

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-201

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on June 28, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated June 7, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

On November 9, 2009, the applicant's name was removed from the promotion year (PY) 2009 selection board list for promotion to lieutenant commander (LCDR), which was considered his first failure to be selected for promotion to that grade. After his second non-selection for promotion to LCDR before the PY 2011 selection board, he retired from the Coast Guard on December 31, 2010, by reason of sufficient service for retirement.

The applicant asked the Board to correct his record by vacating "the rescission of [his] promotion, retroactively adjust [his] date of rank, effective date of pay and allowances and award all accrued back-pay. [Footnote omitted] In short, [the applicant] should be again rightfully recognized as a moral person, commensurate with the rank [LCDR]."

Further in his brief, the applicant stated that he is not seeking to reenter the Service. "He just wants to set the record straight, and indeed, believes that the stigma of his unceremonious discharge from the Service may continue, in the foreseeable future, to have negative impacts on his ability to seek gainful employment as a result of disclosure and routine employment background checks; particularly in these depressed and insecure economic times." The applicant also requested an oral hearing before the Board.

BACKGROUND

On July 25, 2008, the applicant reported to a Coast Guard Sector for duty as the Incident Management Division Chief. During that summer a pregnant enlisted member (Petty Officer (PO) W) transferred into his department, but she was medically restricted to desk work. According to the applicant, PO W did a good job in her office duties. The applicant stated that on August 27, 2008, he told P O W a joke that he had used to tease his then-pregnant sister. The applicant stated that the joke he told to PO W went something like this:

*“I’d like to send you out on a spill response, but you are sitting there **fat, dumb, and pregnant** and there is nothing I can do.” Petty Officer [W] responded “wow . . . really?” Sensing she might play along, [the applicant], while recalling prior conversations with his pregnant sister, thereafter smiled, and delivered the punch line, “**I guess I shouldn’t have said dumb.**” (Emphasis in original.)*

Approximately one week later PO W sent the unit’s Equal Opportunity Representative (EOR) an email that stated the following:

I am currently assigned to [the Sector] IMD, TAD, since I am currently pregnant and my board is underway. The following incident occurred last week and I feel as if I need to report this before it goes any further. At the time of the incident I was really just in shock that an officer had said that. It is still bothering me now to the point that I dread coming into work and second guess everything that he assigns me to do when 5 other petty officers are right there taking a break, while I am working on cases.

[The applicant] approached me, 28 August 08 1310, to do a project and said “I figured since you are fat, dumb, and pregnant this would be a good job for you” I said, “wow, really” he said, I guess, I shouldn’t have said dumb.

The applicant’s supervisor counseled him on a page 7 about the “inappropriate, insensitive, and disrespectful” remark. The applicant stated that he was “required to apologize to PO W in front of his entire department staff during an ‘all hands’ meeting,” which was embarrassing for him, even though he had already apologized to the PO W. The applicant submitted the results of an October 28, 2010 polygraph examination showing that in the examiner’s opinion the applicant was not attempting deception in his “yes” answers to the following questions:

5. Did you apologize to [PO W] within two minutes of making an offensive remark to her on August 28, 2008?
7. On August 28, 2008, did you apologize to [PO W] within two minutes of making an offensive remark to her.

The applicant stated that on November 24, 2008, on his way to receive a tasking, he saw PO W and she sneered at him. He was upset and angry. So when he saw PO W again passing

outside his office, overcome with frustrating thoughts due to the command's hypocrisy and maltreatment of him, the whispered words "white trash" slipped from his mouth. He stated that the words were meant only for his ears and not directed at anyone. Although PO W did not hear these words, other members of the department heard them and reported them to the applicant's supervisor.

The applicant's supervisor ordered an informal investigation into the alleged inappropriate comments. The applicant admitted to the investigating officer that he made the comments. The investigating officer recommended the following actions in his report dated December 16, 2008: that the applicant be removed as division chief and assigned to a supervisory position with more oversight; that the command give the applicant an administrative letter of censure; that his conduct be included in his OER (special if removed from primary duty and regular if not); that the command review both incidents involving the applicant with the district's civil rights officer (CRO); and that the command require the applicant to attend HRA training and/or counseling.

Removal from Primary Duty, Delay of Promotion, and Removal from the Promotion list

On January 9, 2009, the applicant was removed from his primary duty and assigned to the Sector's Waterways Management Division. In a letter notifying the applicant of his removal from his primary duty, the CO directed that he attend work life counseling and training to be completed by June 1, 2009.

On January 26, 2009, the CO sent a memorandum to the Commander, Coast Guard Personnel Command (CGPC), with the applicant listed as an addressee, recommending that the applicant's promotion be delayed due to his poor judgment in making inappropriate and disrespectful comments toward a pregnant enlisted member on two separate occasions.¹ The letter also noted that the applicant failed to complete human relations/sensitivity training despite

¹ Article 5.A.13.f.1. of the Personnel Manual states that each officer in the chain of command or Commander, (PSC-opm) is responsible for delaying a promotion if he or she knows the appointee has disqualified himself or herself after being placed on a promotion list. Disqualification means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers, courts-martial, or investigative proceedings. See 14 U.S.C. 271(f).

Subsection 2 stated that a complete report of the circumstances recommending removing the selectee from the promotion list under Article 5.A.4. shall be sent to Commander (PSC-opm). The selectee must be furnished a copy of the report and required to acknowledge receipt. A signed copy of the acknowledgment is attached as an enclosure to the report.

Subsection 3 states that the Commandant shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list. The selectee will be afforded 21 days notice of the proceedings, and may communicate directly by letter to the board, in care of Commander (PSC-opm), before the board convenes. Enclosures or attachments are limited to copies of official records and materials allowed to be submitted with OERs. Letters from other officers shall not be solicited or submitted as enclosures.

Subsection 5 states that the President of the Board will forward a report of the proceedings of the Board containing a recommendation to the Commandant as to whether the officer should be promoted, along with reasons for the recommendation. If the Commandant finds removal from the promotion list appropriate, he or she will forward the report with endorsements to the Secretary of Homeland Security (acting as the alter ego of the President), who is the final reviewing authority. If the Commandant determines that removal is inappropriate, the case is closed, and the delay of promotion is canceled.

being directed twice to do so (after the first comment). The memorandum noted that a derogatory special officer evaluation report (SOER), the investigation into the comments, and the memorandum notifying the applicant of the delay of promotion were attached.

On January 27, 2009, the applicant acknowledged receiving notification that his promotion would be delayed and the attachments to the January 26, 2009 memorandum.

On February 9, 2009, a SOER was placed in the applicant's record covering the period from June 1, 2008 to January 9, 2009, to document the applicant's removal from his primary duty and to document performance notably different from the previous reporting period. The SOER was signed by the supervisor on January 22, 2009, by the reporting officer on January 22, 2009, and by the reviewer on February 5, 2009. The supervisor assigned the applicant a below standard mark of 2 in "workplace climate" and wrote the following pertinent comments:

Insensitive towards female enlisted member with special situation; made inappropriate/disrespectful comment to IMD enlisted member & failed to properly/promptly acknowledge error; member lost support/respect for [the applicant] & asked to be removed from IMD due to poor workplace climate. [The applicant's] comments were personal, derogatory & demeaning & fostered a disrespectful and unprofessional workplace climate. Despite counseling, [the applicant's] repeated insensitive actions by using derogatory language directed at same enlisted member while in front of IMD staff; second incident underscored [the applicant's] poor leadership skills & failure to fully understand/grasp poisonous/negative affect such comments have on IMD staff/workplace climate.

In his portion of the SOER, the reporting office assigned the applicant marks of 2 in "judgment" and "responsibility" and a mark of 3 in "professional presence." In the comment block for section 8, the reporting officer wrote the following:

Recognized critical need for Federal On-Scene Coordinator . . . training in IMD after loss of experienced personnel due to 2008 summer transfer season: initiated effort with D13 to host & help develop curriculum for FOSCR workshop. Improved safety by smartly pursuing use of GAR Risk Assessment Model into IMD pollution response ops to help ID/mitigated risks. Exercised extremely poor judgment by making inappropriate/disrespectful comments towards enlisted member on two separate occasions; actions clear indication of unconcern for crew & disregard for impact. After first derogatory language incident, [the applicant] was directed by Sector Command on two separate occasions to schedule & attend human relations/sensitivity training for entire IMD staff & self but failed to complete. While professional/respectful to external agencies & senior officers, lacked respect for certain subordinates & publicly professed it

On the block 9 comparison scale of the SOER, the reporting officer rated the applicant in the lowest block, which described his performance as unsatisfactory for his grade or billet when compared with other LTs the reporting officer has known. In describing the applicant's potential for assuming greater leadership roles and responsibility, the reporting officer stated that the

applicant had demonstrated poor judgment in making derogatory comments toward an enlisted member and that he lacked essential leadership skills, which led to his removal from his primary duty. The reporting officer recommended a special board to consider whether the applicant should be promoted to LCDR. The reporting officer did not recommend the applicant for promotion.

On May 1, 2009, Commander, Personnel Service Center (PSC) informed the applicant that action had been initiated under Article 5.A.13.f. of the Personnel Manual to convene a board of officers to recommend whether or not his name should be removed from the promotion year (PY) 2009 LCDR selection board list. The applicant was advised that the board would review his imaged personnel data record, including the SOER and all documents related to the CO's basis for requesting his removal that were attached to her January 26, 2009 memorandum. The memo informed the applicant that PSC could initiate special action when information of an adverse nature is discovered. The memo informed the applicant that in his case, "this action was initiated upon receipt of [the derogatory SOER, the CO's January 26, 2009 memorandum to PSC, and her January 27, 2009 memorandum to the applicant informing him of the delay in his promotion]."

PSC also advised the applicant that a separate action had been initiated under Article 12.A.12. of the Personnel Manual to decide whether the applicant's commission should be vacated. PSC advised the applicant that he could submit comments to the special board, in which he could only discuss matters of record.

On May 20, 2009, the applicant acknowledged receipt of the proposed special board action and stated that he understood its contents and his rights and protections. He also acknowledged his intention to submit a statement to the special board.

On May 27, 2009, the applicant submitted a statement to the special board. In that statement he apologized for the comments and stated that he understands how inappropriate his comments were. He asked that his name not be removed from the list and pointed to his more than 23 years of honorable, professional and exceptional service in the Coast Guard.

On June 22, 2009, the applicant was informed that the special board would convene on June 24, 2009.

On June 24, 2009, the special board convened to consider whether to recommend the removal of the applicant's name from the PY 2009 LCDR selection list.² In a report dated June 24, 2009, the special board recommended that the Secretary remove the applicant's name from the selection board list for promotion to LCDR. The special board offered the following reasoning:

[T]he board determined this officer demonstrated extremely poor judgment by making inappropriate and disrespectful comments towards a pregnant enlisted member on two separate occasions. The officer acknowledges the use of highly

² Selection list and promotion list may be used interchangeably in the decision.

inappropriate language that contributed to an uncomfortable work environment. This officer failed to obey the command's direction to attend sensitivity training in a timely manner. These egregious lapses in judgment, as documented in the officer's record, compromised the good order and discipline of the unit and were an affront to the integrity and authority of the officer corps. In accordance with the Coast Guard Personnel Manual, Article 5.A.13.f. these circumstances cast doubt on the moral and professional qualifications for the officer and demonstrate a blatant disregard for the command's expectations of an appropriate workplace climate. Therefore, the officer damaged the ability to serve as an officer in the next higher grade and the Board recommends removal from the Promotion Year 2009 lieutenant commander selection list.

On September 16, 2009, PSC informed the applicant that his promotion to LCDR scheduled for October 1, 2009, was delayed in accordance with Article 5.A.13. of the Personnel Manual and his CO's January 26, 2009 memorandum.

On October 28, 2009, the Commandant forwarded the special board's recommendation that the applicant's name be removed from the PY 2009 selection board list to the Secretary for approval.

On October 29, 2009, the Secretary approved the special board's recommendation that the applicant's name be removed from the selection board list.

On November 9, 2009, PSC notified the applicant that his name had been removed from the selection list under 14 USC § 272. The applicant was told that his permanent removal from the list was considered his first failure of selection for promotion to LCDR and that he would be considered by the PY 2011 LCDR selection board. *See* Article 5.A.4.f. of the Personnel Manual, citing 14 U.S.C. § 262(a). He was advised that his record would be considered by the PY 2011 promotion board and a non-selection by the board would constitute his second failure and he would be discharged from the Coast Guard on June 30, 2011. The applicant was advised that action to vacate his temporary officer commission had been cancelled.

On September 30, 2010, the PY 2011 selection board list for promotion to LCDR was published and the applicant was not among those selected for promotion to LCDR. This was his second non-selection for promotion to LCDR. He retired on December 31, 2010.

ALLEGATIONS

The applicant argued that he was unfairly and prematurely forced into retirement after faithfully serving his country for 24 years for making two comments that were "aberrational, momentary lapses in judgment, and did not speak to the his true character."

In this regard, the applicant asserted that his first comment to PO W stating that she was fat, pregnant, and dumb was a joke and that he immediately apologized after seeing PO W's displeasure with the comment. He claimed that PO W saw the joke as a valuable opportunity to transfer to a less stressful position. Noting that PO W did not report the joke until a week later,

the applicant stated that her referral of the matter to the EOR had to do with PO W's job dissatisfaction in his department and nothing to do with his innocuous joke. He stated that although PO W wrote in a follow-up email to the EOR that she felt like a target for extra tasking since she could not respond to oil spills, she never received any extra tasking beyond her office related duties. The applicant stated that PO W was the only one in the office full-time while the other 5 petty officers were deployed (24/7) to the field to address ongoing and potential environmental emergencies. The applicant stated that PO W could not comprehend why other petty officers, who worked irregular hours could be allowed to take differently timed breaks. The applicant stated that "[PO W] never claimed that the joke was offensive because it was actually the high operational tempo [of the department] that she deemed oppressive."

The applicant stated that he was ridiculed by his chain of command after the incident and he felt overwhelmed by the position he was in from a leadership perspective. In this regard, the applicant stated that "The IMD chief position was, by definition, a LCDR (O-4) position. But, despite [his] protests, he was never allowed to develop as a junior officer after his direct commission, as he went from MST1 (E-6) straight to LT (O-3) thereby skipping ensign (O-1) and lieutenant junior grade (O-2)." He stated that he spent his first tour as an officer at Coast Guard Headquarters where he had no one to supervise or to model how to be a junior officer. He stated that he did not receive any mentoring and training from his chain of command as IMD chief and was expected to learn on the job. He stated that his captain's failure to mentor her officers was one of the reasons she was relieved for cause.

The applicant stated that while his "white trash" quip, borne of dismay, was clearly made, it did not justify the unduly harsh punishment that swiftly followed, particularly when other senior officers engaged in far more troubling conduct against subordinates and were let off. By way of example, he pointed to his CO, Capt E, who took command in June 2008, was investigated and in the applicant's words found to have mercilessly and belligerently verbally abuse her own subordinates, including the applicant. According to an internet article he submitted, in June 2010, Capt E was relieved of command due to her superior officer's loss of confidence in her ability to effectively manage the unit due to an investigative finding that she fostered an "unacceptable command climate." In the internet report, a Coast Guard spokesman described a positive command climate as follows: "open communication from subordinates to superiors, mentoring of junior personnel and a feeling of mutual professional respect among unit members." The spokesman stated that the investigators had concerns with all three of these factors when reviewing the complaint against Capt E. The applicant alleged that Capt E wanted his promotion rescinded and she ultimately got her wish.

The applicant alleged that after considering the joke, knee jerk remark, and Capt E's sardonic condemnation of them, the special board recommended the removal of his name from the selection list on June 24, 2009. The special board held: "these circumstances cast doubt on the moral and professional qualifications of the officer and demonstrate a blatant disregard for the Command's expectation of an appropriate workplace environment." The applicant argued that this condemnation grossly exaggerates the significance of his error in judgment. "Such language was not then, nor is it now, warranted by the facts in this case." In addition to the above allegations, the applicant offered several legal bases on which the Board could grant relief, as discussed below.

1. The special board deprived the applicant of his due process rights to “fair notice” by failing to inform him that one of the bases for removing his name from the selection list was his failure to obey the command’s direction to attend sensitivity training in a timely manner. The applicant stated that the Personnel Manual required that he receive notification of the basis on which his promotion would be rescinded. In this regard, he stated that Article 5.A.13.f.2. states that “a complete report of the circumstances recommending removing the selectee from the promotion list . . . shall be sent to Commander (CGPC-opm). . . the selectee shall be furnished a copy of the report and required to acknowledge receipt. Article 5.A.13.f.3. states, ‘If Commander (CGPC-opm) initiates delaying a promotion, he or she shall advise the officer concerned in writing of the reasons for so doing and require acknowledgement of receipt. Finally, Article 5.A.13.f.4. states that the officer concerned will be afforded 21 days’ notice of the proceedings and may communicate directly to the board.

The applicant asserted that the special board never apprised him that it would consider the timeliness of his sensitivity training against him. Therefore, he never rebutted the statement, which allowed the special board to find the claim meritorious. The applicant explained the situation this way:

[The supervisor] ordered [the applicant] to attend sensitivity training on or about November 6, 2008. [The applicant] did attend sensitivity training, and the delay was caused by two factors beyond his control. First, [the applicant] repeatedly asked [his supervisor] for the memo from the first investigation with the list of the items that he was required to attend to, as required by law. [The applicant] was CC’d on this Memo but never received a copy. So he repeatedly asked [the supervisor] for the requested memo. His requests were always denied. In fact, [the applicant] finally received it from [the investigating officer] and thereafter made the first available sensitivity training appointment.

2. The applicant argued that the Coast Guard was under a legal obligation to resolve the issues of equal opportunity complaints within the EO apparatus at the lowest level possible, which was not done. Instead of attempting to resolve the problem at the lowest level possible, the command immediately initiated a formal investigation and sought draconian measures founded upon an ambiguous definition of “morality” and political correctness.

LT K, who served as the investigating officer after the second comment, wrote a letter on the applicant’s behalf. In that letter he stated that issues involved in the applicant’s case were discussed with the District’s full time civil rights officer, “but were mishandled by the sector by a collateral-duty junior officer.” The action violated a key element of the equal opportunity policy which is to handle things at the lowest level first. LT K stated that by “failing to follow the prescribed guidelines, the allegations were not properly investigated and likely escalated into something far more significant than was warranted.”

The applicant argued that the special board’s finding misconstrues morality and was arbitrary and capricious. In explaining this allegation, the applicant stated that he was advised by his friends to “fall on the proverbial sword” and seek forgiveness. He argued that but for his

willingness to accept responsibility, this case would never have proceeded. In support, he points to LT K's statement, "it should be noted that the allegations against [the applicant] were based on contradictory statements, which could have been grounds for dismissal of the allegations had it not been for [the applicant's] honesty, integrity and remorseful admission of fault." The applicant stated that by accepting fault he partially compromised the truth by admitting that he contributed to an "uncomfortable work environment," which the special board seized on to support its adverse "morality" finding. The applicant argued in reality the underlying facts do not support a finding that there was an intolerable work place environment at play. **"In fact, there is no personal statement, document, memorandum, note, email text message, or letter from anyone stating that they felt [the applicant's] behavior was sexist, immoral or otherwise contributed to a hostile work environment within IMD."** (Emphasis in original.) He asserted that his friend's advice to accept blame and seek forgiveness proved to be wrong, as the special board found that his joke and whispered comment compromised good order and discipline. He argued that the special board failed to cite or offer a single example as to how that alleged negative impact manifested itself. The applicant stated that neither formal investigation came to the conclusion that there was a hostile work environment.

3. The matters of equity compel favorable remedies in this special of case of justice. The applicant noted his numerous years of Coast Guard service and the numerous awards and citations that he has received during his career. He noted the several letters of support he submitted attesting to his moral character and speak to the "absurdity of the Board's immoral characterization of [his] aberrational actions."

In concluding his brief, the applicant restated the bases on which the Board could grant relief. They are: 1) a due process claim associated with a lack of fair notice; 2) a due process claim based upon the lack of adherence to Coast Guard regulations; and 3) equitable relief premised on the unduly harsh punishment he received. He also stated the following:

The promotion board likewise failed to consider several extenuating and mitigating factors, such as the commanders that subjected [the applicant] to a "hostile work environment" failed to invest in his mentorship, and unfairly held him to a high standard despite his significant lack of leadership experience. [Footnote omitted] And finally, the board did not have the [email evidence] attached to this appeal, which unequivocally demonstrates that the joke did not create a "hostile work environment" but was rather, in Petty Officer [W's] view, an afterthought that allowed her to move into a less strenuous job. In essence, the IMD operational tempo was guilty and not its Chief—it was as simple as that.

There is something categorically wrong with how this third generation Coast Guardsman was mistreated for simply being human, particularly after he had accomplished so much, for so many years, from mentoring eager minds, to working long hours, to saving the environment, to spending precious time away from his family. It should count. Without sounding overwrought, the blood, sweat and tears associated with 24-years of impeccable service should matter. How it could have all come down to one petty officer's desire to work somewhere

else and a barely audible expression of frustration is in some measure, well disturbing.

Thus, contrary to the promotion board's prior automated conclusions, [the applicant] is a man of integrity. He is not immoral. Indeed, there should be little doubt that in judging this man, and his many years of faithful service that his morality was never lost, it was rather unfairly taken from him—kindly give it back to this man and his equally deserving family.

The applicant submitted several letters attesting to his character from active and retired officers who have known him during his career.

VIEWS OF THE COAST GUARD

On December 14, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG stated that the applicant's argument that he was not provided due process as to "fair notice" of his command's intention to delay his promotion are clearly without merit. The JAG stated that the applicant knew the basis for the delay in his promotion through his CO's memorandum to PSC requesting the delay. The JAG stated that the applicant was also aware of the basis for the delay of promotion and the special board through the SOER.

The JAG argued that the applicant's allegation that the command committed an error by not resolving the matter at the lowest level possible is without merit. In this regard, the JAG stated that the applicant's CO was responsible for maintenance of discipline within her command and the exercise of that discretion is made on an individual basis. In this case, the CO decided to address the first comment through the issuance of an administrative letter of caution and the second through a request for a delay in his promotion because the applicant's action cast doubt on his moral and professional judgment.

The JAG asserted that the special board did not abuse its discretion in characterizing the applicant's conduct as immoral based on the applicant's egregious lapses in judgment, his compromise of the command's good order and discipline, and his highly inappropriate language that contributed to an uncomfortable work environment.

The JAG also argued that allegations of mitigation based on his command's failure to train and mentor him are without merit. The applicant's contention that his CO was subsequently removed from her primary duties is non-dispositive of this particular case and has no relevance on the BCMR's findings and conclusions. The JAG stated that the applicant is fortunate that his CO decided to forgo UCMJ actions which would have more likely than not resulted in a dismissal from service with no retirement and loss of VA benefits.

PSC Memorandum

In the PSC memorandum attached to the advisory opinion, PSC stated that the January 26, 2009 memorandum from the CO to PSC requesting a delay in the applicant's promotion did

not outline a failure to attend sensitivity training as a reason for delaying the applicant's promotion.³ PSC stated that the basis for the delay of promotion was the derogatory information outlined in the January 26, 2009 memorandum. However, PSC noted that the SOER, which was attached to the memorandum, stated that the applicant failed to attend sensitivity training in a timely manner after being ordered to do so.

PSC stated that the applicant was provided with the bases for delaying his promotion in the January 27, 2009 memorandum notifying him of the CO's recommendation for a delay of his promotion through his receipt of the investigation into the alleged inappropriate comments.

PSC also stated that in a May 9, 2009 memorandum to the applicant informing him of the proposed special board, PSC stated that the special board would review his imaged record that included the SOER. In the SOER, the reporting officer noted that the applicant failed to complete required sensitive training despite being ordered to do so. PSC stated that the applicant had the opportunity to review his record and to submit comments to the special board.

PSC stated that the special board reviewed four documents that were not authorized for the board's review under COMDTNIST 1410.2, paragraph 7.g.1. The documents that should not have been before the special board were: the memorandum to CGPC requesting a delay of the applicant's promotion to LCDR, the memorandum to the applicant notifying him of the request to delay his promotion, the CGPC memorandum notifying the applicant that his record would appear before a special board, and the CGPC memorandum notifying the applicant of the date for the special board. However, PSC argued that although these documents should not have been before the special board, the documents did not contain any information that was not available to the special board in other documents properly within the imaged record.

PSC noted applicant's arguments that the promotion board failed to consider several extenuating factors, such as his command subjected him to a hostile work environment, that his command failed to invest in his leadership and mentorship, that his command held him to a high standard despite his significant lack of leadership experience, and that the board did not have access to the emails from PO W. In response to the allegations, PSC stated the following:

"Promotion boards and boards to remove members from a selection list convened under . . . the Personnel Manual . . . are governed by policy on the scope of information to be viewed by the board. Non-matters of record such as the perception of a hostile work environment have no basis to be considered by a Board unless entered into a matter of record that is permissible for the board to view . . .

"Per the policy, Documents Viewed by Coast Guard Officer Promotion and Special Boards, COMDTINST 1401.2, both types of boards would not be permitted to view evidence of mitigating circumstances outlined in an email. Only information made after the officer's original commissioning date and those entries dealing with performance as an officer are permitted to be viewed . . . "

³ However, paragraph 2 of that memorandum indicated one of the reasons the CO was requesting a delay in his promotion was his failure to complete sensitivity training despite being directed to do so on two occasions.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On April 10, 2012, the Board received the applicant's response to the views of the Coast Guard. He argued that the rescission of his promotion constituted both legal error and injustice because PSC admitted that the "applicant's failure to [timely] attend sensitivity training was not cited as a basis for denying the member's promotion," which was a violation of Article 5.A.13.f(3) of the Personnel Manual. The applicant stated that he was entitled to "fair notice" so that he could focus on everything that needed to be addressed with regard to the allegation and his rehabilitation. The applicant stated that Coast Guard rules are rules, and he reasonably expected to be provided notice in writing. He stated that he reasonably expected the Coast Guard to strictly adhere to its own legal guidance.

The applicant again complained that the adverse action was unjust because his supervisor failed to mentor him after his first slip-up and instead chose to ignore his repeated requests for "sensitivity training" documentation and fair treatment, culminating in incidents of personal ridicule. The applicant stated that contrary to the advisory opinion's assertions, "[the supervisor] failed to: (1) conduct a rehabilitative transfer of applicant after the first event; (2) timely provide written documentation concerning sensitivity training; (3) provide applicant with a letter of censure; and (4) mentor applicant (a notably inexperienced officer) under exceedingly challenging circumstances."

The applicant stated that the latter deficiency is noteworthy because the advisory opinion claims "discipline rests within the sound discretion of applicant's then [CO]," when Rear Admiral B on April 15, 2010, labeled that CO's discretion to be unsound "due to an unacceptable command climate this commander no longer had my confidence to command an effective unit. I firmly believe this decision was made in the best interest of the unit and the Service." The applicant also states that the advisory opinion is incorrect that the CO decided to address the applicant's first inappropriate comment by issuing the applicant a letter of censure because the letter of censure is unsigned and the applicant never received it.

With regard to his alleged "failure to attend sensitivity training," the applicant stated that it cannot be overemphasized that the applicant did attend training. Apparently, he just did not do it fast enough, which he attributed to his supervisor's own willful failure, despite repeated requests by the applicant, to provide written guidelines for training. He stated that it is undisputed that the applicant's then supervisor inexplicably failed to provide the applicant with the September written notice until December.

The applicant again restated that he made a joke that was taken as an affront to a young restricted woman's role in a hectic office. With regard to the second comment, the applicant stated again that it was not directed toward PO W because she was outside at the time. He argued that even if taken together, his statements were not immoral.

The applicant stated that the claim in the advisory that his conduct could have subjected him to prosecution for conduct unbecoming an officer is farfetched. The applicant quoted *United States v. Shober*, 26 M.J. 501, 503 (A.F.C.M.R. 1986), that "not every deviation from the high standard of conduct expected of an officer constitutes conduct unbecoming an officer." He

further quoted, “Immoral conduct must impugn the honor or integrity of the officer or subject him to social disgrace.” *Id.* The applicant argued that his making an off color joke and later uttering an inappropriate comment under his breath, barely overheard by one person does not “impugn the honor or integrity” of this former officer. The applicant also argued that there is absolutely no evidence of any uncomfortable work environment ever being created by his words, with the exception of his own admission made out of fear for his career.

The applicant stated that the advisory opinion ignores issues of command climate that culminated in the firing of applicant’s then CO. It likewise fails to address the compelling e-mails from the petty officer, with the caveat that this board is simply told to ignore them.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that his first comment to PO W describing her as fat, pregnant and dumb was an innocuous joke that she used as a means to obtain a transfer from a job in a high tempo environment to one with less stress in another department. In support of his contention in this regard, the applicant relied on the fact that PO W did not report the inappropriate comment until a week later. However, the applicant admits that he made the comment and that it was inappropriate. The fact that PO W waited approximately one week after the comment was made to report it to the EOR does not prove that that she was not offended by the comment at the time or that it did not have a negative impact on her work environment. In addition, the applicant’s statement that he immediately apologized to PO W when he saw that she was displeased with the comment does not support his contention that she was not offended by the alleged joke. The simple fact is that the applicant should not have made the inappropriate comment.

4. With regard to the second comment, the applicant stated that he made the “white trash” quip out of dismay about the command’s treatment of him, but that the comment did not justify the unduly harsh punishment that followed, particularly when other senior officers at the unit engaged in far more troubling conduct against subordinates and were let off. By way of example, he pointed to his CO, Capt E, who was investigated and relieved of command. In regard to the applicant’s argument that his “punishment” for the inappropriate comments was unduly harsh, the Board notes that the decision on how to proceed in handling the matter was within the discretion of his command. The matter was investigated, after which the CO made a recommendation to CGPC that the applicant’s promotion be delayed and that his record be placed before a special board. Article 5.A.13.f. of the Coast Guard Personnel Manual states that

each officer in the chain of command or Commander, CGPC is responsible for delaying a promotion if he or she knows the appointee has disqualified him or herself after being placed on a promotion list. All of the administrative processes that occurred in the applicant's case were authorized in the Personnel Manual at the discretion of the CO or higher authority. The Board will not substitute its judgment for that of the Coast Guard officers responsible for managing the Service in the absence of legal error. The applicant has not shown that the CO abused her discretion in this case.

5. The applicant also alleged that he was placed into a LCDR supervisory position for which he lacked the leadership background and neither the CO nor others in his chain of command mentored or trained him in how to fulfill his duties in this regard. He was expected to learn on the job. In the Board's experience, learning on the job is not a unique circumstance in the Coast Guard. However, even if the applicant's contention about his lack of leadership training is true, it fails to explain why he believed that making the inappropriate comments was acceptable in light of his approximately 20 years in the Service at that time.

6. Nor is the Board persuaded that the applicant suffered an error or injustice with regard to the administrative actions taken against him because his CO was relieved of command due to her superior officer's loss of confidence in her ability to effectively manage the unit due to an investigative finding that she fostered an "unacceptable command climate." In a news report from the Internet, a Coast Guard spokesman described a positive command climate as follows: "open communication from subordinates to superiors, mentoring of junior personnel and a feeling of mutual professional respect among unit members." The spokesman stated that the investigators had concerns with all three of these factors when reviewing the complaint against Capt E. Evidence shows that Capt E took command in June 2008 and she was relieved in June 2010. The applicant reported to the command on July 25, 2008 and was relieved of his duty in January 2009. He was in the assignment as IMD chief for only approximately 6 months. From the evidence of record, it is not possible to know when the complaint against the CO was first made or whether she exhibited mal-treatment toward her subordinates, and in particular the applicant, during the six months that the applicant was assigned to the unit. The applicant even suggested that the CO wanted him removed from the selection board list for reasons other than the issue at hand. However, he presented no evidence that would support this contention. As stated above, after approximately 20 years of enlisted and officer service, the applicant should have known that such comments were inappropriate and disrespectful. Neither the CO's subsequent removal from command nor the alleged lack of mentoring or training excuses the applicant's behavior.

7. The applicant has failed to prove that he was not provided with notice of the basis for recommending a delay in his promotion. Specifically, he has not proved that he was not notified that his failure to complete sensitivity training in a timely manner would be considered in deciding whether to delay of his promotion and whether his name should be removed from the selection board list. In the memorandum to CGPC, which included the applicant as an addressee, the CO, in recommending a delay in the applicant's promotion, noted the applicant's poor judgment in making inappropriate and disrespectful comments towards a pregnant enlisted member and his failure to complete human relations/sensitivity training despite being directed twice to do so. The memorandum noted that the derogatory SOER and the investigation were

attached. The SOER also noted that the applicant failed to attend sensitivity training as directed by the command on two separate occasions. On January 27, 2009, the applicant acknowledged receiving the CO's January 26, 2009 memorandum and documentation regarding her recommendation that he be removed from the promotion list.

In addition, PSC's memorandum to the applicant notifying him of the proposed special board to consider whether his name should be removed from the promotion list advised the applicant that the special board would consider his imaged PDR, which included the SOER, and all documents related to the CO's memorandum recommending his removal from the promotion list. A reading of the documentation would have alerted the applicant to the bases for the delay in his promotion and the bases for the special board. In light of the documentation provided to the applicant, the Board finds that he was fully apprised of the basis for the administrative actions taken against him.

8. The applicant argued that under the EO Manual the command was obligated to resolve the complaints related to his inappropriate comments at the lowest level possible. The first inappropriate comment was resolved at the lowest level under EO Manual through a settlement agreement according to the IO. Although the agreement reached between the parties was not provided to the Board, according to the IO, the applicant was required to complete several actions that included apologizing to PO W. The settlement agreement possibly would have ended the matter, if the applicant had not made the second inappropriate comment. The second comment was not heard by PO W and no complaint was filed with the command's EOR. As no civil rights complaint was filed, the procedures of the EO Manual did not apply. The CO apparently felt the matter needed to be investigated. She ordered an investigation under the Administrative Investigation Manual (AIM), as it was her right to do. In this regard, Article 1.G.1. of the AIM, states that the officer in command has primary responsibility for initiating an investigation into an incident arising in the command and for deciding the type of investigation to convene. Article 1.A.3.a. states that the primary function of all administrative investigations is to search out, develop, assemble, analyze, and record available information relative to the matter under investigation, and Article 1.C. states that the Coast Guard's policy is that the least extensive investigation that meets *all* service needs shall be utilized.

According to the investigative report, the IO officer conducted a standard investigation (formerly known as an informal investigation) into the circumstances of the applicant's inappropriate comments. The standard investigation is the lowest level of investigation under the AIM. See Article 1.D. of the AIM. Therefore, it appears to the Board that the applicant's conduct was investigated using the lowest level of investigation under the AIM. The applicant's CO is charged with making judgments about the type of investigation needed and the applicant has not shown that she abused her discretion in this regard. In addition, the applicant has not shown that the ultimate outcome in his case would have been different had an EO complaint been filed and the matter investigated under the EO Manual. The applicant's complaint in this regard is without merit.

9. The applicant disagreed with the special board's finding that his actions under the circumstances cast doubt on his moral and professional qualifications and demonstrated a blatant disregard for the command's expectations of an appropriate workplace climate. He argued that

there is no personal statement, document, memorandum, note, email text message, or letter from anyone stating that they felt the applicant's behavior was sexist, immoral, or otherwise contributed to a hostile work environment.⁴ First, the special board does not describe the work place as a hostile work environment, but rather, it states that the applicant's actions contributed to an uncomfortable work environment and disregarded the command's expectations of an appropriate workplace climate. The evidence supports the special board's comments in this regard because PO W was upset enough to report the comments to the EOR and chose to be transferred to another division and because the individuals who heard the second comment were concerned enough to report it to the applicant's supervisor. Therefore, the evidence supports a finding that the applicant's comments had a negative impact on the workplace environment.

10. The applicant argued that the special board's finding that his actions were immoral was arbitrary and capricious. The Board notes that the special board did not make an absolute finding that the applicant's actions were immoral, but rather that under the circumstances he demonstrated extremely poor judgment by making inappropriate and disrespectful comments toward a pregnant enlisted member on two separate occasions and by failing to attend sensitivity training in a timely manner that compromised good order and discipline of the command *and cast doubt on his moral and professional qualifications*. While the applicant may disagree that his behavior and poor judgment cast doubt on his moral and professional qualifications to serve in the next higher grade, that disagreement is not proof that the Coast Guard's determination in that regard was erroneous.

11. The applicant argued that the special board failed to consider extenuating and mitigating factors, such as his allegations that his commanders subjected him to a hostile work environment by failing to invest in his mentorship; his command unfairly held him up to a high standard despite his significant lack of leadership experience; and his special board did not have the PO W's email which shows that she used the joke to obtain a less strenuous job assignment and not to escape a hostile work environment. The Board understands that the applicant believes that the Coast Guard placed him in a job that he did not have the leadership experience for and once in the job failed to mentor and train him so that he could succeed in that job. However, even if true, as stated above, the lack of leadership experience, mentoring, or training fails to explain why the applicant, who had been in the Coast Guard for approximately 20 years at the time of the incident, felt that he could make such comments to and about a fellow Coast Guard member, let alone one of his subordinates.

12. With regard to the emails between PO W and the EOR, the Coast Guard stated that such emails were not appropriate for review by the special board unless they were a part of the applicant's record. Article 14.A.4.d. of the Personnel Manual describes the documents that makeup the personnel record to be reviewed by a officer boards as "general administrative

⁴ In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (Nov. 9, 1993), the Supreme Court stated that a hostile work environment exists where the offending conduct is so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive. *Id.* at 21 All circumstances should be considered in making a determination as to the creation of a hostile work environment, including the frequency of conduct, its severity, whether the conduct is physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with the employee's work performance. *Id.* at 23.

paperwork including such items as statements of service and sea service, the record of emergency data, page 7 entries, documentation of alcohol incidents, and reports of civil arrests, performance evaluations, education information, and awards and discipline documentation.” Emails are not listed as documents that makeup of an officer’s record, and therefore, they were properly not reviewed by the special board.

However such evidence can be considered by this Board. The applicant interpreted the email between PO W and the EOR as proof that she did not believe she was in a hostile work environment but instead saw his inappropriate comment an opportunity to get a less strenuous assignment. The Board has reviewed the emails between PO W and the EOR and finds nothing in that exchange to convince us that PO W was using the inappropriate comments made to her by the applicant to get less strenuous duty. Although she stated in the initial email that she dreaded coming into the office and second guessed everything she did after the comment was made, it was the investigating officer who asked her if she felt comfortable in her work space or wanted to work someplace else. The fact that she chose to remove herself from an uncomfortable situation does not prove that she was not genuinely upset by the comments or that she pretended to be offended merely to get a less strenuous assignment.

13. The Board notes that in the advisory opinion PSC stated that the special board improperly considered certain documents. They were: the memorandum to CGPC requesting a delay of the applicant’s promotion to LCDR, the memorandum notifying the applicant of the delay in his promotion, the CGPC memorandum notifying the applicant that his record would appear before a special board, and the CGPC memorandum notifying the applicant of the date for the special board. However, the Board agrees with PSC that the inclusion of these documents did not prejudice the applicant before the special board because the same information was in the SOER and other documents properly within the applicant’s record.

14. The applicant argued he should have been transferred after the first event. However, the Board is aware of no regulation that requires a transfer in situations such as that faced by the applicant. Therefore, the Board finds no error in this regard.

15. The applicant suggested in his brief that the CO was out to get him by delaying his promotion, but he provided no basis for that belief. It is clear that the applicant believes that his comments should not have resulted in the loss of his promotion. However, in the judgment of his CO, PSC, the special board, the Commandant, and the Secretary, he did not exhibit the qualities of an officer who should have been promoted to LCDR. Unless the applicant demonstrates a significant error in the processes that occurred in his case, the Board has no basis on which to overturn the decision of those charged with managing the Coast Guard. The applicant has not demonstrated a significant error in this case. Nor is the Board persuaded that the applicant suffered an injustice.

16. The applicant made several other allegations that are not discussed in the findings and conclusions of this decision because the Board finds that they are not dispositive of the issues in this application.

17. In light of the above findings, the application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXXXX, for correction of his military record is denied.

Donna M. Bivona

Randall J. Kaplan

Paul B. Oman