

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2001-017**

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**FINAL DECISION**

**ANDREWS, Deputy Chair:**

This is a proceeding under the provisions of section 1552 of title 10 of the United States Code. It was docketed on April 4, 2001, upon the applicant's completion of the application with additional significant evidence.<sup>1</sup>

This final decision, dated November 26, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST FOR RELIEF**

The applicant, a retired chief warrant officer (CWO3), asked the Board to correct her record by expunging an officer evaluation report (disputed OER) she received for the period July 1, 19xx, to July 31, 19xx, and by altering comments in a concurrent OER she received for a temporary assignment writing contingency plans from March 3 to August 24, 19xx. She also asked the Board to expunge her retirement and her failures of selection for promotion by the PY (promotion year) xxxx and xxxx selection boards from her record, return her to active duty, and award her back pay and allowances.<sup>2</sup>

**SUMMARY OF THE APPLICANT'S ALLEGATIONS AND EVIDENCE**

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<sup>1</sup> The applicant first submitted her application on January 11, 2001. On April 4, 2001, she submitted significant new evidence, causing her application to be newly completed. She later received extensions of the time to respond to the advisor opinion totaling more than five months.

<sup>2</sup> The applicant was not selected for promotion in 19xx and 19xx and was slated to retire on November 1, 19xx. However, on August 19, 19xx, in Docket No. 1998-048, the BCMR ordered the removal of those failures of selection because the Coast Guard had not obeyed the Board's order in Docket No. 124-92 to remove an OER from her record. In Docket No. 1998-048, the Board found that the erroneous continued presence of that OER in her record when it was reviewed by the selection boards in 19xx and 19xx could have caused her failures of selection. However, after her record was properly corrected, the applicant failed of selection again in xxxx and xxxx by the PY xxxx and xxxx boards and was retired on July 1, xxxx.

The applicant stated that the disputed OER, the third she received while serving as an administrative officer at a xxxxxxxxxxxxxxxxxxxxxx (XXX), is “filled with violations of the Personnel Manual, lies, half-truths, and distortions of fact.” She stated that her first two OERs as the Administrative Officer at the XXX from October 1, 19xx, through June 30, 19xx, more accurately reflect her performance. She pointed out that nothing in those first two OERs suggests that her performance at the XXX was lacking. She alleged that after a new commanding officer (CO) arrived at the office at the beginning of her third evaluation period at the XXX, she was not given a “fresh start” and was removed from her position as Administrative Officer within a few weeks. The numerical marks (on a scale of 1 to 7, with 7 being best) and comments in the disputed OER are as follows:

### MARKS AND COMMENTS IN DISPUTED OER

(The bold letters inserted in the text refer to correspondingly lettered allegations and supporting evidence below.)

#	CATEGORY	MARK	WRITTEN COMMENTS BY SUPERVISOR
3a	Being Prepared/ Planning	4	<p>“Continued with process improvement through assisting in departmental goals. Consolidated unit instructions &amp; migrated to SWS III. Provided positive support in preparation of upcoming MLC compliance audit. Updated unit reserve personnel roster on SWS III data base; result - 98% success rate in contacting reserve members during OPERATION POSITIVE RESPONSE exercise. <b>[A1]</b> With some resistance eventually agreed to provide weekend admin support to reservists; support resulted in greater reserve satisfaction &amp; increased development of reserve YN skills. Identified shortcomings of new Tricare health care, developed survey to measure customer satisfaction. <b>[B]</b> Administrative credibility at times in question, professional competence supplemented by very capable YN1. As Mutual Assistance Officer did not always follow program &amp; command guidelines; recommended loan approvals without informing cmd that they were outside prgm parameters; failed to provide reference material w/ loan packages even after requested by XO; <b>[C]</b> refused to learn computerized check-issuing system resulting in unfair delays to applicants. Strong commitment to members as alcohol/substance abuse counselor <b>[D1]</b> but failed to follow CG prgm guidelines &amp; failed to inform/update XO on personnel problems &amp; rehab recommendations; e.g. applied inappropriate &amp; unrealistic standard in selecting counselor, unnecessarily delaying essential patient counseling.”</p>
3b	Using Resources	3	
3c	Getting Results	4	
3d	Adaptability	4	
3e	Professional Competence	3	
4a	Speaking and Listening	5	<p>“Confident &amp; articulate speaker; gave informative presentation on sensitive topics to unit utilizing creative attention tactics, held all hands interest for duration of program; received kudos from many attendees. Written material often superb, demands higher standards from subordinates. Showed improvements on proofreading through submission of migrated unit instructions resulting in a product close to completion. Excellent vocabulary; written materials logically prepared &amp; required minimal correction.”</p>
4b	Writing	4	
5a	Looking Out for Others	4	<p>“Demonstrated concerned response to unit members in need of counseling for both alcohol screening and mutual assistance requests; arranged counseling for members at local military treatment facility, prepared request for member seeking funding for relative’s funeral. Supported flex time arrangement for subordinate with extensive commute. Compassionate towards needs of single parent requiring special consideration. As CDAR, effectively provided alcohol-abuse training to all hands. Supported decision to update unit instructions in preparation for MLC compliance audit. Recognized need to send unit HS TAD to larger medical unit to increase skill level. <b>[A2]</b> Resistant to full support to &amp; from reservists. Created</p>
5b	Developing Others	4	
5c	Directing Others	4	
5d	Teamwork	3	
5e	Workplace Climate	3	

5f	Evaluations	3	stressful workplace environment; e.g. [E] reprimanded senior POs in presence of nonrates; e.g. displayed anxiety that POs were conspiring against her; e.g. [F] gave poor advice about their low marks to two marginally performing POs; result: subordinates involved CEA, XO in seeking relief fm her. [G] Her poor interaction w/ subords & failed leadership resulted in emergency meetings of CPO Mess, CEA, & XO. Evaluations of subordinates on time & accurate. Rcvd no personal OER input despite numerous requests.”
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**END OF SUPERVISOR'S SECTION/BEGINNING OF REPORTING OFFICER'S SECTION**

7	“Concur w/ supervisor. [H] At beginning of the period, served as Admin Dept Chief which included F&S2 and SKs. Dept was dysfunctional & Supply Branch was broken out as separate dept to allow [the applicant] to focus on YNs & admin issues & regain leadership credibility. [I] Admin Dept cont'd to be dysfunctional despite numerous command counseling sessions. Acted unprofessionally during counseling. Relieved as dept head on 9/18/xx due to loss of command confidence in leadership abilities. She took initiative to request TAD to XXXXX which was approved.”		
8a	Initiative	4	“Recognized & sought opportunity for personal growth in volunteering for TAD assignment. Upon migrating to SWS III, aggressively sought knowledge & trng on new applications resulting in new databases for personnel. Resourcefully ID'd & utilized new application to run spreadsheet in response to D5 data call. Judgment at times in question; requires supervision due to own interpretation of regulation/policy; results in time wasted. More often finds roadblocks than solutions when queried for advice by seniors. [D2] Held off on required counseling of member involved in alcohol incident – requesting specific counselor – increasing anxiety of member in need of counseling. [J] Took advantage of position; e.g. refused to submit to direct-subordinate HS1's repeated request for mandatory weigh-in prior to TAD; XO led to believe weigh-in accomplished; e.g. [K] wrongly & surreptitiously had orders for training issued by HQ, bypassed normal process including Supervisor, Training Officer & XO; result – kept eligible member from attending school.[ <sup>3</sup> ] Caused others, including subordinates, great emotional stress. Occasionally showed pride as member; has potential to reflect positively upon CG.”
8b	Judgment	4	
8c	Responsibility	2	
8d	Professional Presence	3	
8e	Health & Well-Being	3	
9	Comparison Scale	2	The Comparison Scale is not actually numbered. The reporting officer is instructed to compare the evaluatee with other officers of the same rank whom he has known and assign one of seven possible marks. The second mark indicates that the evaluatee is merely “qualified,” which is better than “unsatisfactory” (the first mark) but lower than “competent” (the third mark).
10	Potential	“Though technically a ‘qualified’ officer, overall performance, attitude and leadership was unsatisfactory to marginal this period. Exhibits great difficulty working with others. [L] Professional skills/position often used to “work the system” to own purposes/advantage, adversely impacting subordinates and command good order; [she] lost credibility within this command. Not recommended for promotion or leadership positions.”	

The disputed OER was signed by the applicant’s supervisor—a lieutenant who was assigned to serve as Administrative Officer after the applicant was removed from that position—on August 4, 19xx; by her reporting officer, the executive officer (XO) of the XXX, on November 3, 19xx; and by the reviewer, the CO of the XXX, on November 5, 19xx. The applicant submitted the following allegations and evidence concerning the disputed comments marked [A1] through [L] in the OER:

**COMMENTS [A1] & [A2]: “With some resistance eventually agreed to provide week-end admin support to reservists.” & “Resistant to full support to & from reservists.”**

The applicant alleged that she provided as much support to the reservists as she could “under the circumstances.” She alleged that during the 19xx summer transfer

<sup>3</sup> This shaded phrase was deleted from the OER by the Personnel Records Review Board (PRRB).

season, when she had just two active duty yeoman and one reserve yeoman, her priority was to process transferring active duty members. She alleged that both her command and the reserve command master chief were aware of her office's personnel shortage. She alleged that as soon as the transfer season was over, she arranged for the active duty yeomen and another reserve yeoman to support the reservists on weekends.

In support of her allegations, the applicant submitted a copy of an email message dated August 15, 19xx, from the reserve command master chief, who commented on upcoming retirements and expressed frustration over the lack of administrative support for reservists on weekends. She also submitted copies of email messages she sent to her command in which she asked that the yeoman, YN1 Y, whom she had previously "loaned" to the housing office be returned to the personnel office since the billet in the housing office had recently been filled by another petty officer. In an email message dated September 21, 19xx, she told her command that another reserve yeoman would be assisting her office one day a week and that two active duty yeomen in her office had agreed to work one Saturday a month each in exchange for the following Monday.

**COMMENT [B]: "Administrative credibility at times in question, professional competence supplemented by very capable YN1."**

The applicant alleged that the yeoman referred to in this comment, YN1 X, was not "capable." She stated that she was not impressed with his abilities when she arrived at the XXX, but organized the office so that each yeoman would "have an area of expertise or an opportunity to shine." She alleged that YN1 X would do only what was necessary to get by, and when she asked him to conduct some training at an upcoming all hands meeting, he forgot. She alleged that YN1 X's replacement in October 19xx complained to her about how badly the work was being done.

**COMMENT [C]: "[R]efused to learn computerized check-issuing system resulting in unfair delays to applicants."**

The applicant alleged that she knew the computerized check-writing system for issuing mutual assistance checks. In support of this allegation, she submitted a statement from the office's current mutual assistance clerk, who stated that between January 19xx and March 19xx, the applicant processed 37 checks totaling \$24,510.86, whereas all other persons in the office had together issued 12 checks totaling \$16,675.54. The applicant alleged that delays in the system occurred because of "micro-management by the command" and because, after new work stations were installed, the only work station that could handle the check-writing software was in a different department and could not be quickly accessed. She alleged that "there were no delays for checks that were considered to be an emergency" and only short delays of a few days for other checks. She alleged that her command was not actually dissatisfied with her performance at this task but criticized it without justification in the OER to try to justify the low marks.

**COMMENTS [D1] & [D2]: “[B]ut failed to follow CG prgm guidelines & failed to inform/update XO on personnel problems & rehab recommendations; e.g. applied inappropriate & unrealistic standard in selecting counselor, unnecessarily delaying essential patient counseling.” & “Held off on required counseling of member involved in alcohol incident - requesting specific counselor - increasing anxiety of member in need of counseling.”**

The applicant denied this comment. She alleged that she followed the program guidelines and did not unnecessarily delay anyone’s treatment or cause anyone to be “exceptionally anxious.” She stated that she had been a Collateral Duty Addictions Representative (CDAR) for more than ten years. She alleged that anyone involved in an “alcohol incident” is anxious and that no one had ever complained about her treatment recommendations. She alleged that the comments in the OER reveal her command’s lack of understanding of how the treatment program works. Treatment for these members was “not held up by [her] unrealistic treatment recommendations but by the multi levels of bureaucracy the paperwork had to move through and by the command’s own delay in adjudicating NJP [nonjudicial punishment].”

The applicant also alleged that after she was demoted on September 18, 19xx, the XO had a “closed door policy” for her and would not meet with her without someone else present. Therefore, it was impossible for her to communicate with him on sensitive issues, such as scheduling a member’s treatment.

The applicant stated that she had five CDAR cases during the evaluation period. Two were easily resolved by sending the members to a Navy alcohol awareness program; two had “other issues” that had to be resolved before treatment could start, and the fifth member needed Level II Treatment, but the Navy required that the command complete his NJP before he could attend. After his NJP, she recommended that he be sent to a counseling center where there was someone trained to differentiate between alcohol abuse and post traumatic stress disorder. However, her command rejected her recommendation because of a scheduling problem. Therefore, she located a private counselor with the necessary training and immediately notified the Maintenance and Logistics Command (MLC). Unfortunately, there was some delay in MLC’s response.

In support of her allegations, the applicant submitted a statement by the Addictions Program Representative for MLC, who stated that he found her to be

professional, truly caring, and [to] have extensive knowledge in the field of addictions. [She] continually made extra efforts to find members at [the XXX] the best care possible. She understood that often issues not directly related to chemical dependency, e.g. support of family, could have a profound effect on treatment success. With that understanding she worked for approval of local care when appropriate, which was unfortunately a lengthier process. One case in particular ended up “parked” on a Medical Officer’s desk at MLC, while he was on temporary assignment, and was inordinately delayed through no fault of [the applicant]. In my view she was an excellent ... CDAR ... .

**COMMENT [E]: “[R]eprimanded senior POs in presence of nonrates.”**

The applicant alleged that this accusation was made by YN1 X in a meeting on September 17, 19xx (when she was not present), at which he defended himself for using foul language and blamed her for his stress. She stated that, while she may have reprimanded senior POs in the presence of nonrates during a previous evaluation period, she never did so in the evaluation period for the disputed OER. She also alleged that she herself was reprimanded in front of junior personnel when she was ordered by her supervisor in September 19xx to “work for” YN1 X. She alleged that her supervisor “continued to humiliate” her until she left the XXX on March 1, 19xx, for a temporary active duty (TAD) assignment in the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx (XXXXX).

**COMMENT [F]: “[G]ave poor advice about their low marks to two marginally performing POs; result: subordinates involved CEA, XO in seeking relief fm her.”**

The applicant alleged that the only “marginally performing” petty officer she supervised was an HS1 (health services technician). She alleged that she thought the HS1 was nevertheless “a capable caring professional and ... evaluated her as such and ... recommended her for promotion.” However, the applicant’s supervisor, who acted as the marking official for the HS1, did not recommend her for advancement. She alleged that his decision was made based on only six weeks of observation, during which the HS1 made a few mistakes. The applicant stated that she advised the HS1 to appeal his decision, but after talking to a career counselor, the HS1 chose to retire.

**COMMENT [G]: “Her poor interaction w/ subords & failed leadership resulted in emergency meetings of CPO Mess, CEA, & XO.”**

The applicant alleged that this comment refers to the incident on September 17, 19xx, when YN1 X used “foul and aggressive language” that was overheard by a master chief. When called on it, YN1 X cried and blamed the applicant for not being “there for him.” A meeting was called but her side of the story was never requested, and the command did not consider or investigate the yeoman’s background, which she alleged was very troubled with continued drinking despite Level III treatment for alcohol abuse. She stated that, based on the yeoman’s story, her command “turned its back” on her and “convicted and executed” her without allowing her to defend herself. She was removed from her position as Administrative Officer the next day.

**COMMENT [H]: “At beginning of the period, served as Admin Dept Chief which included F&S2 and SKs. Dept was dysfunctional & Supply Branch was broken out as separate dept to allow [the applicant] to focus on YNs & admin issues & regain leadership credibility.”**

The applicant alleged that the Supply Branch was “broken out” as a separate department only to avoid having one CWO (her) supervise another CWO. She alleged that no one ever counseled her about the matter or suggested that the division was nec-

essary because she lacked "leadership credibility." She alleged that the comment is inconsistent with her previous OER and with the fact that the command later reorganized the whole Administrative Department into a Support Services Branch headed by a lieutenant commander.

**COMMENT [I]: "Admin Dept cont'd to be dysfunctional despite numerous command counseling sessions. Acted unprofessionally during counseling."**

The applicant alleged that the only command counseling session she received occurred in August 19xx, a few weeks into the evaluation period, when the new CO arrived. She alleged that the actual purpose of the session was for her to brief the new CO. She alleged that she later requested additional meetings to no avail. She alleged that during their one session, she told the CO that she was short-staffed because it was the height of transfer season and because, before the division of the department, she had "loaned" two petty officers to other branches assuming that, as department head, she would be able to move them back. However, since the division, she could no longer move them back to her office. She alleged that her explanations "fell on deaf ears."

The applicant further alleged that during the briefing, she realized that the outgoing CO had told the new CO about a memorandum she had written in June 19xx describing three situations in which African-American petty officers in her department had threatened white subordinates with physical violence. She stated that the outgoing CO had not taken her allegations seriously and had told her to get counseling because she was "hyper-sensitive to racial issues." She stated that she was a trained civil rights counselor and had graduated from the Defense Equal Opportunity and Management Institute and could therefore recognize "situations that affect productivity in the work place."

In support of her allegations, the applicant submitted a memorandum she prepared on her office's organization. It indicates that of four yeoman (YN) positions, two were filled, one was vacant because a YN1 was "on loan" to the housing office, and a second was vacant because the member had transferred. It also indicates that a seaman was getting on-the-job training to fill the second vacancy, but the applicant alleged that other duties left the seaman little time for his training.

The applicant submitted a copy of the memorandum she wrote to the previous CO on June 25, 19xx, about a "hostile and intimidating work environment" in her department. It indicates that she had recently witnessed three incidences in which African-American petty officers had "utter[ed] threats of violence to junior white memers." She stated that both supervisors and subordinates were tolerating the threats out of fear of being "labeled racist." She also stated that supervisors were assigning a disproportionate amount of work to white male subordinates "out of fear of reprisals" by women and minorities. She indicated that African-American subordinates were challenging her authority and asking to talk to the XO or CO.

The applicant submitted a statement by a fellow CWO who had served as the Operations Officer of the XXX until July 19xx. The CWO stated that the previous Administrative Officer at the XXX had been transferred early due to conflicts with the XO. He stated that because the applicant had no prior experience as an Administrative Officer, he “spent many sessions with [her] trying to provide guidance.” He stated that she cried in his office many times after having frustrating meetings with the XO, whom she believed had prejudged her “based on the way they felt toward the previous Admin Officer.” She told him that “she could not get guidance or support from the command.” The CWO stated that he did witness one occasion when the CO embarrassed the applicant at an “All Hands Meeting” by commenting on her not being prepared to brief them. He stated that in response to this “environment” she “went into a shell.” The CWO stated that he sometimes felt frustrated with her because she and her staff seemed unresponsive. He stated that her staff would go over her head to the XO, who would then “call[] [her] on the carpet.” The CWO stated that he believes that after he left the XXX, in August 19xx, the outgoing CO and XO briefed the new CO and XO about the applicant’s “situation and thereby prejudged her getting a fair chance to prove herself.”

The applicant also submitted a copy of an email message she received from the new XO on August 12, 19xx, in which he stated that, before she discussed “the YN situation” with the new CO, he wanted to meet with her to discuss it. He stated that her office was supposed to have three yeomen—a YN1, a YN2, and a YN3—and that she currently had a YN1, a YN2, and a seaman “striking” for YN3, so he did not understand her problem. He stated that she herself had let the previous YN3 leave. He stated, “I want to know how you can adapt and make it work to the best of your ability and what compromises you will need to make, not just that it can’t work.” He further stated, regarding “performance perceptions,” that the CO had been briefed on past problems but had said that she would start with a “clean slate with him” and be judged only on “the performance he observes on HIS watch.” He stated that she could meet with the new CO but should present several alternative solutions to any problem, instead of just one solution. He also stated that she should be ready to discuss the “pros and cons” of each alternative, but he stressed that she should not argue with the CO.

**COMMENT [J]: “Took advantage of position; e.g. refused to submit to direct-subordinate HS1’s repeated request for mandatory weigh-in prior to TAD; XO led to believe weigh-in accomplished.”**

The applicant denied this comment. She alleged that she was weighed prior to going on TAD and met the Coast Guard’s weight standards. She submitted a copy of an email message in which the HS1 stated that the applicant was weighed but that the HS1 “was never able to get the percent body fat so it was not adequate for the official weight check.” The applicant pointed out that COMDTINST M1020.8C provides that, if a member fails the weight standard but meets the percentage body fat test, an entry must be made in their record noting that fact. She alleged that the absence of such an



entry in her record supports her claim that she met the weight standard since her “very precise” supervisor was also the HSI’s supervisor. The applicant further alleged that she does not “know who misled the XO as [she] never had direct contact with him after 18 Sept xx

**COMMENT [K]: “[W]rongly & surreptitiously had orders for training issued by HQ, bypassed normal process including Supervisor, Training Officer & XO; result - kept eligible member from attending school.”<sup>4</sup>**

The applicant denied this comment. She stated that in January 19xx, when she received the TAD orders to XXXXX, she learned that her job would be to write two contingency plans. She then called Mr. X of xxxxxxxxxxxxxxxx to see if he had any sample plans. Mr. X offered her a seat in a 12-day Contingency Plans Writing Class that was to begin on March 28, 19xx. He stated that he would send a message to her Group, which could either cut the orders for her to attend the class or forward the message to XXXXX. The applicant alleged that she told her supervisor about the class. When the message about the class arrived on February 24, 19xx, her last day at the XXX before going on TAD, both her name and that of her supervisor appeared on the class list. She stated that since her supervisor was aware of the message well in advance of the class, there was plenty of time for another member from her Group to attend.

The applicant alleged that when she arrived at XXXXX on March 1, 19xx, she was told that her orders to the class had been canceled so that someone with a “higher operational need” could attend. However, she alleged, no one else from her Group was ever enrolled in the class, the class was never filled, and she was not allowed to attend. She alleged that the statement that she kept someone else from attending is false and that her Group “set [her] up for failure at XXXXX by preventing [her] from attending training necessary to do [her] job and by causing [her] to get off on the ‘wrong foot’ with the command at XXXXX.”

In support of her allegations, the applicant submitted a copy of the February 24, 19xx, message showing that both she and her supervisor were enrolled in the 20-member class. She also submitted a copy of Mr. X’s class list and a letter from Mr. X, who stated that after she contacted him, he had suggested she attend the class and included her name on his “quota submissions to Commandant.” Mr. X further stated that, when the XXX received the quota message, “they decided to send [her supervisor] to the course instead of [the applicant]. However, since there were unused quotas for the course, I decided to keep [the applicant’s] name on the list with the hope that XXXXX would allow [her] to attend.” He also stated that the fact that the applicant’s name was on the class list “did not prevent another person from attending the training.”

The applicant also submitted a copy of a letter she wrote to her command at XXXXX dated March 25, 19xx, in which she asked to be allowed to attend the class. In

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<sup>4</sup> The shaded phrase was deleted from the OER by the PRRB.

it, she stated that although the XO of XXXXX, LCDR M, had told her she was bumped from the class for someone with “higher operational need,” Mr. X had told her that there was room for her in the class. She stated that, when she again asked LCDR M about attending the class, he said she could not because her “housing situation” was unresolved. She resolved it quickly, but then he told her that she could attend the next class. However, when Mr. X told her that the next class would not occur until the fall, she asked LCDR M again, and he said that she had “sold” herself to him as being able to do the work and that she “should just do the job that [she] came down here to do.” The applicant also stated in the letter that her attendance at the class would not cost XXXXX anything, and she could not understand why she was not allowed to attend after she had “taken the initiative to get the training.”

The applicant’s letter was forwarded to the Deputy Commander by the Operations Officer (OO), who stated that he “did not concur with the assertions made” in the letter. He stated that LCDR M recollected the events differently. The OO stated that, when she was first being considered for the TAD assignment, the applicant mentioned the class, and he told her he did not care whether she attended as long as he did not have to pay for it. Soon after that conversation, someone from her Group asked if someone from the Group with a compelling, higher priority could be substituted, and LCDR M agreed. The OO stated that he did not see the applicant’s attendance at the class as “critical,” but would not object to her attending, although it might be an “inappropriate expenditure” of scarce funds.

**COMMENT [L]: “Professional skills/position often used to ‘work the system’ to own purposes/advantage, adversely impacting subordinates and command good order ... .”**

The applicant alleged that this comment by the reporting officer in block 10 of the disputed OER refers to her filing civil rights complaints and, as such, is a prohibited comment in Article 10.A.4.f. of the Personnel Manual. She submitted a copy of a rough draft for the disputed OER, in which her supervisor originally commented in block 5 of the OER that she “[e]xhibits discriminatory tendencies; stirs the pot by creating gender & racial issues where none exist. Uses civil rights issues as scare tactics towards supervisor. Invited outside agency civil rights investigator to question command on CG trends.” She alleged that, although these comments do not appear in the final version of the disputed OER, the reporting officer’s negative comment on her ability to “work the system” is a direct if veiled reference to her civil rights complaints.

### *Summary of Applicant’s Allegations and Evidence Concerning the Concurrent OER*

The applicant asked the Board to alter two comments in the concurrent OER that she received for her TAD assignment to XXXXX from March 1 to August 24, 19xx. The concurrent OER contains many positive comments and has 12 marks of 4, 6 marks of 5, and a comparison scale mark of 4.

The applicant pointed out that there is only one comment in the concurrent OER about her work on the hurricane plan, which was her primary assignment. The comment is that, upon her arrival at XXXXX, the applicant “[i]mmediately began work on updating the hurricane plan ... .” She alleged that because of her own command’s bias against her, she was not allowed to attend the plan-writing class. Therefore, instead of being assigned to write the plan alone, she was assigned to work on the project with a lieutenant, who wasted time and effort writing the plan in the wrong format. The applicant did not, however, request any specific correction to the concurrent OER to address the lack of commentary on her work on the plan. The comments that she wants corrected in the concurrent OER appear below.<sup>5</sup>

**COMMENT [1]: “This officer also seemed to be dedicated to the CG.”**

The applicant alleged that this comment is prejudicial because it suggests that she was not actually dedicated to the service. She alleged that she was very dedicated and that nothing in her performance at XXXXX would have led anyone to believe otherwise. She asked the Board to change the phrase “seemed to be” to “is.”

**COMMENT [2]: “This officer is considered qualified for promotion to CWO4.”**

The applicant alleged that her performance at XXXXX justified an unqualified recommendation for promotion. She asked the Board to change the phrase “considered qualified” to “recommended.” She alleged that only the bias against her by her rating chain at the XXX could have caused her XXXXX rating chain to use the phrase “considered qualified” instead of outright recommending her for promotion.

## **SUMMARIES OF OTHER EVIDENCE SUBMITTED BY THE APPLICANT**

### *Applicant’s Civil Rights Complaint*

On July 9, 19xx, before the disputed OER was completed, the applicant filed a civil rights complaint against her rating chain at the XXX.<sup>6</sup> She alleged that her command had removed her as Administrative Officer in September 19xx in reprisal for the memorandum she wrote her previous CO in June 19xx about a hostile work environment. She stated that she was concerned about possible reprisal in her next OER and that “[w]hat I mean by that is that I expect that my OER be the same or better than the two previous OERs[;] any thing less I would consider to be still another form of reprisal.”

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<sup>5</sup> One comment in the concurrent OER has already been deleted by the PRRB: “However, external issues seem to have impacted on fullest utilization & most effective performance.” The PRRB reasoned that it should be removed because it “encompasses a matter outside the purview of XXXXX’s OER Rating Chain and, while probably objective, it would serve to create an injustice if left undisturbed.”

<sup>6</sup> The Department’s Office of Civil Rights responded to the applicant’s complaint by initiating an investigation. However, in 2001, it notified the applicant that it would not issue a decision on her complaint because she had chosen to submit an application to the BCMR on the same matter.

In the complaint, the applicant alleged that before leaving the XXX in February 19xx, she asked her supervisor about her OER. He told her that her only hope for a good one was to get a separate (concurrent) OER from the XXXXX command or to get good input from that command for her OER from the XXX command. He told her that the XXX command would not give her a good OER. She alleged that this was unfair because, after she was removed from her position as the Administrative Officer, she had asked what she needed to do to get a good OER, and she had done "exactly what he asked of me." She alleged that the disputed OER must therefore be a result of the memorandum she wrote to the previous CO in June 19xx.

The applicant alleged that, after she submitted her memorandum about the hostile work environment, her previous CO told her she needed psychological counseling because she was "hypersensitive" to racial issues and told the incoming CO about it. Therefore, she did not have a "fresh start" with her new rating chain. She alleged that on September 17, 19xx, YN1 X began crying after he was heard using foul language, but he blamed her and she was immediately relieved of duty as Administrative Officer without being allowed to state her case. She stated that, if her command had checked his record, it would have found that YN1 X had a "long history of not getting along with his supervisors."

The applicant alleged that the XO and CO of the XXX had separate standards for men and women. She was "given one strike" and was relieved of her duties without being given a chance to present her side. She also alleged that she was not given any recognition for her efforts and that she had witnessed "extremely hard treatment" of herself and four of the other eight women at the XXX.

#### *Statement of the CO at the XXX Regarding the Civil Rights Complaint*

On December 17, 19xx, the CO of the XXX sent a letter to the District Commander regarding the applicant's complaint. He pointed out that the complaint was not filed within 45 days of the day she was relieved of duty as the Administrative Officer and that it was filed before the disputed OER existed.

The CO stated that after the applicant was relieved of duty, she consulted with the Commandant's Gender Polity Advisor, who found no basis for gender discrimination. He stated that even after the applicant learned of a new process for filing a complaint on May 6, 19xx, she waited 63 days to file the complaint. He stated that, although the applicant's complaint mentions the treatment of other women, no other women at the XXX had filed complaints, and neither the XO nor the CO had heard of any harsh treatment of women.

#### *Affidavit of the Applicant's Supervisor at the XXX to the Investigator*

The investigator assigned to the applicant's case interviewed her rating chain, and on October 5, 2000, received a signed statement from her supervisor. The supervisor stated that in September 19xx, the XO asked him to "try and clean up" the Administrative Department and appointed him to serve as the Administrative Officer in place of the applicant. He stated that he kept the applicant as the supervisor for the yeomen in the personnel office. He stated that at some point, she told him that she had filed a civil rights complaint against a previous supervisor and had an application pending at the BCMR. He denied that any part of the disputed OER was based on her race, sex, or civil rights complaints.

The investigator questioned the supervisor about the comments he wrote in the rough draft for the disputed OER about the applicant showing "discriminatory tendencies," "creating gender & racial issues where none exist," using "civil rights issues as [a] scare tactic" against him, and inviting an "outside agency civil rights investigator" to question the command. The investigator also asked him about the bases for comment [L] in the disputed OER, the mark of 2 on the comparison scale, and the lack of a recommendation for promotion. In response, the supervisor alleged that the applicant had once unwisely delayed counseling for an African-American alcohol abuser because she thought he should have an African-American counselor and one was not available. He alleged that the applicant had told someone that he himself had said that he did not like having women work for him. He alleged that she brought a civil rights investigator to the command when she knew he was preparing the disputed OER. In addition, the supervisor alleged that she caused XXXXX "a lot of difficulty" by taking her foster child and daycare provider with her, who both required housing. He stated that he "had no trust" in the applicant. He had asked for results in a compliance inspection and received nothing. She came to work late or not at all and often in civilian attire.

The supervisor told the investigator that his own name was already on the list to attend the plan-writing class when the applicant made a request to attend it through Headquarters rather than through her chain of command at the XXX. Later, the command was surprised to see that she was assigned to the class and to learn that XXXXX thought that the XXX had approved the training and would pay for the class. When he saw the orders for the class with both his own and the applicant's names, he inquired about what office was paying for her attendance. He stated that the XXX was not interested in paying for the training because it would not benefit the XXX. In addition, he stated that attending the class was important for his own work at the XXX. Moreover, he stated, attending the class would have required her to go on TAD to xxxxxx from her TAD at XXXXX, costing the XXX quite a bit for her airfare. He also claimed that a member "can't go TAD from TAD." The supervisor gave the investigator a copy of the official message dated March 2, 19xx, by which the applicant's orders to attend the class were cancelled. The message was sent to both Headquarters and XXXXX and it states, "request can[cellation] of quota for [the applicant] for 29 March class and reassign as necessary."

The investigator asked the supervisor why the applicant had received good evaluations from her previous rating chain at the XXX. The supervisor stated that the applicant's former supervisor was a "very nice guy" who might have avoided "rocking the boat." He also stated that her previous supervisors might have been afraid to hold her accountable for her performance.

The investigator asked if the supervisor had requested input from the applicant for the disputed OER. He stated that he had asked her for it before she left the XXX on TAD and she had stated that she would send it to him from XXXXX. However, he never received any input from her.

### *Affidavit of the XO of the XXX to the Investigator*

The investigator interviewed the XO of the XXX, who served as the applicant's reporting officer for the disputed OER. The XO stated that he did not sign the final draft of the disputed OER until November 19xx because he had asked the supervisor to correct some errors and because he was overseas on extended leave in August and September 19xx. He stated that he did not believe that the disputed OER was affected by the applicant's race, gender, or former civil rights complaints.

The investigator asked the XO about the bases for comment [L] in the disputed OER, the mark of 2 on the comparison scale, and the lack of a recommendation for promotion. In response, the XO stated that the applicant "was a disaster in terms of leadership at this unit." He received many complaints about her and, at about the time he himself decided that "something needed to be done," the chief petty officers held a meeting about her, after which the Command Enlisted Advisor came to him and "said something needed to be done." The XO stated that the head yeoman under the applicant's supervision, YN1 X, had been found crying in the hall because "he just couldn't take it any more."

The XO further stated that because the applicant was so familiar with the personnel system, she was "very dangerous." He cited as an example the fact that, even after she had failed of selection for promotion twice and was slated for retirement, she got herself assigned to attend a class without her supervisor's knowledge. He stated that after members are slated for retirement, they are no longer eligible for such training and that the applicant knew this policy. The XO also stated that, when going on TAD overseas, members are not allowed to take their dependents. However, the applicant "had worked the system and gotten someone to sign off on taking her dependents down there. That caused a lot of headaches for me: administratively coordinating with the other unit, finding out how that had happened and determining who was going to pay for it." He also stated that he had once discovered she was married when she had "made representations that she wasn't married," and that in looking at the "central computer data on her dependents ... things didn't add up. It appeared to me that she was drawing additional pay for dependents ... ." The XO also stated that he believed that the applicant delayed her separation by filing civil rights complaints so that she would be able to retire with 20 years of service.

The investigator asked the XO why the applicant had received good evaluations from her previous rating chain at the XXX. The XO stated that, when he first arrived at the XXX, he saw the applicant in her previous CO's office "crying and carrying on and acting in a way that is totally inappropriate in front of a captain." The XO alleged that she was "negotiating" with the CO to have her previous OER upgraded.

The XO further told the investigator that the applicant was "hypersensitive when it came to race and sex." He stated that YN1 Y, one of the two African-American yeo-

men in her office, complained to him that she would not let him and the other African-American yeoman eat lunch together in an office with the door closed because she thought they might be “conspiring against the white people.” YN1 Y told him that the applicant “looks at everyone in terms of their race and their sex. He gave me 4-6 examples for which I don’t recall the details.” He stated that in one example, YN1 Y told him that the applicant had objected when a female petty officer was assigned to one of three desks out “on the floor” because the applicant said the woman would feel intimidated, but the woman “had no such feelings.”

The XO stated that the command had supported the applicant when she was right. As an example, he stated that when she wanted to transfer, he called another XXX on her behalf but was told that the command “didn’t want her because they had fired her from the legal office many years ago.” He also stated that, once when a bank canceled the applicant’s government credit card because the balance was too high, the XO directed the XXX’s finance and supply warrant officer to work on the matter for her and get the card working again.

The XO also stated that the applicant never submitted input to the OER despite her supervisor’s request and never appealed the disputed OER.

#### *Affidavit of the Applicant’s CO at the XXX to the Investigator*

The CO, who served as the reviewer for the disputed OER told the investigator that because the evaluation period ended on July 31, 19xx, the OER should have been completed and submitted to Headquarters by September 15, 19xx. However, the applicant would not provide them with any input as required by regulation to help them write the OER. He denied that the applicant’s race, gender, or civil rights complaints had any effect on the disputed OER and stated that he encouraged people who had complaints to “pursue their rights.”

Regarding the negative recommendation for promotion in the OER, the CO stated that he had discussed it with the XO. He stated that it resulted from the applicant’s failure to comply with policies. An audit of the CDAR and Mutual Assistance programs she headed had found “many inconsistencies” and failures to follow guidelines. He stated that she made unilateral decisions for personnel and failed to inform the XO or CO about them. He also stated that her subordinates complained about her leadership.

When asked about comment [L], the CO stated that the XO told him that the applicant had become involved with “various inquiries and procedures” without the command’s knowledge when she should have been working through the chain of command.



The investigator also asked the CO why the applicant had received good evaluations from her previous rating chain at the XXX. The CO stated that he had discussed the applicant's performance with the previous CO upon his arrival and had received a copy of her prior OER. He stated that when he found that her performance "did not jive" with the prior OER, he called the previous CO, who told him that he had raised several of the marks on her last OER when she took exception to them in an "emotional and tearful" meeting. He stated that he had "given her the benefit of the doubt" and raised the marks "against his better judgment." He apologized for leaving the new CO with a difficult situation.

The CO further stated that neither he nor the XO had observed the applicant's performance on a daily basis but that the applicant had never complained to them about discrimination by her supervisor.

### **SUMMARY OF THE APPLICANT'S RESPONSE TO THE AFFIDAVITS**

In response to the affidavits by her rating chain to the investigator, the applicant alleged that their justifications for the disputed comments in the OER were erroneous. She stated that her supervisor's comment in block 3 of the disputed OER about her support for the MLC compliance audit proves that his statement that he received "no results" from her on the project is false and cannot justify comment [L]. She alleged that his statements that her orders to attend the plan-writing class were canceled because he did not know who would pay for it and "you can't go TAD from TAD" are both false. The copy of the orders for the class include a second page of accounting information, from which she alleged he should have known that her attendance would be paid for by Headquarters. In addition, she pointed out that nothing in the Joint Federal Travel Regulations or Coast Guard policy prevents a member from going on TAD from TAD. She alleged that, because the command at XXXXX thought that her orders were canceled so that someone with a higher operational need could attend, it is clear that her supervisor has contradicted himself and must have canceled her orders because of his bias against her.

The applicant alleged that her supervisor's explanations to the investigator about his comments in the rough draft for the disputed OER were erroneous. She alleged that an email in the investigator's report from a lieutenant at XXXXX to her supervisor at the XXX shows that they were familiar with each other and that the command at XXXXX became prejudiced against her because of the bias at the XXX. In that email, dated May 28, 19xx, the lieutenant at XXXXX told her XXX supervisor—who had sent him a message concerning administrative steps the applicant needed to take because of her upcoming retirement—that "[s]he has checked out cause she knows that she will not get what she needs on an OER, so now she does bills and reads the paper."

The applicant alleged that the XO's affidavit is also full of errors and false information. She stated that, contrary to the rules, he used examples of her performance

outside the evaluation period to explain the disputed OER comments to the investigator, such as the complaint about her objections to the African-American yeomen lunching with the door closed; her prior work at a legal office; and the issue of her marriage and dependents, which she alleged arose in October 19xx, after the end of the period. Furthermore, she alleged that YN1 X was the only yeoman who ever complained about her during the reporting period and he was one of the people she had cited in her memorandum to the previous CO for using threatening language to a white subordinate. She also alleged that there is no rule against someone about to retire taking a class, and in any case she did not receive her mandatory retirement letter until after she enrolled in the class. She also stated that there is no rule against taking one's dependents on TAD "as long as you pay their way out of your own pocket," which she did. She pointed out that since anyone with more than 18 years of service who is passed over for promotion is allowed to retire after 20 years, the XO's argument about her filing civil rights complaints and BCMR applications to attain a retirement is clearly false.

The applicant also alleged that the CO's affidavit is full of errors and false information. She alleged that she did not violate any Coast Guard or unit policies and that her command may have thought she did only because they did not know the policies. She stated that an MLC compliance inspection report dated September 19xx shows that no discrepancies occurred in the Mutual Assistance program prior to her going on TAD and that many discrepancies occurred in the Administrative Department after she was relieved of duty as the Administrative Officer. She alleged that her previous CO did not raise her marks in her prior OER as a result of their meeting. Finally, the applicant argued that she did file a reply to the disputed OER (though none appears in her record and she did not submit a copy of one).

### **DECISION OF THE PERSONNEL RECORDS REVIEW BOARD**

On January 30, 2001, the Personnel Records Review Board (PRRB) issued a decision in this case. In addition to the evidence submitted by the applicant, the PRRB sought and received statements from the applicant's supervisor and reporting officer (the XO) at the XXX, which are summarized below.

#### ***Declaration of the Applicant's Supervisor at the XXX***

The supervisor stated that he was the XXX's training officer and the applicant never gave him a training request form for the plan-writing class. He stated that when she initially applied for the TAD assignment, Headquarters had stated that she was already qualified for the work and did not need further training. When he saw her name on the orders for the class, he called XXXXX and was told that that command thought that the XXX was funding her attendance at the class. Therefore, he had her name removed from the class list. He indicated that no one from the XXX was prevented from attending the class because of her actions, contrary to one comment in the

disputed OER, although by removing her name from the class roster, her seat was made available to members of other units.

The supervisor alleged that, before the applicant went on TAD, he had to sign a paper verifying that she met the Coast Guard's weight standards. When he asked the unit's HS1 about it, he was told that the applicant had refused to be weighed. He stated that later the XO ordered the applicant to weigh in and she did and passed the test, so no entry was made in her record.

The supervisor alleged that after an African-American member had an alcohol-related car accident, the applicant delayed treatment and, when asked for an explanation, stated that the member "should be counseled by an African American counselor" because "only one from that member's background would fully understand the issues accurately." No African-American counselor was available at the time.

The supervisor alleged that well in advance of an annual all-hands weekend for the reservists, the applicant was asked to provide a CDAR presentation. She asked to be exempt, but although her request was denied, she arrived late in civilian attire and did not participate in the presentation. He also alleged that he received many complaints about her lack of support from reservists, including the reserve Command Enlisted Advisor, but he received compliments from the reservists about YN1 X.

Finally, regarding the applicant's allegations with respect to comment [F], the supervisor stated that the HS1 in question was not ready for promotion. He stated that after he counseled the HS1, she agreed with his decision and signed the evaluation, but the applicant advised her to appeal. The HS1 told him that she did not want to appeal, and she ultimately decided not to appeal.

#### *Declaration of the XO at the XXX*

The XO, who served as the reporting officer for the OER, stated that the applicant attempted to negotiate the contents of the disputed OER after it was submitted, which is not permitted, and she did not file an OER reply. He stated that the OER was submitted late because she did not respond to numerous requests for OER input. He stated that he believed she wrote the civil rights complaint on July 9, 19xx, before the disputed OER was even written "to lay the groundwork for having the OER ultimately set aside" because she knew that it would reflect the fact that she had been removed from her position as Administrative Officer.

The XO alleged that the applicant's command at the XXX would not have approved her request for training since she was expected to retire on November 1, 19xx. When the orders arrived, they investigated how she got them without the knowledge of her supervisor, who was the XXX's training officer, or himself. He stated that whether

there was a seat for her in the class was not relevant to how she went about procuring it.

The XO stated that he could not remember the specifics of the weigh-in issue, but he did remember there was some concern about whether she would present herself to be weighed in time.

The XO denied that he had a “closed door policy” but stated that he does “not believe it is prudent for any male supervisor to be behind closed doors alone with a female subordinate, especially under the trying circumstances in this case and I always made sure that [the applicant’s] supervisor was present. [She] never brought to my attention that it was necessary for her to discuss confidential CDAR matters alone with me.” He alleged that he did discover that she was not keeping him informed about CDAR matters and was making decisions that “were not hers to make.” He alleged that her delaying a member’s counseling to wait for a “racially compatible counselor” was an example of her “hypersensitivity to race.”

The XO alleged that because of the applicant’s poor leadership, the Supply Branch was separated from the Administrative Department “to minimize the number of personnel under her supervision. The conflict was not that one CWO worked for another. The problem was that no one could work for [her].” He stated that at one time or another, almost all of her subordinates complained to him about her, as did a reservist, and that members of the Planning Department reported witnessing unprofessional behavior on her part and interactions “indicative of a total lack of leadership.” He stated that, to his knowledge, her department was properly staffed.

### *Findings and Conclusions of the PRRB*

Regarding comment [K] in the disputed OER, the PRRB found that the applicant had proved that her enrollment in the plan-writing class did not keep anyone else from attending the course. Therefore, the PRRB recommended that the phrase be removed. However, it found that the statements of her rating chain support the remainder of the comment. The PRRB stated that, while there is no regulation prohibiting retiring members from attending classes, “it is the Command’s prerogative to decide whether or not training is critical and necessary for their members” and that the record indicates her command had previously concluded that no special training was necessary.

Regarding comments [D1] and [D2], the PRRB found that the applicant had blamed her difficulties acting as CDAR on not being able to communicate privately with the XO, but the XO stated that the applicant never told him she needed to speak to him privately about a CDAR matter. It found that both the supervisor and reporting officer had fully supported the comments and that other causes of delay cited by the applicant did not excuse her failure to consult with the command before making important decisions about members’ treatment.

Regarding comment [H], the PRRB found that the reporting officer had supported this comment in his declaration. The PRRB also found that comments [A1] and [A2] were supported in the declarations. It pointed out that, while the applicant alleged that she received only one counseling session from her command during the evaluation period, Article 10.A.2.c. of the Personnel Manual states that the reported-on officer should “seek performance feedback from the Supervisor during the period.”

Regarding the concurrent OER, the PRRB found that, while one comment should be removed because it referred to matters at the XXX rather than at XXXXX,<sup>7</sup> the applicant had presented no “clear and convincing evidence” to show that comments [1] and [2] were erroneous or that they resulted from bias.

The PRRB also held that the applicant’s failure to submit replies to the OERs was a “tacit indication” that she accepted their characterization of her performance. It concluded that aside from the removal of one phrase from the disputed OER and another from the concurrent OER, no further corrections should be made to her record because she did not present “clear and convincing evidence” that the other comments in the OERs were in error or that she was evaluated unfairly.

#### **APPLICANT’S RESPONSE TO THE DECISION OF THE PRRB**

On April 4, 2001, the applicant sent the BCMR a response to the decision of the PRRB. The applicant stated that her supervisor’s statement about her failing to make a CDAR presentation to the reserves is an “outright lie.” She stated that the CDAR presentation is the only one she ever made to a reserve all-hands meeting, and she submitted a copy of an email message from the reserve command master chief, who—in response to an email asking if she remembered the applicant giving CDAR training at a reserve all-hands meeting in November 19xx—replied simply “Yes, I do remember you giving training.”

The applicant alleged that the XO lied when he said he had to remove personnel from her space because of her poor leadership. In support of her allegation, she submitted a copy of an email message from a chief warrant officer, who stated that he thought the Supply Department was moved because the Planning Department was growing and needed more space.

The applicant argued that the rating chain’s statements about her weigh-in do not actually support comment [J] in the OER, and she alleged that the HS1’s statement that she submitted proves that comment [J] is false.

The applicant alleged that the PRRB ignored the fact that her supervisor “lied to the command at XXXXX by saying that they were canceling my seat because of a higher

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<sup>7</sup> See footnote 5.

operational need,” and lied to the civil rights investigator by saying that she could not “go TAD from TAD” and could not attend class because she was retiring. She also stated that the PRRB ignored the supervisor’s lie about not knowing who was paying for the class, when the information was contained in the orders, which he saw. The applicant alleged that “the one person who could make the determination if I could use this training” was Mr. X, who clearly thought she should attend the class. She submitted a letter from him in which he stated that she would have benefited from taking the course and that her pending retirement would not have mattered. She further alleged that her supervisor set her up by not asking her for a training request form.

Regarding the PRRB’s discussion of comments [D1] and [D2], the applicant alleged that it wrongly blamed her for not focusing on the delay of the African-American member’s counseling. She alleged that her supervisor lied about this because the member “had not yet been diagnosed and there was no determination that he needed treatment.” She alleged that the diagnosis had not yet occurred because the Navy required members to have disciplinary proceedings resolved before entering a treatment center for screening, and the member in question had to go to NJP. In support of her allegations, she submitted another email from the Addictions Prevention Specialist, who stated that he could not remember her ever delaying treatment for a member and could not recall that she ever asked for a specific counselor for a member based on his race.

The applicant argued that the PRRB ignored the fact that, when questioned by the civil rights investigator, the XO justified comment [L] by citing incidents that occurred outside the reporting period and by misrepresenting Coast Guard regulations.

The applicant pointed out that other than the disputed OER, there were no negative entries in her record documenting her allegedly “atrocious performance and poor leadership.” She alleged that if she had actually disobeyed an order to be weighed or to conduct training for the reserves, her supervisor would have noted it in her record or reported her for insubordination.

## **VIEWS OF THE COAST GUARD**

On February 27, 2002, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant’s request for lack of merit. The Chief Counsel stated that in making his recommendation, he adopted the analyses, findings, and conclusions of the PRRB and would not duplicate them in his advisory opinion but would address some other issues. Prior to issuing the advisory opinion, the Chief Counsel sought and received new declarations from the applicant’s supervisor and XO at the XXX, as well as declarations from the applicant’s previous XO and CO at the XXX, YN1 X, a CWO who headed the Supply Branch at the XXX, and the command master chief at the XXX. These declarations are summarized below.

## *Second Declaration of the Applicant's Supervisor at the XXX*

The supervisor stated that the Chief Counsel had sent him a copy of the application and that none of the evidence in it changes his evaluation of her performance, which was "both fair and objective." He stated that, in addition to the comments he made to the investigator of her civil rights complaint, he would add the following specific comments about her performance to explain disputed comments in the OER.

Regarding YN1 X, the supervisor alleged that contrary to the applicant's statement, the petty officer's performance was "outstanding," and he received an Achievement Medal prior to leaving the unit. Regarding the training for reserves, he alleged that the applicant resisted providing it and "arranged tasks for all yeomen so that she wouldn't have to come in," so he had to order her to provide the training. Regarding the delay of treatment for an alcohol abuser, the supervisor stated that, when she told him she had not yet scheduled screening for a member because she wanted to wait until an African-American counselor was available, he reasonably concluded that such a delay was not in accordance with policy.

Regarding the applicant's allegation that the supervisor humiliated her in front of her subordinates, he stated that when she consistently came to work an hour late and would not get into uniform for several hours, he would call her into his office to ask why. He stated that he did not close the door because he was afraid she would make a false allegation of harassment. He stated that she may have felt humiliated, but he had to hold her accountable for her actions.

The supervisor stated that, prior to going on TAD, the applicant was assigned and expected to update and transfer the unit instructions from the SWII computer system to the SWIII system, but she did not even come close to completing the work. He stated that he himself counseled her to go on TAD to another unit so that she could get a better OER and improve her chance of promotion. He alleged that he was not "out to get her." However, he alleged, she never told him that she had enrolled in the plan-writing class through Headquarters before he received the orders. He alleged that the applicant was qualified to write the plans without attending the class. When he saw her name on the orders, he called XXXXX to see if XXXXX had approved her attendance at the class, and the response was "no." Then he called the program manager for the course, who stated that the applicant's supervisor and command had approved her attendance, but he knew this not to be true. Regarding funding for the class, he stated that while Headquarters would pay for the class itself, "it is well known that the unit incurs the expense per-diem and travel." He alleged that he never claimed any particular person with a higher operational need was denied enrollment because of the applicant, only that her actions would keep "any" member with a such a need from enrolling. He stated that after the applicant went to XXXXX, a lieutenant from that command whom he had known at a previous station contacted him and complained all she did was read the newspaper.

Regarding the applicant's lack of input in the disputed OER, the supervisor alleged that she had "every opportunity" to provide input but would not answer his calls to her. He alleged that he asked her supervisor at XXXXX to tell her to send him input but still received nothing.

### *Second Declaration of the XO at the XXX*

The XO, who is now retired, stated that after arriving at the XXX in 19xx, he became aware of the odd behavior and lack of leadership of the applicant "through direct observation as well as being informed by my branch chiefs of problems my personnel had encountered." In the spring of 19xx when he learned that he would become the XXX's next XO, he spoke with the then current XO and CO, who "[b]oth assured [him] that they would handle and resolve the problem before [he] assumed the XO position." Before he became XO, two African-American yeomen told him that it was hard to work for the applicant because she was hypersensitive about race and gender and "looked at them as black petty officers instead of petty officers." They told him that she did not allow them to eat lunch together behind a closed door.

The XO stated that after he became the XO on July 2, 19xx, he saw the memorandum she had written, but he believed that the previous CO and XO had addressed the allegations. He stated that he met with her and told her what his expectations were for her performance. However, the applicant did not follow his instructions. She forwarded correspondence for him to sign that was counter to policy. She recommended that he approve mutual assistance requests that did not meet the guidelines and did not provide him with a copy of the guidelines even after he asked for them. He stated that she refused to learn the mutual assistance check-writing system and so checks were often delayed because the assistance clerk who knew the system was frequently out of the office conducting marine inspections. He also alleged that she went to another command and "worked the system to get a very large mutual assistance loan," which created an administrative nightmare for others. In addition, the XO alleged that she set her own hours, which was contrary to command policy, and retained her original medical record despite command directives that it be filed in the medical department. She was able to do this because she supervised the HS1 who ran the medical department. The XO stated that as a result of "a number of interactions and incidents, I began to lose confidence in her integrity."

The XO stated that after observing her performance, he discussed with the CO possible solutions "on numerous occasions prior to relieving her as department head." After an "emergency meeting of the Chief's Mess," the command master chief came to him and told him that the applicant "did not have the respect of her subordinates, was causing them great apprehension, and was adversely affecting the entire command." The XO stated that this was not news to him. When the master chief reported finding YN1 X in tears because he "could no longer stand to come to work," the XO decided to



relieve the applicant of her position even though shifting another officer into the position to be her supervisor would leave another important command position vacant.

The XO concluded that the disputed OER was “fact-based and objective” and not in retaliation for the applicant’s civil rights complaint. He alleged that in prior OERs, she “kept getting a free pass from her prior supervisors because, as I have now discovered, it took too much time to deal with her.”

### *Declaration of the Previous CO at the XXX*

The captain who served as the CO of the XXX until July 19xx and who signed her previous OERs from that unit as the reporting officer is now retired. He stated that he believed the applicant was “a very capable officer” but “had the potential to do better and I generally gave her the benefit of the doubt in her evaluations.” He alleged that she was “never happy with her OERs” and “often argued for higher numbers, although I thought the supervisor and I were generally quite generous.” He believed that she had several personal problems and that those might have negatively affected her job performance and work relationships, causing “turmoil” in her department.

The captain stated that when he became CO of the XXX, a junior officer was the Administrative Officer, supervising two CWOs who headed the storekeepers and yeomen. However, he wanted to use the junior officer elsewhere, so he made one of the CWOs (the applicant) the Administrative Officer, supervising the other CWO. Unfortunately, he alleged, the applicant “interjected herself” into some situations among the storekeepers in a “less than helpful” way that caused a “downturn in attitude.” Therefore, he decided to divide the department.

Regarding the applicant’s memorandum about a hostile work environment, the captain stated that in response he first asked her why she had reported the matter to him in such a formal manner since he “had always encouraged the staff to come forward, directly to me if appropriate, to report any discriminating behavior.” Then he personally investigated her allegations and spoke with the alleged victims but found that the alleged threats of violence were either not serious or were made in jest. The captain stated that he left a copy of the memorandum for the new CO and told him how he had addressed the allegations but avoided making any remarks about the applicant’s motives for writing it. He also told the new CO that the Administrative Department was requiring too much of his attention and so “some reorganization was appropriate.”

The captain stated that sometime after he left the XXX, the new CO called him about the applicant’s performance and her prior, positive OERs. He told the CO that the applicant was “a capable officer with greater potential and, right or wrong, I tended to give her the benefit of the doubt.”

### *Declaration of the Previous XO at the XXX*

The commander who served as the XO of the XXX until July 1, 19xx, stated that he remembers seeing the memorandum and briefing the incoming XO about it, but he was not involved in the investigation. He alleged that, while he was at the XXX, the applicant's performance was "severely" affected by personal problems, and she came late to work because of "family situations." He believed she had a "fragile personality" and sometimes thought she "was going to have a mental breakdown." However, he and the CO spoke about her almost daily and both of them "felt that we would do more harm than good by holding [the applicant] strictly accountable for her performance." He chose not to deal with the problem because she had been passed over for promotion many times and would be required to retire soon. He stated that the "department performed well while she was the department head but it was not because of her leadership but in spite of it." The commander stated that he told the new XO about "the problem he was inheriting" and was not surprised when he heard that the applicant had later been relieved as Administrative Officer.

### *Declaration of YN1 X at the XXX*

YN1 X stated that the applicant became his direct supervisor in early 19xx, when YN1 Y was "loaned" to the Housing Branch. At that point, YN1 X became the supervisor for the YN2 in the office. YN1 X alleged that, contrary to the applicant's June 19xx memorandum, he never threatened YN2 with violence, although he frequently had to remind a YN2 not to "jump the chain of command" and to keep YN1 X informed of his whereabouts during working hours. He recalled that on one occasion, his direction to YN2 "became heated" but he alleged that he never threatened the YN2 with violence or discriminated against him and that they had a good relationship. He further alleged that the applicant told YN1 Y and him that they should eat lunch with YN2 so that he would not feel discriminated against. He alleged that her comments caused tension in the office.

YN1 X also alleged that the reserve personnel felt alienated because they were not getting paid timely, not receiving orders on time, and not being informed of policy changes. He had to cope with them because they "did not want to deal with [the applicant] due to her attitude." He also alleged that she frequently came to work late, did not wear the proper uniform, and kept her office door closed because she was "on the phone for hours at a time." The previous XO had noticed this and eventually required the applicant to check in and out with him.

Regarding the applicant's allegation that YN1 X undercut her authority by complaining to the XO, he stated that he resorted to complaining to the XO and others because, whenever he approached her, she "gave me the impression that her personal problems far outweighed anything I had to say." YN1 X alleged that in mid September 19xx, the applicant came to the office in a "foul mood" one day and accused him of not completing a task that she had not even assigned to him. When he told her he did not know what she was talking about, she told him he was a "'fuck up' just like everyone else in the department" in front of his subordinates. He left the office, ran into the master chief, and told him what was going on. The next day, the applicant was relieved as Administrative Officer. YN1 X alleged that the applicant was relieved of her position because "she had created a hostile and detrimental working environment."

YN1 X alleged that after the new Administrative Officer took over, he held meetings at which he would assign tasks and deadlines and ask about results. He alleged that the supervisor was very fair but the applicant "could not produce any results" and gave excuses. Once when the new supervisor "became upset" with her excuses, she was embarrassed. While at work, YN1 X alleged, she was either on the phone or looking at the newspaper.

YN1 X alleged that when the applicant submitted her request to go on TAD to XXXXX, her supervisor told her she had to be weighed. He alleged that the applicant "avoided doing this right up till it was time for her to go" because she was overweight

and did not want it to stop her from going on TAD. When the supervisor asked the HS1 about it, he was told that the applicant had her medical record and had never turned it in.

YN1 X also stated that contrary to the applicant's statement, he had "never attended [alcohol treatment] Level III nor was I ever directed not to use alcohol." He also alleged that other statements she had made about his record were also false.

#### *Declaration of the CWO Who Headed the Supply Branch at the XXX*

The CWO who headed the Supply Branch under the applicant's supervision as department head until the branch was made a separate department stated that he had never been told about the applicant's June 19xx memorandum and was unaware of any threats of violence. He stated that YN1 X sometimes came to him for guidance about leadership since he received very little from the applicant. Other members of her staff also asked him for guidance. He stated that he was not told why the applicant was relieved as Administrative Officer and he was told that his branch was moved physically away from the applicant's branch because the Planning Department needed more space.

The CWO stated that the applicant was "the least effective leader" he encountered in the Coast Guard. He alleged that her "complicated" personal life "had complete priority," causing her to be "away from work physically or mentally most of the time" and leaving her staff "effectively rudderless." He alleged that she "alienated the reserve YNs to the point that most retired."

#### *Declaration of the Command Master Chief at the XXX*

The master chief stated that in mid September 19xx, he ran into YN1 X, who greeted him with "a negative comment." He realized something was wrong and took the yeoman to the Chief's lounge for privacy. YN1 X disclosed many "issues" to him and stated that because the applicant had shifted a lot of work onto him, he was working 12-hour days and most weekends to try to keep up. She was doing nothing to help. When the yeoman began to cry, the master chief promised he would help him even if it meant sharing his work. Because the applicant was not "on board," he went to the XO, who indicated that the problem would be fixed. The applicant was removed from her position the next day.

The master chief alleged that he "never saw [the applicant] do anything to help her staff. The door to her office was always closed and she routinely left early on liberty." He also stated that YN1 X was an "outstanding" petty officer with "exceptional military bearing and ability."

## *Advisory Opinion of the Chief Counsel of the Coast Guard*

The Chief Counsel argued that the Military Whistleblowers Statute, 10 U.S.C. § 1034,<sup>8</sup> does not apply to the applicant's case even though she argued that the disputed OER was prepared in retaliation for her June 19xx memorandum. He alleged that she has never proved that the incidents alleged in her memorandum constituted illegal discrimination based on race. He argued that merely indicating that the parties to the alleged incidents were of different races does not prove that race was a contributing factor. He further argued that her memorandum did not meet the third-party reporting requirements for whistleblower status contained in Article 5.A.2.b. of COMDTINST M5350.4 because she did not show that the situations had not been resolved, that addressing the situations with the parties directly was unreasonable under the circumstances (since she was the supervisor of every person she mentioned in the memorandum), or that the behavior reported was clearly criminal in nature. Therefore, he argued, her June 19xx memorandum is not a protected complaint under the statute.

The Chief Counsel also argued that the applicant's July 9, 19xx, civil rights complaint is not a protected communication under the statute because she did not file it within 45 days of her removal as Administrative Officer, as required by COMDTINST M5350.4, and she filed it several months before the *anticipated* alleged reprisal—the disputed OER—was completed. Therefore, he argued, her complaint cannot be considered a valid discrimination complaint protected by 10 U.S.C. § 1034. However, he argued, even assuming *arguendo* that her July 9, 19xx, civil rights complaint is a protected communication within the meaning of the statute, the applicant has not made a *prima facie* showing that either her removal as Administrative Officer or the preparation of the disputed OER was retaliation because the record is “replete” with evidence of her substandard performance during the evaluation period. Therefore, the Chief Counsel argued, the Board should conclude that the procedures required by 10 U.S.C. Part 53 are inapplicable.<sup>9</sup>

Regarding the merits of the applicant's allegations, the Chief Counsel argued that she failed to provide clear and convincing evidence that “there was any reprisal or bias in the disputed OERs.” He argued that, although the applicant repeatedly alleged that her rating chain retaliated against her after she submitted her June 19xx memorandum about a hostile work environment, “[n]othing in any of the testimony

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<sup>8</sup> The statute states that “[n]o person may take (or threaten to take) an unfavorable personnel action ... as a reprisal against a member of the armed forces for making or preparing ... any communication that the member reasonably believes constitutes evidence of ... a violation of law or regulation, including ... sexual harassment or unlawful discrimination ... that is made to a Member of Congress, an Inspector General, or any other person or organization (including any person or organization in the chain of command) designated by regulations or other procedures to receive such communications.” 10 U.S.C. § 1034(b).

<sup>9</sup> Under 10 U.S.C. § 1034(f), if an applicant “has alleged a personnel action prohibited by subsection (b),” the Board “shall review” the report of the Inspector General, “may request” the Inspector General to gather more evidence, and must issue a final decision within 180 days.

provided by her superiors indicates that the June 19xx complaint played any role whatsoever in their decision to relieve her in September 19xx nor in the evaluation process completed in November 19xx.” The Chief Counsel built on the PRRB’s findings about the case by making the following arguments about how the new declarations he gathered reflect on the applicant’s allegations:

**COMMENT [C]:** The Chief Counsel argued that the applicant’s evidence indicating that she issued many checks does not disprove the truth of the comment because it does not negate her supervisor’s statement that during the evaluation period she refused to learn the new system and delayed some members’ receipt of mutual assistance checks. The Chief Counsel pointed out that the XO’s declaration supports the supervisor’s comment in the disputed OER.

**COMMENT [H]:** The Chief Counsel stated that the PRRB “adequately addressed the factual correctness of the comment” and that the comment’s accuracy is further supported by the declarations of the applicant’s former CO and XO, who both indicated that the applicant was negatively affecting the performance of her staff during the final months of the previous reporting period. He pointed out that the former CO particularly mentioned her negative impact on the Supply Branch, which made him decide that that branch should be removed from her department. Therefore, he argued, the Board should find that the applicant has failed “to overcome the presumption of regularity afforded this comment.”

**COMMENT [J]:** The Chief Counsel stated that the applicant’s argument that she met the weight standard are irrelevant to the truth of the comment. He argued that YN1 X’s statements about this matter in his declaration support the comment and that the applicant’s avoidance of her supervisor’s command by delaying her weighing reflects on her “Responsibility,” one of the performance categories grouped with comment [J].

**COMMENT [K]:** Regarding this comment, the Chief Counsel stated that her supervisor’s declaration indicates that it reflects her conduct with respect to obtaining a quota for the plan-writing class without her chain of command’s knowledge or permission. The Chief Counsel alleged that she has failed to prove that she followed normal procedures for requesting training or that she received any kind of tacit approval from her command. He argued that even if, as she alleged, she asked her supervisor at some point to “look out for” a message about the class, such a statement would not amount to following proper procedure or receiving her command’s consent to take the class. Therefore, he argued, she has not proved that comment [K] is erroneous or unjust.

The Chief Counsel also addressed the following comments, which, he pointed out, the applicant did not dispute in her application to the PRRB:

**COMMENTS [A1] & [A2]:** The Chief Counsel alleged that the applicant's excuse for resisting supporting the reservists (being short-staffed) "does not refute the objectivity of the OER comment" and that there is "ample evidence indicating that the comments were fundamentally fair." He pointed out that the supervisor indicated in his declaration that he had received numerous complaints from the reserve Command Enlisted Advisor; that the CWO who headed the Supply Branch stated that she "alienated the reserve YNs to the point that most retired"; and that YN1 X stated that he had to deal with the reservists' significant administrative problems because they would not deal with the applicant "due to her attitude." Therefore, he argued, the Board should find that the applicant has failed "to overcome the presumption of regularity afforded this comment."

**COMMENT [B]:** The Chief Counsel stated that there is ample evidence in the record to support the comment that the applicant's "administrative credibility" came into question and that she was aided by a very capable YN1. He pointed out that her previous XO indicated that she came to the job with little experience and needed a lot of help and that the declarations of both the new CO and YN1 X indicated why her "administrative credibility" was in question. He also pointed out that both the Command Master Chief and the applicant's supervisor praised YN1 X's abilities. Therefore, he argued, the Board should find that the applicant has failed "to overcome the presumption of regularity afforded this comment."

**COMMENT [E]:** The Chief Counsel pointed out that the applicant provided no evidence to disprove this comment. He also pointed out that in his declaration, YN1 X stated that the applicant used very derogatory profanity to criticize his work "in plain view of everyone in the Department." Therefore, he argued, the Board should find that the applicant has failed "to overcome the presumption of regularity afforded this comment."

**COMMENT [F]:** The Chief Counsel stated that the supervisor's declaration amply supports this comment and that, therefore, the Board should find that the applicant has failed "to overcome the presumption of regularity afforded this comment."

**COMMENT [G]:** The Chief Counsel stated that the applicant has admitted that this statement is true but blamed the incident on YN1 X's poor performance rather than her lack of leadership. He alleged that comment [G] is amply supported by the declarations of the applicant's XOs and COs and by those of the CWO and Command Master Chief. Therefore, he argued, the Board should find that the applicant has failed "to overcome the presumption of regularity afforded this comment."

Regarding the disputed comments in the concurrent OER (Comments [1] and [2]), the Chief Counsel argued that the PRRB properly found that the applicant's unsupported allegations of bias and taint and her own opinion of her performance at XXXXX

are insufficient to overcome the presumption of regularity afforded the comments of her rating chain at XXXXX.

The Chief Counsel did not include in the advisory opinion an analysis of whether the alleged errors and injustices in the two OERs, if proven, could have caused her to be passed over for promotion and consequently retired. However, he offered to provide one or to address any other matter upon the Board's request.

### **APPLICANT'S RESPONSE**

On February 28, 2002, the Chairman forwarded copies of the Chief Counsel's advisory opinion and its attachments to the applicant and invited her to respond. The applicant requested and was granted extensions totaling more than five months and responded on September 3, 2002.

In her response, the applicant stated that she never alleged that the disputed OER was prepared in retaliation for her civil rights complaint and she asked the Board to "ignore the Coast Guard's responses that contain any reference to Civil Rights issues so they do not detract from the main focus of [the] application." She stated that she is asking the Board to remove the OER because it is an unfair evaluation of her performance and full of "lies, half truths and distortion of facts," not because of any purported retaliation.

The applicant stated that the declarations provided by the Coast Guard prove her allegation that her CO and XO were prejudiced against her by negative reports they received at the beginning of the reporting period and even before the period began. She alleged that the XO's statement proves that he prejudged her based on the negative reports, removed her from her position "at the first opportunity," and tried to substantiate his decision afterward.

The applicant alleged that if her performance were truly lacking during the prior evaluation period and if she were truly the "poor fragile person" they described in their declarations, her previous CO and XO would not have allowed her to be the Administrative Officer for two and one-half years or given her positive OERs. She argued that their recent declarations are less reliable indicators of her performance than the positive OERs they timely prepared and that their declarations "were certainly colored by information provided by" her rating chain for the disputed OER. She argued that the statement she provided from the CWO who had served as the Operations Officer of the XXX until July 19xx (see page 7 above) also proves that there was prejudice against her.

The applicant alleged that the supervisor's statement in his declaration that she did not complete the job of updating and transferring the unit instructions is contradicted by his comment in the disputed OER that she "[c]onsolidated unit instructions & migrated to SWS III." She alleged that his comment that the unit would have been



required to pay for her per diem and travel costs for the plan-writing class is contradicted by the message he received from Headquarters showing that they were both enrolled in the class, which shows that Headquarters provided the travel orders and "fully funded the school." She alleged that he has provided three different stories about her training the reservists: in the disputed OER, he wrote that she "effectively provided alcohol-abuse training to all hands"; he told the PRRB that she showed up late in civilian clothes and did not participate; and after she submitted a contrary statement by the Reserve Command Master Chief, he stated that he had to order her to provide training for the reservists.

Regarding the XO's declaration, the applicant asked how she could have written three times as many checks as all others at the command if she did not know the software. She alleged that, in claiming that he discovered her marriage when she went on TAD, the XO lied, because no interviews with spouses are required prior to TAD assignments. She alleged that the XO only discovered her marriage after the evaluation period, in November 19xx, because spouses must be interviewed prior to permanent transfers. She alleged that he lied about the date he discovered her marriage because she had shown that his prior claim that she would not have been allowed to take her dependents on TAD was also false.

The applicant alleged that YN1 X's declaration is "replete with lies." She alleged that she was not even at the office on September 17, 19xx, so she could not have used profanity on him that day in the presence of others, as he alleged. She argued that the Command Master Chief's statement that she was "not on board" proved her allegation and the falseness of YN1 X's declaration. She also alleged that the negative compliance report completed in September 19xx, six months after she left the office, proves that YN1 X was not a capable yeoman.

The applicant stated that she believes that, in praising YN1 X, the former CO was misremembering because the capable YN1 she had worked with while he was at the XXX was YN1 Y, who no longer worked in her department during the evaluation period for the disputed OER.

The applicant pointed out that the statement of the CWO who headed the Supply Branch about her causing the reserve yeomen to retire is hearsay. She alleged that she was friends with both of the reserve yeomen who retired while she was at the XXX and that one retired for medical reasons and the other retired because she had had trouble during a prior temporary active duty contract that "negatively affected her ability get any more" contracts.

The applicant repeated her allegation that if her performance had been as bad as is indicated in the disputed OER, other negative entries would have been made in her record during the evaluation period. Finally, she argued that she only lacked credibility when she arrived at the XXX because she had previously received "out of specialty

assignments” as a result of the Coast Guard’s failure to timely remove an OER that the BCMR had ordered removed from her record in Docket No. 124-92. Therefore, she argued, her failure to be promoted and mandatory retirement are unjust results of the Coast Guard’s failure to implement an order of the BCMR.

## RELEVANT REGULATIONS

Article 10.A. of the Personnel Manual (COMDTINST M1000.6A) governs the preparation of OERs. Each OER is prepared by the reported-on officer’s “rating chain” of three officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), who completes blocks 3, 4, and 5 of the OER; the reporting officer (the supervisor’s supervisor), who reviews the supervisor’s blocks and completes blocks 7 through 10; and the reviewer (the reporting officer’s supervisor), who checks the OER for errors, omissions, and inconsistencies. Article 10.A.1.b. states the following:

17. Each commanding officer must ensure that accurate, fair, and objective evaluations are provided to all officers under their command. . . .

2. Individual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards.

Article 10.A.2. provides that it is the responsibility of the reported-on officer to seek performance feedback from the supervisor; the supervisor provides performance feedback upon the reported-on officer’s request or whenever appropriate; and the reporting officer provides performance feedback to the reported-on officer “as appropriate.” Article 10.A.1.c.5. provides that

[n]o specific form or forum is prescribed for performance feedback . . . . [It] occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should be clear about the feedback received. If the feedback is not fully understood, it is the Reported-on Officer's responsibility to immediately seek clarification.

Article 10.A.2.g.2.b. provides that an officer may be disqualified from serving on a rating chain if he or she has been relieved “for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.”

Article 10.A.4.d. of the Personnel Manual governs the preparation of OERs. The instructions state the following:

(d) In the "Comments" sections following each evaluation area, the Reporting Officer [or Supervisor] shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a "4." . . .

(e) Comments should amplify and be consistent with the numerical evaluations in the evaluation area. They should identify specific strengths and weaknesses in performance or qualities. Well-written comments must be sufficiently specific to paint a picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.

. . .

Article 10.A.4.f.1. prohibits a rating chain from mentioning any ongoing investigation, including discrimination investigations, in an OER. However, "[t]his restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings." Article 10.A.4.f.11. prohibits a rating chain from discussing a "Reported-On Officer's performance or conduct which occurred outside the reporting period."

Article 10.A.4.g. states an officer may submit a reply to any OER within 14 days of receiving it and have this reply filed with the OER. The purpose of the reply is to "provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official."

## 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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. In several documents the applicant submitted, she suggested that the disputed OER and/or her removal as Administrative Officer, which is mentioned in the disputed OER, were actions of reprisal for complaints she had made. The Chief Counsel argued in his advisory opinion that the provisions of the Whistleblower Statute, 10 U.S.C. § 1034, regarding allegations of reprisal do not apply to her application. In response to that advisory opinion, the applicant asked the Board essentially to ignore all civil rights and retaliation arguments because she is asking the Board to remove the OER because of its inaccuracy and unfair assessment of her performance, not because of any alleged retaliation. Therefore, the Board finds that the applicant has waived the

issue of whether her removal as Administrative Officer and the disputed OER were acts of reprisal or retaliation, and the Board will not address it.

4. Absent strong evidence to the contrary, the Board presumes that rating officials have acted correctly, lawfully, and in good faith.<sup>10</sup> To overcome the presumption of regularity, an applicant must present at least some “clear, cogent, and convincing” evidence—i.e., evidence that specifically and convincingly contradicts her rating officials’ marks and comments. If the presumption is overcome, the Board will weigh the evidence in the record to determine whether the applicant has met her burden of proof—the preponderance of the evidence—with respect to the disputed comments and marks.<sup>11</sup> The Board determines whether the applicant has proved by a preponderance of the evidence 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.<sup>12</sup> With this standard in mind, the Board has carefully considered all of the evidence presented regarding the disputed and concurrent OERs and draws the following conclusions with respect to the evidence.

5. **COMMENTS [A1] & [A2]:** “With some resistance eventually agreed to provide weekend admin support to reservists.” & “Resistant to full support to & from reservists.”

The applicant alleged that she provided as much support to the reservists as she could “under the circumstances,” given that she was short-staffed and in the middle of the transfer season. An email message from the reserve command master chief indicates that she provided training at a reserve all hands meeting in November 19xx. Another message in the record indicates that, after the transfer season was over, she arranged for two yeomen to assist the reservists once a month each on Saturdays. However, none of the applicant’s evidence contradicts comment [A1] or [A2]. The comments do not state that she never supported the reservists but only that she resisted supporting them, and an email message from the reserve command master chief dated August 15, 19xx, clearly shows his frustration over a lack of administrative support. Although the applicant was able to point out variations in her supervisor’s descriptions of her performance with respect to the reserve all hands meeting, the Board finds that she has not rebutted the presumption of regularity with respect to comments [A1] and [A2] because she has not presented any evidence that directly contradicts them.

6. **COMMENT [B]:** “Administrative credibility at times in question, professional competence supplemented by very capable YN1.”

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

<sup>11</sup> In determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain’s assessment even though the presumption of regularity has been rebutted. See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

<sup>12</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980); CGBCMR Docket No. 86-96.

The applicant challenged this comment by alleging that the YN1 in question, YN1 X, was not “capable.” She submitted a copy of a compliance report dated September 19xx, which indicated that the department was not complying with several policies. However, there is no evidence that YN1 X was responsible for the failures identified in the compliance report, and the record includes many statements from officers attesting to the capability of YN1 X. The record also contains many statements that support the first half of comment [B]. The applicant did not submit a single statement from a colleague to indicate that she was a hardworking, effective, or “credible” administrative officer during the evaluation period. Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [B].

7. **COMMENT [C]:** “[R]efused to learn computerized check-issuing system resulting in unfair delays to applicants.”

The applicant alleged that she knew the computerized check-writing system for issuing mutual assistance checks, and she submitted a statement from the office’s current mutual assistance clerk, who stated that between January 19xx and March 19xx, the applicant processed 37 checks totaling \$24,510.86, whereas all other persons in the office had together issued 12 checks totaling \$16,675.54. However, this information does not contradict comment [C], which indicates that at some point between the start of the evaluation period on July 1, 19xx, and when she left the XXX in February 19xx, she refused to learn a new check-issuing system and thereby unfairly delayed payments to members. Although comment [C] was written by the supervisor, the XO supported it in his declaration for the Chief Counsel. Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [C].

8. **COMMENTS [D1] & [D2]:** “[B]ut failed to follow CG prgm guidelines & failed to inform/update XO on personnel problems & rehab recommendations; e.g. applied inappropriate & unrealistic standard in selecting counselor, unnecessarily delaying essential patient counseling.” & “Held off on required counseling of member involved in alcohol incident – requesting specific counselor – increasing anxiety of member in need of counseling.”

The applicant submitted a statement by the Addictions Program Representative for MLC, who described her as a very experienced, excellent CDAR who “continually made extra efforts to find members at [the XXX] the best care possible.” Moreover, the same officer stated in an email to the applicant that he could not recall her ever delaying treatment for a member or asking for a specific counselor based on the race of the member. The Board finds that these statements are sufficiently clear and convincing about the applicant’s professional abilities and actions as a CDAR to overcome the presumption of regularity afforded comments [D1] and [D2]. Moreover, the applicant’s abilities as CDAR are supported in the disputed OER itself, as it includes comments that she had a “[s]trong commitment to members as alcohol/substance abuse counselor”; “[d]emon-

strated concerned response to unit members in need of counseling for both alcohol screening and mutual assistance requests”; and “[a]s CDAR, effectively provided alcohol-abuse training to all hands.”

The applicant alleged that she failed to inform the XO about certain CDAR matters because he had a “closed door policy” for her. The XO admitted that he had someone else in the office with him whenever she came in, but he also stated that she never told him that she needed to speak to him in private about a CDAR matter and made unilateral decisions that “were not hers to make.” The applicant did not deny these statements.

The applicant alleged that the African-American member’s counseling was delayed not because of her desire that he be treated by an African-American counselor but because the member had to undergo NJP before he could be diagnosed, and the statement of the Addictions Program Representative supports her allegation. However, the supervisor in his declarations to the PRRB and to the Chief Counsel indicated that when he noticed that the member’s treatment was being delayed and asked the applicant for an explanation, she told him that she was seeking an African-American counselor for the member. The supervisor’s statement is supported by the XO in his declaration to the PRRB. Therefore, although the Navy’s rule about treatment and NJP may have caused a delay in the member’s treatment, the Board finds that the applicant has not proved by a preponderance of the evidence that comments [D1] and [D2] are false or that the disputed OER as a whole unfairly reflects her performance as CDAR during the evaluation period.

9. **COMMENT [E]:** “[R]eprimanded senior POs in presence of nonrates.”

The applicant presented no evidence that contradicts this statement. Moreover, a statement by YN1 X in his declaration to the Chief Counsel indicates that in front of his subordinates one day she told him that he was a “‘fuck up’ just like everyone else in the department.” Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [E].

10. **COMMENT [F]:** “[G]ave poor advice about their low marks to two marginally performing POs; result: subordinates involved CEA, XO in seeking relief fm her.”

The applicant alleged that when her supervisor failed to recommend a “marginally performing” HS1 for promotion, she advised the HS1 to appeal the decision because it was based on only six weeks of observation and she believed the HS1 to be “a capable caring professional.” However, the HS1 spoke to a career counselor and decided to retire. These allegations do not contradict comment [F] and the applicant presented no evidence that does contradict the comment. Therefore, the Board finds that the

applicant has failed to overcome the presumption of regularity with respect to comment [F].

11. **COMMENT [G]:** “Her poor interaction w/ subords & failed leadership resulted in emergency meetings of CPO Mess, CEA, & XO.”

The applicant alleged that this comment resulted from an incident in which YN1 X was caught using “foul and aggressive language” and blamed it on her. She alleged that YN1 X was not credible because he had a history of having difficulty with supervisors and was drinking despite having received Level III treatment for alcohol abuse. She alleged that she was not even in the office that day and was never given a chance to tell her side of the story. However, the applicant submitted no evidence whatsoever to show that her interactions with her subordinates was not lacking or that emergency meetings of those officers were not required because of her failed leadership. Moreover, the XO stated in his declaration to the PRRB that during the evaluation period almost all of her subordinates complained to him about her, and other members also reported her unprofessional behavior and interactions to him. In addition, the XO stated that prior to her removal as Administrative Officer, he had several meetings with other officers and petty officers concerning her failed leadership. Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [G].

12. **COMMENT [H]:** “At beginning of the period, served as Admin Dept Chief which included F&S2 and SKs. Dept was dysfunctional & Supply Branch was broken out as separate dept to allow [the applicant] to focus on YNs & admin issues & regain leadership credibility.”

The applicant alleged that the Supply Branch was “broken out” as a separate department only to avoid having one CWO (her) supervise another CWO who headed that branch. She also alleged that her prior good OER proves that the department was not dysfunctional and that she did not need to regain leadership credibility. In support of her allegation, she submitted a copy of an email from the CWO who headed the Supply Branch. He stated that he was told his office was physically relocated to make more room for the Planning Department, but this does not address why his branch was made a separate department. Moreover, comment [H] is amply supported by the declarations of the applicant’s former CO and the new XO regarding their reasons for removing the Supply Branch from her control and by the their declarations and those of the same CWO and the command master chief regarding the dysfunction of the department, her failed leadership, and her interactions with personnel in the Supply Branch. Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [H].

13. **COMMENT [I]:** “Admin Dept cont’d to be dysfunctional despite numerous command counseling sessions. Acted unprofessionally during counseling.”

The applicant alleged that she had only one command counseling session and that it was merely a briefing for the new CO when he arrived at the XXX. She submitted no evidence of this allegation, but the CO did not mention any counseling sessions in his statement to the civil rights investigator and no other declarant referred to a specific counseling session. However, a counseling session occurs whenever anyone designated by the command counsels the member, and it is clear from the record that the applicant's supervisor and XO frequently made her aware during the evaluation period that she was not meeting their expectations. In addition, the record includes many statements indicating that the department was dysfunctional under her leadership, and the applicant did not deny that she acted unprofessionally during counseling sessions. Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [I].

14. **COMMENT [J]:** "Took advantage of position; e.g. refused to submit to direct-subordinate HS1's repeated request for mandatory weigh-in prior to TAD; XO led to believe weigh-in accomplished."

The applicant alleged that this comment is disproved by the lack of an entry in her record showing that she failed to meet the weight standard and an email message from the HS1 stating that the applicant was weighed but that the HS1 "was never able to get the percent body fat so it was not adequate for the official weight check." However, the fact that she ultimately was weighed and met the weight standard does not prove that she did not refuse to submit to repeated requests to be weighed or that the XO was not at some point wrongly led by her words or actions to believe that the "weigh-in" requirements for her TAD assignment had been met. Moreover, both the supervisor and the XO reconfirmed the truth of comment [J] in their statements to the PRRB. Therefore, although the record indicates that the applicant was weighed before she went on TAD, the Board finds that she has not proved by a preponderance of the evidence that comment [J] is erroneous or unjust in how it characterizes her actions.

15. **COMMENT [K]:** "[W]rongly & surreptitiously had orders for training issued by HQ, bypassed normal process including Supervisor, Training Officer & XO; result - kept eligible member from attending school."<sup>13</sup>

The applicant alleged that she told her supervisor to expect a message about the class and that he set her up by not asking her for a training request form. However, she also admitted that she accepted Mr. X's invitation to be enrolled in the class without consulting her command. In their declarations, both the supervisor and the XO indicated that they knew nothing about her enrollment until they received the message from Headquarters on her last day at the XXX. Although the applicant and the Coast Guard submitted many documents and allegations concerning her quota for the class and why it was cancelled, these allegations are irrelevant to the issue addressed in com-

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<sup>13</sup> The shaded phrase was deleted from the OER by the PRRB.



ment [K]. Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comment [K].

16. **COMMENT [L]:** "Professional skills/position often used to 'work the system' to own purposes/advantage, adversely impacting subordinates and command good order ... ."

The applicant alleged that this comment is a direct if veiled reference to her filing civil rights complaints and, as such, is prohibited by Article 10.A.4.f. of the Personnel Manual. She submitted a copy of a rough draft for the disputed OER, which includes the statements "[e]xhibits discriminatory tendencies; stirs the pot by creating gender & racial issues where none exist. Uses civil rights issues as scare tactics towards supervisor. Invited outside agency civil rights investigator to question command on CG trends." However, other than the fact that comment [L] did not appear in the supervisor's rough draft for the OER, and the fact that the language about her creating "racial issues" and inviting an investigator did appear, there is no evidence that comment [L], which appears in the XO's part of the disputed OER, is a revised version of the deleted language in the rough draft, which appeared in the supervisor's part of the OER. Moreover, both the supervisor and the XO pointed to the applicant's actions with respect to her enrollment in the plan-writing class and her taking her dependents on TAD without her command's knowledge as examples of her "working the system" to her own advantage, and the applicant provided no evidence, other than her own word, to refute these statements.

In her arguments concerning comment [L], the applicant pointed out that her supervisor and XO made several erroneous allegations about her actions with respect to the TAD assignment and the class because they did not know the rules. For example, they erroneously alleged that it is against regulations ever to "go TAD from TAD," to take a class when one is retiring soon, and to take dependents on TAD. She has proved that they sometimes erroneously assumed she was breaking a regulation, when she may only have been acting against the command's general policy and without its knowledge, but this does not disprove comment [L], which indicates only that her knowledge and ability to "work the system" sometimes adversely affected her subordinates and "command good order." Although her rating chain's declarations provided no example of how her "working the system" negatively affected a subordinate, they do indicate that "command good order" was adversely affected when she failed to follow the chain of command to request training and moved her dependents without warning her command or the command at XXXXX.

The applicant also pointed out that some of the examples of her "working the system" described by her rating chain in their declarations occurred outside of the evaluation period. Article 10.A.4.f.11. of the Personnel Manual prohibits a rating chain from discussing a "Reported-On Officer's performance or conduct which occurred outside the reporting period" in an OER. However, the fact that her rating chain cited such

examples in their statements to the investigator and declarations does not prove that she did not also “work the system” to her own advantage and to the detriment of her subordinates and “command good order” during the evaluation period. Therefore, the Board finds that the applicant has not proved by a preponderance for the evidence that comment [L] is prohibited by the Personnel Manual, erroneous, or unjust in its characterization of her actions.

18. **COMMENTS [1] & [2]:** “This officer also seemed to be dedicated to the CG.” & “This officer is considered qualified for promotion to CWO4.”

The applicant alleged that these comments are unfair because her rating chain at the XXX essentially sabotaged her reputation and performance at XXXXX by unfairly canceling her orders to attend the plan-writing class and by biasing the XXXXX command against her. She submitted evidence indicating that there was room for her in the class and that it would have been helpful for her work at XXXXX. She alleged that her supervisor’s explanation as to why he cancelled her quota is a lie because the message he received from Headquarters indicated that Headquarters had issued the travel orders, thereby fully funding the class. She also proved that her supervisor and the lieutenant at XXXXX knew each other and had some communication about her performance.

There is no evidence in the record, however, indicating that the applicant’s supervisor was not honestly mistaken about the cost of the class to the XXX. In addition, the record indicates that her command had previously verified that she did not need any training to do the work, and her command at XXXXX apparently agreed with this assessment. While the class may have been helpful to her, as Mr. X stated, there is no evidence in the record that it was necessary for her to do the work or that either command denied her enrollment because of prejudice. Moreover, the record indicates that the applicant did not work very hard at XXXXX to earn a good OER: in response to an innocuous inquiry from her supervisor about her upcoming retirement, the lieutenant at XXXXX wrote back on May 28, 19xx, that “[s]he has checked out cause she knows that she will not get what she needs on an OER, so now she does bills and reads the paper.” Therefore, the Board finds that the applicant has failed to overcome the presumption of regularity with respect to comments [1] and [2].

19. The applicant alleged that she never got a “fresh start” with the new rating chain that formed in the summer of 19xx because they had heard complaints from her subordinates and saw her June 19xx memorandum. The record indicates that the new CO and XO did see her June 19xx memorandum and that her subordinates did complain to the XO about her. However, the applicant has not proved that it was improper or unfair for the previous CO to provide them with a copy of the memorandum or to inform them of the status of her department. Moreover, an email message from the XO dated August 12, 19xx, states that the CO had told the XO that the applicant was to begin with a “clean slate,” and the applicant’s supervisor did not join the

office until September 19xx, after she had already been removed from her position. Although the applicant was removed from her post just a few weeks after the new CO arrived, the record indicates that in that short time, he had already noticed a difference between her actual performance and the comments and marks she had received in prior OERs. In addition, the XO stated that before they decided to remove her, he had received many complaints about her performance and he had consulted with the CO about her several times. Under Article 10.A.2.g.2.b. of the Personnel Manual, an officer is "disqualified" from serving on a rating chain only if he or she has been relieved "for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation." The Board finds that the applicant has not proved by a preponderance of the evidence that any member of her rating chain at the XXX or at XXXXX was unfairly prejudiced against her or was otherwise disqualified from serving on her rating chain.

20. The applicant alleged that if her performance had been as bad as the disputed OER indicates, her supervisor would have made some other entry in her record. She alleged that she was not properly counseled and that she met all her supervisor's expectations after he was made Administrative Officer. She stated that some of the positive comments in the disputed OER prove that she performed work that he stated she had not completed. However, the comments in the disputed OER indicating that she did work on certain projects do not prove that she met her supervisor's expectations with respect to those projects. In addition, YN1 X indicated in his declaration that at office meetings, the applicant "could not produce any results" and gave her supervisor excuses about why her work was not done. Moreover, Articles 10.A.1. and 10.A.2. of the Personnel Manual place the primary onus for ensuring performance feedback on the reported-on officer. Officers are expected to make sure that they know their supervisor's expectations and meet them. The applicant has not proved that her rating chain did not meet the requirements of the Personnel Manual with respect to evaluating her performance.

21. The applicant made numerous allegations with respect to the actions and attitudes of her command, her rating chains, and other Coast Guard members. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

22. The applicant has not proved that any comment or mark in the disputed OER or the concurrent OER (as corrected by the PRRB) is erroneous or unfair. She has not proved that the marks and comments in the OERs are the result of anything other than her rating chain members' fair and objective assessments of her performance during the evaluation periods.

23. The applicant argued that the Board should remove her failures of selection for promotion and expunge her retirement because the selection boards that failed to select her reviewed her record with the disputed OERs in it. Although this Board has not found any further errors in the disputed OERs to correct, the PRRB did find and remove one erroneous comment from the disputed OER and another from the concurrent OER. Therefore, the Board must consider whether the erroneous comments removed by the PRRB could have caused her failures of selection by the PY 2000 and 2001 CWO selection boards in 19xx and 2000, respectively.

24. In *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982), the Court of Claims held that the BCMR should decide whether an applicant's failure of selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" The Board finds that the two phrases removed from the applicant's OERs by the PRRB—"kept eligible member from attending school" and "However, external issues seem to have impacted on fullest utilization & most effective performance"—make her record appear slightly worse than it would have in their absence. However, the Board further finds that, in light of the many negative comments and low marks in the disputed OER and the concurrent OER, it is very unlikely that the applicant would have been promoted even if those two phrases had not been in the OERs when they were reviewed by the PY 2000 and 2001 CWO selection boards.

25. Accordingly, the applicant's request should be denied.

**[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]**

**ORDER**

The application of retired xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of her military record is denied.

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Kevin C. Feury

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Donna L. O'Berry

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Gareth W. Rosenau