



OFFICE OF INSPECTOR GENERAL

Department of Homeland Security

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WHISTLEBLOWER RETALIATION REPORT OF INVESTIGATION

<i>Case Numbers:</i>	W17-USCG-WPU-08828 & W17-USCG-WPU-19305
<i>Complainants:</i>	[REDACTED], Lieutenant Commander [REDACTED], Lieutenant U.S. Coast Guard
<i>Investigation Under:</i>	10 U.S.C. § 1034, Military Whistleblower Protection Act
<i>Date Issued:</i>	September 24, 2019

I. SUMMARY OF INVESTIGATION

The Department of Homeland Security (“DHS”), Office of Inspector General (“OIG”) conducted this investigation in response to complaints made by Lieutenant Commander [REDACTED] (“Complainant 1”), and Lieutenant [REDACTED] (“Complainant 2”) of the United States Coast Guard (“USCG”) alleging that Lieutenant Commander [REDACTED] (Responsible Management Official 1 (“RMO 1”)) and Captain [REDACTED] (“RMO 2”) retaliated against the Complainants for making protected communications, in violation of the Military Whistleblower Protection Act (“MWPA”), 10 U.S.C. § 1034.

The evidence established that Complainant 1 made the following protected communications:

- (1) Reports of misconduct made to RMO 1 and others regarding a weigh-in incident; and
- (2) Reports of misconduct made to RMO 2 and others regarding RMO 1’s drill pay.

The evidence also established that the USCG took the following personnel actions against Complainant 1 soon after Complainant 1’s protected communications:

- (1) A denial of a training request;
- (2) An unfavorable Officer Evaluation Report (“OER”); and
- (3) A denial and withholding of performance awards for more than one year.

Separately, the evidence established that Complainant 2 made a protected communication when he also reported the same misconduct to RMO 2 regarding RMO 1’s drill pay.



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The evidence established that the USCG took the following personnel actions against Complainant 2 soon after Complainant 2's protected communication:

- (1) A removal of a duty assignment;
- (2) A non-selection to a temporary vacancy and promotion;
- (3) An unfavorable OER; and
- (4) A denial and withholding of performance awards for more than one year.

DHS OIG's investigation substantiated most of the Complainants' allegations that the personnel actions were taken in retaliation for their whistleblowing activity.¹

As a result, DHS OIG makes four recommendations for corrective action at the end of the report.

II. SCOPE

This investigation covered the period from approximately October 2015 through approximately December 2016 ("the alleged retaliatory period"). DHS OIG reviewed a large volume of documents obtained from USCG, including email records, text messages, personnel records, USCG manuals and policy, and performance reviews.

DHS OIG interviewed the following key witnesses:

- 1) Lieutenant Commander [REDACTED], formerly Force Readiness Officer ("FRO") and Logistics Department Head, Port Security Unit ("PSU") [REDACTED] ("Complainant 1")
- 2) Lieutenant [REDACTED], formerly Administrative Officer, PSU [REDACTED] ("Complainant 2")
- 3) Lieutenant [REDACTED], former Logistics Department Head, PSU [REDACTED] ("Witness 1")
- 4) Lieutenant Commander [REDACTED], former Operations Division Department Head, PSU [REDACTED] ("Witness 2")
- 5) Lieutenant [REDACTED], former Administrative Officer PSU [REDACTED] ("Witness 3")
- 6) Yeoman 1st Class [REDACTED], formerly of PSU [REDACTED] ("Witness 4")

¹ DHS OIG found clear and convincing evidence that Complainant 1's denied training request and Complainant 2's non-selection to a temporary vacancy would have occurred even absent their whistleblowing activity. Thus, DHS OIG did not substantiate the allegations regarding these personnel actions.



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- 7) StoreKeeper 1st Class [REDACTED], formerly of PSU [REDACTED] (“Witness 5”)
- 8) Commander [REDACTED], formerly Pacific Area Command (“PACAREA”) officer overseeing PSU [REDACTED] (“Witness 6”)
- 9) Lieutenant Commander [REDACTED], former Executive Officer, PSU [REDACTED] (“RMO 1”)
- 10) Captain [REDACTED], formerly Commanding Officer, PSU [REDACTED] (“RMO 2”)

III. STATUTORY AUTHORITY

DHS OIG conducted this investigation pursuant to its authority under the MWPA, 10 U.S.C. § 1034, and the Inspector General Act of 1978, as amended.

IV. FINDINGS OF FACT

A. Complainants’ Employment with USCG

Complainant 1 is an O-4 Lieutenant Commander (“LCDR”) in the USCG. From around May 2013 to around May 2016, Complainant 1 was assigned to the Port Security Unit (“PSU”) [REDACTED], stationed in [REDACTED]. (Exhibit 2)

PSUs are deployable USCG units typically staffed by 140 reservist members and six active duty staff. PSUs are under the command and oversight of USCG Pacific Area Command (“PACAREA”).

At PSU [REDACTED], Complainant 1 was an active duty officer, serving as the Logistics Department Head and the Force Readiness Officer (“FRO”). Beginning in October 2015, Complainant 1 reported directly to RMO 1, a reservist who was the Executive Officer (“XO”) at the PSU. RMO 1 reported directly to RMO 2, a reservist who was the Commanding Officer (“CO”).² (Exhibit 2)

Complainant 2 is an O-3 Lieutenant (“LT”) reservist in the USCG, and served as the Administrative Officer for PSU [REDACTED] from approximately May 2013 to late June 2016. Complainant 2 reported directly to Complainant 1. (Exhibit 3)

B. October 2015 Weigh-In Incident

On Saturday, October 17, 2015, during a drill weekend, two PSU [REDACTED] yeomen staff members, who were subordinates of Complainant 2, notified Complainants that on the previous day RMO 2 coerced them to falsify a weigh-in report to give RMO 2 a passing score (“the Weigh-In Incident”). (Exhibit 2)

² A CO and XO are, respectively, the first and second in command of a USCG unit. RMO 1 and RMO 2 are collectively referred to as “RMOs” or “Command.”



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The USCG regularly checks the weight and physical measurements of members to ensure fitness for duty. These weigh-ins occur every six months, and a member who does not meet the requirements is placed on probation, with potential expulsion from the USCG if the member fails a weigh-in while on probation. (Exhibit 2)

1) Complainant 1's Initial Report to RMO 1 regarding the Weigh-In Incident

After receiving advice from a retired USCG mentor, on Sunday, October 18, 2015, Complainant 1 informed RMO 1 in person about the Weigh-In Incident and alleged misconduct by RMO 2. RMO 1 immediately notified RMO 2 of the allegations and that they came from Complainant 1. RMO 1 recommended that RMO 2 report it up the chain of command. Thereafter, RMO 2 called his supervisor, Commander ("CDR") [REDACTED] of PACAREA ("Witness 6"), and informed him that there was an "issue" with his RMO 2's weigh-in, that he planned to take another weigh-in to replace the first, and that some members may have felt pressured during his weigh-in. The drill weekend ended that Sunday afternoon, when PSU [REDACTED] reservists returned home. (Exhibit 2)

2) Outside Reports of Weigh-In Incident

On October 19, 2015, Complainant 1 reported the Weigh-In Incident to Captain ("CAPT") [REDACTED], an officer at PACAREA, providing him with both the falsified weigh-in report and the correct measurements. (Exhibit 4)

Complainant 1 also contacted an officer at USCG Headquarters for advice. Later that day, after RMO 1 texted Complainant 1 that PACAREA had been informed of the situation through Witness 6, Complainant 1 informed RMO 1 that he had similarly contacted CAPT [REDACTED] of PACAREA. (Exhibit 8)

Also on October 19, 2015, Complainant 2 called LCDR [REDACTED], a Judge Advocate with the USCG District Nine legal field office, to report the alleged misconduct related to the Weigh-In Incident. LCDR [REDACTED] advised Complainant 2 to report the misconduct to the PACAREA legal field office. (Exhibit 6)

C. Complainant 1's Informal Counseling Session

By October 20, 2015, RMO 1 began questioning Complainant 1 about the Weigh-In Incident, asking, for example, who else had been contacted for counsel on the matter. In response, Complainant 1 told RMO 1 that he did not have a list of people who may have been contacted. On October 22, 2015, RMO 1 ordered Complainant 1 to report to PSU [REDACTED] the next day for a meeting. (Exhibit 8)



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At the October 23, 2015 meeting, RMO 1 discussed a number of issues with Complainant 1, including Complainant 1's reporting of the Weigh-In Incident. RMO 1 questioned Complainant 1's judgment for how he reported the Weigh-In Incident, rebuked him for waiting until Sunday to make the report, and criticized him for going outside of PSU [REDACTED] to report directly to PACAREA. RMO 1 also accused Complainant 1 of "usurping command" by going over her head with reports of misconduct. (Exhibit 9) The written talking points RMO 1 prepared for the meeting characterized Complainant 1 as having turned a "private matter" into a "public exhibit" and warned Complainant 1 that unless he improved his performance, "your last OER will look wonderful compared to your next one." (Exhibit 60) These talking points were generally consistent with how RMO 1 and Complainant 1 described the actual meeting.

During the meeting, RMO 1 also raised the issue of unfinished tasks at PSU [REDACTED], including fixing the copy machine, mailbox, and front-door latch, and completing discharge paperwork for PSU [REDACTED] members. (Exhibit 49)

After the meeting, Complainant 1 informed Complainant 2 of his discussion with RMO 1, including that RMO 1 accused Complainant 1 of poor judgment because of the way he had reported the Weigh-In Incident. (Exhibit 2) Complainant 1 also contacted a USCG attorney about the meeting. The USCG attorney told Complainant 1 that the timing of his report of the Weigh-In Incident to RMO 1 and his reports outside of PSU [REDACTED] were appropriate. Separately, on November 2, 2015, Complainant 2 reported the meeting as whistleblower retaliation against Complainant 1 to a USCG attorney, who said she would send the report to her supervisor. Complainant 2 did not hear back from the USCG attorney.³

D. November 2015 Denial of Training Request

On October 28, 2015, Complainant 1 sought RMO 1's endorsement of his request to attend a November 2015 acquisition law training course. Following discussion with RMO 2, on November 2, 2015, RMO 1 denied Complainant 1's request on the basis that it was too high-level and not mandatory. (Exhibits 11 and 12)

E. November 2015 Resolution of Weigh-In Incident

According to RMO 2, he passed a weigh-in at a separate location the week following the Weigh-In Incident, and his command at PACAREA concluded that they had no issue regarding RMO 2's conduct with respect to the weigh-in.

³ It is unknown whether the USCG attorney submitted the report to her supervisor.



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This conclusion was reached informally, as there was no formal inquiry or investigation, and no written review of the Weigh-In incident was documented. CAPT ██████████ of PACAREA (“PACAREA Officer”), to whom Witness 6 reported, informed RMO 2 verbally that they had no issue with his conduct, and encouraged RMO 2 to reset his relationship with Complainant 1. (Exhibit 52)

On November 2, 2015, RMO 2, Complainant 1, Witness 6, and the PACAREA Officer had a conference call, during which Complainant 1 reported feeling that RMO 1’s counseling meeting with him regarding the Weigh-In Incident was retaliatory. RMO 2 replied that RMO 1 was just trying to “establish herself as a supervisor,” meaning establishing her supervisory position and relationship with subordinates.⁴ Otherwise, RMO 2 did not address the allegation of whistleblower retaliation during the call. (Exhibit 2) The PACAREA Officer and Witness 6 appeared satisfied that the conference call had fully resolved the issue. (Exhibit 66) No USCG investigation was opened on Complainant’s retaliation allegations.

Immediately following that call, a separate conference call was held with senior members from PSU ██████, including RMOs 1 and 2, to plan and prepare for the next drill weekend. On that call, RMO 2 reportedly declared to PSU ██████ leadership that the Weigh-In Incident had been resolved, and stated that he had the full support of PACAREA. (Exhibit 52)

Later that night, RMO 2 sent an email to the PACAREA Officer thanking him for his support and apologizing that “this situation escalated to the point that it required [the PACAREA Officer’s] involvement.” (Exhibit 31) RMO 2 acknowledged that the situation caused “professional embarrassment” but wrote that “I am walking away with my head held high.”

F. December-January 2016 Drill Pay Issue

Complainant 1’s duties as Logistics Department Head involved the oversight and approval of members’ pay based on hours worked. A “drill” is a USCG term for a four-hour shift, and members have the option to work a “single drill” or an eight-hour “multi-drill.” (Exhibit 2)

In early January 2016, Complainant 1 noticed that RMO 1 had put in for a single drill on December 11, 2015, but Complainant 1 did not recall her being present at PSU ██████ that day. (Exhibits 2 and 14)

⁴ At the time, RMO 1 had only been XO of PSU ██████ for approximately one month.



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On January 5, 2016, Complainant 1 emailed RMO 1 to verify her attendance for the December 11 single drill, asking if she had been there “and/or if you were authorized off site or what.” (Exhibit 13)

On the same day, RMO 1 responded that she “came on late and worked.” Based on this response, Complainant 1 processed RMO 1’s pay for the December 11 drill weekend. (Exhibit 13)

During the January 8-10, drill weekend, Complainant 1 once again had concerns that RMO 1 marked time on her drill pay sheet that did not align with when she was actually present at PSU [REDACTED].⁵ (Exhibit 2)

On January 9 and 10, 2016, Complainant 1 emailed his concerns to Complainant 2, who was on vacation. Soon after, Complainant 1 reviewed security camera footage from PSU [REDACTED] that showed RMO 1 was not present for the entire time marked for the January drill period. (Exhibit 2)

On January 25, 2016, upon Complainant 2’s return to PSU [REDACTED], Complainant 2 discussed the issue with an attorney with the USCG Academy, who advised him to report the misconduct to RMO 2 or file a complaint under Article 138 of the Uniform Code of Military Justice (“UCMJ”). (Exhibit 3) On January 30, 2016, Complainant 2 also emailed two other USCG members requesting additional advice regarding the Drill Pay Issue. (Exhibit 3) Separately, Complainant 1 also made several calls regarding the Drill Pay Issue in January 2016, including to his retired mentor, and to individuals at USCG Headquarters and CG Legal. (Exhibit 2)

On February 19, 2016, with Complainant 1 and another USCG member present, Complainant 2 also reviewed the surveillance footage and confirmed Complainant 1’s findings. (Exhibit 3)

1) Complainants Report Drill Pay Issue to RMO 2

On February 20, 2016, the Complainants jointly reported RMO 1’s alleged misconduct directly to RMO 2. They summarized their concerns, both highlighting RMO 1’s January 5 email response in which RMO 1 indicated that she “came on late and worked,” and describing what they saw on the surveillance footage. (Exhibit 16)

During the meeting, Complainant 2 raised the issue of treating RMO 1’s conduct as a UCMJ violation for falsifying timesheets. RMO 2 advocated against reporting it through the UCMJ process and stated that he wanted to

⁵ These incidents will collectively be referred to as the “Drill Pay Issue.”



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keep the issue in-house.⁶ RMO 2 also suggested that the Complainants were singling-out RMO 1 by scrutinizing her attendance more strictly than other members' attendance, which Complainant 1 disputed. Complainant 1 followed up the conversation with an email to RMO 2 providing additional written documentation and suggesting that they obtain legal advice from PACAREA legal. (Exhibit 16)

2) RMO 2's Response to Drill Pay Issue Report

Immediately after receiving the Complainants' report on February 20, 2016, RMO 2 informed RMO 1 that Complainants had reported the Drill Pay Issue. According to RMO 1, she had been working offsite during the dates at issue. (Exhibit 52)

At 6:23 a.m. on Saturday morning, February 21, 2016, RMO 1 emailed RMO 2 a list of the work projects she completed on December 11, 2015, January 8, 2016, and February 19, 2016. (Exhibit 18) This "Accountability Email" provided evidence of work activity, the amount of time taken for the work activity, and how and where the work was completed, which was typically off-site and not at PSU [REDACTED]. (Exhibit 18)

Less than an hour later, RMO 1 also emailed RMO 2 with two instances in which Complainant 2 was listed on a berthing roster in December and February despite reportedly not being in the room.⁷ (Exhibit 20) RMO 1 wrote that she spoke with two other officers who verified that Complainant 2 was not in the assigned room.

On February 24, 2016, RMO 2 emailed Complainant 1 that he discussed the Drill Pay Issue with RMO 1 and PACAREA Commander [REDACTED],⁸ and that there were no adjustments needed to RMO 1's drill statuses. RMO 2's email went on to say that no further action was warranted. (Exhibit 21)

There is no evidence establishing that RMO 2 independently corroborated the times and tasks listed in RMO 1's Accountability Email, or that any investigation or inquiry was conducted into the Drill Pay Issue.

⁶ RMO 2 told DHS OIG that he meant that he did not want Complainant 1 to jump the chain of command after the meeting or otherwise go to "outside places." (Exhibit 52)

⁷ Being on the berthing roster means a room has been reserved for someone at USCG expense. If the individual is not in the room, the cost of the room to the USCG is considered unnecessary.

⁸ DHS OIG did not independently confirm this conversation with PACAREA Commander [REDACTED], but the record showed that no investigation or inquiry was opened into the Drill Pay Issue.



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In response to the Drill Pay Issue, RMO 2 took no action against RMO 1, but did informally counsel the Complainants on the improper use of the surveillance footage, telling them that surveillance footage is only to be used for security purposes. RMO 2 also warned Complainant 2 (through a message from Complainant 1) against providing legal advice, stating that Complainant 2, although a lawyer by training, was not in a legal duty billet and therefore could not “practice law.” (Exhibits 6 and 52)

G. Subsequent Workplace Changes for Complainant 2

On March 20, 2016, RMO 1 informed Complainant 2 through email that he would no longer be the lead project officer for the PSU [REDACTED] Change of Command Ceremony (“CCC”). This CCC would honor RMO 2 as he was ending his tour at PSU [REDACTED]. Witnesses agreed that an officer being selected to lead the CCC is considered an honor and a high profile assignment. According to the email, the reassignment was based on an increased workload for Complainant 2. (Exhibit 61)

Additionally, in or around June 2016, Complainant 1 was expected to end his tour at PSU [REDACTED], but his replacement would not arrive until October 2016, creating a need for Command to select a temporary Logistics Department Head and FRO. The Administrative Officer typically filled in for the FRO and Logistics Department Head when that individual was on leave or unavailable.

However, instead of Complainant 2 temporarily filling the vacancy, Command selected a LT Junior Grade (“LTjg”), a lower-ranked officer to Complainant 2. According to RMO 2, Complainant 2 had arranged to transfer out of PSU [REDACTED] prior to the full-time replacement coming in October 2016. (Exhibits 3 and 49)

H. USCG Medals and Awards

Medals, service ribbons, and awards are an important signifier of service accomplishments and achievements in the USCG. Medals and awards are governed by a Coast Guard Military Medals and Awards Manual (“Awards Manual”), which provides the authority, policies, procedures, and standards governing military medals and awards for the USCG.

At PSU [REDACTED], there is an Awards Board that collects award and medal nominations and facilitates the awards process. The Awards Board at PSU [REDACTED] is led by the XO and includes the XO, the three department heads, the Administrative Officer, and the enlisted Master Chief. The Awards Board reviews award submissions for content and appropriateness, and forwards approved submissions to the CO for final approval and issuance. The CO can approve any award up to a Coast Guard Achievement Medal (“CGAM”).



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Anything above a CGAM, such as a Commendation Medal (“COMM”) or a Meritorious Service Medal (“MSM”), would have to be submitted to PACAREA for its approval. It was customary for supervisory officers departing PSU [REDACTED] to be recognized via an award issued at the end of their tour. (Exhibits 2, 23, and 43)

1) 2016 Award Nominations for Complainants

On May 13, 2016, Complainant 2 nominated Complainant 1 for two awards: 1) the end of tour COMM, and 2) the Meritorious Outstanding Volunteer Award (“MOVSM”).⁹ (Exhibit 24) That same day, Complainant 1 also nominated Complainant 2 for the two same awards. (Exhibit 25) The nominations were submitted to Chief Master Chief (“CMC”) [REDACTED], a member of the Awards Board.

Although the Awards Board, led by RMO 1, did approve MOVSMs for the Complainants in or around August 2016, it rejected the COMM for both Complainants. CMC Dougherty informed each Complainant of the rejection and requested that the awards be resubmitted as the lower level CGAM. (Exhibits 27-28) Over the next two months, each Complainant resubmitted the awards as downgraded CGAMs on behalf of the other.

No later than October 13, 2016, the Awards Board reviewed and approved the re-nominated CGAM for Complainant 1. Administrative Officer LT [REDACTED] (“Witness 3”), an Awards Board member, created and signed the CG1650 form to process the award. The form also required the signature of RMO 1 before advancing to the CO for final approval. On October 13, 2016, Witness 3 forwarded the form to several other Awards Board members indicating that it was ready for routing for signatures. RMO 1 was copied on the email, but she did not respond. (Exhibit 29)

On November 19, 2016, RMO 1 inquired with Witness 3 about the status of the awards for Complainants. On December 1, 2016, Witness 3 responded that Complainant 1’s CGAM had been sent to the Awards Board and that Complainant 2’s CGAM and COMM award submissions were ready for the Awards Board’s reconsideration to determine which he would receive.¹⁰

RMO 1 responded that the Awards Board previously rejected the COMM for Complainants because neither one demonstrated “systematic change across

⁹ The MOVSM is a service award rather than a performance award, and is more commonly awarded.

¹⁰ Witness 3 believed that the Awards Board needed to compare the two award submissions for Complainant 1, to determine the proper selection.



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the entire” USCG. RMO 1 noted that each Complainant had nominated the other, and directed that if the awards had not yet been resubmitted as CGAMs, both should be “off the table.” (Exhibit 29)

Also in December 2016, LT [REDACTED] (“Witness 1”), who had become the new Logistics Department Head at PSU [REDACTED] and was a member of the PSU [REDACTED] Awards Board, discussed the award submissions with RMO 1. (Exhibit 30) Witness 1 felt that the nominations seemed appropriate for a COMM, and that PACAREA would have approved them as such. Witness 1 further told DHS OIG that RMO 1’s “systematic change” criteria was not in the Awards Manual, which only requires “definite contributions to the service.” According to Witness 1, RMO 1 had an adversarial attitude when discussing the awards submissions, and got upset when discussing Complainants. When Witness 1 attempted to advocate for the COMMs with RMO 1, RMO 1 told him “we would no longer be discussing the awards for [Complainants].”

The evidence indicates that no further action was taken on either Complainant’s award submissions until June 4, 2017, when RMO 1 signed the CG1650 form for Complainant 1’s CGAM. According to RMO 1, she signed it by hand in June after becoming aware of this DHS OIG investigation.¹¹ (Exhibit 49)

DHS OIG interviewed RMO 1 concerning the CGAMs in September 2017. At the time, RMO 1 could not explain why the awards still had not been issued. Ultimately, PSU [REDACTED] issued CGAMs to the Complainants on October 6, 2017. (Exhibit 53 and 53b)

I. Officer Evaluation Reports (OERs)

The USCG utilizes OERs as a performance evaluation for officers. OERs are typically submitted annually, and are completed and approved by a “rating chain” consisting of the officer’s immediate supervisor, reporting officer, and reviewer. The OER typically contains various sections of evaluation, including: Performance of Duties, Leadership Skills, and Personal and Professional Qualities. Each of these sections has specific categories asking for a numerical grade from 1-7, with 7 being the highest score. Following the numerical grades, there is a blank space for the supervisor to add comments. The reporting officer and reviewer either “Concur” or “Do not concur” with the supervisor’s evaluation, though the reporting officer may draft some comments

¹¹ DHS OIG submitted a document request to USCG in May 2017, effectively notifying USCG that DHS OIG was investigating an allegation of whistleblower retaliation involving Complainants and RMO 1.



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and numerical scores for the reported-on officer in a section of the OER. (Exhibit 22)

The OERs are utilized by USCG Officer Accessions, Evaluations and Promotions Boards (“Promotions Boards”), which meet to determine which eligible officers at each rank to promote to the next highest rank. The Promotions Boards do not meet with eligible candidates, so written statements from candidates, personnel files, and officer records, such as OERs, are the only criteria used by the Promotions Board in making promotions.

At PSU [REDACTED], members are typically reviewed by their immediate supervisor, then the XO as reporting officer, and the CO as reviewer. For LCDRs like Complainant 1, their immediate supervisor would be the XO, the reporting officer would be the CO, and they may have a reviewer from outside PSU [REDACTED], such as PACAREA.

1) OERs for Complainant 1 (May 2016 – July 2016)

As Complainant 1’s immediate supervisor, RMO 1 served as the primary drafter of Complainant 1’s OER for the May 1, 2015 – April 30, 2016 review period (“the 2015-2016 OER”). On May 15, 2016, RMO 1 forwarded her draft OER for Complainant 1 to RMO 2. RMO 1’s draft OER contained many low scores, including several scores of 1, the lowest possible mark.¹² (Exhibit 33) Additionally, RMO 1’s draft included many comments that would likely reflect poorly on Complainant 1, such as “Struggled to foster inclusive leadership climate; deliberately marginalized CO/XO and failed to respond to numerous [command] inquiries precipitating need for continuous follow up; diminished communications up/down chain of command.” (Exhibit 33) RMO 1 told DHS OIG that this draft comment specifically referred to the way Complainant 1 handled the Weigh-In Incident. (Exhibit 49)

As reporting officer, RMO 2 reviewed the scores and comments from RMO 1, and provided additional comments and numerical scores for Complainant 1 on page 3, the dedicated section for the reporting officer. Over the next two months, RMO 1 and RMO 2 collaborated on the OER, with RMO 2 “softening” some of RMO 1’s comments in the OER, according to RMO 2. (Exhibit 34) On July 11, 2016, the RMOs signed and finalized Complainant 1’s 2015-2016

¹² The available scores range from 1 to 7, with 7 being the highest score. RMO 1 told DHS OIG that she did not know why there were several scores of 1, and stated that she believed the blank form defaulted to a 1 score. However, DHS OIG reviewed a blank form and found that there are no default scores.



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OER. The OER contained an average score of 4.72, and a final comparison scale score of 4; a “good performer” rating.¹³ (Exhibit 44)

By way of comparison, in Complainant 1’s prior OER, he received an average score of 5.22. Complainant 1’s supervisor was a different XO, but RMO 2 was still the reporting officer. Over the previous five review periods, Complainant 1’s average score was 5.97, although the first three of those reviews were not under either RMO. Further, in Complainant 1’s OER subsequent to the 2015-2016 OER, when he had a new chain of command, Complainant received an average score of 6.22. In the seven review periods evaluated by DHS OIG, Complainant 1’s comparison scale only once was below a 5 — in the 2015-2016 OER completed by the RMOs.

Additionally, in the same 2015-2016 review period, the RMOs also reviewed six other USCG officers at Complainant 1’s pay grade, including Witness 2. The other six officers received an average of 6.15. The next lowest score to Complainant 1’s was a 5.78 average score. Only one O-4 received a comparison scale of 5, with the other four receiving a comparison scale score of 6. Complainant 1 was the only O-4 to receive a comparison scale rating of 4 this period.

The OER also included comments that Complainant 1 considered negative, such as: “While overall performance was good; work effort occasionally strayed from the priorities established by the Command; receptive to guidance and recommendations that refocused work effort.” (Exhibit 44) However, other negative comments, such as the one beginning with “Struggled to foster inclusive leadership climate,” were removed during the finalization process.

2) Complainant 2’s OER for October 2015 – May 2016 Review Period

As a lower-level officer, Complainant 2 was reviewed twice per year. Complainant 2’s OER for the alleged retaliatory period covered October 1, 2015 – May 31, 2016. (Exhibit 37)

As his immediate supervisor, Complainant 1 drafted the first two pages of Complainant 2’s OER for this period, and the scores and comments were largely positive. Complainant 1 gave Complainant 2 a comparison scale score of 5, or “excellent,” and gave Complainant 2 average scores of 5.67. DHS OIG

¹³ The comparison scale is the only section on the USCG OER form where the reviewing officers are told to compare the reviewed officer with others USCG officers from the same grade. The comparison scale provided choices from: 7 (Best officer of this grade), 6 (Strongly recommended for accelerated promotion), 5 (Excellent performer), 4 (Good performer), 3 (Fair performer), 2 (Marginal performer), to 1 (Performance unsatisfactory).



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evaluated the previous eight OERs for Complainant 2, and found his average over those eight periods was a 5.47. In each of the previous eight OERs, Complainant 2 had received the same comparison scale of 5, or “excellent” — the same as the 2015-2016 comparison scale rating from Complainant 1.¹⁴ On August 15, 2016, RMO 1, as reporting officer, emailed Complainant 1, asking if he was available for a call on August 17 to discuss Complainant 2’s OER. On August 17, 2016, RMO 1 followed up with another email to Complainant 1 requesting additional information on some of the items identified in the OER, providing a number of questions and negative comments. RMO 1 stated that she believed they could reach “some middle ground on some of the comments and numerical values.”

On August 19, 2016, RMO 1 forwarded the email chain to both Complainants and stated that she and RMO 2 were available to discuss the request for additional documentation. (Exhibit 38) Email records indicate that neither Complainant responded to RMO 1 in August.¹⁵

On September 1, 2016, RMO 1 notified staff from PACAREA and the Personnel Service Center that she was going to mark the OER “Do not concur,” meaning she did not concur in Complainant 1’s evaluation. RMO 1 noted to PACAREA that neither she, nor RMO 2, had ever marked “Do not concur.” RMO 1 also noted that she had received no response to attempts to discuss the draft OER from Complainant 1 and Complainant 2. (Exhibit 41)

Later in the day on September 1, 2016, Complainant 1 forwarded to RMO 1 and RMO 2 an email with a 104-page attachment from Complainant 2 responding to the questions from RMO 1. (Exhibit 40) Complainant 1 noted his belief that the attachment satisfied the outstanding questions.

Neither RMO responded to Complainant 2’s response before finalizing his OER, and signed the OER without further edits on September 5, 2016.

In the OER, RMO 1 included a comment explaining her non-concurrence:

[Complainant 2] is sincere, hardworking & capable however marks and comments supporting Planning & Preparedness; Results &

¹⁴ Only the 2015-2016, 2014-2015, and 2013-2014 OERs for Complainant 2 were completed by Complainant 1 as primary reviewer, with only the 2015-2016 and 2014-2015 OERs rated by the combination of Complainant 1 and RMO 2 as primary reviewer and reporting officer. The remaining five OERs were completed by different chains of command. The other OER completed by the combination of Complainant 1 and RMO 2 gave Complainant 2 an average score of 5.33, with the comparison scale rating of 5.

¹⁵ Complainants and the RMOs could not recall the specific communications that had occurred during this period.



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Effectiveness; Adaptability; Looking out for Others and Writing overstated by Supv when compared to totality of work effort. Cost spreadsheet & designation letters incomplete; ADOS-RC finally secured by Command after EOP; Division competencies in CGBI at CMD direction vice initiative; attendance at finance and acquisition courses not approved by CMD, research on mbr eligibility for Korea Srv Medal fundamentally flawed requiring CMD intervention to resolve.

(Exhibit 37)

RMO 2 also took the optional step to make Reviewer Comments and to express his agreement with RMO 1's "Do not concur," writing that he also felt Complainant 1's review was "overstated." (Exhibit 37) Of the eight OERs DHS OIG reviewed for Complainant 2, this was the only OER marked as "Do Not Concur."

V. ANALYSIS

In order to substantiate a Complainant's claim of retaliation under the MWPA, a preponderance of the evidence must demonstrate: 1) one or more protected communications; 2) knowledge by an RMO of the protected communications; (3) personnel actions taken, threatened, or withheld by an RMO; and (4) a causal connection between the protected communications and the personnel actions.¹⁶ If the evidence establishes the first four elements by a preponderance of the evidence, the analysis shifts to determine whether there is clear and convincing evidence that the agency would have taken the personnel actions against the Complainant absent the protected communications.¹⁷

A. Complainants Made Multiple Protected Communications

The MWPA prohibits any person from taking a personnel action as retaliation against a member of the armed forces for making a communication to "any person or organization in the chain of command" or "any other person or organization designated pursuant to regulations or other established administrative procedures for such communications" regarding, among other

¹⁶ "Preponderance of the evidence" is "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4(q).

¹⁷ "Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(e).



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things, a “violation of law or regulation.” 10 U.S.C. §§ 1034(b)(1)(B) and (c)(2)(A).

A preponderance of the evidence establishes that Complainant 1 made protected communications regarding both the Weigh-In Incident and Drill Pay Issue and Complainant 2 made a protected communication regarding the Drill Pay Issue.

Specifically, in October 2015, Complainant 1 reported to RMO 1 and a PACAREA representative evidence that RMO 2 had caused the falsification of a weigh-in report through duress. The disclosures were made to persons in the chain of command, and Complainant 1 had a reasonable belief, based on the yeomen reports, that the report disclosed, at the very least, evidence of a violation of the USCG weigh-in regulations found in COMDINST M1020.8H, which state that “Members are required to be compliant with weight and body fat standards at all times,” and that if a member is found non-compliant, a USCG Form CG-3307 is prepared to document the non-compliance.

Further, Complainant 1’s report that RMO 2 attempted to coerce the yeomen into falsifying the report represented a reasonable belief that RMO 2 engaged in “conduct unbecoming of an officer” in violation of Article 133 of the UCMJ,¹⁸ as well as the falsification of an official statement in violation of Article 107 of the UCMJ.¹⁹

Additionally, Complainant 1 and 2’s February 2016 report to RMO 2 of the evidence that RMO 1 did not work the drill hours marked for the previous two months was made through their chain of command and based on objective evidence, including surveillance footage. Thus, the Complainants possessed a reasonable belief that RMO 1, in not accurately reporting her work time, had committed multiple violations of law and regulation, including Articles 107 and 133 of the UCMJ.²⁰

Therefore, a preponderance of evidence establishes the Complainants made protected communications regarding a reasonable belief of violations of law and regulation.

¹⁸ 10 U.S.C. § 933 (“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”).

¹⁹ *Id.* § 907(a) (“Any person subject to this chapter who, with intent to deceive (1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or 2) makes any other false official statement knowing it to be false; shall be punished as a court-martial may direct.”).

²⁰ *See* 10 U.S.C. §§ 907(a) & 933.



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B. The RMOs Possessed Knowledge of Complainants' Protected Communications

A preponderance of the evidence establishes that the RMOs knew of the protected communications made by Complainants 1 and 2. Specifically, when Complainant 1 reported the Weigh-In Incident on October 18, 2015, he did so directly to RMO 1, who immediately reported it to RMO 2. Similarly, when Complainant 1 and Complainant 2 reported the Drill Pay Issue on February 20, 2016, they did so directly to RMO 2, who immediately reported it to RMO 1.

C. The RMOs took Personnel Actions against Complainants 1 and 2

An adverse personnel action includes any action that affects, or has the potential to affect, the complainant's current position or career, including: promotions; disciplinary or corrective actions; performance evaluations; and decisions on pay, benefits, awards, or training. Under the MWPAA, 10 U.S.C. § 1034(b), prohibited personnel actions can include taking or threatening to take an "unfavorable personnel action" or withholding "a favorable personnel action" as retaliation for making a protected communication.

The evidence established that Complainant 1 was the subject of the following three personnel actions:

- (1) The denial of a training request on November 2, 2015;
- (2) Unfavorable marks and comments in Complainant 1's 2015-2016 OER; and
- (3) The denial and withholding of the end-of-tour performance medal/award from May 2016 to October 2017.

The evidence further established that Complainant 2 was the subject of the following four personnel actions:

- (1) Removal from leading the CCC in March 2016;
- (2) The non-selection for Acting FRO and temporary Logistics Department Head in or around June 2016;
- (3) The unfavorable "Do not concur" in Complainant 2's 2015-2016 OER; and
- (4) The denial and withholding of the end-of-tour performance medal/award from May 2016 to December 2016.



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Each of the personnel actions listed above affected, or had the potential to affect, the Complainants' position in USCG, and/or their career advancement.²¹

D. Complainants' Protected Communications were a Contributing Factor in the Personnel Actions taken by the RMOs

To establish causation, the evidence must demonstrate that the protected communication was a contributing factor in the adverse personnel action. "If a whistleblower demonstrates both that the deciding official knew of the disclosure and that the [adverse] action was initiated within a reasonable time of that disclosure," causation is established.²² When this "knowledge/timing" test is satisfied, "no further nexus need be shown, and no countervailing evidence may negate the [complainant]'s showing."²³ Courts have been reluctant to specify a precise time period as "reasonable" under the "knowledge/timing" test; however, courts generally consider actions taken within the same performance evaluation period or within one year to satisfy the test.²⁴

As addressed above, the RMOs had knowledge of each protected communication in October 2015 and February 2016, respectively. The RMOs' denial of Complainant 1's training request occurred on November 2, 2015, within three weeks of the report of the Weigh-In Incident, easily satisfying the timing requirement. The RMOs also finalized Complainant 1's unfavorable OER on July 11, 2016, within one year of each protected communication. Finally, the downgrading, postponing, and withholding of Complainant 1's performance award occurred between May 2016 and October 2017 at the direction of or as the result of RMO 1, who led the PSU [REDACTED] Awards Board.²⁵

As to Complainant 2, his report of the Drill Pay Issue was made on February 20, 2016, with RMO 2 having direct knowledge of that report on that date. The RMOs removed Complainant 2 from leading the CCC on March 20, 2016, the

²¹ Complainant 1 also alleged that the meeting on October 23, 2015, was a retaliatory counseling session. However, a preponderance of evidence fails to establish the counseling session as a personnel action under the MWPA, as it was not documented or placed into his file and therefore does not appear to have the potential to adversely affect Complainant 1's career. Statements made by RMO 1 during the meeting do suggest that RMO 1 harbored retaliatory animus against Complainant 1, and are considered in a later section.

²² See *Kewley v. Dep't of Health & Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998).

²³ *Id.*

²⁴ See *id.* See also *Jones v. Dep't of the Interior*, 74 M.S.P.R. 666, 673-76 (M.S.P.B. 1997).

²⁵ The withholding of the performance award was actively discussed by the PSU [REDACTED] Awards Board through December 2016, at which point the issue appears to have been tabled by RMO 1, until the award was issued October 2017.



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RMOs did not select him as Acting FRO around June 2016, and Complainant 2's "Do Not Concur OER" was finalized in August 2016. Each of those occurred within six months of his report of the Drill Pay Issue, satisfying the timing requirement. Finally, similar to Complainant 1, Complainant 2's CGAM nomination was withheld beginning in May 2016 until October 2017 when it was issued, also falling within the one year standard of the knowledge-timing test.

Therefore, because the knowledge and timing test is satisfied, a preponderance of the evidence establishes that both Complainants' protected communications were contributing factors in the personnel actions taken by the RMOs against them.

E. Evidence That the Personnel Actions Would Have Occurred Absent the Protected Communications

Because a preponderance of the evidence established the first four elements, the analysis shifts to determine whether there is clear and convincing evidence establishing that the agency would have taken the personnel actions absent the protected communications. In making this assessment, DHS OIG generally considers the following factors for MWPA complaints:

- The strength of the agency's reason for the personnel action when the protected communication is excluded;
- The existence and strength of any motive to retaliate for the whistleblowing activity; and
- Any evidence of similar action against similarly situated non-whistleblower employees.²⁶

1) Denial and Withholding of Performance Medal/Awards

Strength of the Reasons

Clear and convincing evidence failed to support the RMOs' purported reasoning for withholding performance awards for Complainants 1 and 2. RMO 1 stated that Complainants' performance and accomplishments did not deserve a COMM because they failed to effect a "systematic change across the Coast Guard." However, RMO 1 could not clearly explain what that meant, nor

²⁶ *Duggan v. Dep't of Defense*, 883 F.3d 842, 846 (9th Cir. 2018) (considering these factors in the context of the Whistleblower Protection Act); *Greenspan v. Dep't of Veterans Affairs*, 464 F.3d 1297, 1303 (Fed. Cir. 2006) (same).



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explain how others demonstrated this in their COMM package. Moreover, the record indicates that this “systemic change” requirement is not found in the Awards Manual, and was a criteria of her own making.

On the other hand, Witness 2, another Awards Board member, also felt that Complainant 1 did not deserve a COMM, and argued against awarding it to Complainant 1, though Witness 2 also could not specify his reasoning. (Exhibit 57) However, Witness 1 and Witness 5 both believed that Complainant 1 easily deserved a COMM. (Exhibits 23 and 43) Witness 1 also advocated for a COMM for Complainant 2. Witness 1 cited the Awards Manual requirement for “definite contribution to the service,” which he believed was demonstrated in the nomination packages, and noted that RMO 1’s service-wide impact language was not in the Awards Manual. (Exhibit 23) Specifically, the Awards Manual requires that a member “distinguishes him or herself by heroic or meritorious achievement or service” and the “achievement should be such as to constitute a definite contribution to the Service,” which is consistent with Witness 1’s characterization. (Exhibit 72)

Additionally, RMO 1’s reason for delaying the issuance of the CGAMs after they were approved by the Awards Board is unpersuasive. RMO 1 claimed that Witness 1 should have placed the issuance forms on her desk, and because he failed to do so, she did not sign the form and issue the awards. (Exhibit 49) However, evidence shows she received the forms via email twice, and still failed to sign the forms. In fact, she did not sign Complainant 1’s form until June 2017, after becoming aware of this DHS OIG investigation. (Exhibit 29b) Even then, the award was not actually issued until October 6, 2017, a few weeks after DHS OIG’s interview with RMO 1 concerning, in part, the awards withheld from Complainants.

Motive to Retaliate

The evidence establishes that RMO 1 harbored animus against Complainants for their protected communications, and had a strong motive to retaliate. Complainants’ report of the Drill Pay Issue was an allegation directly against RMO 1 that could have negatively affected her reputation and standing, and if proven, likely would have negatively affected her career.

Specifically, after Witness 1 discussed the Complainants’ award submissions with RMO 1 in December 2016, Witness 1 reported unusual hostility and anger from RMO 1 against the Complainants, which was documented contemporaneously in a February 2017 email. Two neutral witnesses, Witness 4 and Witness 5, also attributed the withholding of the awards for Complainant 1 to whistleblower retaliation.



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RMO 2 also displayed animosity in his DHS OIG interview towards Complainants for their reporting of the Drill Pay Issue, stating they intentionally maligned RMO 1, and arguing that the Complainants were actually the ones retaliating against RMO 1. (Exhibit 52)

Similarly Situated Individuals

The evidence indicates that the other two department heads who served with Complainant 1 and were not whistleblowers received a COMM upon their separation from PSU [REDACTED]. Thus, DHS OIG does not find clear and convincing evidence that Complainant 1 would have been denied a COMM and withheld the CGAM through October 2017 absent his protected communications.

In contrast, the evidence shows that a COMM may not be typical for an O3 Administrative Officer, such as Complainant 2, though it has been given to O3 officers before. However, the complete denial of any performance award for Complainant 2 when he left PSU [REDACTED] was not normal, according to multiple PSU [REDACTED] witnesses,²⁷ and suggests Complainant 2 was treated less favorably than comparable non-whistleblowers. Accordingly, although his lower rank would make it less likely that he would have received a COMM, DHS OIG did not find clear and convincing evidence that Complainant 2 would have been denied a CGAM absent his protected communication. Therefore, DHS OIG substantiates the Complainants' allegations of whistleblower retaliation regarding the performance awards.

2) Other Personnel Actions Taken Against Complainant 1

a. November 2015 Denial of Training Request

Strength of the Reasons

The RMOs clearly and convincingly explained their reasoning for why they denied the training request; namely that the course was not found on the Master Training List and therefore was discretionary. (Exhibits 49 and 52) At the time of the denial, RMO 1 explained in an email that she was focused on required training, though would consider non-required training that benefited the unit. RMO 1 noted that the requested course concerned high-level acquisition and procurement matters beyond the scope of PSU [REDACTED]'s needs. RMO 1 suggested that Complainant 1 find a lower-level course that was more applicable to the needs of PSU [REDACTED]. (Exhibit 12)

²⁷ Witnesses stated that it was customary for officers leaving an assignment to receive at least some sort of award and/or medal. They noted it was extremely odd that neither Complainant received anything upon leaving PSU [REDACTED].



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Motive to Retaliate

RMO 2 had motive to retaliate against Complainant 1 in November 2015, when the training was denied, because Complainant 1 had reported the Weigh-In Incident concerning RMO 2 just a few weeks prior.

Additionally, although the Weigh-In Incident did not implicate RMO 1, she had exhibited animus against Complainant 1 for reporting the issue to PACAREA by October 20, 2015, when she informally counseled him on October 23, 2015. Both RMOs acknowledged feeling frustrated by Complainant 1's protected communication, and RMO 2 admitted in an email that the incident caused him "professional embarrassment."

Similarly Situated Individuals

Witness testimony was mixed on whether non-whistleblower PSU [REDACTED] employees were approved to attend non-mandatory training during this time period, though RMO 1 noted at the time she denied Complainant 1's training that there could be exceptions to non-mandatory training that benefited the unit.

Overall, the evidence indicates that training courses were evaluated on a case-by-case basis. Notably, in June 2016, a non-whistleblower department head was also denied travel to a symposium by RMO 1, providing evidence that RMO 1 denied non-mandatory training for non-whistleblowers as well. (Exhibit 63)

In sum, the RMOs provided clear reasoning in denying the training course by citing to the Master Training List. While there was motive to retaliate and animosity from of the RMOs, DHS OIG found evidence that non-whistleblowers were treated in a similar fashion. Therefore, DHS OIG found clear and convincing evidence indicating that the training request would have been denied regardless of whether Complainant 1 made a protected communication.

b. Complainant 1's 2015-2016 OER Marks and Comments

Strength of the Reasons

Complainant 1's 2015-2016 OER was far less favorable than his other OERs. In the aggregate, Complainant 1's average score from the 2015-2016 OER was 27.3% lower than his others over a seven year period.

Overall, DHS OIG found the RMOs to be evasive when responding to questions regarding how or why they scored Complainant 1's OER so differently from



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comparator OERs. For example, in discussing the Complainants' OERs, the RMOs refused to provide explanations or broader context for their specific scores. RMO 2 went so far as to refuse to acknowledge, when questioned by DHS OIG, that a score of 4 out of 7 was better than a score of 3, only commenting that "a 4 is to the right of 3" on the OER page. RMO 1 similarly provided unhelpful testimony, for example stating that a series of markings of 1 in her draft OER for Complainant 1 was due to that being the default score in a blank form. In fact, the blank form is not pre-populated with default scores. (Exhibits 22 and 49) The RMOs evading simple questions on how they scored the OERs, or providing contradictory explanations of the OER process reflected negatively on their credibility.

Additionally, in justifying these unfavorable 2015-2016 OER marks and comments, the RMOs described poor performance from Complainant 1 that is not clearly supported by the record. For example, RMO 2 noted that Complainant 1 failed to attend a September 2015 conference call (Exhibit 55), and was otherwise unresponsive when needed to procure an agreement with the U.S. Air Force ("USAF"). However, upon reviewing the issue DHS OIG found that Complainant 1 was on approved annual leave when the call was both arranged and conducted, and Complainant 1's leave was communicated to RMO 2 prior to the organizing of the conference call. In fact, the first USAF email organizing the conference call was sent and directed specifically to RMO 2, with Complainant 1 only copied, and requested that RMO 2 let the USAF know who would be calling in for PSU [REDACTED] and the USCG. A day before the call, RMO 2 added RMO 1 to the email chain and removed two others, but never indicated to the USAF that Complainant 1 was on leave and would miss the call. If anything, the incident indicates an error or oversight on the part of RMO 2. (Exhibits 67-70)

Further, RMO 2 was on email correspondence discussing Complainant 1's leave weeks before the conference call, and also was reminded about the leave by Complainant 1 following his return in October. (Exhibit 70) When providing this alleged example of Complainant 1's poor performance, however, RMO 2 did not mention to DHS OIG that Complainant 1 was on approved leave. (Exhibit 52)

RMO 1 also provided a list of delayed or failed tasks by Complainant 1 during the OER period. However, the record indicates that at the time, the RMOs praised Complainant 1 for his work during the period, including for providing a "detailed update" that was "nice work" to RMO 1, regarding many of the issues she later cited as being problematic. (Exhibit 47) RMO 2 also praised Complainant 1 for his handling of a copier issue that RMO 1 later identified as a performance problem. (Exhibit 50)



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Other PSU [REDACTED] members contradicted the RMOs' criticism of Complainant 1's performance by heavily praising Complainant 1 as an officer, supervisor, and department head. For instance, Witness 2, a fellow O4 employee and department head, did not notice any decline in Complainant 1's performance during the alleged retaliatory period from previous years, and generally commended Complainant 1.

Contradicting the RMOs' claims of a non-retaliatory basis for the low marks is the strong evidence — including the RMOs' own admissions to DHS OIG — that Complainant 1's reports outside his immediate chain, including the protected communications, contributed to the negative remarks found in the OER. Specifically, RMO 1 acknowledged that her comment "struggled to foster inclusive leadership climate; deliberately marginalized CO/XO" was in regard to Complainant 1's reports of misconduct to parties outside of PSU [REDACTED]. Similarly, RMO 2 acknowledged that the comment "rigid interpretation by subord's as only course of action" referred to Complainant 1's reporting of the Drill Pay Issue. RMO 2 initially described Complainant 1 as refusing to accept Command's findings on the Drill Pay Issue, but could not explain how Complainant in any way refused to accept Command's findings.

Although both RMOs argued that it was improper for Complainant to go above his immediate chain (i.e., to PACAREA or higher), the MWPA expressly protects such communications, authorizing members to make protected communications outside the chain of command to specifically enumerated individuals or entities.

Motive to Retaliate

By the time of the issuance of the OER, both RMOs had clear motive to retaliate, as each RMO was the chief subject of a protected disclosure from Complainant 1. These allegations of misconduct could potentially undermine the authority of each RMO to command the members at PSU [REDACTED], as each allegation questioned the moral and ethical conduct of the RMOs. Further, the Weigh-In Incident was of a particularly personal nature, and RMO 2 admitted it caused him "personal embarrassment."

Moreover, Complainant 1 made reports outside PSU [REDACTED] regarding each RMO's alleged misconduct. This seemed to be a personal affront to each RMO, as they claimed it resulted in a loss of control over the situation. The evidence revealed several instances of the RMOs complaining about Complainant 1's outside reports, and impugning Complainant 1's judgment in speaking to PACAREA, USCG attorneys, and others. In their interviews with DHS OIG, both RMOs demonstrated clear animus toward Complainant 1, attacking his judgment, motivations, and sense of propriety in making the outside reports of



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misconduct. Thus, the RMOs demonstrated animosity toward Complainant 1 for engaging in protected activity.

Similarly Situated Individuals

Evidence indicates that similarly situated individuals who were not whistleblowers were treated more favorably than Complainant 1. In this case, DHS OIG evaluated data from the OER history of Complainant 1. Prior to his whistleblowing, Complainant 1's OER scores were higher than in the alleged retaliatory review. This includes his previous scores at PSU [REDACTED] under RMO 2, which were 10.6% and 15.3% higher than in the alleged retaliatory period. Overall, the alleged retaliatory review was a significant outlier, with numerical scores 27.3% lower than average over the last seven years. (Exhibits 35 and 71)

Further, DHS OIG examined data from other O4-level PSU [REDACTED] officers during the alleged retaliatory period. These individuals were not whistleblowers, but were otherwise comparable in status to Complainant 1. Each of those employees' scores was significantly higher than Complainant 1's. In fact, an analysis shows that other O4 PSU [REDACTED] employees received 30.7% higher scores than Complainant 1 for the 2015-2016 review period. (Exhibits 35 and 71)

Also, a review of the comments sections from Complainant 1's previous reviews, and the reviews of other PSU [REDACTED] comparators, showed that non-whistleblowers received more positive comments and remarks in their OERs.

In sum, there is not clear and convincing evidence demonstrating that Complainant 1's OER would have been as negative absent his protected communications. Accordingly, DHS OIG substantiates Complainant 1's allegations regarding his OER.

- 1) Other Personnel Actions Taken Against Complainant 2
 - a. March 2016 Removal from Leading the CCC

Strength of the Reasons

RMO 1's email notifying Complainant 2 of his removal as the CCC lead project officer cited Complainant 2's increased workload as the reason for the removal. (Exhibit 45) However, in their interviews with DHS OIG, the RMOs did not provide details regarding the purportedly excessive workload experienced by Complainant 2. In contrast, Complainant 1 and Complainant 2 both credibly stated that Complainant 2 had an appropriate workload at this time, and that he would have been able to handle the CCC and his normal duties.



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In interviews, the RMOs also asserted that they removed Complainant 2 because he would be leaving PSU [REDACTED] by the time of the ceremony. However, in addition to the fact that this reason was not given at the time, the credibility of this assertion is undermined by the fact that the RMOs were likely not aware at the time of the removal that Complainant 2 would be transferring, as Complainant 2 had not yet requested a transfer, and did not receive orders until May 2016. (Exhibit 3)

In sum, the RMOs' stated reasons for reassigning Complainant 2 do not clearly and convincingly establish that the RMOs would have taken the same action absent Complainant 2's protected disclosures.

Motive to Retaliate

As with Complainant 1, Complainant 2's protected communication was against RMO 1, which would provide a motive for RMO 1 to retaliate against him. In addition, the evidence indicates that both RMOs closely associated Complainant 1's actions with Complainant 2's, which resulted in similar animus against Complainant 2.

Moreover, RMO 1 exhibited animosity against Complainant 2 for his protected communication regarding the Drill Pay Issue when she made her own accusation against Complainant 2 regarding the berthing issue less than 12 hours after the report of misconduct against RMO 1. In addition, it is notable that RMO 2's response to the report of the Drill Pay Issue was limited to obtaining an email from RMO 1 outlining the work she did on the dates in question. RMO 2 took no steps to verify RMO 1's accounting of her time, or even discuss with RMO 1 her email stating "I came on late and worked," which at a minimum was an incomplete response to Complainant 1's proper inquiry to verify her time and attendance.²⁸ Instead, RMO 2's only action was to informally counsel Complainant 2 for using surveillance footage to determine whether RMO 1 was on base. (Exhibit 52)

In sum, the evidence strongly suggests that the RMOs had a motive to retaliate and animus toward Complainant 2 on the basis of his whistleblowing activity.

²⁸ Complainant 1's job duties included verifying time and drills. In response to his specific question to RMO 1 regarding whether she was authorized to work off-site, RMO1 only stated that she "came on late and worked." RMO 2 acknowledged to DHS OIG that this response was incomplete, but would not call it misleading, instead saying RMO 1 was snippy and short. RMO 2 stated that, as a superior officer, RMO 1 had a right to respond in such a way because Complainant 1 was questioning her integrity. However, by failing to mention anything about off-site work, RMO 1 led Complainant 1 to believe that her drill was completed after hours.



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Similarly Situated Individuals

Given the unique circumstances, DHS OIG was unable to determine whether similarly situated individuals existed with respect to this personnel action.

Overall, DHS OIG did not find clear and convincing evidence that the RMOs would have removed Complainant from leading the CCC absent his protected communication. DHS OIG substantiates this allegation.

b. Non-Selection to be Temporary FRO and Department Head

Strength of the Reasons

The RMOs explained that Complainant 2 was not selected as the temporary Logistics Department Head because of his early transfer, and that selecting Complainant 2 would have necessitated a second temporary head after Complainant 2 transferred. Although the record is unclear about when the non-selection was made, on balance it appears likely that the RMOs would have been aware that Complainant 2 was leaving by the time of the non-selection. Specifically, Complainant 1 left PSU [REDACTED] in late June 2016, creating the opening for an Acting FRO. Although Complainant 2 left PSU [REDACTED] in October 2016, he told DHS OIG that he had already discussed transferring out of PSU [REDACTED] by the time he was passed over for temporary selection to the leadership position (mid-June 2016).²⁹

Further, DHS OIG finds that the RMOs' had a convincing, non-retaliatory reason for filling the position with someone other than Complainant 2, who had discussed transferring at the time the position became vacant. Namely, having to refill the position shortly after filling it would have resulted in an administrative burden for Command and required membership to adjust to multiple new department heads within a very short period of time.

Motive to Retaliate

As noted, the RMOs had motive to retaliate against Complainant 2 and harbored animus against him.

²⁹ The nature of those discussions are not clear, including how much the RMOs knew about Complainant 2's possible transfer. But the record establishes that the RMOs at least knew that Complainant 2 was discussing and considering transfer when they passed him over. In contrast, at the time of the CCC reassignment in March 2016, it was far less likely that RMOs would have known about a possible transfer.



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Similarly Situated Individuals

Given the unique circumstances, DHS OIG was unable to determine whether similarly situated individuals existed with respect to this personnel action.

On balance, the RMOs' explanation provides clear and convincing evidence that they would have taken this action regardless of the protected communication, as it would involve actual cost to the unit.

c. Complainant 2's 2015-2016 OER

Strength of the Reasons

DHS OIG did not find clear and convincing evidence to support the RMOs' reasoning for the "Do not concur" OER. The RMOs stated that Complainant 2 was a good employee, just not good enough to receive the scores given by Complainant 1. However, Complainant 2's 2015-2016 OER was in line with his previous eight OERs in both the comparison scale rating, and the average score (5.67 for the 2015-2016 period, and 5.47 over the previous eight reviews). The RMOs believed that Complainant 1 "overstated" the performance and accomplishments of Complainant 2, but did not provide specific reasoning as to why the scores and comments were overstated. The RMOs did not point to a specific task as not having been completed by Complainant 2. Rather, they stated that Complainant 1 was giving too much credit to Complainant 2 for the task or the completion of his duties.

The RMOs stated that they were forced to mark "Do not concur" because the Complainants failed to engage in a collaborative discussion regarding their questions about the OER, so they were therefore unable to come to an agreement. However, the evidence shows that the RMOs received an email from the Complainants four days before finalizing the OER, attaching a 104-page supporting document from Complainant 2 supporting his personnel record for the review period. (Exhibit 40) The record shows that the RMOs did not attempt to discuss the comments provided by Complainant 2, and Complainant 1's email on September 1 was the last correspondence before they finalized the "Do not concur." RMOs were unable to explain why they proceeded with the "Do not concur," which they acknowledged was an extraordinary action, without responding to the submission. (Exhibit 49; Exhibit 52)



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Motive to Retaliate

As noted, the RMOs had a motive to retaliate against Complainant 2 and harbored animus against him. In addition, their retaliatory motive and animus against Complainant 1 likely would have impacted their decision to not concur in Complainant 1's marks.

Similarly Situated Individuals

Complainant 2's 2015-2016 OER was the only "Do not concur" OER recalled by any witness interviewed in the investigation. Further, an email from RMO 1 confirmed that neither she nor RMO 2 had ever submitted a "Do not concur" OER before, and it was such a significant action that she notified PACAREA beforehand. (Exhibit 41) The evidence shows the marking of the OER as "Do not concur" was a rare and drastic step that was not given to non-whistleblowers comparable to Complainant 2.

In sum, there is not clear and convincing evidence demonstrating that Complainant 2's OER would still have been unfavorably marked "Do Not Concur" absent his protected communication. Accordingly, DHS OIG substantiates Complainant 2's allegations regarding his OER.

VIII. CONCLUSIONS

In conclusion, the evidence fails to demonstrate that the RMOs denied a training request for Complainant 1 in retaliation for his protected communications. However, DHS OIG substantiates Complainant 1's allegation that the RMOs provided unfavorable scores and comments on Complainant 1's OER in retaliation for his protected communications. The evidence also establishes that the RMOs withheld performance awards from Complainant 1 in retaliation for his protected communications. The evidentiary record does not provide clear and convincing evidence that these two personnel actions would have been taken absent the protected communications.

Similarly, the evidence fails to demonstrate that the RMOs' non-selection of Complainant 2 for the temporary Logistics Department Head was done in retaliation for his protected communication. However, the evidence did establish that the RMOs removed Complainant 2 from CCC leadership in retaliation for his protected communication. The evidence also established that Complainant 2's negative OER, specifically the "Do not concur," was in retaliation for his protected communication, and that the RMOs withheld performance awards from Complainant 2 in retaliation for his protected communications. The evidentiary record does not provide clear and convincing



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evidence to establish a firm belief that these three personnel actions would have been taken absent Complainant 2's protected communication.

IX. RECOMMENDATIONS

DHS OIG recommends that the Secretary of Homeland Security direct USCG officials to:

- (1) Submit Complainants' Coast Guard Commendation Medal nominations for reconsideration by the USCG Pacific Area Command, without involvement from the Responsible Management Officials;
- (2) Replace Complainant 1's Officer Evaluation Report (OER) for the period of May 1, 2015, to April 30, 2016, with a Continuity OER³⁰;
- (3) Remove the Do Not Concur and associated comments from Complainant 2's OER for the period of October 1, 2015, to May 31, 2016, and replace them with a retroactive concurrence from a PACAREA officer; and
- (4) Convene the appropriate records review boards (typically known as "Special Boards") to review Complainants' updated personnel file and determine whether to order any retroactive promotions, back pay, and benefits.

³⁰ Continuity OERs, CG-5310E, may be submitted in cases where an OER is required by policy, but full documentation is impractical, impossible to obtain, or does not meet Officer Evaluation System goals. The Continuity OER would be a neutral note indicating that a performance review was not possible or impractical for the review period in question.