

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-093


LCDR/O-4 (Retired)

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 January 14, 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 August 15, 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 AND ALLEGATIONS

The applicant, a retired Lieutenant Commander (LCDR/O-4) on active duty, asked the Board to correct her record by making the following corrections:

1. Retroactively promoting her to Commander (CDR/O-5) effective November 2015, or the date that she would have been promoted given her placement on the 2014 Register of Officers and all backpay and allowances that would flow from this correction;
2. Changing her DD-214 to reflect a retirement at the paygrade of O-5;
3. Approval and issuance of a draft Meritorious Service Medal she enclosed with her application that she should have received at the end of her service. She further requested that the Meritorious Service Medal be reflected on her DD-214; and
4. That the Board make a special finding ordering the Coast Guard to retroactively implement their in vitro fertilization (IVF) weight abeyance enacted by the Coast Guard on June 12, 2017.

The applicant explained that the Coast Guard's Diversity Inclusion Plan and Human Capital Strategy Plan outlined and supported the idea that a female in the Coast Guard could have a family and a successful career, but unfortunately the policies necessary to ensure that protection were lacking. The applicant further explained that she was unable to conceive and sought medical assistance for the first time in 2014, which was over the objection of her commanding officer (CO).

The applicant alleged that this CO was just the first of many supervisors to object to her attempts to have a family, either explicitly or through exasperation or annoyance.

The applicant alleged that her pursuit to have a family cost her a career in the Coast Guard when she was ultimately forced to retire for failing to promote. The applicant further alleged that she had her retirement benefits threatened for non-compliance with weight standards in effect at the time. The applicant claimed that she was given lower marks, reduction or denial of rewards, and viewed as a troublemaker who was not dedicated to the Coast Guard. According to the applicant, her commands watched her suffer through the pain, disappointment, and chemically-induced health challenges associated with numerous IVF treatments with disdain and frustration.

The applicant claimed that her history of Officer Evaluation Reports (OERs) shows consistent, sustained strong performance, with incremental but notable decreases over time. The applicant alleged that the decrease marks correlated to her increased effort to start a family through IVF treatment, in addition to her vocal objection to the unfair treatment she had received. She stated that she did not undergo any fertility treatments while working for the Coast Guard Recruiting Command and her OERs reflect the disparity endured at the hands of those who did not agree with her pursuits to build a family.

The applicant supported her arguments by citing to the *Engles* test,¹ but the *Engles* test is no longer the standard for evaluating an officer's record because it was superseded by 14 U.S.C. § 2120 that allows for Special Selection Boards. Accordingly, the applicant's arguments and citations regarding the *Engles* test will not be summarized here.

The applicant claimed that she would have been promoted to O-5 in 2015 had she not failed to meet the Coast Guard's weight and body fat standards while undergoing IVF treatment. The applicant argued that the Coast Guard's policies regarding weight and body fat prevented her from realizing the benefit of working as an O-4 in and O-5 billet in one of the nation's busiest ports, in the nation's largest Coast Guard field command, all while planning for contingencies in an area containing some of our most critical and high-value targets in the eyes of our enemies. The applicant claimed that because of the policy in place at the time, her supervisors were free to discriminate against her due to her medical condition. She alleged that her supervisors viewed her fertility treatments as "elective," and made insensitive comments such as "why don't you just adopt?" which illustrated their serious misunderstanding and disregard for her plight.

The applicant explained that she was shocked when she was non-selected for CDR during the promotion year (PY) 2013 selection board (selection board met in 2012). She alleged that her non-selection was the result of an inaccurate record that went before the selection board. The applicant stated that she was not undergoing IVF treatment at the time. She was again passed over for promotion to CDR for the following year for the PY 2014 and 2015 CDR selection boards and was likewise not going through IVF treatments at this time.

¹ *Engles v. United States*, 678 F.2d 173, 177 (Ct. Cl. 1982).

2014-2015 Evaluation Year

The applicant claimed that during the second half of the 2014 evaluation period, her command became openly hostile to her efforts to utilize IVF treatments. During her 2014-2015 evaluation year, the applicant alleged that her command lowered her marks and reduced the strength of their recommendation for promotion, despite her sustained high performance. According to the applicant, her command refused to document her International Association of Emergency Managers award nomination in her OER as well as downgraded her Meritorious Service Medal which she was nominated for. The applicant claimed she was told her Meritorious Service Medal was downgraded because her district had hit their quota, but her male peer was given a Meritorious Service Medal. Furthermore, the applicant contended that no limitation exists in any Coast Guard policy for issuing awards.

Regarding her IVF treatments, the applicant explained that her IVF treatments were demanding, exhausting, and seen as a lack of commitment by her command. The applicant alleged that her credibility was her command faded and she was treated with contempt. She further alleged that her command lowered her recommendation for promotion from “strongly recommended for accelerated promotion” to “excellent performer.” The applicant explained that she filed Equal Opportunity (EO) complaints to address what she perceived as being unlawful gender discrimination. The applicant claimed that during the mediation discussions with her CO’s representative, CAPT L, compared her IVF treatments to getting a DUI. She further claimed that CAPT L remarked that it was not her professionalism that was in question, but her emotional control and poise, including getting along with others, that was the issue.

2015-2016 Evaluation Year

The applicant stated that she reported to a new duty station in the summer of 2015 to serve as the Contingency Planning and Force Readiness Chief, at which point she immediately met with her command and secured their support to spearhead a new IVF policy. She claimed that she quickly drafted proposed changes to the IVF policy and forwarded the proposed changes to the necessary stakeholders within her chain of command, but their support was largely philosophical and aspirational. The applicant alleged that as the scope of her commitment to change the Coast Guard’s IVF policies became apparent to her command, they became hostile toward her. The applicant stated that for example, her command nominated her for the prestigious Dorothy Stratton Leadership Award but refused to document the nomination in her OER just one month later.

The applicant claimed that the Coast Guard’s position on her situation was unjust and internally inconsistent. She explained that it was during the finalization of her 2016 OER that she found herself fighting for a personal medical exemption to the weight standards while concurrently advocating for a broader policy exemption for everyone else. The applicant contended that the Coast Guard refused to support her and denied her personal request for an exemption. The applicant argued that the Coast Guard’s denial of her abeyance was egregious considering she qualified for an exemption for two conditions that were already listed as exemptions within policy. She explained that she could not explained why the Coast Guard did not grant her abeyance requests based on the qualifying exemptions that applied to her case. She noted that she does not have evidence that this denial was intentional or whether or not senior officers communicated with

each other regarding her case, but the refusal to grant her any abeyance for any reason, even those that were approved and present in her case, was prejudicial, unfair, and could suggest a broader organizational desire to deny relief. The applicant further noted that the decision to deny her abeyance was made against the advice of the medical officer. The applicant explained that she was passed over for promotion for the fifth time, but stated the non-selection was unsurprising given the mark of 3 she received on her annual OER for “Health and Well-Being” due to her failure to meet weight and body fat standards.

The applicant stated that she submitted her recommended policy changes in December 2015, but the Coast Guard did not act on the recommendations for two years and only after Congress intervened. The applicant alleged that during the two years she had to wait she was treated poorly. According to the applicant, her evaluations suffered and her career was forced to come to an end. The applicant explained that she does not believe that the Coast Guard delayed in processing her proposed changes to hurt her, but it also did not try to move the proposed changes through faster in order to help her, which it could have done. The applicant noted that the policy changes she advocated for were already in place in other branches of the military.

2016-2017 Evaluation Year – Retirement Year

The applicant explained that for her final year in the Coast Guard she received two OERs and could not have been more dissimilar. She claimed that her “retirement” OER was the worst OER she had ever received during her long career, wherein she received a mark of 3 for “Health and Well-Being” for failing to meet weight and body fat standards again and a mark of “Do Not Promote.” However, the applicant noted that she also received an OER from Coast Guard Recruiting Command wherein she received a mark of “Definitely Promote.” The applicant alleged that her Sector displayed petty, adverse acts against her, such as withholding a retirement award—an award she argued this board should direct the Coast Guard to sign—denying her a retirement ceremony, and withholding her DD-214 until months after she had left the service. Finally, she alleged that her Deputy even chilled her peers and coworkers from supporting her in some later efforts to obtain justice.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy on May 21, 1997, and was commissioned an Ensign the same date.

On November 21, 1998, the applicant promoted to Lieutenant Junior Grade (LTJG).

On November 21, 2001, the applicant promoted to Lieutenant (LT).

On September 1, 2007, the applicant promoted to Lieutenant Commander (LCDR).

On May 8, 2009, the applicant received her annual OER for the May 1, 2008 through June 30, 2009 rating period. The applicant received one mark of 5 (on of a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), fourteen marks of 6, and three marks of

7. The applicant also received a mark of 5 (“Excellent Performer; give toughest, most challenging leadership assignments”) out of 7 on the Comparison Scale.

In June 2010, the applicant received a Detachment of Officer OER for the July 1, 2009 through June 30, 2010 rating period. The applicant received thirteen marks of 5, four marks of 6, and one mark of 7. She also received a mark of 5 out of 7 on the Comparison Scale.

In June 2011, the applicant received a Detachment OER for the July 1, 2010 through June 16, 2011 rating period. The applicant received three marks of 5, twelve marks of 6, and three marks of 7. She also received a mark of 5 out of 7 on the Comparison Scale.

In June 2011, the applicant also received a Concurrent OER² for the August 2, 2010 through October 30, 2010 rating period. The applicant received five marks of 6 and thirteen marks of 7. She also received a mark of 6 (“Strongly recommended for accelerated promotion”) out of 7 on the Comparison Scale.

In May 2012, the applicant received her annual OER for the June 17, 2011 through April 30, 2012 rating period. The applicant received two marks of 5, eleven marks of 6, and six marks of 7. She also received a mark of 5 out of 7 on the Comparison Scale.

In July of 2012, the applicant’s record was reviewed by the PY2013 CDR selection board and was non-selected for promotion to CDR. This was the applicant’s first non-selection to CDR.

In May 2013, the applicant received her annual OER for the May 1, 2012 through April 30, 2014 rating period. The applicant received twelve marks of 6 and six marks of 7. She also received a mark of 5 out of 7 on the Comparison Scale.

In July 2013, the applicant’s record was reviewed by the PY2014 CDR selection board and was non-selected for promotion to CDR. This was her second non-selection.

In April 2014, the applicant began receiving IVF treatments. The applicant received three IVF treatments between 2014 and 2015.

In July 2014, the applicant received her annual OER for the May 1, 2013 through April 30, 2014 rating period. The applicant received one mark of 5, twelve marks of 6, and five marks of 7. She also received a mark of 6 out of 7 on the Comparison Scale.

In July 2014, a Command Screening Board screened the applicant and eight others for a commanding officer position. The board found the applicant qualified to be on a Command Strike Team as an O-5.

² Article 7.B. of the Officer Evaluation Systems Manual, PSCINST M1611.1A, states, “Concurrent OERs serve as a vehicle for documenting performance away from the permanent unit. A Concurrent OER covers performance observed by a rating chain other than the permanent unit, e.g., senior aviator deployed aboard a Coast Guard icebreaker. The Concurrent OER will be written upon the detachment of the officer and cover only the period of temporary duty. The Concurrent OER provides a record of significant performance that was not directly observed by the rating chain from the permanent unit. The Concurrent OER rating chain has the option to complete the Concurrent OER on either the one page Concurrent OER form or the regular three page OER form.

In July 2014, the applicant's record was reviewed by the PY2015 CDR selection board and was again non-selected for promotion to CDR.³ This was her third non-selection.⁴

In April 2015, the applicant received a Detachment OER for the May 1, 2014, through April 30, 2015 rating period. The applicant received three marks of 5, twelve marks of 6, and three marks of 7. She also received a mark of 5 out of 7 on the Comparison Scale.

In June 2015, while an O-4, the applicant joined a major Sector as the Contingency Planning & Force Readiness Chief, an O-5 position. The applicant served in this position until September 2016, and while there supervised approximately 15 people, prepared plans for major disasters, water events, and for projects such as bridge closures, evacuations, or virus outbreaks.

In July 2015, the applicant's record was reviewed by the PY2016 CDR selection board and was again non-selected for promotion to CDR. This was her fourth non-selection.

In December 2015, the applicant drafted a "White Paper" entitled, "Diversity & Inclusions Shortfalls."⁵ The White Paper outlined the issues the applicant had faced while seeking IVF treatments, issues that included the gaps in USCG policy regarding IVF treatments and the lack of USCG support for individuals and family members seeking IVF treatment. The applicant requested that the Coast Guard include IVF treatments in weight abeyance and deployment exemptions, that it address family needs, and that it include IVF treatments in the Tricare insurance plan. The applicant's chain of command, which included the Sector Commander (an O-6) and Deputy Sector Commander (an O-5), endorsed the applicant's White Paper. At the time, the Deputy Sector Commander was on sick leave, but still asked the applicant to come to his home so that he could help her edit the document so that it would present better to Coast Guard Command.⁶ The Deputy Sector Commander estimated that it took their Coast Guard District approximately five months to review the applicant's White Paper and then send it to Coast Guard Headquarters for review, which took another six months for review.

In January 2016, the applicant contacted her local civil rights office and alleged that the commanding officer at her prior unit had discriminated against her based on her sex when he presented her with her OER for the May 1, 2014 through April 30, 2015 rating period, which the

³ A Command Screening Board and a Promotions Board are two separate entities. It is possible for a Command Screening Board to select a member for a position and then for the Promotions Board to not select the same member for promotion.

⁴ Pursuant to Article 1.C.5.e.2 of the Military Separations Manual, COMDTINST M1000.4, states, "Each Regular Coast Guard officer serving as commander or lieutenant commander who fails selection for promotion to captain or commander, respectively, for the second time, or if not selected for continuation on active duty, shall: (2) If ineligible for retirement on 30 June of the promotion year in which the second failure of selection occurs, remain on active duty and retire on the last day of the month in which he or she completes 20 years of active service, unless earlier removed under another provision of law (14 U.S.C. §285).

⁵ A White Paper is an authoritative report designed to inform readers about a particular topic and offer information in the decision-making process.

⁶ Information relating to the "White Page" was gathered from the Officer of Inspector General (OIG) Investigative Report.

applicant contended did not reflect her true accomplishments. After mediation failed, the applicant filed a formal EO complaint on March 28, 2016.⁷

In April 2016, the applicant's supervisor, the Deputy Sector Commander, reached out to the applicant and asked her to provide a list of all service members who had not yet completed their semi-annual weigh-in. At this time, it was discovered that the applicant was one of the members who had not yet completed her semi-annual weigh-in. The applicant's supervisor asked the applicant why she had not yet completed her weigh-in and the applicant stated it was because she, in partnership with the clinic doctor, was preparing a weight abeyance request. The applicant was then ordered to weigh-in by the end of April.

On May 5, 2016, the applicant received a negative CG-3307 ("Page 7") for failing to meet the Coast Guard's weight and body fat standards. The applicant weighed 204 pounds and was determined to be 24 pounds overweight. The applicant was ordered to lose 24 pounds, or 1% body fat, by October 20, 2016.

On May 6, 2016, the applicant's supervisor, Deputy Sector Commander CDR S, submitted a medical weight abeyance request on behalf of the applicant. The reason outlined for the abeyance was that the applicant was currently undergoing medical care, including hormone treatments that cause weight gain. The medical abeyance request included a recommendation from a medical doctor that noted the applicant was currently taking five medications, including corticosteroids and hormones, and strongly recommended that the applicant be given a weight abeyance until her medical condition was resolved.

On May 19, 2016, the applicant's weight abeyance request was denied. The denial provided the following explanation:

2. As a matter of policy, all medically-related weight abeyance requests are treated as unique and reviewed by the Medical Evaluations Branch located at the Coast Guard Personnel Service Center prior to final determination. In this instance, a six month weight abeyance for LCDR [Applicant] is not appropriate. Member's physiological state is the result of an elective procedure and the member assumes the responsibility for any resulting condition that could negatively impact fitness for duty. Her general state of health is presumed to be good. Her condition is not considered a qualified physiological medical condition as specified in CH 5 COMDTINST M1020.8H (series) and has no physiological impact on the member's ability to lose weight and/or body fat if member continues to follow a safe and effective weight-loss program to include healthy eating habits and exercise. Additionally, it should be noted that COMDTINST M1020.8H (series) states the abeyance period should be utilized by the member to come into compliance. Note: weight abeyances are not retroactive for past weigh-in failures.

In May 2016, the applicant received her annual OER for the May 1, 2015 through April 30, 2016 rating period. The applicant received one mark of 3 in "Health & Well-Being," ten marks of 5, and seven marks of 6. She also received a mark of 4 ("Good performer; give tough, challenging assignments") out of 7 on the Comparison Scale.

⁷ Although the alleged discriminatory action occurred well outside of the 45-day window in which a member must typically file a complaint, the applicant alleged that she only became aware that the action was discriminatory after taking a civil rights awareness training in January 2016. The Coast Guard rejected the applicant's argument, and in June 2016 dismissed the complaint as untimely.

On July 8, 2016, the applicant submitted a personal statement to the PY2017 CDR selection board wherein she outlined her issues with fertility and the reason she failed to meet weight standards. The applicant explained that she had never before failed a weigh-in, but was the Coast Guard's 2004 Elite Athlete of the Year and was repeatedly the Unit Health Promotion Coordinator. The applicant also highlighted her career achievements, including being selected a Commander for a Strike Team.

In July 2016, the applicant's record was reviewed by the PY2017 CDR selection board and was non-selected for promotion to CDR. This was her fifth and final non-selection.

On September 7, 2016, the applicant appealed her weight abeyance denial, which was endorsed by the applicant's chain of command. The applicant stated the following:

2. A medical weight abeyance request was submitted to CG PSC (PSD-fs) on 06 May 2016. I have been undergoing comprehensive and physician-supervised fertility treatments to establish a successful pregnancy. The required potent hormone therapies that include use of corticosteroids have had a significant impact on my metabolism resulting in weight gain which is a typical side effect. Despite efforts to follow a dietary fertility regimen and authorized exercise, I have not lost any weight. Once treatment is complete, it is expected that I will respond physiologically and achieve substantial weight loss and improved metabolism per enclosure (1). Throughout my career, I have been within the Coast Guard's weight and body fat standards; however, as a result of undergoing fertility treatments, I currently exceed standards.

3. Reference (b) does not explicitly exclude fertility treatments or elective procedures from a medical weight abeyance. In addition, reference (b) states that prescribed corticosteroids is a qualifying medical example for a medical weight abeyance. I am taking corticosteroids as part of my fertility treatment. Furthermore, I have been since diagnosed with polycystic ovarian syndrome per enclosure (2), which is also a qualifying example for a medical weight abeyance.

4. Even though fertility treatments are considered an elective procedure, starting a family is a fundamental work-life issue, not simply an elective procedure; denying a member's request for a medical weight abeyance clearly discriminates against women who experience inevitable weight gain as a result of fertility treatments in order to establish a successful pregnancy and start a family. Denial is not in the spirit of either the Coast Guard's Diversity and Inclusion Strategic Plan or the Human Capital Strategy.

On November 2, 2016, the applicant received a negative Page 7 for her failure to abide by the requirements of her weight probation. The applicant weighed 208 pounds. The applicant was notified that because she failed to meet the requirements of her weight probation she was being separated from the Coast Guard.

On November 2, 2016, in accordance with Coast Guard policy, the applicant's supervisor submitted a memorandum, "Recommendation for Separating an Officer for Cause," wherein he noted the applicant's failed weight probation. He also noted that the failed weight probation was the result of the applicant's fertility treatments and was appealing the denial of her weight abeyance. The supervisor recommended that the applicant's approved retirement date be honored instead of proceedings with a special board.

On November 7, 2016, Rear Admiral (RADM) H, denied the applicant's weight abeyance appeal, stating, "When you made the decision to pursue elective medical treatment, you assumed full responsibility for any risks associated with the treatment that affected your Individual Medical

Readiness per reference (c) and ability to comply with applicable standards in reference (d). While I appreciate the deeply personal motivations you acted upon in deciding to pursue elective medical treatment, I cannot approve your appeal to the denial in reference (b).”

On December 28, 2016, PSC approved the applicant’s supervisor’s recommendation and concluded that a special board was not warranted. The applicant’s retirement date of June 1, 2017 was approved.

On May 31, 2017, her last day in the Coast Guard before mandatory retirement and days before her last OER was signed by her rating chain, the applicant filed two form 4910, “Report of Offense and Disposition,” wherein she alleged that her supervisors violated the Uniform Code of Military Justice (UCMJ). Specifically, against the Captain, the applicant alleged he failed to obey an order or regulation when he failed to ensure the applicant received a retirement certificate and ceremony, which is the custom of the service. Regarding her supervisor, CDR H, the applicant repeated her allegations about her retirement, but also alleged CDR H committed conduct unbecoming an officer when he, without good cause, denied a past request by the applicant to be removed from Watch Duty so that she could receive fertility treatments. The applicant further alleged that CDR H included a false statement in an Administrative Letter of Censure he gave the applicant.

On June 2, 2017, an investigating officer was assigned to investigate the applicant’s allegations against her chain of command.

On June 13, 2017, the investigating officer issued his findings and found that the applicant’s claims were unsubstantiated and unsupported by the evidence. He recommended that the investigation be closed without taking further action. Specifically, the investigating officer found that the applicant’s rating chain did not have any duty under Coast Guard regulations to provide for the applicant with a retirement certificate or ceremony. As it relates to the delayed retirement certificate, the investigating officer found that the certificate was issued, but the delay was caused by a yeoman who was out of the office when the applicant retired. With regard to Watch Duty, the investigating officer found that the applicant’s supervisor had no duty to remove that applicant from the unit duty schedule because the applicant’s treatment was for an elective procedure. Furthermore, the investigating officer found the supervisor’s rationale reasonable because the period in question was a busy transfer season for their already demanding sector, and taking the applicant out of Watch Duty rotation during that time would have been undue strain on another officer. Finally, regarding the alleged false statement made in the Administrative Letter of Censure, the Investigating Officer found that there was a factual inaccuracy but the supervisor was unaware of the inaccuracy at the time.

On June 17, 2017, the Reserve and Military Personnel Directorate changed the policy and created a Fertility Treatment Exemption from weight and body fat standards for females undergoing IVF treatments. This change was not retroactive.

In June 2017, the applicant submitted a complaint with the Department of Homeland Security’s OIG wherein she alleged that she was retaliated against by her chain of command because she made protected communications. Specifically, she alleged that she was retaliated

against for filing an EO complaint against her previous supervisor and for filing UCMJ violations against her current rating chain. After completing their investigation, the OIG issued its Final Report on Investigation and concluded that the applicant's allegations of retaliation were unsubstantiated. The OIG provided the following analysis for its conclusions:

Timing:

A preponderance of the evidence showed that RMO1 [Responsible Management Official] likely learned of Complainant's EO complaint when Complainant filed it in March 2016. The personnel actions under review occurred in May 2016 and June 2017. This timing, by itself, provides little information on whether there is an inference of retaliation.

A preponderance of the evidence shows that RMO1 likely learned of the Form 4910 Reports on June 7 or June 8, 2017, after RMO1's involvement in the personnel actions. Thus, RMO1 could not have taken these actions in retaliation for the Form 4910 Reports. RMO2 likely learned of the Form 4910 Reports on June 2, a few days prior to signing the June 2017 OER. However, RMO1 and RMO3 completed the marks and comments for the OER as early as May 25, and RMO2 made no changes to the OER after learning of the Form 4910 Reports. Thus, the timing provides little support to infer retaliation.

Strength of the Reasoning:

The RMOs with knowledge of Complainant's protected communications provided credible, non-retaliatory reasons for the personnel actions. USCG regulations required the numerical mark of three in Complainant's OERs because Complainant failed weigh-ins during the reporting periods. The reasons given for the other low numerical marks that Complainant had performance issues and difficulty handling more complex taskings were supported by the record and were corroborated by RMO3, who had no knowledge of the protected communications.

Motive to Retaliate:

None of the RMOs had motive to retaliate against Complainant for filing the EO complaint, which she made against a former supervisor in another unit. There was little evidence in the record of any RMO exhibiting animosity toward Complainant. In fact, DHS OIG found several instances of Complainant's command supporting her, including endorsing her requests for weight abeyances and appeal, supporting her White Paper advocating for changes to USCG policy on IVF treatments, and supporting her TDY to Colorado. In addition, when Complainant failed her second weigh-in, her supervisors could have sought her removal but instead they took actions to ensure that Complainant could retire with full benefits. In all of these examples, the RMOs chose not to take actions harmful to Complainant, suggesting a lack of retaliatory intent.

RMO1 and RMO2 would have had motive to retaliate against Complainant for filing the Form 4910 Reports, which contained allegations directly against them and triggered an investigation. However, as discussed, RMO1 did not learn of the complaint until after his role in the personnel actions, and the only action RMO2 took after learning of the Form 4910 Report was to sign her 2017 OER, which had already been completed and signed by RMO1 and RMO3.

...

Summary of Causation Analysis:

In considering all four factors in the analysis, DHS OIG found that: (1) the RMOs had reasoning for their OER ratings that was supported by the record; (2) the timing between the protected communications and personnel actions provided little evidence of a causal connection; (3) the RMOs had little motive to retaliate against Complainant when drafting the OERs and did not demonstrate animosity toward Complainant; and (4) although Complainant's OER numerical marks were lower than others similarly situated, the RMOs provided reasons for the numerical marks. Of particular note, RMO3, who had neither knowledge of the

protected communications nor any reason to retaliate against Complainant, independently corroborated the reasoning provided by the other RMOs and agreed with the final 2017 OER ratings. On balance, ample evidence established that the RMOs would have issued the same OER ratings even absent Complainant's protected communications.

VIEWS OF THE COAST GUARD

On February 13, 2023, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC argued that the applicant failed to establish there were matters of record presented to PY13, PY14, PY15, PY16, and PY17 Commander Selection Boards that contained material administrative errors. Specifically, PSC took issue with the applicant's claim that she, "would have been promoted to O5 in 2015 and (sic) had I not been non-compliant with weight standards due to undergoing IVF procedures." PSC argued that the applicant's presumption is highly speculative and lacks merit as the applicant was non-selected for the first time to the grade of CDR during the summer of 2012 (for Promotion Year 2013 CDR Selection Board) two years before even starting her IVF therapy. Moreover, PSC contended that when the applicant was considered for promotion by the CDR selection board in 2015, she had already been non-selected by the PY13, PY14, and PY15 CDR Selection Boards. According to PSC, it is unreasonable to assume that an assignment to a larger, busier Sector in 2015 would result in an automatic selection to CDR, especially given three previous non-selections by the applicant.

Regarding the denial of the applicant's abeyance request, PSC stated that Article 5 of the Coast Guard's Weight and Body Standards Program Manual, COMDTINST M1020.8H, was in effect at the time and outlined the appropriate policy for weight abeyances. PSC explained that at the time IVF treatments were considered elective procedures and were therefore not eligible for consideration under the weight abeyance policy. Accordingly, PSC argued that the applicant's abeyance request was correctly denied. PSC explained that the policy change permitted weight abeyances for women undergoing IVF treatments were not retroactive and her request for retroactive enforcement should be denied.

Finally, regarding the applicant's request for a Meritorious Service Medal, PSC stated in accordance with the Military Medals and Awards Manual, COMDTINST M1650.25E, Flag Officers are the approval authority for the Coast Guard Meritorious Service Medal and here the applicant failed to produce evidence that her Command submitted a nomination via CG-1650 to the cognizant approval authority for this level of award.

For the reasons outlined, PSC argued that the applicant's requests for relief should be denied.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 1, 2023, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited her to respond within thirty days. The Chair received the applicant's response on May 17, 2023.

The applicant addressed her lack of timeliness, however, the Board is waiving any untimeliness in the interest of justice, so those arguments will not be summarized here. Furthermore, the applicant contended that the Coast Guard failed to apply the applicable legal standard to her case because it failed to apply the *Engles* test. However, as already stated previously in this decision, the applicant erroneously applied the *Engles* test which has been superseded by applicable policy found in 14 U.S.C. § 2120. Therefore, for efficiency and clarity, any arguments relating to the *Engles* test will not be summarized here.

The applicant countered the JAG's arguments regarding her previous non-selections by stating that while it is true that she had previous non-selections, when the issue of her weight probation arose, she was serving as an O-4 in an O-5 billet in one of the nation's busiest ports. She explained that she had also successfully screened for an O-5 command as an O-4, which she argued is objective evidence that her skill set and background had increased in value relative to her peers since her previous non-selections. The applicant claimed that the assignment and successful screening would have made her more competitive and her selection far less speculative.

The applicant contended that regardless of the Coast Guard's position that relief should be denied because the change in policy was not retroactive, this Board has the authority to remove an injustice. The applicant argued that the Coast Guard changed its policies because of her advocacy and the circumstances of her case. The applicant alleged that what happened to her was unjust. According to the applicant, when she persistently and repeatedly told policy makers about that injustice, they acted to prevent that same injustice from happening to anyone else by changing the applicable policy. The applicant contended that it is impossible to conclude that her experience was not an injustice that shocks the sense of justice. The applicant alleged that her battle for equal treatment cost her a career in the Coast Guard and asked this board to correct that injustice.

Regarding the Meritorious Service Medal, the applicant stated that she provided a draft award and statement of performance that satisfies the standard for a Meritorious Service Medal in the Coast Guard Medals and Awards Manual, COMDTINST M1650 (series). The applicant alleged that she provided this draft to her Sector from her command (CG Recruiting) but chose to give her nothing at the end of her tour and career. The applicant claimed that this was an egregious departure from service custom and Coast Guard policy evidenced by the fact that her peers received Meritorious Service Medals when they departed the unit. According to the applicant, it was the standard for departing personnel in her paygrade and position to receive an award. The applicant contended that a Meritorious Service Medal certainly would have been appropriate for her departure and retirement. She stated that she was honorably retired, but was not treated honorably. She claimed that she received no retirement ceremony, award, or informal recognition whatsoever.

APPLICABLE LAW AND POLICY

The Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8H (series) in effect in 2016, provides the following guidance on Coast Guard weight standards and screening:

Article 2.A.1. Semiannual (April & October). All Coast Guard military personnel shall be screened against weight and body fat standards every April and October.

...

Article 2.A.3. Upon Expiration of an Authorized Abeyance or Exemption. As identified in chapter 5 of this Manual, members shall be evaluated for compliance on the first business day following the expiration of an abeyance or exemption.

...

Article 3.A.1. Consequences of Non-Compliance with Weight and Body Fat Standards. If a member is found noncompliant with weight and body fat standards, the following limitations and restrictions apply:

...

b. Officers may be considered and selected at a promotion board if non-compliant with weight and body fat standards. However, they will not be promoted until they have met these standards.

...

Article 3.B.1. Requirement for Documentation. All members found non-compliant with Weight and Body Fat Standards during any weigh-in must sign the form CG-3307 documenting their non-compliance unless covered by an abeyance or exemption as listed in chapter 5 of this Manual.

...

Article 5.A. Medical Abeyances.

1. Approving Authority. CG PSC-psd is the approving official for all medical abeyance/exemption requests. Each medically related abeyance request will be treated as unique and evaluated on a case-by-case basis. Commands should not forward requests for medical abeyances to CG PSC-psd until a diagnosis is made. Awaiting a medical diagnosis or abeyance decision does not constitute reason to waive or delay weight screening, documentation, and/or probation procedures.

2. Intent. The intent of authorizing a medical abeyance is to avoid penalizing a member who may be non-compliant due to medical conditions/medications that directly contribute to weight gain. Injuries or illnesses that interfere with a member’s ability to exercise are not grounds for a medical abeyance. Commands do not have to wait until a member is found non-compliant to request a medical abeyance.

3. Abeyance Examples.

a. Medical abeyance requests will only be granted for cases involving diagnosed physiological medical conditions or use of prescription medications (which are not disqualifying for continued service) that contribute to the member’s inability to maintain compliance with weight standards.

b. Abeyance requests that stem from medical conditions which may restrict a member’s ability to exercise, but otherwise have no physiological impact on the member’s ability to lose weight/body fat through proper diet or exercise, will not be approved.

c. The following chart provides some representative examples of qualifying and non-qualifying medical conditions:

Qualifying Medical Examples	Non-Qualifying Medical Examples
<ul style="list-style-type: none"> • Hypothyroidism • Polycystic Ovarian Syndrome 	<ul style="list-style-type: none"> • Depression • Twisted Ankles

<ul style="list-style-type: none"> • Prescribed Corticosteroids 	<ul style="list-style-type: none"> • Pulled Muscles • Broken Bones • Lower Back Pain
--	---

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, provides the following guidance on OER required comments:

Article 5.A.7.g. Required Comments.

...

2. Weight and Body Fat Non-Compliance. Reported-on officers found non-compliant with weight and body fat standards shall have this documented in their performance evaluation. Reflection of this shall occur during the reporting period to which noncompliance occurred. Commanding officers shall ensure all other required documentation is recorded in the member's PDR in accordance with the Coast Guard Weight and Body Fat Standards Program Manual, COMDTINST M1020.8 (series); is acknowledged by the member; and a copy sent to Commander (CG PSC-OPM-1), Commander (CG PSC-RPM-1) and (CG PSC BOPS-C-MR).

Article 2.A.11.a. of the Military Medals and Awards Manual, COMDTINST M1650.25E, outlines the eligibility criteria and states:

Eligibility Requirements. May be awarded by the Commandant in the name of the President to any member of the Armed Forces of the United States or to any member of a friendly foreign nation's armed force, who distinguish themselves by outstanding meritorious achievement or service to the United States. To justify this decoration, the acts or services rendered by an individual, regardless of grade or rate, must be comparable to that required for the Legion of Merit, but in a duty of lesser degree than the Coast Guard Medal, and single acts of merit under operational conditions may justify this award. When the degree of meritorious achievement or service rendered is not sufficient to warrant the award of the Meritorious Service Medal, the Coast Guard Commendation Medal, when appropriate, should be considered.

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 concerning this matter pursuant to 10 U.S.C. § 1552.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁸
3. The application was 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).
4. The applicant alleged that she was denied the opportunity to fairly compete for promotion because of her command's bias against her pursuit of fertility treatments, her advocacy for policy changes so that other similarly situated women could receive fertility treatments without

⁸ *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).

the fear of losing their careers, and an overall lack of sensitivity to the impacts that her fertility procedures had on her physical and emotional health. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁹ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."¹⁰ 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

5. Weight Abeyance. The applicant alleged that it was erroneous and unjust for the Coast Guard to deny her a weight abeyance for her fertility treatments and then fail to retroactively apply the newly implemented abeyances for women undergoing fertility treatments to her case. For the following reasons the Board disagrees:

- a. Fertility Treatments. The Board's review of the record shows that applicant began fertility treatments in April of 2014 and received three treatments between 2014 and 2015. As part of the fertility treatments, the applicant was prescribed corticosteroids and hormones which caused the applicant to gain weight and ultimately fail her semi-annual weigh-in on May 5, 2016. On May 6, 2016, the day after she failed her weigh-in, the applicant's supervisor submitted a medical abeyance request on behalf of the applicant due to the fertility treatments, but the abeyance was denied as well as the applicant's subsequent appeals. The applicant's request was denied because at the time under Coast Guard policy fertility treatments were considered an elective procedure for which service members take full responsibility for the side-effects of. The applicant has failed to prove that the Coast Guard's denial was not based on policy in effect at the time or that the policy was applied erroneously or unjustly to her.
- b. Medications. The applicant alleged that it was erroneous and unjust for the Coast Guard to deny her a weight abeyance because she was taking a medication outlined in policy that allows for weight abeyances. However, the applicant's use of the corticosteroids and hormones was completely elective at the time and was not due to a medical diagnosis outside of her control, which is what the medical abeyances are meant to address. Although the Coast Guard now provides for such weight abeyances, Coast Guard policy at the time did not provide abeyances for elective procedures such as IVF.
- c. Approved Medical Condition. The applicant alleged that it was erroneous and unjust for the Coast Guard to deny her a weight abeyance because she was diagnosed with Polycystic

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹¹ *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).

Ovarian Syndrome. However, the weight abeyance submitted by the applicant and the medical recommendation submitted in conjunction with the weight abeyance makes no mention of such a diagnosis. The weight abeyance request and doctor's note focused solely on the applicant's fertility treatments as justification for the weight abeyance. The only mention of the diagnosis was from the applicant's September 7, 2016 appeal wherein she stated, "Furthermore, I have been since diagnosed with polycystic ovarian syndrome per enclosure (2), which is also a qualifying example for a medical weight abeyance." There is no evidence that the applicant followed up and applied for an abeyance under the newly diagnosed qualifying condition. Moreover, the applicant's reference to a diagnosis of Polycystic Ovarian Syndrome in her September 7, 2016 appeal indicates that her diagnosis came only after she failed her weigh-in and after she applied for an abeyance. The Coast Guard was only looking to her fertility treatments and the record indicates that it was wholly unaware of any Polycystic Ovarian Syndrome diagnosis. Accordingly, the Board finds that the applicant has failed to prove that the Coast Guard committed an error or injustice when it denied her weight abeyance appeal based off of her fertility treatments and not off of her Polycystic Ovarian Syndrome.

- d. Subsequent Changes to Policy. The applicant contended that the injustice in the Coast Guard's denial of her weight abeyance is proven by the Coast Guard's subsequent implementation policy that now permits abeyances for women undergoing fertility treatments, however, subsequent implementation does not make a previous policy omission unjust. Indeed, medical advances are continuous and happening all of the time and as the advances occur adjustments to service requirements will be necessary, but their late or delayed implementation does not render the Coast Guard's actions prior to those advancements in science and understanding erroneous or unjust nor does it shock the sense of justice.
- e. Effects on Career. Although the applicant alleged that her choice to have a family and undergo fertility treatments ended up costing her a career in the Coast Guard, her contentions are not supported by the record. The applicant herself admitted in her application to this board that she had already been passed over for CDR three times before she even started taking her IVF treatments. In total, the applicant had been passed over for promotion to CDR four times before her weight became an issue and there is no evidence to support her claims that a weight abeyance would have had a significant impact on her career. The applicant stated that her previous OERs reflected her high performance, yet despite the high marks and laudatory comments contained her in previous OERs, the applicant was still passed over for CDR three times before her fertility treatments began. Coast Guard policy in effect at the time did not provide for abeyances for elective procedures such as fertility treatments and the applicant has failed to prove that the policy itself was erroneous or unjust.

6. CDR Non-Selections. The applicant alleged that but for the erroneous and unjust mark of 3 she received for the "Health & Well-Being" performance dimension on her OER for the May 1, 2015, through April 30, 2016, rating period she would have been promoted to CDR. According to the applicant, absent this mark of 3 she would have been promoted to CDR. For the following reasons, the Board disagrees:

- a. Non-Selections Prior to Fertility Treatments. The Board's review of the record shows that the applicant promoted to LCDR on September 1, 2007, and went before her first CDR selection board in July 2012 where she received her first non-selection. The Board's review of the record further shows that the applicant's LCDR OERs prior to her first CDR selection board averaged marks of 6s and 7s with only a few marks of 5, with the exception of the July 1, 2009, through June 30, 2010, OER wherein the applicant received thirteen marks of 5 and only four marks of 6 and one mark of 7. This OER, and the substantial marks of 5s the applicant received, would have affected her competitive standing for CDR amongst other applicants who had limited or no marks of 5 on their respective LCDR OERs. Following the applicant's first non-selection, her OERs continued to exhibit strong performance, achieving almost exclusively marks of 6s and 7s, with very few marks of 5. She also received marks of 5 and above on the Comparison Scale. However, despite the consistently high performance, the applicant went on to be non-selected by CDR selection boards another three times. In total, the applicant was non-selected by CDR selection boards four times before she even received a mark of 3 in "Health & Well-Being."
- b. Non-Selection Subsequent to Fertility Treatments. The applicant contended that because she was selected to be a Strike Force Team Commander, in essence performing the duties of an O-5, had it not been for the mark of 3 in "Health & Well-Being" she would have been selected for CDR. However, the applicant's contentions are not supported by the record or facts in this case. First, even absent the applicant's mark of 3, she had already been non-selected by various CDR selection boards four times. Second, the applicant submitted a supplemental statement for the CDR board to consider wherein she addressed her reasons for the failed weight probation, including discussing her fertility treatments and desperate pursuit to start a family. The applicant also highlighted her many career accomplishments and various assignments in her statement to the Board. However, the record shows that even with this supplemental statement and explanation for the mark of 3, the applicant was still non-selected for promotion to CDR. The applicant has submitted no evidence to show that the records reviewed by the requisite CDR selection boards contained material errors or were manifestly unjust. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that her mark of 3 was the result of her failure to make CDR.

7. Bias by Command. The applicant alleged that she faced extreme hostility and pushback from her command for her decision to pursue fertility treatments, but other than her own statements, the applicant has submitted no evidence of command hostility or bias. On the contrary, the applicant's claims are contradicted by the OIG investigation wherein it describes a command that was supportive of the applicant's pursuits, so much so that she was invited to her supervisor's home, who was out on sick leave at the time, to help with editing the applicant's White Paper to ensure it had the best chances of being approved by Coast Guard command. Moreover, the applicant's command submitted a weight abeyance on behalf of the applicant, endorsed her appeal after the first request was denied, and even recommended that she be allowed to retire in lieu of administrative separation, a request that was granted by PSC. Ultimately, the OIG found no evidence of wrongdoing by the applicant's command, but found their personnel actions to be supported by the records and facts in the record and unsubstantiated the applicant's claims of

retaliation. The Board finds the OIG's report and findings persuasive and supported by the facts and evidence in this case. Accordingly, the Board finds that the applicant has failed to prove by a preponderance of the evidence that she was subjected to unjust bias as a result of her pursuit of fertility treatments.

8. OER Comments. The applicant alleged that her command's bias and hostility toward her is evidenced by their refusal to acknowledge or record various award nominations in her OERs. According to the applicant, her command refused to document in her OERs her nomination for the International Association of Emergency Managers award or the prestigious Dorothy Stratton Leadership Award. However, 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."¹² The applicant has failed to establish that any of these prongs were violated. Article 4.E.2.j. of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C, states only that "comments must be sufficiently specific to accurately portray the officer's performance and qualities which compares reasonably with the standards defined and marked on the performance dimensions in the evaluation area." The applicant has failed to prove that her supervisor's comments were not specific enough to accurately reflect her performance during the applicable rating period or that failure to mention an award nomination is a violation of Coast Guard policy. The fact that the applicant's rating chain chose to highlight the applicant's performance without highlighting her award nominations does not render the OER erroneous or unjust. Furthermore, it was the applicant's rating chain that nominated the applicant for the Dorothy Stratton Leadership Award, and arguably had their intent been to disrupt the applicant's promotion potential they would not have nominated her for such a prestigious award in the first place. Therefore, the Board finds that the applicant has failed to prove that the disputed OERs were adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a "prejudicial violation of a statute or regulation."¹³

9. Meritorious Service Medal. The applicant alleged that her command erroneously and unjustly downgraded her Meritorious Service Medal upon her retirement. She further alleged that her performance satisfied the standard for a Meritorious Service Medal in the Coast Guard Medals and Awards Manual, COMDTINST M1650 (series). According to the applicant, she provided a draft to her Sector from her command (CG Recruiting) but instead, her command chose to give her nothing at the end of her tour and career. The applicant claimed that this was an egregious departure from service custom and Coast Guard policy evidenced by the fact that her peers received Meritorious Service Medals when they departed the unit. The applicant further claimed that it was the standard for departing personnel in her paygrade and position to receive an award. The applicant contended that a Meritorious Service Medal certainly would have been appropriate for her departure and retirement.

Article 2.A.11.a. of the Military Medals and Awards Manual, COMDTINST M1650.25E, provides that the Meritorious Service Medal:

¹² *Id.*

¹³ *Id.*

May be awarded to any member who . . . distinguish[es] themselves by outstanding meritorious achievement or service to the United States. To justify this decoration, the acts or services rendered by an individual, regardless of grade or rate, must be comparable to that required for the Legion of Merit, but in a duty of lesser degree than the Coast Guard Medal, and single acts of merit under operational conditions may justify this award. *When the degree of meritorious achievement or service rendered is not sufficient to warrant the award of the Meritorious Service Medal, the Coast Guard Commendation Medal, when appropriate, should be considered.* (Emphasis added.)

As outlined above, there is nothing in the eligibility requirements that entitle any officer, regardless of their retirement status, to be issued a Meritorious Service Medal. Rather the eligibility requirements allow for a less prestigious award if the degree of meritorious achievement or service rendered is not sufficient to warrant the Meritorious Service Medal, and even then, the alternate award is permissive, not mandatory. The applicant was free to submit a draft version of the award she believed she was entitled to, but the responsibility for approving an award fell to Coast Guard flag officers, not solely the applicant's command, as outlined in Table 1-1 of COMDTINST M1650.25E, and those reviewing officials were free to deny the applicant's recommendation. The Board finds that the fact that the applicant was not awarded the Meritorious Service Medal indicates that the Coast Guard reviewed her record and determined her service did not rise to the level that justified issuing her such an award. The applicant's service records are presumptively correct, and the applicant has failed to prove that the Coast Guard's decision not to award her a Meritorious Service Medal was erroneous or unjust. Her request for relief should therefore be denied.

Finally, the fact that other members of the applicant's unit allegedly received the Meritorious Service Medal does not render the applicant's failure to receive the award erroneous or unjust. Awards are fact specific and depend solely on the individual service member's service. The fact that one service member received an award that another member of the same unit did not, does not make the decision erroneous or unjust.

10. Injustice. Injustice. Under 10 U.S.C. § 1552(a), the Board may "remove an injustice" from a member's record, as well as correct an error in the record. The Board has authority to determine whether an injustice has been committed on a case-by-case basis.^[1] Therefore, the Board must consider whether the Coast Guard's denial of the applicant's weight abeyance was an injustice. Based on a plain language reading of Article 5.A.3.a. of COMDTINST M1020.8H, and using canons of statutory construction, one must give equal and separate weight to phrases when an "or" appears. Meaning, "diagnosed medical conditions" *or* "use of prescription medications" are equally, and separately, sufficient reasons to approve an abeyance request. Additionally, Article 5.A.3.b. separately lists "Prescribed Corticosteroids" as one of the "Qualifying Medical Examples." Based on the facts presented, the applicant was using prescribed, specifically corticosteroids. Pursuant to the plain language of Articles 5.A.3.a. and 5.A.3.c. of COMDTINST M1020.8H, that is sufficient reason to approve the abeyance request. Accordingly,

^[1] Decision of the Deputy General Counsel, BCMR Docket No. 2001-043. According to *Sawyer v. United States*, 18 Ct. Cl. 860, 868 (1989), *rev'd on other grounds*, 930 F.2d 1577, and *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976), purposes of the BCMRs under 10 U.S.C. § 1552, "injustice" is "treatment by military authorities that shocks the sense of justice."

the Board finds that the denial of the weight abeyance for the applicant's use of prescribed corticosteroids was an injustice based on the plain language of the Coast Guard's own policy.

However, despite this injustice, the record does not demonstrate that the denial of the weight abeyance would have affected the outcome of the applicant's non-selection for promotion to CDR as alleged by the applicant. As outlined above, the record shows that before the applicant was ever denied a weight abeyance, she had already been non-selected for promotion to CDR four times.

Furthermore, Article 2.A.1. requires members to weigh-in every April and October. Further, Article 5.A.1. states that awaiting an "abeyance decision does not constitute reason to waive or delay weight screening, documentation, and/or probation procedures," and Article 3.B.1. states that members found non-compliant with the weight standards "during any weigh-in must sign the form CG-3307 documenting their non-compliance unless covered by an abeyance." However, per Article 3.A.1., even if a member is non-compliant with the weight standards may still be considered and selected at a promotion board but would not be promoted until they have met the standards.

The record shows that the applicant's record was fully presented to the CDR selection board, including the applicant's personal statement outlining the circumstances of her weight failure, the prescribed corticosteroids, and her many career achievements. Per Article 3.A.1.b., the applicant was eligible to be considered and selected at a promotion board, but the applicant was still non-selected by the CDR promotion board. In addition, the Board notes that despite knowing that she would not make weight standards, the applicant delayed weighing in until May, in contravention of Article 2.A.1., and she failed to submit a request for a weight abeyance until after she had already failed her weigh-in, resulting in the mandatory mark of 3 on her OER and Page 7 in accordance with Article 3.B.1. Thus, even if the Coast Guard had provided a weight abeyance, it would have been provided only after the non-compliance was noted on her OER and page 7. Additionally, per Article 3.A.1.b., the applicant could only be promoted if she met the weight standards by the expiration of the weight abeyance, and there is no indication in the record that the applicant would have been able to meet those standards even if a weight abeyance had been approved.

Therefore, given the totality of the requirements and facts in the record, the Board determines that the injustice of the denial of a weight abeyance would not have affected the outcome of the applicant's non-selection for promotion to CDR as alleged by the applicant.

11. Retroactive Implementation of Policy. The applicant has requested that the Board require the Coast Guard to retroactively implement its June 17, 2017 policy change wherein it permitted weight abeyances for women utilizing IVF treatments. However, the Board's authority rests on correcting individual records and the applicant's request to require the Coast Guard to retroactively apply its policy to the entire service is not a record correction within the meaning of 10 U.S.C. § 1552.

12. For the reasons outlined above, the applicant has not met her burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that

its administrators acted correctly, lawfully, and in good faith.¹⁴ She has not proven, by a preponderance of the evidence, that the Coast Guard erroneously or unjustly denied her a weight abeyance, and Coast Guard awards. Accordingly, the applicant's requests should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁴ *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

ORDER

The application of Retired LCDR [REDACTED] [REDACTED] formerly [REDACTED] [REDACTED] USCG, for correction of her military record is denied.

August 15, 2024

[REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
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