memorandum in Support of Application for Corrections of Records. Furthermore, though MSTC [Applicant] reported to the LT [F] and me for the majority of the reporting period for the 2015 OER, we did not have any input into the evaluation. Given the significant downgrade of multiple evaluation categories it was significantly more difficult to advocate for any increase in evaluations in 2016, also due to the evaluation practices within the Prevention Department.

4. Based on my experience as the Assistant Branch Chief for 6 months during the 2015 OER I believe many categories were significantly devalued based on MSTC [Applicant's] work ethic and initiative.

5. In regards to the 2016 OER, which I was the direct supervisor, I would recommend the following categories be increased based on MSTC [Applicant's] performance and medical circumstances at the time:

- Planning and Preparedness: 6
- Looking Out For Others: 6
- Health and Well-Being: 5

6. Based on the new OER format, during the 2016 period I would have selected MSTC [Applicant] as a promote with top 20% of peers or higher.

7. Given my experience supervising warrant officers and based on MSTC [Applicant's] professionalism, work-ethic, and dedication, I do not believe MSTC [Applicant] should have been passed over for promotion to W-3. Since 2016 there have been several policy changes and program changes both Coast Guard wide and within the Marine Safety field that would have positively impacted MSTC [Applicant's] record and promotion potential. Without a doubt, I believe MSTC [Applicant] would have been an excellent W-3 and Journeyman Marine Inspector.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of January 2023.

- I, LT [H], United States Coast Guard, declare as follows, pursuant to Title 28 United States Code § 1746:
 1. Served as the Assistant, Chief Inspections Division and Reporting Officer of Applicant.
 2. I was supervisor to LT [R] and in the rating chain for MSTC [Applicant] and assisted LCDR [C] in the supervision of the Inspections Division at Sector [redacted] from June 2015 to December 2016.
 3. I agree with the points of LT [R] and LCDR [W]. I too witnessed Mr. [C's] openness to sharing his opinion about the performance of inspections personnel, whether positive or negative. Mr. [C] was bias between the "in-crowd and out-crowd" and treated women in the inspection division as inferior, especially female Warrant Officers. The actions taken by LCDR [C] and CDR [M] to address Mr. [C] seemed to help but not alleviate the already negative climate. I believe the comments and treatment by Mr. [C] had a detrimental impact on MSTC [Applicant's] performance and morale and the ability to obtain qualifications in a normal timeline.

The 2016 OER, as I recall and now review, in my opinion reads positive. However, the mark and subsequent comment on "Looking Out for Others" do not support one another and the mark of 4 seems low. The comment suggests at least a 5. Comparing the marks, there was some, albeit marginal, improvement between the 2015 and 2016 OERs. The potential block in the 2016 OER is fair and an accurate account of MSTC [Applicant's] abilities and strengths.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 27 day of December, 2022.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 1, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. The Chair received the applicant's response on August 15, 2023.

Through counsel, the applicant argued that as a preliminary matter the advisory opinion's description of the applicant as a retired CWO is not entirely accurate and requires additional context. The applicant explained that although she did advance to a CWO, she was advised by Officer Personnel Management (OPM) to take a reduction in rank to E-7 or be separated due to twice being passed over for non-selection to CWO-3. She stated that because she only had 17 years at the time, she would have lost her opportunity to retire, so she took a reduction in rank so she could complete 20 years of service and retire. The applicant explained that upon her retirement she was approved to retire as a CWO but her retired pay was more financially beneficial so she chose

to retire as an E-7.

The applicant argued that the Board is not bound by the “higher standard” the Court applied in *Hary* under its separate, more narrow, judicial authority. The applicant contended that the Board’s authority—and its obligation to consider whether a record contains an error or injustice—is much more expansive and less rigid. The applicant argued that the Board has an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.³ Accordingly, the applicant stated that notwithstanding *Hary* and the advisory opinion’s reliance upon it, the Board may still grant relief purely on a finding that her case, when taken as a whole, amounts to a correctable injustice.

The applicant contended that she should not be penalized for not applying to the PRRB simply because she failed to “exhaust” all of her administrative remedies. According to the applicant, administrative exhaustion is a “jurisdictional” matter under 33 C.F.R. § 52.13(b). The applicant contended that the advisory opinion conspicuously ignored that the Coast Guard regulation directs members to file applications submitted beyond the one-year mark directly to this Board, therefore, there is no exhaustion concern here and the Board should disregard the advisory opinion’s arguments on the matter. The applicant stated that even if there was an exhaustion concern, the PRRB was not an “effective administrative remedy” available to her because most of the competent evidence in this case became available after the one-year timeline expired for either contested OER.⁴ Indeed, the investigation upon which her theory of relief relies was not completed nor provided to her until September 2020 and even then only partially.

Regarding the Coast Guard’s position that the applicant failed to prove error for her 2015 OER, the applicant contended that the advisory opinion’s rationale for correcting her 2016 OER supports relief for the 2015 OER as well. The applicant explained that the advisory opinion concluded that only the 2016 OER was erroneous or unjust because “the evaluation was unjustly and unfairly influenced by the processes in place,” but the supervisor’s declaration, upon which the advisory opinion relied in reaching its conclusions, supports relief for both OERs. The applicant stated that the advisory opinion cited her supervisor’s sworn declaration and described the 2016 “evaluation practice” as one in which Mr. C improperly influenced senior members of the rating chain, but his “evaluation practice” was not isolated to her 2016 OER.

The applicant explained that her supervisor clearly stated that the 2015 OER was affected for the same reasons. (“Based on my experience as the Assistant Branch Chief for 6 months during the 2015 OER I believe many categories were significantly devalued based on MSTC [Applicant’s] work ethic and initiative.”); (stating that these devaluations on MSTC [Applicant’s] 2015 OER then made it “significantly more difficult to advocate for any increase in evaluations in 2016, also due to the evaluation practices within the Prevention Department.”); (“I support the allegation that MSTC [Applicant’s] evaluations from 01JUL2015 to 13MAY2016 were unfair and unjust *due to the evaluation practice* as described in the Memorandum in Support of Application for Corrections of Records.”) The applicant stated that her supervisor also described these evaluation practice issues in his declaration submitted with her initial application and stated that this practice had been occurring since he reported to the Sector in 2013. The applicant contended

³ *Yee v. United States*, 512 F.2d 1383, 1387–88 (Ct. Cl. 1975).

⁴ *See* 33 C.F.R. § 52.13.

that if her supervisor's declaration is sufficient to demonstrate an error or injustice in her 2016 OER then it must be sufficient to warrant corrective relief on the 2015 OER for the same reasons.

The applicant noted that LT H's declaration further supports that Mr. C's malfeasance predated June 2015 when he became a part of her rating chain. She stated that although he only spoke to the 2016 OER for which he played a formal role, LT H described a "negative command climate" created by "Mr. [C's] openness to sharing his opinion about the performance of inspections personnel" and his "bias between the 'in-crowd and out-crowd' and treat[ment] of women in the inspection division as inferior, especially female[] Warrant Officers." The applicant claimed that based on his observations, Mr. H opined that "the comments and treatment by Mr. [C] had a detrimental impact on MST [Applicant's] performance and morale and the ability to obtain qualifications [in] a normal timeline." The applicant argued that the competent evidence indicates that these climate dynamics existed *throughout* Mr. C's tenure, not just during her 2016 OER rating period.

The applicant claimed that despite this evidence, the advisory opinion stated that the investigation "discusses actions during the period covered in the 2016 OER, not the 2015 OER" and, in essence, argued that the investigation does not contain evidence germane to the fairness of the 2015 OER. However, the applicant claimed that the investigation clearly contained findings regarding Mr. C's misconduct during the 2015 rating period. Indeed, her initial complaint that triggered the investigation alleged that Mr. C's abuse of authority stretched back to at least 2014, and although the investigation made findings about misconduct that occurred in June 2016, the investigation's own evidence and the statements accompanying the advisory opinion demonstrate that Mr. C's malfeasance occurred during the 2015 OER rating period as well.

In this regard, the applicant claimed that the advisory opinion ignored one of the most glaring problems with the 2015 OER, the fact that it contains numerous downgrades from the previous OER without any evidence that her performance had declined. Indeed, the reporting officer on the OER, CDR C, only offered a general opinion that the OER was accurate. The applicant claimed that the advisory opinion relied on CDR C's declaration to dismiss the applicant's challenge to the 2015 OER, but CDR C did not address or acknowledge Mr. C's improper involvement in the OER process. The applicant contended that he also failed to address the assertions that he too harbored bias against her. The applicant explained that in fact, the investigation found that CDR C played a role in facilitating Mr. C's improper involvement in the OER process that the advisory opinion now finds tainted her 2016 OER. The applicant claimed that CDR C "invited" Mr. C "to provide input into the training and qualifications timelines that members were on, and whether they were failing, meeting or exceeding the set qualifications." The applicant contended that CDR C's opinion is further belied by her supervisor's declaration, which detailed Mr. C's unfair treatment of her and LT H's declaration, which corroborated the supervisor's statements. The applicant argued that based on a preponderance of the evidence, the only reasonable explanation for the downgrades is Mr. C's malfeasance and, consequently, her 2015 OER should be corrected as requested.

The applicant argued that her case warrants promotion-related relief in order to provide a full remedy for the errors and injustices in her record. The applicant claimed that the advisory opinion argued that her status as a warrant officer removed her from the ambit of SSB

consideration and if that is the case, then this Board has the authority to directly promote her under its plenary authority to correct “any military record of the Secretary’s department” pursuant to 10 U.S.C. § 1552(a)(1). The applicant argued that the Board should do so here in accordance with its “abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.”⁵ The applicant further argued that “[W]hen a [military records] correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its [statutory] mandate [under 10 U.S.C. § 1552]. And such a violation, contrary to the evidence, is arbitrary and capricious.”⁶

The applicant claimed that the advisory opinion asserted that the 2016 OER was erroneous or unjust within the meaning of 10 U.S.C. § 1552, thereby necessitating corrective relief. She stated that as she has already argued, this Board has ample justification to find the 2015 OER unjust and erroneous which would also require corrective relief. She contended that these OERs were in her record when she was considered and not selected for promotion to CWO-3, which is a clear injustice this Board must correct to effectively carry out its statutory mandate to grant thorough and fitting relief. The applicant contended that merely correcting the OERs without additional promotion relief would only provide an illusory “remedy” and would ignore the collateral damage of these unjust and erroneous records in her record. She stated that although she maintains that the 2015 OER is erroneous and unjust, promotion-related relief is warranted even if the board agrees with the advisory opinion that only the 2016 OER requires correction.

The applicant claimed that the erroneous OER tainted the record considered by the promotion selection boards and it is entirely reasonable to deduce that the report substantially contributed to her being non-selected. She noted that importantly, her supervisor—whose declaration forms a substantial basis for the advisory opinion’s recommended partial relief—unequivocally supports her promotion to CWO-3. Specifically, her supervisor stated, “Given my experience supervising warrant officers and based on MSTC [Applicant’s] professionalism, work-ethic, and dedication, I do not believe MSTC [Applicant] should have been passed over for promotion to W-3.” The applicant alleged that to illustrate his support for her promotion, her supervisor stated that, under the new OER format, he would have selected her as a promote with the “top 20% of peers or higher” and that she “would have been an excellent W-3 and Journeyman Marine Inspector.” In sum, she claimed that her lack of promotion to CWO-3 is a manifest injustice that the Board can and must correct.

APPLICABLE LAW AND POLICY

Title 14, United States Code (U.S.C.), section 2120(b) provides the following guidance on Special Selection Boards:

...

⁵ *Yee*, 512 F.2d at 1387–88 (citations omitted).

⁶ *Haselwander v. McHugh*, 774 F. 3d 990, 996 (D.C. Cir. 2014)(quoting *Yee*, 512 F.2d 1383 at 1387 (Ct. Cl. 1975)); see also *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959) (“We feel that the Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.”).

(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 . . . (Emphasis added.)

...

Title 14, U.S.C., section 2106 provides the following:

At least once a year and at such other times as the needs of the service require, the Secretary shall convene selection boards to recommend for promotion to the next higher grade officers on the active duty promotion list in each grade from lieutenant (junior grade) through captain, with separate boards for each grade. However, the Secretary is not required to convene a board to recommend officers for promotion to a grade when no vacancies exist in the grade concerned, and he estimates that none will occur in the next twelve months. (Emphasis added.)

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.⁷

4. The applicant alleged that her rating chain erroneously and unjustly allowed a civilian who was outside of her rating chain to negatively affect her OERs and eventually led to her being twice non-selected for CWO-3. According to the applicant, her rating chain relied on the

⁷ *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).

civilian's input on the applicant's performance because they had not personally observed her during the applicable rating period. 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.⁸ 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.⁹ 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.¹⁰

5. Background. The Board's review of the record shows that after promoting to CWO-2, the applicant endured treatment from a marine inspector training officer, Mr. C, that resulted in denied training opportunities, withheld qualifications letters, and lower OER marks. This treatment led the applicant to file a formal complaint with the Office of the Inspector General who forwarded the complaint to the Coast Guard for investigation and disposition. The Coast Guard initiated a single officer investigation and the Investigating Officer (IO) submitted his final report on December 11, 2018. The IO found that the applicant, along with other female members of the inspection unit, had been subjected to disparate treatment by Mr. C. Specifically, the IO found that Mr. C restricted the applicant's ability to go out on seasonal inspections and withheld her training certificates for reasons that were atypical. The IO concluded that Mr. C's treatment of the applicant constituted bullying under the Coast Guard's Discipline and Conduct Manual, COMDTINST M1600.2.

6. July 1, 2014 through June 30, 2015 OER. The applicant has alleged that the marine inspector training officer unlawfully influenced her rating chain's evaluation marks during the applicable rating period. As outlined 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.¹¹ Given the overwhelming evidence compiled during the investigation the Board is persuaded that the applicant's OER was erroneously and unjustly affected by factors that had no business being in the rating process, namely, Mr. C's animus and bias toward the applicant. The Coast Guard has argued that the investigation only substantiated allegations of improper bias and bullying during the July 1, 2015 through May 13, 2016 OER and therefore the applicant failed to prove that the July 1, 2014 through June 30, 2015 OER was violated by any of the *Hary* standards. The Board finds the Coast Guard's arguments unpersuasive. To believe that Mr. C's animus and bias toward not only the applicant but women in general only began after June 30, 2015 is unreasonable.

⁸ 33 C.F.R. § 52.24(b).

⁹ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁰ *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).

¹¹ *Id.*

The record shows that Mr. C had a history of treating the applicant differently and though specific dates cannot be placed on when Mr. C's animosity and bias toward the applicant began, it is difficult for the Board to believe the animus and bias were reserved to one single rating period. In this regard, the Board finds the sworn declaration from LCDR R persuasive. LCDR R stated that despite the fact that the applicant reported to LT F and himself for the majority of this rating period, they were not allowed to have any input on her 2015 OER. LCDR R further stated that based on his experience as the Assistant Branch Chief for 6 months during the 2015 rating period, he believed many categories were significantly devalued based on the applicant's work ethic and initiative. The Board finds LCDR R's statements persuasive and troubling. The fact that the officers who observed the applicant during the rating period were prevented from providing input on the applicant's performance is concerning and casts substantial doubt that the applicant's June 30, 2015 OER was an accurate reflection of her performance during that rating period.

The applicant's supervisor who came in during the last 30 days of the applicant's rating period, LCDR G, alleged that all but one of the applicant's marks for that rating period were accurate. According to LCDR G, "based on her recollection of events, prior to and following his departure, LT F and myself communicated about all OERs," including the applicant's. The Board finds LCDR G's statements unpersuasive and unsupported by a sworn declaration from LCDR R, someone who was actually a part of the applicant's rating chain for the majority of her rating period. Specifically, LCDR R claimed that both he and LT F, who LCDR G claimed to have received input from, were prohibited from having input on the applicant's 2015 OER.

Accordingly, based on the records and facts in this case, the Board finds that the applicant has proven, by a preponderance of the evidence, that the Coast Guard erroneously and unjustly allowed factors that had no business being in the rating process, namely Mr. C's animus and bias toward women, to infect the applicant's July 1, 2014 through June 30, 2015 OER. The Board also finds that the individuals who should have had input on the applicant's performance during this rating period were prevented from doing so, making the OER ratings unreliable. Accordingly, given that there is insufficient evidence to gauge the applicant's performance for this rating period and to fully know which marks should be adjusted, the Board finds that the Coast Guard should remove the applicant's OER for the July 1, 2014 through June 30, 2015 rating period and replace it with a Continuity OER. In replacing the OER, to fully cure the errors caused, the Coast Guard should ensure that those individuals, such as LCDR R, who actually observed the applicant's performance for that rating period, are able to provide sufficient input on the applicant's performance to ensure the OER is an accurate reflection of the applicant's performance.

7. June 1, 2015, through May 13, 2016. For the same reasons as outlined in Finding 6 above, the Board finds that the applicant's May 13, 2016 OER was erroneously and unjustly infected by factors that had no business being in the rating period. The Board is persuaded by the applicant's direct supervisor for this rating period, LCDR R, who declared that due to the significant downgraded marks given to the applicant in multiple evaluation categories during her 2015 rating period, it was significantly more difficult for him to advocate for any increase in evaluations in 2016, these obstacles were in addition to the evaluation practices in place for the Prevention Department. LCDR R stated that for the applicant's 2016 OER, which he was the direct supervisor for, based on the applicant's performance during the rating period, he would increase

the applicant's marks for the following categories: Planning and Preparedness: 6, Looking Out For Others: 6, and Health and Well-Being: 5. LCDR R further stated that Based on the new OER format, during the 2016 period he would have marked the applicant was "Promote w/top 20% of peers" or higher on the Promotion Scale. It was LCDR R's opinion based on the applicant's professionalism, work-ethic, and dedication she should not have been passed over for CWO-3.

The Coast Guard has stipulated to the errors that occurred during the applicant's July 1, 2015 through May 13, 2016 rating period and the Board is persuaded, based on a preponderance of the evidence, that the applicant is entitled to have her OER for the July 1, 2015 through May 13, 2016 rating period corrected. The Coast Guard should upgrade the applicant's marks on the Applicant's July 1, 2015 through May 13, 2016 OER in the following categories: Planning and Preparedness: 6, Looking Out For Others: 6, and Health and Well-Being: 5.

8. Injustice. Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."¹² The Board has authority to determine whether an injustice exists on a "case-by-case basis."¹³ Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"¹⁴ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."¹⁵

Normally, when a Board finds that the Coast Guard has offended at least one of the *Hary* factors in one or multiple OERs, the Board orders the Coast Guard to convene a Special Selection Board (SSB) under 14 U.S.C. § 2120(b) which states:

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 . . . (Emphasis added.)

14 U.S.C. § 2106 states:

At least once a year and at such other times as the needs of the service require, the Secretary shall convene selection boards to recommend for promotion to the next higher grade officers on the active duty promotion list *in each grade from lieutenant (junior grade) through captain*, with separate boards for each grade. However, the Secretary is not required to convene a board to recommend officers for promotion to a grade when no vacancies exist in the grade concerned, and he estimates that none will occur in the next twelve months. (Emphasis added.)

Accordingly, based on federal statutes, in order for the Board to convene a SSB, the officer must first have had their original record reviewed by a LTJG through CAPT selection board.

¹² *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

¹³ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

¹⁴ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

¹⁵ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

Warrant Officers are not included in the authority granted to the Secretary to convene SSBs. The Board's authority to correct errors and injustices is directly linked to the authority granted to the Secretary. If the Secretary does not have authority to correct the contested record, neither does this Board. In this instance, the Secretary does not have the authority to convene a SSB for the applicant because she was not a commissioned officer whose record had been reviewed by at least a LTJG selection board.

To say that this results in an injustice is an understatement. The fact that the statute as written excluded Warrant Officers from the right to a SSB and thereby an avenue for redress against erroneous and unjust records shocks the sense of justice. This statute's restriction inhibits this Board from correcting the very errors and injustices it is appointed to correct. As it stands, the applicant was forced to endure bullying and sexist treatment from a civilian trainer who was erroneously permitted to exert an unjustified amount of power over the applicant's performance ratings. These errors and injustices resulted in the applicant losing her career as a Warrant Officer because this unrestrained civilian intentionally prejudiced her promotion potential and led to the applicant being twice passed over for selection to CWO-3. Disappointingly, this Board is restricted by statute from ensuring these injustices are cured.

The injustice of this statute's limitations is compounded because in this case in order for the applicant to receive the benefit of the nearly 17 years she invested into the Coast Guard, she was forced to take a reduction in rank to E-7 or be separated under statute for twice being passed over for promotion.¹⁶ Not only does this Board not have the authority to convene a SSB for the applicant, but because she took the reduction in rate to save her career, she forfeited her commission, preventing this Board from returning her to active duty because it does not have the authority to commission officers, that power resides with the President of the United States.

Therefore, although the Board finds that the applicant has endured several injustices at the hands of the Coast Guard, this Board is restricted by statute from fully curing those injustices. Nonetheless, the Board found it necessary to discuss the compounding injustices to ensure that the matter was adequately on record.

9. 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.¹⁷ She has proven, by a preponderance of the evidence, that her July 1, 2014 through June 30, 2015 and July 1, 2015 through May 13, 2016 OERs were infected by factors that had no business being in the rating process, specifically, the marine inspector trainer's bias and sexist attitude toward women. Therefore, the Coast Guard should remove the applicant's July 1, 2014 through June 30, 2015 OER from the applicant's record and replace it with a Continuity OER. The Coast Guard should also correct the applicant's July 1, 2015 through May 13, 2016 OER to reflect the following increased marks: Planning and Preparedness: 6, Looking Out For Others: 6, and Health and Well-Being: 5. The applicant has also

¹⁶ 10 U.S.C § 580(a)(1). Regular warrant officers twice failing of selection for promotion: involuntary retirement or separation. Unless retired or separated sooner under some other provision of law, a regular chief warrant officer who has twice failed of selection for promotion to the next higher regular warrant officer grade shall be retired under paragraph (2) or (3) or separated from active duty under paragraph (4).

¹⁷ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

proven, by a preponderance of the evidence, that in addition to the errors found in her records, she also endured multiple injustices as a result of the Coast Guard's failure to adequately perform its OER duties. However, as discussed in Finding 8 above, this Board is precluded by statute from fully curing those injustices by providing the applicant with a SSB or restoring her rank.

ORDER

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

- Remove the applicant’s July 1, 2014 through June 30, 2015 OER and replace it with a Continuity OER, ensuring that those officers who observed her performance the most during the applicable rating period, such as LCDR P and LT F, are permitted to provide the appropriate feedback on her performance and ratings.
- Increase the following marks on the applicant’s July 1, 2015 through May 13, 2016 OER:
 - Planning and Preparedness: from a mark of 5 to a mark of 6
 - Looking Out For Others: from a mark of 4 to a mark of 6 and
 - Health and Well-Being: from a mark of 4 to a mark of 5.

October 3, 2024

