

N.B.: The delegate of the Secretary concurred in the relief recommended by the Board in this case on June 30, 2000.

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-035

FINAL DECISION

ANDREWS, Attorney Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 of the United States Code. It was commenced upon the BCMR's receipt of the applicant's application on November 24, 1997.

This final decision, dated November 5, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxx, first enlisted in the Coast Guard on xxxxxxxxxx, 19xx. On xxxxx, 199x, she accepted a voluntary discharge to avoid accepting orders she alleged were retaliatory for a sexual harassment complaint she had made. After an investigation by the Departmental Office of Civil Rights (OCR),¹ she signed a settlement agreement with the Coast Guard and reenlisted on xxxxxxxx, 199x.

¹ The following persons were interviewed by the OCR investigator:

Z. is the chief xxxx whom the applicant accused of seeking retribution.

Y. is the administrative xxxx whom the applicant accused of seeking retribution at Z.'s instigation.

X. is a commander and the executive officer at XXX Xxxxxxxx.

A., B., C., and D. are all witnesses who were stationed at XXX Xxxxxxxx.

Q. is another xxxx against whom Z. allegedly sought retribution.

Cx is a captain and the commanding officer at XXX Xxxxxxxx.

The applicant asked the Board to correct her record to show no break in service so that she would receive back-pay and benefits and be credited with active service time for the year and a half between her discharge and reenlistment.

APPLICANT'S ALLEGATIONS

The applicant alleged that she suffered retaliation as a result of lodging a sexual harassment complaint against a petty officer in 199x, while stationed in Xxxx. As a result of the complaint and subsequent investigation, the petty officer went before a captain's mast and took early retirement in lieu of a court-martial. The applicant was then transferred to the XXX (XXX) in Xxxxxxxx, Xxxx, because, she alleged, a xxxx (Z.) who was a very close friend of the petty officer threatened to "get" her for lodging the complaint against his friend. The applicant alleged that Z. told her that he would soon be her detailer,² and then he would be able to "take care of" her.

The applicant alleged that, after Z. became the xxxx detailer for the xxxxx, he made her job at XXX difficult by prejudicing her administrative xxxx (Y.) against her by telling that officer his own view of the sexual harassment complaint. She alleged that thereafter Y. constantly criticized her without cause. She also alleged that Y. wrote a Page 7 (administrative remarks) to include in her record about an alleged inappropriate relationship but never wrote a Page 7 to include in the record of the supervisor with whom she was supposedly involved, even though the regulations hold a ranking member primarily responsible for having an inappropriate relationship with a member of lower rank. The applicant stated that she requested and received a transfer out of Y.'s department after he told her that he knew that everything that had happened in Xxxx was her fault.

During her tour at XXX, the applicant alleged, she received several messages from Z. through other members to the effect that he had not forgotten about her. The applicant's tour at XXX was scheduled to end in November 199x. In July 199x, she received notice from the Military Personnel Command (MPC) indicating that a request for extending her tour would probably be granted. The applicant applied for an extension. She wanted to stay in the area because she had a xxxxxxxxxxxx nearby.

R. is a commander, chief of the Enlisted Assignment Branch, and Z.'s second-line supervisor.

S. is a lieutenant commander and the applicant's last supervisor before her discharge.

T. is a lieutenant commander and president of the 199x xxxx TERA panel.

² A "detailer" is an officer who recommends and has significant control over which enlisted member is ordered to which billet.

The applicant alleged that on January 2, 199x, she was contacted while on leave by another xxxx, who informed her that Z. had called the applicant personally to inform her that he was sending her to a new billet. When she returned Z.'s call, he told her that she was being transferred to the Xxxx, a Coast Guard cutter based in xxxxxxxxxxxxxxxx, on April 1, 199x, "so [she] better start packing." When she reminded him that her tour was not scheduled to end until November 199x, he said, "This is it [applicant's first name], and you should have expected something like this." She alleged that members are usually informed when their extension requests have been disapproved so that they can submit another "dream sheet" of preferred posts.

The applicant alleged that when her leave ended on January 8, 199x, a lieutenant commander told her that "she had talked to [Z.] the week before and that he had told her that I was to receive those orders because of some guy I went after in Xxxx." She also alleged that when she informed her department head of the situation and told him she did not want to accept orders arranged by Z., he told her there was nothing he could do because there was no proof. The command's xxxx responded similarly.

The applicant alleged that the executive officer (X.) asked her that same day what orders she would be happy with. She told him she was afraid to take anything Z. offered her. She said she would rather be discharged than accept orders to a unit in which she would not feel safe. She "fear[ed] being sent out in the middle of the ocean with someone who believed I deserved whatever he could get away with doing to me." She alleged that she finally told the [executive officer] she would take "any shore billet anywhere" because "[h]e didn't seem to hear anything I had said to him of my concerns or my fears." When the executive officer asked her why she didn't cite her xxxxxxx as a "special needs" situation to get out of orders to a ship, she responded that she did not mind accepting orders to a ship, it was receiving any orders from Z. that she feared.

The applicant lodged a civil rights complaint of retribution with her command on January 16, 199x. On January 17, 199x, an opportunity to apply for early retirement was announced, and the applicant applied for it on January 19, 199x. On the same day, she was called by a Coast Guard civil rights counselor about her civil rights complaint. She told him she had applied for early retirement but that she was afraid Z. "would have some say on the results." He told her that her command believed that she just did not want to go to sea. He said her command was drafting a letter to request that her tour be extended for another year.

The applicant's request for early retirement was denied. She alleged that it was because Z. was one of the officers on the committee that decided whose

applications would be accepted. She alleged that it was discriminatory for the Coast Guard to allow the officer who had sexually harassed her to retire early in lieu of court-martial but to deny her early retirement.

On January 31, 199x, X. asked her if she would settle her complaint informally at the command level. After discussing her options with him, she decided to file a formal complaint. She also asked him about the letter the counselor had told her the command was writing regarding her extension. She alleged that the executive officer told her "there were some editing problems and the letter isn't going to be sent, besides you have filed a Civil Rights claim and seem to be taking care of it yourself." Rather than accept the orders to the Xxxx arranged by Z., the applicant chose to be discharged.

The applicant was discharged on xxxxxx, 199x. In April 199x, she received a copy of the Report of Investigation prepared by the Department of Transportation's Office of Civil Rights. (A summary of the report begins on page 6, below.) The report arrived with a letter urging her to settle informally with the Coast Guard and stating that, if they did not settle, the OCR would issue a final agency decision after 30 days. However, in August 199x, after the OCR had repeatedly refused to issue its decision, the applicant finally accepted an offer to settle with the Coast Guard. (All pertinent parts of the settlement provisions are reproduced on pages 12 and 13, below.)

VIEWS OF THE COAST GUARD

On September 30, 1998, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The Chief Counsel argued that relief should be denied because the applicant voluntarily left the Coast Guard at the end of her enlistment³ instead of accepting orders. Rather than accept a voluntary discharge, the Chief Counsel alleged, the applicant should have accepted the orders she received to serve on the Xxxx. Once there, she could have used Article 138 of the Uniform Code of Military Justice (UCMJ) or other prescribed complaint processes to contest the orders or address her concerns. Furthermore, the Chief Counsel alleged, the applicant "provide[d] no evidence^[4] that she would have faced an intolerable situation if she executed the orders and, furthermore, there is no evidence that her future command would not have taken appropriate action if called upon to do so."

³ The applicant's six-year enlistment was due to end xxxxxxx, 199x, but she was not discharged until xxxxxxx, 199x.

⁴ Paragraph eight of the Settlement Agreement prohibits the applicant from submitting evidence to the BCMR other than the OCR's Report of Investigation.

In addition, the Chief Counsel alleged that the applicant had waived the argument that her discharge was unjust when she accepted the settlement agreement. As proof of this, the Chief Counsel quoted several paragraphs from the settlement agreement.

Finally, the Chief Counsel argued that the Coast Guard lacks authority to pay a member for time not served on active duty. The Chief Counsel cited BCMR Docket No. 1997-114 for the proposition that the applicant cannot receive back-pay because she chose to be discharged rather than pursuing her claims while on active duty. Although paragraph eight of the settlement agreement allows the applicant to seek relief through the BCMR, the Chief Counsel argued that it did "not concede that her claim has any merit nor that the Coast Guard has any fiscal law authority to pay Applicant active duty pay and allowances and grant benefits including leave for a period of time when the Applicant did not serve on active duty."

APPLICANT'S RESPONSE TO THE COAST GUARD'S VIEWS

On October 9, 1998, the applicant responded to the Chief Counsel's advisory opinion by stating that she "accepted discharge because [she] had no other alternative other than to accept orders from an individual who had threatened me with retribution." She stated that she "chose discharge over reenlistment simply because to reenlist and then refuse orders would have allowed the Coast Guard the opportunity to prosecute, making me a criminal." Punishments could have included, she alleged, a dishonorable discharge, forfeiture of all pay and allowances, and up to two years' confinement, under Article 90 of the UCMJ, or a bad conduct discharge, forfeiture of all pay and allowances, and up to six months' confinement, under Article 92 of the UCMJ.

In response to the Chief Counsel's argument that she should have reported to the Xxx and used Article 138 remedies to resolve the problem, she alleged "[t]he UCMJ process was not recommended by my superiors as the goal was to stop issuance of orders by this officer or cancel the orders issued by this officer. To submit a CG-4910 against the Detailer for violation of Article 138 would not have taken the Detailer out of the loop." "Further, when I pursued Article 138 charges while still at XXX Xxxxxxxx, I was advised that since the members were from two different commands, Article 138 would not be appropriate."

SUMMARY OF REPORT OF INVESTIGATION

On April 14, 199x, an investigator for the Departmental Office of Civil Rights sent the applicant and the Coast Guard a report of his investigation of the

applicant's complaint. The report largely substantiated many of the applicant's allegations concerning Z.

In 199x, a petty officer who had gone before a captain's mast for sexually harassing the applicant took early retirement in lieu of being court-martialed. The applicant's complaint and the result were common knowledge at the base. Several witnesses stated that Z. was a very close friend of the petty officer. The applicant was soon transferred to XXX XXXXXXXX. Z. became the xxxx detailer in XXXXXXXXXXXX 199x. He exercised significant control over the decisions made regarding her request for extension, her orders to the Xxxx, and her denial of early retirement.

Witnesses' Statements Concerning Retribution by Z.

Y., the administrative xxxx, confirmed that he had prepared a Page 7 for the applicant's record regarding an inappropriate relationship with her supervisor. He stated further that "he did not get around to writing a Page 7 on [the supervisor] because the issue got elevated with [the applicant's] reaction to being issued the Page 7 and all was resolved in a counseling session." He denied that the Page 7 had anything to do with his friendship with Z., but he admitted that Z. had told him about her sexual harassment complaint.

A witness, A., stated that she believed "[the applicant] got the Page 7 in this case instead of [the supervisor] because [Y.] did not like [the applicant]." A. also stated that Y. and Z. were in frequent contact and "got along rather well." She indicated that the two did favors for each other. Another witness, B., stated that Y. and the applicant "did not get along well."

Witnesses' Statements Concerning Extension and Orders to Cutter

Another witness, C., stated that she had heard Z. confront the petty officer who had harassed the applicant "about the fact that he would jeopardize his marriage and career over 'someone like [the applicant].'" She also stated that,

when [Z.] got his orders to become the Detailer, he made a statement to people in the office that he had a list of all of the people he would pay back once he became Detailer. He then named some of the names of people that were on his list. She said there was only one name of the people he mentioned that she knew, [Q.], who had previously been stationed at xxxxx. She said that Z. disliked [Q.] less than he disliked [the applicant]. Therefore, they (the people in the office) knew that [the applicant] would definitely be a target if [Q.] was to be a target.

Regarding the applicant's request for extension at XXX, Witness D. stated that in July 199x, the MPC asked commands about staffing concerns. He responded by indicating that all of the xxxx at his command were due to leave at about the same time, "leaving the command with little or no 'corporate' knowledge." At the time, only two of the command's seven xxxx "could realistically expect to be extended." One of the two was the applicant. D. received a response from Z.'s second-line supervisor (R.) at MPC stating that it would "consider an extension." D. stated that in his experience, such a response meant that a request for extension would be granted. He "had never seen a xxxx not be granted an extension when told he or she would probably get one through written correspondence, unless there was an overriding concern"

D. further stated that, when he heard of the applicant's orders, he was very surprised, and he questioned Z., who told him that they needed to fill billets with "the most qualified candidates, and that all options would be considered." Although D. got the impression that no concrete decision had been made, he soon received the applicant's orders to the Xxxx, and

[t]his disturbed him, . . . because he was aware that [Z.] had already telephoned at least two female xxxx [sic] stationed at Coast Guard xxxxxxxxxx who did not want to remain at their commands and were told by [Z.] that they would be extended in their current assignments whether they wanted to be or not. Yet, he had two xxxx [sic] who wanted to stay, but [Z.] would not give them extensions. He said that both xxxx [sic] . . . were initially extended against their wishes. . . .

D.'s statements were corroborated by X. X. also stated that the normal process for assigning enlisted members was that, "if nothing is available for the member in the areas that he/she enters on the Assignment Data Form (dream sheet), the Detailer gets back to the member and lets him/her know that none of the desired options are available. The member is then asked for other choices." D.'s statement regarding the two xxxx whose tours had been extended against their wishes was corroborated in regard to one of the xxxx by C., who knew the xxxx in question.

In response to questions concerning the procedure for reviewing and deciding on extension requests, R. indicated that Z. forwarded extension requests to the branch with recommendations. Z. did not have final authority to approve or disapprove such requests. He stated that, when he had informed the applicant's command that they would "consider an extension," no guarantees were made. R. stated that no action was ever taken on the applicant's request for extension because she was ordered to the Xxxx before it was necessary. High priority is given to filling empty billets on ships. Decisions regarding extension requests are usually made last.

D. also stated that Z. had explained the applicant's orders to the Xxxx by saying that the cutter "had a female berthing requirement and that [the applicant] was the closest female xxxx who did not have sea duty." However, "when all xxxx orders had come out, they discovered that there was a female xxxx already stationed in xxxxxx who got transferred to . . . xxxxxxxxx, and a second female xxxx at . . . xxxxxx, [Xxxx], was sent to either Headquarters or [xxxx]. . . . [N]either of these two xxxx [sic] had sea duty time as a xxxx and both were closer to the [cutter] than [the applicant was]." Moreover, D. stated, in contradiction to Z.'s claim that the Xxxx required a female, a male xxxx was assigned to the cutter when the applicant chose to be discharged rather than accept the orders. D.'s statement regarding the two transfers was corroborated by B.

C. stated that she and several other members had monitored the transfer orders that year "because they knew who [Z.] liked and disliked. The few people they knew were his favorites went where the group knew they wanted to go. The few that they knew for sure that [Z.] disfavored, [the applicant and Q.] both got assignments they did not want."

A. stated that Y. "told her he knew [where the applicant] was being ordered to, that [the applicant] did not yet know, and that she was going to be surprised. A. stated that "she got the impression [Y.] was happy about [the applicant's] going to a ship. She also said it seemed like he knew that [Z.] was doing this intentionally and he was satisfied that it was happening. She said further that "it was her sense that while she and [Y.] were discussing [the appli-

cant's] orders, that [Y.] knew something about [the applicant's] incident in Xxxx."

S., who was the applicant's last supervisor before her discharge, stated that she asked Y. about the applicant's orders and that "he said something to the effect that he was not surprised that [the applicant] was going to a ship and alluded to the fact that he was not surprised because . . . the Detailer was stationed with [the applicant] in Xxxx and knew of the incident in Xxxx." S. stated that she informed the applicant of the substance of her conversation with Y. because she knew it "somewhat confirmed [the applicant's] concerns."

The applicant's commanding officer (Cx) at XXX stated that he did not learn of her concerns about Z. until January 11, 199x. He stated that before that date, he thought her chief concern was to stay near her xxxxxxx. When Cx tried to arrive at an informal resolution to the complaint, the applicant asked (1) for orders to any shore unit and (2) for Z. to be removed as detailer. On January 31, 199x, when X. told R. about the applicant's retribution complaint, R. responded that, unless she enrolled in the special needs program, the applicant's orders would not be changed because "on paper" she "fit" the billet profile. "[R.'s] bottom line was that even if there were some personal differences between [the applicant] and [Z.], there was still a fit for her to go to the [cutter] and that if [Z.] had not made the assignment someone else would have." Cx stated that when the applicant learned of R.'s response, she decided to follow through with a formal complaint.

In a letter to OCR dated February 15, 199x, that accompanied the applicant's complaint, Cx also stated that "it is difficult to measure the impact that this very real perception of retribution by [Z.] has had on [the applicant]. . . . If this investigation proves [Z.] was using his position as detailer against [the applicant] to get revenge for [the petty officer's] forced retirement, then [the applicant] should be given the option of retiring It is further requested that [the applicant] be allowed to remain on active duty and assigned to [the same unit] pending the outcome of this investigation."

R. stated that enlisted members are considered tour complete and may be transferred at any time during the calendar year their tours are scheduled to end. Regarding the applicant's orders to the Xxxx, he stated that, "a need for a xxx aboard USCGC Xxxx came up unexpectedly. . . . [T]he incumbent xxx aboard USCGC Xxxx, who was not tour complete in 199x and thus not expected to have to be replaced, decided to leave the Service rather than reenlisting as had been previously expected." This development "created a need for a relatively rapid transfer of a xxx." He explained that Z. had "immediately looked for [xxxx] who were tour complete in 199x and for units with 'extra' [xxxx] that could more easi-

ly absorb the transfer of a member a few months earlier in the assignment process than might normally be expected." In addition, "[t]he Cutter Command had expressed a strong need for mid-grade enlisted women to be assigned, due to the distribution of pay grades of the women already aboard." Because the applicant fit the requirements and her command had "extra" xxxx, she was "an excellent choice for the position." R. stated that, after X. informed him of the applicant's fear of retribution, he and another officer reviewed the rationale for her orders, agreed the decision was a good one, and decided it should not be cancelled.

When questioned further about these statements, R. stated that he had misremembered the circumstances. The xxxx whom the applicant was supposed to replace was a male who was tour complete that year. In fact, he was overdue for transfer. Coast Guard records indicate that, apart from the applicant, six female xxxx stationed in Xxxx and xxxxxxxx were tour complete and had not done sea duty at the time of the applicant's orders. The OCR investigator interviewed four of the six. All of those interviewed were tour complete before November 199x, and all were transferred to land-based assignments. Two were already stationed in xxxxxxxx at the time. Another was stationed closer to xxxxxxxx than was the applicant's unit. Of the four, three had no "extenuating circumstances or conditions to prevent them from performing sea duty."

X. indicated that, at the time the applicant received her orders, there were no "extra" xxxx assigned to his command. However, on January 3, 199x, the same day the applicant learned of her orders from Z., Z. sent a message to D. indicating that he was assigning an "extra" xxxx to the station. The "extra" xxxx arrived in mid-January.

When the investigator first questioned Z., he stated that he could not recall the nature of the charges the applicant had brought against the petty officer in Xxxx, what findings had been made at the captain's mast, or what the results were. Later, however, Z. insisted that, when he made the decision to assign the applicant to the Xxxx, he had informed R. that his decision might be attributed to that fact that she had accused his friend of sexual harassment and he had been forced to retire.

Z. admitted having known that the applicant's xxxxxxxxxxxxxx at the time he recommended that she be transferred to the Xxxx. He stated that the cutter had requested a mid-grade female xxxx and that a process of elimination had brought him to choose the applicant.

Witnesses' Statements Concerning Early Retirement

On January 16, 199x, the Commandant solicited applications for early retirement (Temporary Early Retirement Authority (TERA)) from officers and enlisted members. The applicant met the announced qualifications. She applied on January 19, 199x, to be retired on October 1, 199x.

When questioned about the selection process, Z. stated that the panel's first priority was that ships not be adversely affected. "'Anyone,' according to [Z.], '[a]pplying for TERA who had been ordered to a ship would not get recommended.'"

T., the president of the TERA panel, stated that "the criteria for selection would include, but not be limited to, factors such as grade, years of service, obligated service, special skills, performance history, and programmatic needs" In addition, the applicants' rotation dates, time in service, time in grade, expiration of enlistment, conduct, special skills, requested retirement dates, and command endorsements had been considered to minimize adverse impacts on the units. No other criteria were developed. "[T]here was no hard and fast rule regarding applicants who had been order[ed] to or [were] stationed on a ship. However, information indicating that people were already aboard ships or had been ordered to ships, was used in helping them make their decisions because ships were their highest priority."

T. further stated that there were five members, including Z., on the xxxx TERA selection panel. Four of the five members had to be in agreement as to each person on the final list of those selected for TERA. Of the fifteen xxxx who applied for TERA, eight were approved. "When asked why [the applicant] was not recommended for the early retirement program given she would have had fifteen years service by the requested retirement date, she was tour complete in 199x, her enlistment expired in 199x, her conduct was acceptable, and she received her command's endorsement for early retirement, [T.] stated that the panel's report . . . indicated that [the applicant] was not recommended because she was under orders afloat."

EXCERPTS OF THE SETTLEMENT AGREEMENT

On xxxxxx, 199x, the applicant signed a settlement agreement with the Secretary, the Department of Transportation (DOT), and the Coast Guard. The parties agreed as follows:

FIRST: [The applicant] agrees and accepts that this Agreement is the result of a compromise and shall never at any time for any purpose be construed as an admission by [DOT] of any liability or responsibility to [the applicant] . . . as a result of [her] prior enlisted service in the United States Coast Guard.

SECOND: [The applicant] agrees to report to U.S. Coast Guard Recruiting Office . . . for processing back into the Coast Guard. . . .

THIRD: [DOT] will offer [the applicant] a five (5) year enlistment contract. This contract is contingent on [the applicant's] ability to qualify for enlisted status in the Coast Guard.

FOURTH: Upon return to service in the Coast Guard, [DOT] will immediately assign [the applicant] to . . . a Xxxx billet. . . .

FIFTH: With the exception of the specification of the duty location, [the applicant] will be subject to all the laws, regulations . . . applicable to all enlisted personnel

SIXTH: [The applicant] will make no further claims against [DOT] in connection with her prior enlisted service in the United States Coast Guard except as set forth in EIGHT below.

SEVENTH: After execution of this agreement, a copy shall be provided to the Departmental Office of Civil Rights and [the applicant's] formal complaint shall be dismissed with prejudice. [The applicant] and [DOT] mutually agree that from the date of the execution of this Agreement they will keep the terms and fact of this Agreement completely confidential, and that they will not release or disclose any information concerning this Agreement to anyone except as otherwise required by law.

EIGHTH: [The applicant] may file a petition to [DOT's] Board for the Correction of Military Records in which she can seek backpay and credible [sic] service for the period of time between the expiration of her prior enlistment contract and the initiation of the enlistment contract signed in conformity with this Agreement, and if the evidence supporting such petition is limited to the evidence in the Department's Report of Investigation, the Coast Guard will not present additional evidence regarding such petition.

NINTH: [The applicant] acknowledges that she has thoroughly reviewed and discussed all aspects of this Agreement, and acknowledges that she is fully aware that she is entitled to seek legal counsel to review the document, and to advise her concerning the document. [The applicant] also acknowledges that she is voluntarily entering into this Agreement of her own free will.

TENTH: [The applicant] hereby totally and unconditionally releases, and forever discharges [DOT] . . . from any and all charges, causes of action . . . arising from [her] prior enlistment in the Coast Guard.

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SEVENTEENTH: By executing this Agreement, [the applicant] acknowledges that this agreement was the result of mutual consideration; and that this Agreement was made freely and fairly and was not the result of any duress or bad faith negotiations.

APPLICABLE LAWS

According to Chapter 5-D-5 of the Civil Rights Manual (COMDTINST M5350.11B), all members have the right “[t]o present a discrimination complaint to the command without fear of intimidation, reprisal or harassment.”

Article 138 of the UCMJ (10 U.S.C. § 938) states as follows:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.

According to Chapter 7-B-3 of COMDTINST M5810.1C, which contains the regulations that interpret the UCMJ, a “commanding officer” means “[a]ny Coast Guard commanding officer empowered to impose nonjudicial punishment upon the complainant, which includes any superior commanding officer in the chain of command.”

According to Chapter 7-I of COMDTINST M5810.1C, “Notwithstanding anything to the contrary in this Part, the provisions of Coast Guard regulations addressing civil rights complaints shall apply to complaints falling under the purview thereof.”

According to Chapter 5-I-1 of the Civil Rights Manual, “Any member who experiences an incident of reprisal as a result of filing a complaint of discrimination or participating in the discrimination complaint procedures in this chapter, should file a complaint of reprisal with their district or Headquarters unit Civil Rights Officer. . . .”

According to Chapter 5-F-1 of the Civil Rights Manual, “All members of the chain of command shall do everything possible, within Coast Guard policy, to facilitate a satisfactory informal resolution of any complaint of discrimination prior to resorting to the formal complaint procedures described in this chapter.” Chapter 5-F-6 provides that, after the complaint is lodged with the command, a military civil rights counselor/facilitator “shall meet with the member, explain the discrimination complaint procedures and attempt to facilitate a resolution at the lowest level of the command. Complainants will be counseled to seek redress of their complaints through other appropriate administrative or disciplinary procedures if the requested remedy is not within the purview of this instruction. If a resolution is not achieved within 15 days, the [counselor/facilitator] shall assist the member in preparing the formal complaint if the complainant so desires.”

BCMR CASE CITED BY THE COAST GUARD

In BCMR Docket No. 1997-114, the applicant was in second place on the chief xxxx promotion list when she was offered a promotion before the man who was first on the list. However, her promotion was conditioned upon her accepting orders to a cutter based in xxxxxxx. The applicant alleged that the Coast Guard wanted to assign a woman to the cutter because another woman had already received orders to the cutter. Coast Guard policy states that, whenever possible, it will assign women to ships in groups of two or more. Accepting the orders would have been difficult for her as it would have moved her far away from her xxxxxx and forced her to sell or rent her house at a loss. She alleged that, had the Coast Guard not considered her gender, she would have received orders that did not create a hardship for her. Instead of accepting the orders, she declined the tendered appointment and therefore gave up a chance to be promoted.

The Board denied relief, finding that the applicant had confused permissible gender consideration with illegal gender discrimination. The Board also found that, in refusing the orders to xxxxx, the applicant had violated Article 4-A-6.a. of the Personnel Manual, which requires members to be available for unrestricted duty assignment worldwide.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The Report of Investigation prepared by the Departmental Office of Civil Rights includes statements by several credible witnesses who corroborated the applicant's allegations that in January 199x, a detailer issued her orders to the Coast Guard cutter Xxxx in retaliation for her filing a sexual harassment complaint against a friend of his in 199x. Witnesses also corroborated her allegations that the detailer had threatened to use his position against her and had induced another officer to act against her. The detailer's denials of many of the applicant's allegations were contradicted by witnesses and by some of his own statements. His explanation for how she was chosen for the orders to the Xxxx was contradicted by witnesses and by Coast Guard records.

3. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that in January 199x she received orders to a cutter from a detailer whose primary motivation for the assignment was to exact retribution for a sexual harassment complaint she had filed.

4. The Coast Guard argued that the applicant should have accepted the orders and sought a remedy through Article 138 of the Uniform Code of Military Justice or the civil rights complaint procedures rather than accept a voluntary discharge. The Board finds that none of the remedies promulgated by the Coast Guard would have permitted the applicant to avoid accepting the orders chosen by the detailer (shipboard duty on the *Xxxx*) who sought to use his position to exact retribution from her.

5. The Board finds that the Coast Guard erred when it issued orders intended as a reprisal against the applicant for filing a sexual harassment complaint. Furthermore, the Board finds that the Coast Guard committed an injustice when it forced the applicant to choose between accepting orders crafted by a detailer who had threatened her and accepting a voluntary discharge.

6. The Board finds that the applicant did not waive the argument that her discharge was unjust when she signed the settlement agreement in xxxxx 199x. Moreover, the agreement expressly preserves her right to ask the Board to add the time between her discharge and reenlistment to her total creditable service so that she may receive the consequent benefits and back-pay.

7. The Board finds that the final decision in BCMR Docket No. 1997-114 is not relevant to the decision in this case. The applicant in that case was not the target of reprisals for filing a sexual harassment complaint.

8. Although the Coast Guard argued that it has no authority to pay a member for time not served on active duty, it is well established that the Board may exercise its authority to correct an applicant's record by removing an unjust discharge and break in service.

9. Therefore, the Board should grant the relief requested by the applicant.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXXX, USCG, is hereby granted as follows:

- The applicant's DD Form 214 dated xxxxxxxx, 199x, and all other references to her discharge on that date shall be removed from her record.
- The applicant's record shall be corrected to show no breaks in service at anytime in 199x and 199x. The time between xxxxx, 199x, and xxxxx, 199x, shall be credited to her as time served on active duty.
- The Coast Guard shall pay the applicant all back-pay and allowances she is due as a result of these corrections, minus any wages she may have earned from other sources while discharged from the Service.

Charles Medalen

Walter B. Myers

Karen Y. Petronis