DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-110

Xxxxxxxxxxxxxxxxxx
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DECISION OF THE DELEGATE OF THE SECRETARY

I adopt the findings and approve the order of the Board in the Board's Recommended Decision dated February 27, 2003, except for the findings and that part of the order concerning:

1. The applicant's officer evaluation report (OER) for the period June 1, 1998, to May 31, 1999, which is denoted as OER3 in the Recommended Decision. I do not adopt the findings or approve the part of the order that concerns OER3 because the applicant did not ask the Board to remove the OER in his original application; the Board raised the issue. Because the applicant failed to request its removal, the issue was not considered by the Chief Counsel of the Coast Guard and it was not addressed in his advisory opinion to the Board for the case. The Board made its decision with respect to OER3 without hearing the Coast Guard's views on the matter. Under 33 C.F.R. § 52.82, the Coast Guard should have been given an opportunity to consider and submit a recommendation to the Board regarding the requested removal of OER3. Without the Coast Guard's input on the matter, the record has not been sufficiently developed for me to make an informed decision regarding OER3.

2. The removal of all evidence from the applicant's record of his 1994 integration into the regular Coast Guard. I do not adopt the findings or approve the part of the order that concerns this because I find that another form of relief is more suitable in this situation. Specifically, I find that the Secretary of the Department of Homeland Security, acting with the authority given him by the President, should appoint the applicant to the U.S. Coast Guard Reserves with the rank of xxxxxx effective December 16, 1999. The applicant's record will be corrected to reflect that he has served on inactive duty with the U.S. Coast Guard Reserves from December 16, 1999, until the present. The applicant's DD-214 should be corrected to show that he was discharged on December 15, 1999, by reason of Secretarial Authority with an honorable character of service and separation code LLF, in accordance with Article 12.A.5. of the Personnel Manual.

Therefore, I advise the Secretary to appoint the applicant to the U.S. Coast Guard Reserve with the rank of xxxxxxxx effective December 16, 1999. I approve the relief granted in paragraphs (b), (g), (h), (i), and (j) of the Board's order. The relief granted in paragraph (a) is

also approved except with respect to the removal of the applicant's OER for the period June 1, 1998, to May 31, 1999. The applicant's recent request for the removal of this OER is remanded to the Board for further and full consideration in accordance with the Board's rules. Because I do not approve the removal of this third OER, the explanation for the gaps in the applicant's record in paragraph (f) of the Board's order shall read as follows:

> "xxxxxxxxxxxxxxxxxxxxx's Personnel Data Record includes no Officer Evaluation Reports for his active duty service from May 17, 1997, to May 31, 1998, from June 1, 1999, to December 15, 1999, and for a period of inactive duty from December 16, 1999, through [insert the date he returns to active duty]. His record has been corrected by the Secretary in accordance with 10 U.S.C. § 1552, and no adverse inference of any kind is to be drawn from the lack of Officer Evaluation Reports, his release from active duty, or the period of inactive duty."

The relief granted in paragraph (c) is removed and replaced with the following: "The delegate of the Secretary recommends that the Secretary of the Department of Homeland Security appoint the applicant to the Coast Guard Reserves with the rank of xxxxxxxx effective December 16, 1999." The relief granted in paragraph (d) is amended to read as follows: "His DD 214 shall be corrected to show that he was discharged from the Coast Guard on December 15, 1999, by reason of Secretarial Authority with an honorable character of service and separation code LLF, in accordance with Article 12.A.5. of the Personnel Manual." The relief granted in paragraph (e) is approved except that the first sentence of paragraph (e) is amended to read as follows: "The Coast Guard shall offer to recall the applicant to active duty on a mutually convenient date within six months after the Secretary has appointed the applicant to the Coast Guard Reserves."

_April 4, 2003_____
Date

_____/s/_____
Lucy G. Clark
Chief Legal Counselor
Department of Homeland Security

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-110

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FINAL DECISION

ANDREWS, Deputy Chair:

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 BCMR docketed the case on May 28, 2002, upon receipt of the applicant's completed application and military records.

This final decision, dated February 27, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, who was discharged from the Coast Guard on December 15, 1999, after having pled *nolo contendere* to a State charge of xxxxxxxxxxx that was later dismissed, asked the Board to correct his record by expunging the following documents:

- his separation from the Coast Guard on December 15, 1999, and his general discharge under honorable conditions;
- a special officer evaluation report (OER) for the period July 15, 1995, through April 6, 1998 (OER1);
- his regular OER for the period May 17, 1997, through May 31, 1998 (OER2);
- a Determination Board Results Notification letter of January 25, 1999;
- a Board of Inquiry (BOI) precept dated March 30, 1999;
- a BOI amended precept dated April 15, 1999;
- a BOI report dated April 17, 1999;
- a BOI Results Notification dated May 21, 1999, with BOI transcripts, acknowledgment referral cards, and exhibits of the proceedings from April 15 through 17, 1999;

- a transmittal letter from LCDR X dated May 13, 1999;
- a Board of Review (BOR) precept dated June 29, 1999;
- a letter from LCDR X dated June 18, 1999;
- the BOR's findings and recommendations dated July 12, 1999; and
- the BOR's Notification of Results dated October 28, 1999.

In addition, the applicant asked the Board to order the Coast Guard to take the following actions:

- withdraw any submissions it has made concerning him to the National Crime Records Center;
- restore him to active duty as a xxxxxxxx in his previous position as the xxxxxxx xxxx Detached Duty supervisor and with the same signal number and class standing he had prior to his discharge;
- pay him back pay and allowances from the date of his discharge until his return to active duty; and
- restore his security clearance; or
- as an alternative to the above, grant him a 20-year retirement by recognizing his constructive service from the date of his separation through July 4, 2001, which is the date he could have retired had he remained in the service, and promoting him to the rank of xxxxxxx (xxx) with back pay.

APPLICANT'S ALLEGATIONS

The applicant alleged that in 1996, his then xxxxxxxxxx told a friend that he had had xxxxxxxxxxxx in 1995. The xxxxx friend told her xxxxxx, who told the xxxxxx xxxxx. His xxxxxxxxx filed a complaint with civil authorities, and the applicant was arrested for xxxxxxxxxx, which he denied. However, he stated, "His attorney negotiated a plea agreement with the [county] prosecutor that was practical. These kinds of cases can yield convictions based solely on a xxxxxxxx. The accused xxx is left only with a verbal denial." Therefore, he alleged, he pleaded *nolo contendere*.[1] He was put on probation and had to xxxxxxxxxxxxxxx.

The applicant alleged that as a result of his plea, he received a derogatory special OER (OER1) and an adverse regular OER (OER2). He alleged that some of his reporting officer's comments in his response to the applicant's reply to OER2 prove that his plea was the basis for the adverse marks and comments in OER2.

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[1] According to BLACK'S LAW DICTIONARY, 4th ed., the plea *nolo contendere* means "I will not contest it" and has "the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment and on which the defendant may be sentenced. Like a demurrer, this plea admits, for the purposes of the case, all the facts which are well pleaded, but is not to be used as an admission elsewhere." [citations omitted]

The applicant alleged that as a result of his plea, the Coast Guard convened a Board of Inquiry, which ultimately resulted in his separation with a general discharge after 18 years, 5 months, and 11 days of active military service. He alleged that but for his plea and the allegations against him, he would have retired from the Coast Guard after 20 years of service with a "spotless" record.

The applicant alleged that, as xxxxxxxxxxx, "the consequences xxxxxxxxxxx became more concrete xxxxxx. In July 2000, without any prompting, [xxxxxxx], then xxxxxx, spontaneously told xxxxxxxxxxxxxxxx that the events never occurred." On November 27, 2000, the xxxxx signed a detailed affidavit recanting xxxxxx and expressing remorse. He alleged that a "false allegation by xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx is not a novel circumstance." Thereafter, he sought to have his *nolo contendere* plea overturned and, on November 19, 2001, he was released from probation and from the requirement to xxxxxxxxxxxxxx. Because of xxxxxxxxx recantation, the State moved to dismiss the charges against him, and the case was dismissed on December 3, 2001. The applicant alleged that the State was not required to move to dismiss the charges against him but did so "because the recantation was credible."

The applicant alleged that he was "wrongly accused," that he now "seeks to complete his vindication" through the BCMR, and that receiving the relief he has requested "is the only way [he] can obtain a just result."

SUMMARY OF THE RECORD

On September 20, 19xx, the applicant enlisted in the Coast Guard Reserve under an agreement to attend Officer Candidate School. He had several years of prior service in the Army, the National Guard, and the Air Force. On March 16, 19xx, he was appointed an xxxxxxxxxx in the Reserve. On May 20, 19xx, he was integrated into the regular Coast Guard as a xxxxxxxxxxxxx with a date of rank of September 16, 19xx. On September 16, 19xx, he was promoted to xxxxxx (xxx).

The applicant excelled as a xxxxxxx in the Coast Guard. On his OER for the period June 1 to November 30, 1995, he received one mark of 5, fifteen marks of 6, seven marks of 7 (on a scale of 1 to 7, with 7 being best), and a comparison scale mark of 6, meaning that he was "strongly recommended for accelerated promotion" to xxx. On his OER for the period December 1, 1995, to May 31, 1996, he received nineteen marks of 6, four marks of 7, and another 6 on the comparison scale. Thereafter, he was transferred. However, his OER for the period June 1, 1996, to May 16, 1997, was similarly excellent, with twenty marks of 6, three marks of 7, and a 6 on the comparison scale.

On April 1, 1997, a warrant was issued for the arrest of the applicant on a charge of xxxxxxxxxxxxxxxxx. On April 2, 1997, the Coast Guard suspended his security clearance. Soon thereafter, he was transferred to a position in the district office.

On June 19, 1997, the applicant was indicted by a grand jury for having xxxxx xxxxxxxxxxxxxxxxxxxxxx on or about July 15, 1995. On February 17, 1998, he pleaded *nolo contendere*. The judge indicated that he would decide whether to accept the plea at a later date. On April 6, 1998, the judge accepted the plea and entered a Deferred Adjudication Order against the applicant for "xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx." The order stated that "after hearing evidence, the Court finds that it substantiates the defendant's guilt; defers further proceedings without entering an adjudication of guilt for [ten years]; and places the defendant under the supervision of the [county probation department], subject to your obeying the following conditions." The long list of conditions included reporting to a probation officer, xxxxxxxxxxxxxxx, avoiding xxxxxxxxxxxxxxxxxx, performing 400 hours of community service, and completing a xxxxxxxxxxx treatment program.

On April 14, 1998, the Coast Guard terminated the applicant's security clearance. On April 30, 1998, his commanding officer (CO) sent the Commandant a letter reporting his April 6, 1998, "non-formal conviction" by the county court for xxxxxxxxxxxxxxxx.

On July 23, 1998, OER1, a "special" OER, was entered in the applicant's record "under Article 10.A.3.c.1.b and Article 10.A.3.c.1.d [of the Personnel Manual] due to a deferred adjudication order from the Criminal District Court of … which substantiated [the applicant's] guilt for a civil offense of xxxxxxxxxxxxxxxxxxxxxxxx." OER1 outlines the applicant's arrest, indictment, plea, and "ten-year deferred adjudication" with probation and multiple conditions. OER1 contains comments about the moral aspects of the offense and the consequences for the Coast Guard, as well as low marks for the performance categories "Workplace Climate," "Judgment," "Responsibility," and "Professional Presence" and the lowest possible score on the comparison scale, denoting an unsatisfactory performance in comparison to other xxxxxxxxs. OER1 ends with the CO's recommendation that he be discharged following a "show cause" board.

The applicant's record contains his official reply to OER1, dated June 25, 1998. In it, he questioned the length of the period covered by the OER—July 15, 1995, through April 6, 1998—and argued that OER1 should cover only the time when the conduct that was investigated occurred, rather than almost three years. He also argued that his comparison scale mark should not have been unsatisfactory since his job performance had been exemplary throughout his career. He stated that the low comparison scale mark was not documented in any way with reprimands, warnings, or counseling sessions and that there was "no direct correlation" between his probation and his performance of duty. Regarding his positive representation of the Coast Guard, he stated that he had coached girls' intermediate, high school, church, and YMCA volleyball leagues, taught children under the Partners in Education program, started a bible study, and delivered Meals on Wheels to the elderly.

The applicant's supervisor forwarded the reply to OER1 to their CO without comment. In forwarding it to the Coast Guard Personnel Command (CGPC), the CO stated, "I stand by the peer comparison I made" on the comparison scale. He further stated, "We have taken great pains to protect [the applicant's] constitutional rights, most importantly his 'innocence until proven guilty' and 'due process.' I supported his assertion of innocence, maintained his privacy and allowed him to discharge his duties as Supervisor of my Detached Duty Office … while his civil case was under consideration. … The process has been completed, his plea and subsequent adjudication have substantiated his guilt and this OER is submitted to document the consequences of his criminal actions and resulting prosecution."

On August 5, 1998, OER2 was entered in the applicant's record to document his performance from May 17, 1997, through May 31, 1998. It contains two marks of 2, for the performance categories "Workplace Climate" and "Responsibility"; two marks of 3, for "Teamwork" and "Professional Presence"; eleven marks of 4; three marks of 5; and the lowest comparison scale mark. Many of the comments are very positive, particularly those regarding the applicant's job performance prior to his plea. However, OER2 notes his plea and probation, his reassignment to the district office, and the negative effect his plea had on the harmony and course of business in his office. It states that his probation interfered with his ability to lead and destroyed his subordinates' loyalty, and it strongly recommends his separation from the Coast Guard.

In the applicant's official reply to OER2, dated July 2, 1998, he called it "inaccurate, unfair, unfounded and biased." He stated that the judge made no adjudication of guilt at all, so he was not actually convicted. He stated that his reassignment was unfair because there is "no direct correlation between the civil incident and my performance of duty." He alleged that his conduct had not affected the workplace climate. He alleged that the unsatisfactory comparison scale mark was unsubstantiated, unfair, and inconsistent with other marks and comments in OER2 and that OER2 should have been based on his job performance rather than the "isolated civil incident."

In forwarding the applicant's reply to OER2 to the CO, his supervisor supported the evaluation by describing several problems with the applicant's job performance and the performance of his staff that had required significant work and reorganization to fix. He stated that the applicant's "personal problems came at the expense of [the office] … with many missed details, … reports glossed over and minimal … oversight provided."

In forwarding the reply to OER2 to CGPC, his CO stated that he stood by the comparison scale mark he assigned the applicant, which he stated was based on the applicant's *nolo contendere* plea to xxxxxxxxxxxxxxxxxxxxxx. Most of his statement is identical to the one he used to forward OER1 to CGPC. He further stated that since the

plea and court order occurred during the regular reporting period, it was proper for OER2 to reflect the consequences of the applicant's criminal actions.

On January 25, 1999, the applicant was notified that in accordance with Article 12.A.15.f. of the Personnel Manual, the Commander of CGPC had convened a Determination Board, which had decided that the applicant would be required to "show cause" as to why he should not be separated for moral dereliction.

On April 17, 1999, following a "show cause" hearing at which the applicant was present and represented by counsel, the Board of Inquiry issued a report. After viewing a videotape of xxxxxxxxxxxx, reviewing the court record, and listening to several character witnesses presented by the applicant, the BOI reported that the applicant's plea of *nolo contendere* had the same effect as a plea of guilty and that the court had found that "sufficient evidence was provided which showed beyond a reasonable doubt that he is guilty of a first-degree felony." The BOI found that the applicant's moral dereliction and the terms of his probation would interfere with his ability to serve in the Coast Guard and recommended that he be separated.

On July 12, 1999, a Board of Review was convened in accordance with Article 12.A.15. of the Personnel Manual. The BOR found that the applicant had been morally derelict and had provided no compelling information to warrant his retention. It recommended his separation.

On July 14, 1999, another OER was entered in the applicant's record, evaluating his job performance at the district office from June 1, 1998, through May 31, 1999. It has five marks of 4, eleven marks of 5, two marks of 6, and a comparison scale mark of 4, which denotes a "good performer." Most of the comments in this OER (OER3) are very positive, describing the applicant as "outstanding" and a "tremendous asset to the Coast Guard." In the final block of comments on the applicant's potential, the CO stated that the applicant was "[w]ell qualified for promotion with peers."

In August 1999, the applicant was considered for promotion to XXX by a selection board. He was not selected.

On October 28, 1999, CGPC informed the applicant in a letter that the Commandant of the Coast Guard had approved the recommendation of the BOR on August 25, 1999, and that the Secretary of Transportation, acting in accordance with 14 U.S.C. § 327(b)(3), had ordered that he be discharged without severance pay. The letter further stated that the applicant would be discharged no later than December 15, 1999.

On December 15, 1999, the applicant received an involuntary general discharge by reason of misconduct with separation code GKQ (which denotes an "involuntary discharge approved on recommendation of a board when member has committed a

serious military or civilian offense") and no severance pay. The discharge was documented in his record by a letter of notification from CGPC dated November 12, 1999, a "page 7" entry, and a discharge form DD 214.

On November 27, 2000, the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, signed a sworn affidavit, which stated the following in pertinent part:

> 2. In December 1996, I accused xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx in the summer of 1995 at … .
> 3. My xxxxxxxxxxxxxxxxxxxx

VIEWS OF THE COAST GUARD

On November 27, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief in this case.

The Chief Counsel alleged that, under the regulations in the Personnel Manual, it was proper for his rating chain to prepare OER1 and OER2 to "reflect his plea bargain to a state felony charge." He argued that the comments and corresponding marks in the OERs were "fair and accurate based on the information available at the time the OERs were prepared. Moreover, the Board of Inquiry and Board of Review properly considered the member's entire record along with his *nolo contendere* plea to xxxxxxxxxxxxxx xxxxxxxxxxxx when recommending that the Applicant be separated from the service. … It cannot be overstated that the Applicant, himself, contributed to the OERs in question as well as the findings and recommendations of the Boards of Inquiry and Review" by pleading *nolo contendere* to "one of the most serious charges in the criminal court system. Clearly the Coast Guard committed no error in taking the course of action it did *at the time it did*." However, the Chief Counsel stated, in light of the xxxxxxxx xxxxxxxxxx recantation and the decision of the State to dismiss the charges, "the Coast Guard agrees that the results of the Boards of Inquiry and Review, as well as the OERs in question and the Applicant's eligibility to gain a security clearance, should be revisited and the Applicant's BCMR petition for relief should be favorably considered."

The Chief Counsel recommended that the Board vacate the applicant's involuntary separation from the service; remove OER1 and OER2 from his record; remove his failure of selection for promotion to xxx in 1999; return him to the active duty promotion list (ADPL) with his prior date of rank as a xxxxxxx, September 16, 19xx; and assign him to a geographic area of his choice if a billet is available. The Chief Counsel stated that because the applicant did not serve on active duty from December 15, 1999, to the present, "due to no fault or error on the part of the Government," he should not receive back pay or seniority as if he had been serving on active duty.

The Chief Counsel argued that because the Coast Guard committed no errors in discharging the applicant, the taxpayers should not pay him a salary he did not earn, nor should he receive constructive credit toward retirement. He stated that the applicant's loss of salary and seniority was "caused by the Applicant's voluntary decision to enter into a plea agreement for a heinously serious offense: xxxxxxxxxxxxxxxxxxxxx xxxxxxxxx." However, the Chief Counsel argued, if the applicant is selected for promotion by the first XXX selection board to consider his corrected record, the Board should give him the choice of (a) having his date of rank backdated to what it would have been if he had been selected for promotion in 1999 "but without crediting him for service and pay for the time period he was not on active duty," or (b) not having his date of rank backdated "so that he can serve the typical number of years to gain

experience and growth, as well as receive the typical number of [XXX] OERs that are in an officer's record, before being considered by a [xxx] Selection Board."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 2, 2002, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. The applicant was granted an extension of the time to respond, and he responded on December 27, 2002.

The applicant stated that the Chief Counsel's argument that he should not receive backpay or constructive service credit "would put the Board on a collision course with settled law." He argued that when the separation of an officer on active duty is set aside, "he is entitled to be deemed to have remained on active duty (both for pay and constructive service purposes) until lawfully separated." *See Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir.), citing *Sanders v. United States*, 594 F.2d 804, 810 (Ct. Cl. 1979). The applicant argued that he is entitled to backpay under the Military Pay Act, 37 U.S.C. § 204, and that the only legal adjustments to his entitlement would be offsets for his civilian earnings and unemployment benefits. He argued that there is no exception in the statute that would bar payment when the service is not to blame for the separation that is being set aside. He argued that "the right to backpay and constructive credit is unconditional, and applies even if the root cause was a falsehood told by a private individual. The back pay entitlement arises as a result of setting aside the separation—something the Coast Guard rightly acknowledges should be done here."

The applicant stated that he "understands the challenge that the [State] proceedings presented for the Coast Guard, and appreciates the service's recognition that his record should be corrected and he should be restored to active duty." He also stated that he would work with CGPC to identify an assignment to "get his career back on track." He submitted with his response a copy of the Order of Expunction.

APPLICABLE LAW

Under 10 U.S.C. § 1552(a), the BCMR "may correct any military record of the Secretary's department when the [Board acting on behalf of the] Secretary considers it necessary to correct an error or remove an injustice."

OER Regulations

Article 10.A.1.b.1. of the Personnel Manual (PM) states that commanding officers must ensure that their subordinates receive accurate, fair, and objective evaluations.

PM Articles 10.A.4.c.4. and 7. provide that the supervisor and reporting officer evaluate officers by comparing their performance in the various categories with written

standards on the OER form and, for each category, assigning them the numerical mark that corresponds to the written standard that "best describes the Reported-on Officer's performance and qualities during the marking period." The supervisor and reporting officer include comments based on their "observations, those of any secondary supervisors, and other information accumulated during the reporting period." Article 10.A.4.c.8. provides that, to complete the comparison scale, "[t]he Reporting Officer shall fill in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. … A mark of "unsatisfactory" requires compliance with Article 10.A.4.h."

PM Article 10.A.4.g. permits the reported-on officer to file a reply to any OER "to express a view of performance which may differ from that of a rating official."

PM Article 10.A.4.h. provides that any OER with an unsatisfactory mark on the comparison scale is "derogatory," and the reported-on officer must be invited to submit an addendum to explain the failure or provide a different view of his performance. The supervisor and reporting officer forward the addendum with the derogatory OER to CGPC and, in so doing, may address any statement made in the addendum.

PM Article 10.A.3.c. provides that commanding officers may direct the preparation of a Special OER under certain circumstances, including whenever an officer is found guilty of a criminal offense or when the command finds it necessary to "document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted."

Separation Regulations

PM Article 12.A.15.c. provides that, in accordance with 14 U.S.C. §§ 317-327, officers may be separated for cause if they commit "[a]cts of personal misconduct prohibited by military or civilian authorities" or "[c]onduct unbecoming an officer." In addition, conviction by a civil court, denial of a security clearance, or receipt of a derogatory evaluation report may be sufficient to invoke separation for cause. PM Article 12.A.15.f. provides that the Commander of CGPC may convene a Determination Board to review an officer's record to determine whether he should be required to "show cause" for his retention on active duty due to, among other things, moral dereliction. If the Determination Board decides that the officer should be required to "show cause," the Commander of CGPC must inform the officer and invite him to appear with counsel before a Board of Inquiry to present evidence, testimony, and witnesses to show why he should be retained as an officer. PM Article 12.A.15.h. requires the BOI, after reviewing all of the evidence presented, to make findings and a recommendation as to whether the officer should be retained. Under PM Article 12.A.15.i., the records, documented evidence, and findings and recommendation of the BOI are reviewed by a Board of Review. If the

BOR decides that the officer should be separated, its recommendation is forwarded to the Commandant, who has "final decision authority."

FINDINGS AND CONCLUSIONS

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

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

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

3. The applicant asked the Board to remove from his record the documents listed on the first page of this decision, all of which pertain to or include mention of his arrest and civil proceedings or his separation for cause from the service. As the Chief Counsel stated, these documents seemed accurate and proper based on the information available to the Coast Guard at the time they were prepared. The applicant did not allege that the Coast Guard failed to follow its regulations in separating him, and the record indicates that he received all due process from the service. The Board finds, however, that in light of the xxxxxxxxxxxxxxx recent recantation and the withdrawal of the criminal charge against the applicant, he has proved by a preponderance of the evidence that the documents listed on the first page of this final decision and any other references to the allegations against him, his arrest, his plea, or the civil proceedings, or to the Determination Board, Board of Inquiry, Board of Review, or his separation for cause, now constitute an injustice and should be removed from his military record.

4. OER1 is a special OER prepared solely because of the applicant's plea and probation and should removed entirely from the record. OER2 is a regular evaluation and thus includes much information about the applicant's job performance aside from the civil proceedings. In BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material." Although it would be possible to redact the comments about the civil proceedings from OER2, it is unclear to what extent those proceedings affected the numerical marks. Therefore, and in light of the CO's comments indicating that some of the marks in OER2 are based on the applicant's plea, the Board is persuaded that OER2 is so infected by the plea and civil

proceedings as to be an unreliable assessment of his actual job performance. OER2 should also be removed in its entirety from his record.

5. The applicant did not mention OER3 in his application, but upon inquiry by the Board, he stated that he wants it removed from his record.[2] OER3 includes no mention of the civil proceedings and contains much information about the applicant's job performance. However, during the evaluation period for OER3, the applicant continued to serve in the same District as before and his alleged crime—having xxxxxxx xxxxxxxxxxxxxxxxxxx—must have been notorious. In fact, comments in OER2 prove that his alleged crime was notorious because it negatively affected the workplace climate and his ability to lead subordinates. The officer who served as the reviewer for OER2 also served as the reviewer for OER3. Moreover, during the evaluation period, the applicant appeared before a "show cause" Board of Inquiry and was being processed for discharge. Although the stress the applicant was under could certainly have diminished his performance from the stellar level he maintained prior to his indictment and plea, the Board is persuaded that the marks in OER3 were negatively affected by the notoriety of applicant's alleged crime and plea and that OER3 is infected by the plea and proceedings. The Board finds that the presumption of regularity normally accorded an OER is overcome for OER3 by the highly unusual events that occurred before and during the evaluation period that must have colored all aspects of the applicant's relationship with his chain of command and subordinates. The Board finds that the preponderance of the evidence in the record indicates that OER3 is an unreliable assessment of the applicant's performance and potential as an officer and should be removed from his record.

6. The applicant asked the Board to order the Coast Guard to withdraw any submissions it has made concerning him to the National Crime Records Center. The court has already asked the Coast Guard to do this in its Order of Expunction dated December 27, 2002. If the Coast Guard has not already done so, the Board finds that it should request the return of any records concerning the applicant's arrest, plea, and civil proceedings that it may have sent to a central federal depository.

7. The applicant asked the Board to award him pay him backpay and allowances from the date of his discharge until his return to active duty as if he had been serving on active duty during the past three-plus years. The applicant also pointed out that if, as the Chief Counsel recommended, the Board vacates his involuntary discharge so that his record reflects continuous active duty, he would be entitled to receive backpay and allowances for those years in accordance with 10 U.S.C. § 204, which mandates pay for regular members and officers based upon their status rather than upon actual

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[2] The Board's inquiry and the applicant's response occurred in an exchange of email messages and telephone calls on February 27, 2003.

performance of duty.[3] The Board realizes that the applicant has undergone tremendous financial and personal hardship. However, the fact is that he was legally discharged on December 15, 1999; he has not performed active duty since that day; and none of his hardship has been the result of any error or injustice committed by the Coast Guard. The record indicates that, once the applicant pleaded *nolo contendere* to xxxxxxxxxxxx xxxxxxxxxxxxxx, the Coast Guard reasonably and carefully followed the required procedures for administratively separating an officer under 14 U.S.C. §§ 321-327 and Article 12.A.15. of the Personnel Manual.

8. In *Powers v. United States*, 212 Ct. Cl. 553 (1976), the Court of Claims upheld the decision of the Board for Correction of Naval Records (BCNR) not to award backpay and allowances to a seaman who had received an undesirable discharge after being convicted of robbery in a New York court. After the conviction was overturned, the BCNR upgraded his discharge to honorable and gave him "mustering-out" pay but denied his claim for restoration to active duty and backpay because he "had not performed active duty" and "his imprisonment was not the fault of the Navy."[4] The court found that the BCNR had "acted lawfully and with a proper exercise of its discretion" in its decision.[5] In the cases relied on by the applicant, *Tippett v. United*, 185 F.3d 1250, 1255 (Fed. Cir. 2001), and *Sanders v. United States*, 594 F.2d 804, 810 (Ct. Cl. 1979) (en banc), the members' separations had been caused by errors committed by the military services, which is not the case here.[6] The Board finds that the applicant's situation is more analogous to that of the plaintiff in *Powers* than to those of plaintiffs wrongfully discharged by a military service.

9. Although the applicant has not proved that the Coast Guard committed any errors in processing him for separation, the Board finds that the general discharge for misconduct in his military record now constitutes an injustice to the extent that it prevents him from continuing his military career and will prejudice him in civilian life. As the Court of Claims held in *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959), "the Secretary and his boards have an abiding moral sanction to determine inso-

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[3] *Cameron v. United States*, 34 Fed. Cl. 422, 426-27 (1995) (holding that "absent a proper discharge," a member is entitled to basic pay as "a member of a uniformed service who is on active duty" and citing *Adkins v. United States*, 68 F.3d 1317 (Fed. Cir. 1995)).

[4] *Powers v. United States*, 212 Ct. Cl. 553, 554 (1976). *See also* xxxxxxxxxxxxx

far as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." In light of the xxxxxxxx recantation and the State court's dismissal of the charge, the Board finds that thorough and fitting relief would be to upgrade the applicant's discharge and allow him to continue his career in the Coast Guard with a personnel record that has been cleaned of any mention of the civil proceedings.

10. The Chief Counsel recommended that the Board vacate the applicant's separation, but the Board finds that vacating his separation entirely would inaccurately cause his record to indicate that he has performed active duty for the past three-plus years, which he has not. As the court found in *Powers*, the Board finds that the injustice done to the applicant by his accuser and the legal consequences of the civil proceedings do not entitle him to the vacation of his separation.

11. To fashion thorough and fitting relief, the Board must determine how to allow the applicant to return to active duty and continue his career in the Coast Guard with a personnel record that includes no mention of the civil proceedings. In addition to removing all such references, the applicant's DD 214 should be corrected to show that his departure from active duty was not caused by misconduct. The number of non-derogatory causes of separation provided for an officer under the Personnel Manual and Separation Program Designator Handbook is very limited. Moreover, the Board does not have the authority to appoint an officer once he has been discharged since only the President can appoint a xxxxxx in either the regular Coast Guard or the Reserve.[7] The Board finds that the cause of separation least prejudicial to the applicant's continued service would be an involuntary release from active duty into the Coast Guard Reserve by reason of Secretarial Authority with separation code LFF in accordance with Article 12.A.5. of the Personnel Manual. However, for his record to show that he was released into the Reserve, his 1994 appointment as an officer in the regular Coast Guard must be reversed so that his record will show that he remained on active duty as an officer in the Reserve until his release in December 1999. To undo that reversal, however, the Coast Guard should recall the applicant to active duty on a date that is mutually convenient and within six months of the date of this final decision and then, if he accepts that offer, further offer to reintegrate him back into the regular Coast Guard.

12. The applicant asked the Board to restore him to active duty as a xxxxxxxx with the same signal number and class standing he had prior to his discharge. The Chief Counsel recommended that the Board return him to active duty and to the active duty promotion list (ADPL) with his prior date of rank as a xxxxxxxxx, September 16, 19xx, and remove his 1999 failure of selection to XXX. The Chief Counsel also stated that, if the applicant is selected for promotion by the first XXX selection board to review his record, he should have the choice of (a) having his XXX date of rank backdated to what it would have been if he had been selected for promotion in 1999 or (b) not having

[7] 14 U.S.C. § 211; 10 U.S.C. § 12203.

his date of rank backdated "so that he can serve the typical number of years to gain experience and growth, as well as receive the typical number of [XXX] OERs that are in an officer's record, before being considered by a [xxx] Selection Board."

13. The Board agrees with the Chief Counsel that the applicant should have the opportunity to return to active duty with his prior date of rank and position on the ADPL so that he can continue his Coast Guard career. In addition, because the applicant failed of selection for promotion to XXX in 1999 when the information about his arrest, plea, and probation was in his record, the Board finds that the circumstances of his passover meet the *Engels* test[8] and his failure of selection should be removed so that he may have another chance to compete for promotion while "in the zone." However, with at least a three-year break in his active service and no recent OERs in his record, the applicant may have little chance of being selected for promotion to XXX if his record is reviewed by a selection board immediately after he is recalled to active duty. Therefore, the Board finds that the Coast Guard should recall him to active duty but allow him to acquire at least one more OER before being considered for promotion to XXX by a selection board. In addition, he should be returned to the ADPL with his 1994 date of rank. An explanation of the gap in his OER record should be entered in his record directing selection board members not to draw any adverse inference from the gap. If the applicant is selected for promotion to XXX by the next selection board to review his record, he should have the choice of (a) having his XXX date of rank backdated to what it would have been if he had been selected for promotion in 1999 or (b) not having his date of rank backdated.

14. The applicant asked the Board to order the Coast Guard to return him to his prior billet. The Chief Counsel agreed that he should be assigned to a geographic area of his choice if any billet is available. The Board finds that upon his return to active duty, the applicant should be assigned to a geographic area of his choice if any billet is available.

15. The applicant asked the Board to restore his security clearance. However, even with his arrest, plea, and the civil proceedings erased from his military records, his current eligibility for a security clearance is unknown to the Board. He has not presented any evidence to show that he currently meets the qualifications for a security clear-

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[8] In *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982), the court found that to determine whether an officer's failure of selection should be removed because of errors in his record when it was reviewed by a selection board, the BCMR should answer two questions: "First, was [the officer's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the officer] would have been promoted in any event?" Given the derogatory nature of the civil proceedings and the excellence of the applicant's prior record, it is clear that the applicant's case meets this test and his failure of selection should be removed.

ance. However, the Chief Counsel has stated that the applicant's eligibility for a security clearance should be revisited, and the Board agrees.

16. The applicant requested, as an alternative to his primary request for relief, that the Board promote him to XXX and grant him a 20-year retirement by correcting his record to reflect constructive service from the date of his separation through July 4, 2001, which is the date he could have retired had he remained in the service, with corresponding backpay. For the reasons stated in findings 7 through 10, above, the Board finds that the applicant is not entitled to such relief.

17. Accordingly, the Board finds that relief should be granted by removing from the applicant's military record the documents listed on the first page of this final decision, any other documents concerning or references to the allegations against him, his arrest, his plea, the civil proceedings, the Determination Board, the Board of Inquiry, the Board of Review, OER3, his general discharge for misconduct, and his failure of selection; by requesting the return of any records concerning his arrest, plea, and civil proceedings that may have been sent to a central federal depository; by having his security clearance reassessed after his record is corrected; by voiding his 1994 appointment in the regular Coast Guard so that he shall have remained an officer in the Reserve; by correcting his DD 214 to show that he was involuntarily released from active duty into the Reserve on December 15, 1999, by reason of Secretarial Authority with an honorable character of service and separation code LFF; by offering to recall him to active duty on a mutually acceptable date within the next six months and allowing him to acquire another regular OER in his record before being considered for promotion; by placing an explanation of the lack of recent OERs in his record; by offering him an opportunity to reintegrate in the regular Coast Guard; and if he is selected for promotion by the next XXX selection board to review his record, by backdating his XXX date of rank, at his discretion, to what it would have been if he had been selected for promotion in 1999. In addition, should he choose to return to active duty, the Coast Guard should assign him to a geographic area of his choice if any billet is available upon his return to active duty. Finally, no copy of this Final Decision should be kept in the applicant's military record.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

a) All of the documents listed on the first page of this final decision and any other references to the allegations against him, his arrest, his plea, or the civil proceedings, or to the Determination Board, Board of Inquiry, Board of Review, or his separation for cause shall be removed from his military record. The special OER validated on July 23, 1998, and two regular OERs covering his service from May 17, 1997, to May 31, 1998, and from June 1, 1998, to May 31, 1999, shall be removed from his record. In addition, his failure of selection for promotion to XXX shall be removed from his record.

b) The Coast Guard shall, in accordance with the Order of Expunction, request the return of any records concerning his arrest, plea, and civil proceedings that may have been sent to a central federal depository.

c) His 19xx appointment as a xxxxxxx in the regular Coast Guard shall be null and void so that his record shall reflect that he remained on active duty as a xxxxxxxx in the Reserve, was promoted to xxxxxxxxx as a Reserve officer on September 16, 1994, and remained on active duty until December 15, 1999.

d) His DD 214 shall be corrected to show that he was released to inactive duty in the Coast Guard Reserve on December 15, 1999, by reason of Secretarial Authority with an honorable character of service and separation code LFF, in accordance with Article 12.A.5. of the Personnel Manual.

e) The Coast Guard shall offer to recall the applicant to active duty on a mutually convenient date within the next six months. He shall be allowed to remain on active duty until he has acquired another regular OER before his record is reviewed by a xxx selection board. He shall be offered the opportunity to reintegrate into the regular Coast Guard and he shall be placed on the ADPL with his September 16, 19xx, date of rank and subsequently considered for promotion "in the zone" by an ADPL xxx selection board after the regular OER is entered in his record. If necessary, he shall be allowed to remain on active duty until he has been considered for promotion by an ADPL xxx selection board a second time, "above the zone."

f) The following statement shall be placed in the applicant's record to explain the lack of OERs and the period of inactive duty in his record:

> "xxxxxxxxxxxxxxxxxxxxxx's Personnel Data Record includes no Officer Evaluation Reports for his active duty service from May 17, 1997, to December 15, 1999, and a period of inactive duty from December 16, 1999, through [insert the date he returns to active duty]. His record has been corrected by the Secretary in accordance with 10 U.S.C. § 1552, and no adverse inference of any kind is to be drawn from the lack of Officer Evaluation Reports, his release from active duty, or the period of inactive duty."

g) If he returns to active duty, the Coast Guard shall assign him to a geographic area of his choice if any billet is available upon his return to active duty.

h) If the applicant is selected for promotion by the first xxx selection board to review his record, he shall have the option of having his xxx date of rank backdated to what it would have been if he had been selected for promotion in 1999.

i) The Coast Guard shall have the applicant's eligibility for a security clearance reassessed in accordance with regulation after his military record has been corrected in accordance with this order.

j) No copy of this final decision shall be kept in his military record.

John A. Kern

James G. Parks

Coleman R. Sachs