

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2003-089**

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**FINAL DECISION**

**AUTHOR:** Andrews, J.

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. It was docketed on June 9, 2003,<sup>1</sup> upon receipt of the applicant's completed application and military records.

This final decision, dated May 18, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**RELIEF REQUESTED**

The applicant, who since filing his application has been retired as a commander in the Coast Guard Reserve, asked the Board to correct his record by removing an officer evaluation report (OER) covering his performance from June 17, 1998, to May 24, xxxx, as the commanding officer (CO) of the port security unit (PSU) for xxxxxxxxxxxx xxxxxxxxxxxx. He asked that a substitute OER prepared by an officer of the xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx replace the disputed OER in his record.

The applicant also asked that his two failures of selection for promotion to captain be removed from his record; that he be reinstated in the Selected Reserve in an

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<sup>1</sup> Following receipt of a copy of the Coast Guard's advisory opinion in this case, the applicant requested and was granted two years' worth of extensions because he had pending a request for information and then an appeal on the response to his request for information under the Freedom of Information Act (FOIA). Upon receipt of the applicant's request for a third year of extension due to his pending appeal of the Coast Guard's response to his FOIA request, the Chair granted him a 60-day extension and notified him that if he did not respond and notify the Board that his case was ready for decision, she would close his case administratively without prejudice. In response, the applicant submitted his response to the advisory opinion and stated that he wanted the case to proceed.

appropriate pay billet; that his corrected record be reviewed by the next Reserve captain selection board with a letter explaining the anomalies resulting from these corrections; that, if selected for promotion by that board, his date of rank be backdated to what it would have been had he been selected for promotion to captain in xxxx; that he receive the back pay and allowances he would be due as a result of the backdating of his promotion; and that he receive the pay, allowances, and retirement points that he "would have [] earned except for mandatory retirement, based on the participation level of [his] last three years [of] service."

## SUMMARY OF THE RECORD

On July 26, 1979, the applicant was appointed an ensign in the Reserve. After three years on active duty, he was released to inactive duty in the Selected Reserve as a lieutenant junior grade. He advanced to lieutenant on February 1, 1985; to lieutenant commander on July 1, 1991; and to commander on June 1, 1996.

On his first OER as a commander, the applicant received one mark of 4 (on a scale of 1 to 7, with 7 being best), seven marks of 5, fourteen marks of 6, and one mark of 7 in the various performance categories. The reporting officer assigned him a mark of 6 on the comparison scale.<sup>2</sup>

From September 1, 1997, through June 16, 1998, the applicant served as the "prospective CO" of the PSU. His duties included "familiariz[ing himself] with the specialized functions of the Port Security Unit and facilitate relief" and "determining the status of the unit incident to its change of command." On the OER covering his service as prospective CO of the PSU, he received two marks of 4 in the categories "Evaluations" and "Health and Well-Being," ten marks of 5, and six marks of 6 in the various performance categories, and a mark of 5 on the comparison scale.<sup>3</sup>

Following this evaluation period as prospective CO, the applicant was assigned as the CO of the PSU. In March xxxx, the PSU participated in xxxxxxxxxx in xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx.

On June 2, xxxx, the Area Commander ordered all PSUs to hold a "small boat operational safety stand down" because of "numerous nonstandard boat mishaps

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<sup>2</sup> The comparison scale is not actually numbered. However, as with the performance categories, there are seven possible marks. The comparison scale mark is completed by the reporting officer. The instructions say that the reporting officer should assign a mark on the comparison scale by comparing the reported-on officer with all other officers of the same rank whom the reporting officer has known throughout his career. On the OER form, a mark of "6" meant that the reporting officer "strongly recommended [him] for accelerated promotion.

<sup>3</sup> See note 2 above. On this OER form, a mark of "5" meant that the applicant was rated to be an "excellent performer; give toughest, most challenging leadership assignments."

throughout the Coast Guard.” The applicant’s PSU conducted the safety stand down on June 20, xxxx. On June 21, xxxx, the Boat Division Chief reported to the applicant on the results of the stand down. Regarding the crewmembers’ discussions of safety during underway operations, he reported the following:

It was discussed at great length of a lack of discipline between coxswains when conducting “Force on Force” drills. Not a constant, but regular violation recognized by all coxswains of safety zone distances were happening, and that this practice must stop. A stricter adherence to safety distances must be observed or disciplinary action could take place if warranted. All of Boat Division’s MISHAPS have been a result of safety distance (Safety Zone) being violated for some reason.

On August 6, xxxx, the applicant wrote to the Area Commander regarding the results of the safety stand down. He wrote that “[m]any of the issues raised in [the Boat Division Chief’s letter] are internal to PSU xxx and will be addressed at the unit level.” However, he stated that three issues needed to be addressed on a broader scale: lack of standard rigging for a boat hoisting sling, lack of flotation body armor, and lack of radio headsets that permit the crew to hear radio transmissions.

At about 9:30 a.m., on Sunday, Xxxxxxx, xxxx, more than a year after the applicant assumed command of the PSU, two of the PSU’s 25’ TPSBs<sup>4</sup> collided at high speed in the wake of a large passenger ferry leaving the harbor. Each boat was estimated to be going about 50 to 55 knots,<sup>5</sup> and they hit head on. However, because one boat was at the top of a 3’ to 4’ wake while the other was at the bottom, the higher boat slid over the other before flipping, ejecting the crew, and landing upside down in the water. As the higher boat slid, its propeller passed less than six inches from the abdomen of a crewmember in the lower boat who had fallen to the deck. None of the five crewmembers on the two boats was seriously injured, but the boats sustained more than \$86,000 worth of damage—which was determined to be more than half their replacement value.

The mishap analysis report (MAR) identified unsafe operation of the TPSBs as the primary cause of the collision, as the boats were going too fast, too close to the ferry. The MAR noted that boat operations were too complacent, especially since the boats were not in communication with each other. The MAR concluded that the coxswains had lacked “situational awareness” and noted that they were qualified as UTL (utility) coxswains rather than TPSB (tactical or combat) coxswains. Moreover, they had had, on average, five hours of sleep the night before the collision because they had been released from duty at midnight on Saturday following required night training exercises. The MAR also made several recommendations about TPSB training and equipment that were not specific to the applicant’s PSU.

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<sup>4</sup> The abbreviation “TPSB” stands for “transportable port security boat.” However, when reference is being made to the use of a TPSB in tactical operations or to the qualifications of coxswains, it is sometimes used to mean “tactical” or “tactical port security boat.”

<sup>5</sup> In comparison to land speed, 50 knots is approximately 58 miles per hour.

From October 24, xxxx, through November 8, xxxx, the PSU participated in xxxx xxxxxxxxxxxx in the xxxxxxxxxxxxxxxx.

### *Applicant's Response to the Mishap Analysis Report (MAR)*

On November 29, xxxx, after reviewing the MAR, the applicant responded in a letter to the Commandant. He stated that he concurred with the facts and analysis in the MAR. He noted that although the MAR correctly pointed out that the coxswains involved in the accident were qualified only as UTL (utility) coxswains rather than TPSB or "combat" coxswains, the MAR "did not make a determination whether they were conducting UTL or TPSB operations at the time of the collision." The applicant stated that "the maneuver of 'wake crossing' is within the UTL qualification" since it is a common maneuver, although it was not safely performed by the two coxswains. Moreover, he pointed out, the PSU PQS did not provide authority for TPSB coxswain qualifications, and the six PSUs interpreted the term "TPSB coxswain" differently.

The applicant also agreed that complacency in boat operations was a factor in the collision as well as the fact that the coxswains and crews had performed required night training on Saturday evening.

### *Report of the Administrative Investigation (AIR)*

On January 28, xxxx, the investigating officer (IO) completed the report of the administrative investigation (AIR) into the collision on Xxxxxxx, xxxx. The IO noted that on Xxxxxxx, xxxx, a harbor tug pushing a 360' barge had radioed the Marine Safety Office to complain of several small Coast Guard boats "circling and engaging his vessel at high speeds, and 'cutting across his bow.'" The tug master had tried unsuccessfully to hail the boats via radio to ask them to stop "harassing" him. The Marine Safety Office also unsuccessfully tried to hail the boats. However, the incident was not reported to the PSU or up the chain of command. The IO found that similar complaints to the MSO and Group "over several years from the commercial maritime industry about PSU activities" had not been reported up the chain of command or to the command of the PSU because "[s]uch complaints and concerns were viewed as routine, and confirming of their own personal assessments of the PSU as a 'bunch of cowboys.'" The PSU's tactics were "aggressive and contrary to established rules of the road." In addition, captains of the commercial and civilian vessels reported that because of the Coast Guard's authority over their licenses, they did not press their complaints about the PSU boats' reckless driving and use of their vessels as practice "targets."

On Sunday, Xxxxxxx, xxxx, the IO reported, the Boat Division of the PSU was tasked with using up fuel in several 25' TPSBs so that the tanks would be easier to empty as the boats were to be transported overseas for Exercise Xxx xxxx. In an email

dated August 24, xxxx, the Boat Division Chief stated that he directed BMC C and PO1 P to have the coxswains “burn fuel” and “gave no specifics on ‘Do’ or ‘Don’t do any tactics’ or the like.” He stated that “no ‘structured’ training was scheduled,” but that the coxswains “know that they are responsible for following all rules of good seamanship and rules of the road ..., except when directly involved with the execution of ‘TPSB Tactics.’” BMC C stated in an email that his instructions were to “burn fuel” and that he delegated the assignment to PO1 P.<sup>6</sup> Most of the crewmembers told the IO that they were instructed only to “burn fuel” in the TPSBs. Two stated that they were going to do so by conducting “area fam[iliarization].”

Four TPSBs got underway with the following crews: (1) xxxx (coxswain) and xxx; (2) xxxxxx (coxswain) and xxxxxx; (3) xxxxxx (coxswain), xxxxxx, and xxxxxx; and (4) xxxxxx (coxswain), xxxx, xxxx, and xxxxxx. xxxxx and xxxx stated that they had informally agreed to operate together. As the four boats entered the channel, a large ferry with 323 passengers was leaving the harbor. As it passed, one coxswain admitted, the boats intentionally operated closely around the ferry and performed “hull sweeps.” Another crewmember admitted that in the past, they had operated in similar fashion around a local cruiseship. Passengers on the ferry later told the IO that the PSU’s “‘speedboats’ ... operated at moderate to high speeds alongside and around the ferry. ... They characterized the operation of the boats variously as ‘playing,’ ‘goofing off,’ and ‘showing off for the crowd.’” The assistant to the captain of the ferry stated that the four boats circled the ferry twice and twice “cut off” the ferry’s bow in a “reckless manner.” Just prior to the collision, two of the TPSBs were on the ferry’s port side and two were on the starboard side.

As the ferry left the harbor and increased its speed, one of the TPSBs on the port side of the ferry attempted at high speed to cross the wake to the starboard side at the same time that a TPSB on the starboard side attempted to cross the wake at high speed to the port side. There was evidence that at least one of the coxswains was attempting to “jump” or “launch off” the wake. The TPSBs collided bow to bow. The applicant had certified both boats’ coxswains as qualified to drive the TPSBs on March 12, xxxx. However, the IO reported that although the coxswains involved, xxxxxx and xxxxxx, were “certified as UTB coxswains,” they were “not qualified in TPSB tactics in accordance with current PSU training standards.”

The IO noted that during a “safety stand down” on June 20, xxxx, numerous areas of concern had been identified regarding the Boat and Engineering Divisions of the PSU, including a “noted ‘lack of discipline’ between coxswains conducting force on force drills”; “violations of safety zone distances”; and a “need for basic seamanship skills due to the lack of training.” The IO also noted that on the day of the collision, “no

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<sup>6</sup> There is no statement by PO1 P in the AIR, but crewmembers’ statements indicate that PO1 P was not in any of the four boats operating around the ferry.

training supervisor [was] on-scene during the evolution” and no formal training plan was prepared, although “[s]ome informal planning had occurred between several of the coxswains prior to deployment.” The IO also wrote that the “Unit Master Training Plan was insufficiently detailed and not always followed” and that the “Training SOPs at PSU xxx were not comprehensive and were not always followed.”

The IO cited the following as the direct causes of the collision:

- loss of situational awareness on the part of two coxswains who were “relative[ly] inexperience[d]” in operating TPSBs;
- insufficient communications, planning, and coordination among the coxswains;
- insufficient communications between the coxswains and the Boat Division Chief, whose guidance was “generic and allowed for complete discretion by coxswains”;
- insufficient communications among Coast Guard entities;
- absence of a training officer;
- insufficient communications between the boats and commercial vehicles;
- “grossly insufficient” operating standards due in part to a lack of proper, written operational and training instructions;
- lack of response by the command to the safety concerns identified during the safety stand down;
- lack of effective oversight by the Area Command, given the “length of time identified safety issues went without being properly addressed;
- a “large number of changes in key personnel and primary duty assignments within the unit’s wardroom, training section, and boat division,” which were not addressed by the unit’s command or the Area program managers; and
- the coxswains’ practice of conducting tactical training around civilian and commercial vessels without their knowledge or consent, which was “reprehensible, both eroding public confidence in the professionalism and judgment of the USCG, and lessening the effectiveness of unit training.”

The IO made many recommendations, including the following:

- The Coast Guard’s TRADET should develop training plans and procedures for PSUs and clear guidance for the PSUs to follow in their training and readiness preparations.
- The PSU should review and update the standard operating procedures and training instructions in light of the report and prepare a detailed plan for rectifying the identified problems.
- The PSU should have the Executive Officer appointed as the Safety Officer and should appoint Safety Supervisors.
- The PSU should update its Unit Master Training Plan and “include individual unit members’ progressive training toward qualification and proficiency.”

- The PSU should prepare written training plans for each training evolution and stress the importance of adhering to the plans.
- The PSU should have a training supervisor present at all times to observe training evolutions.
- Radio Guard and operating frequencies should be coordinated, and communications and status checks should be done without fail.
- No “vessels of opportunity” should be used without their fully informed consent; all vessels near a training evolution should be informed; the MSO and Group should be informed of all training activities at the command level; and broadcast notices of training should be filed at the MSO at least 24 hours in advance.

#### ***Written Statement by the Command Duty Officer for the AIR***

LT X, who was serving as the Command Duty Officer on XXXXXXX, xxxx, stated that he was responsible for shore operations that day. He “had read the plan of the day and was aware that Boat Division would be conducting training exercises.” However, when the boats got underway, he and the Boat Division Officer were attending Tactical Action Officer training, which was being conducted by the Boat Division Chief. LT X stated that he did not issue any patrol orders or communications plan and that it was his understanding that the Boat Division Officer and Boat Division Chief were responsible for underway operations that day.

#### ***Written Statement by the Applicant for the AIR***

On September 18, xxxx, the applicant wrote that he was in the office when he received the initial report of the collision. He arrived at the boat basin as the boats were returning. He ordered those involved to get dry clothing and medical assessments and ordered the Engineering Officer to devise a plan to right the inverted boat. He assigned an ensign to interview all the members involved, to document the boats’ condition with photographs, and to contact the ferry to try to identify witnesses. He then telephoned his supervisor, Captain X, and other Coast Guard offices to report the mishap. The AIR includes no background information or opinions from the applicant.

#### ***Disputed OER***

On July 28, xxxx, the Coast Guard Personnel Command (CGPC) entered the disputed OER prepared by the applicant’s rating chain into his record. The applicant’s rating chain consisted of the Captain X, Chief of the Area Operations Force Branch, who signed the OER as supervisor on May 8, xxxx; Captain Y, Chief of the Area Operations Division, who signed it as reporting officer on May 24, xxxx; and Vice Admiral Z, the Area Commander, who signed it as reviewer on May 24, 2005. Captain X had served as both the supervisor and the reporting officer for the OER the applicant received as prospective CO. Captain Y had served as the reviewer for the prior OER.

The OER indicates that from June 17, 1998, through May 24, xxxx, the applicant served as the CO of the PSU and was “[r]esponsible for the performance of all command functions of an overseas deployable Port Security Unit consisting of 5 Active Duty and 140 Selected Reserve personnel ... [and] for two operational deployments during this reporting period to xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx in xxxxxxxxxxxxxxxx xxxxx (March xxxx – 12 Days ADT [active duty for training]) and to xxxxxxxx Xxx xxxx xx in the xxxxxxxxxxxxxxxx (October xxxx – 17 Days ADT),” in addition to other duties.

On the disputed OER, the applicant received three marks of 4 in the categories “Directing Others,”<sup>7</sup> “Evaluations,” and “Judgment”<sup>8</sup>; ten marks of 5 and five marks of 6 in the other performance categories; and a mark of 4 on the comparison scale.<sup>9</sup> The disputed OER contains no mention of the boat collision or the investigations. It does contain many positive statements, such as the following:

- “Competed the first ‘Heavy Lift’ overseas deployment of a fully staffed PSU (117 personnel/60 tons of equipment) during Xxx xxxx (xx) xx. The detailed advance planning and careful execution of the plan resulted in a logistically smooth operation. [He] established operations within 24 hours of arrival in country.”
- “Developed tactics to employ Air Force aircraft in support of Harbor Defense mission and demonstrated the value of those tactics during an operational test ... .”
- “Pre-planning for this exercise created a level of xxxxx-US exercise interaction not previously possible.”

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<sup>7</sup> The applicant had previously received a mark of 5 for “Directing Others.” The written standard for a mark of 4 is a “leader who earned others’ support and commitment. Set high work standards; clearly articulated job requirements, expectations and measurement criteria; held subordinates accountable. When appropriate, delegated authority to those directly responsible for the task.” The written standard for a mark of 6 is an “inspirational leader who motivated others to achieve results not normally attainable. Won people over rather than imposing will. Clearly articulated vision; empowered subordinates to set goals and objectives to accomplish tasks. Modified leadership styles to best meet challenging situations.”

<sup>8</sup> The applicant had previously received a mark of 5 for “Judgment.” The written standard for a mark of 4 is “[d]emonstrated analytical thought and common sense in making decisions. Used facts, data, and experience, and considered the impact of alternatives. Weighed risk, cost and time considerations. Made sound decisions promptly with the best available information.” The written standard for a mark of 6 is “[c]ombined keen analytical thought and insight to make appropriate decisions. Focused on the key issues and the most relevant information, even in complex situations. Did the right thing at the right time. Actions indicated awareness of impact and implications of decisions on others.”

<sup>9</sup> See note 2 above. On the disputed OER form, a mark of “4” meant that the applicant was rated to be a “good performer; give tough, challenging assignments.” In his prior OER, he received a mark of “5,” which meant that the applicant was rated to be an “excellent performer; give toughest, most challenging leadership assignments.”

- “Prepared the unit for its first MLC Compliance Inspection which rated several areas of the unit as ‘Excellent.’”
- “[The applicant’s] leadership is best measured by the accomplishments of PSU xxx. The operational successes of xxxxxxxxxxxxxxxx and Xxx xxxx xx along with the ROA award are notable examples.”
- “[He] took early and successful action in the planning process for Xxx xxxx xx to ensure inter-command coordination and prevent previous year’s confusion.”
- “Particularly noteworthy are the operational achievements of PSU xxx, the XO mentoring, and successful completion of the Naval War College Diploma. The latter is a rare accomplishment for an officer not on active duty.”
- “[The applicant] continued to craft and hone the capabilities of PSU xxx. Raised the level of operational proficiency ... . [He] proved himself in the joint and combined operating environment.”
- “[The applicant] aggressively planned and attended 2 major field training exercises this period. Completed all goals at each, leading the xxxxxxxxxxxxxxxx community in multiple aggressor tactics and extensive exercise event coordination with host nation. [He] initiated the analysis of underwater threat and commenced prototype of portable sonar gear on an extra unit boat. Quickly established credibility throughout the xxxxxxxxxx community from his professional demeanor and knowledge. [He] is well qualified for future assignments to staff positions in the xxxxx community. Recommended for promotion to Captain.”

***Applicant’s Letter to the Area Commander Regarding the AIR***

On June 23, xxxx, the Area Commander sent the applicant a copy of the AIR but noted that the report was still undergoing legal review and would ultimately have to be approved by the Commandant’s Chief of Staff. The Area Commander directed the applicant to take action upon all of the recommendations in the AIR. He asked for “a response, in writing, prior to your unit’s next drill weekend as to what actions you have already taken to ensure accidents such as the one investigated here are not repeated.”

On July 14, xxxx, the applicant responded to the Area Commander concerning steps the PSU had taken in response to the AIR and about his objections to certain findings in the AIR. Regarding training plans, the applicant agreed with the recommendation that there be a plan for every evolution but noted that the PSUs were supposed to use training plans issued by TRADET rather than develop their own. Moreover, he noted that deviations from plans “often occur and nearly always for reasons well beyond the capacity of the unit to control,” such as unforeseen

circumstances that make it unsafe or unwise to follow the established plan. Regarding the presence of a “training supervisor,” the applicant stated that the PSU always designated such a person in writing for major evolutions and followed standard military protocol of having the senior member present supervise minor evolutions.

The applicant stated that training on “vessels of opportunity” was a *per se* violation of the NAVRULES and was never a sanctioned practice at his command. Following receipt of the AIR, he issued new standing orders to coxswains and boat crews incorporating the IO’s recommendations regarding controls on underway training.

Regarding radio communications, the applicant stated that while there was some evidence of laxity among the boat crews and the local MSO, the problems were largely caused by ambient noise and equipment constraints.

The applicant also asked the Area Commander to review the AIR carefully since, he stated, the findings and opinions contained several errors, including the following:

- As shown in a letter assigning primary and collateral duties at the PSU dated February 21, xxxx, the PSU had a Safety Officer at the time of the accident. The Engineering Officer had been appointed the Safety Officer because most of the safety issues that arose at the PSU were in the Engineering Division. The applicant also noted that although the PSU did not have its own safety committee, it participated in the regional ISC’s safety committee, as is permitted for small units. The MK3 who attended the safety committee meetings was the PSU’s *de facto* Safety Supervisor although his appointment was not documented before the AIR was issued.
- PO1 P had been appointed to serve as the supervisor for the evolution. Therefore, the applicant argued, the finding that there was no training supervisor on the scene was erroneous.
- The applicant objected to the finding that there was no lesson plan for the evolution. He stated that it was a logistical evolution (“burn fuel”) and not a training evolution. Therefore, he argued, a plan was not expected.
- The applicant objected to the findings that the Unit Master Training Plan was insufficiently detailed and not always followed and that training SOPs were not comprehensive and were not always followed. He stated that the unit instructions attached to the AIR did not include those he had issued after July 1998. He further argued that the fact that training plans and training SOPs were not being followed at the time of the collision was not probative of the IO’s allegation since the boats were on a logistical evolution rather than a training evolution.

- The applicant objected to the finding that the safety concerns identified during the stand down had not been addressed. He alleged that the written report itself was “the first effort of the command to address the concerns raised in the safety stand down” and that since the report was not required, it should be recognized as a proactive response by the command to the issues raised during the stand down.

### *Action on AIR by Reviewing Authorities*

On August 12, xxxx, the Area Commander, as Intermediate Reviewing Authority, forwarded the AIR to the Commandant for final action. The Area Commander approved most of the findings of fact in the AIR. Notably, he removed the finding that the Unit Master Training Plan “was insufficiently detailed and not always followed” as well as the finding that the “[t]raining SOPs at PSU xxx were not comprehensive and were not always followed” because they were “statements of opinion” rather than factual findings. The Area Commander also deleted the word “training” from the IO’s statement that “no formal training plan was prepared for this evolution.”

The Area Commander stated that the “proximate cause of the collision ... was the substantial lapse in judgment, the failure of prudent seamanship, and the loss of situational awareness by the respective coxswains.” He noted that the boats had no plan or on-scene coordination because the PSU had “failed to undertake, in advance, operational coordination and planning for the day’s exercises, and had failed to establish clear objectives and operational parameters for their operations ... [T]hese serious deficiencies set the scene for, and indirectly contributed to the causation of, the collision. In addition, the Area Commander found that the investigation “brought to light an operational training environment apparently prevalent at PSU xxx that is of deep concern: the use of civilian vessels as foils of opportunity in conducting asset protection training exercises. ... The investigation revealed that the use of the passenger ferry as an unwitting exercise foil was not an isolated incident. Prior similar incidents were also reported—one occurring as recently as the day prior to the collision and involving a tug-and-barge combination—and some involving the exercise of even more aggressive TPSB tactics, such as high-speed head-on targeting and intercepts of other passenger-carrying vessels.” He further found that the behavior of the boats had harmed the Coast Guard’s reputation as a “regulatory agency not itself prepared to observe the minimal standards of seamanship.”

The Area Commander required disciplinary action to be taken against the two coxswains and directed that Administrative Letters of Censure be prepared for QM2 O, the senior coxswain on the scene, and LT x, the Command Duty Officer, for his “failure to ensure that the day’s TPSB operations were properly planned and coordinated.” He also directed that Administrative Letters of Censure be prepared for the PSU’s Commanding Officer (the applicant), Executive Officer, Operations Officer, Boat Division Officer, and Boat Division Chief for the following reasons:

Collectively and individually, these supervisors failed in their obligations to establish appropriate general operating parameters, evolution objectives, communications plans, and radio guard procedures for the sorties of the unit's TPSBs. They failed to effectively oversee, and at minimum implicitly condoned, the practice of repeatedly engaging commercial vessels as foils for TPSB tactics exercises, without the assent of or notification to the vessel master. These supervisors directed coxswains, who were not TPSB-coxswain certified, to launch; while underway, these coxswains then conducted TPSB tactics and high-speed maneuvering and boathandling without direct oversight of an instructor or other properly certified supervisor. These supervisors thus failed to reconcile the day's operational plan with the certification level of the personnel involved, or at least implicitly condoned unsupervised underway activities for which the participants were not qualified. Ultimately, they failed to ensure the paramount goal of safety.

The Commandant took final action on the AIR on May 4, xxxx. He concurred with the findings and actions of the Area Commander.

### *Final Action on MAR*

On November 15, xxxx, the Commandant's Chief of Staff took final action on the MAR. After describing the mishap, the Chief of Staff further stated the following:

3. CAUSAL FACTORS. The primary cause of this mishap was the unprofessional and unseamanlike conduct of the TPSB coxswains, specifically, failure to conduct a pre-mission brief, failure to communicate with other craft operating in the near vicinity, failure to maintain an appropriate distance from the ferry, and failure to safely maneuver boats in the channel. The Mishap Analysis Board and testimony at the Commandant's Boat Safety Board identified several systemic training, organizational, and leadership deficiencies that also contributed to the mishap.

4. LESSONS LEARNED. The types of operations conducted by the PSU TPSB are, by their nature, very demanding. Risk management, training, and adherence to established doctrine is therefore especially important. In the case of this mishap, the unit was not operating in compliance with numerous operating and safety requirements, and the command had not ensured the proper training and qualification of the TPSB crewmembers. In addition to the failures on the part of the TPSB crewmembers, this appears indicative of both a general lack of command attention, and the failure of the Coast Guard to support this and other PSUs with the regular training and assessment required by the approved OLSP.

### *Applicant's Subsequent Service*

Following his service as CO of the PSU, the applicant became the Assistant Operations/Plans Officer for xxxxxxxxxxxx. On an OER received by CGPC on July 23, xxxx, the applicant received five marks of 5 and thirteen marks of 6 in the various performance categories and a mark of 5 on the comparison scale. The xxxxxxxxxxxx of xxxxxxxxxxxx—a Navy captain who served as the applicant's reporting officer—wrote that the applicant was "highly recommended for promotion to Captain." The reviewer,

a Coast Guard captain, concurred in the comparison scale mark of 5 and noted that “[w]hile the completion of the report was based on a slightly different standard, I concur with their intent to characterize [the applicant’s] performance as outstanding.” However, the applicant failed of selection for promotion in xxxx.

On his next OER as the Assistant Operations/Plans Officer for xxxxxxxx, the applicant received one mark of 5, eleven marks of 6, and six marks of 7 in the various performance categories. The Commodore assigned him a mark of 7 on the comparison scale<sup>10</sup> and wrote that the applicant had his “highest recommendation for promotion to Captain.” The reviewer, a commander serving as Chief of Administration for the xxxxx Area, assigned the applicant a mark of 6 on the comparison scale<sup>11</sup> and noted that the “fact that he was chosen to lead a large contingent of Navy, Coast Guard, and Marine personnel within a designated ‘Hostile Fire’ area immediately after the September 11<sup>th</sup> attacks is a powerful reflection on his leadership and management abilities.”

The applicant, however, failed of selection for promotion to captain a second time in xxxx, and so was retired on June 30, xxxx.

### **APPLICANT’S ALLEGATIONS**

The applicant alleged that the disputed OER was prepared by his rating chain after they reviewed an erroneous report of an administrative investigation (AIR) into a collision between two of the PSU’s 25’ “TPSB” boats on Xxxxxxx, xxxx. He alleged that the AIR, which was completed on January 29, xxxx, contained many factual errors, which were later corrected by the Xxxxx Area Commander and by Headquarters. Moreover, neither he nor the on-scene supervisor at the time of the collision, PO1 P, were interviewed by the administrative investigator. The applicant also alleged that the mishap analysis report (MAR), which was completed on November 16, xxxx—long after his OER was prepared—“presented [his] command in a much more favorable manner.” The applicant argued that because the disputed OER was prepared after the erroneous AIR was issued but before the corrections were made and before the MAR was completed, the members of his rating chain based their assessments of his performance on the inaccurate information in the AIR.

The applicant alleged that the AIR was erroneous in stating that the coxswains of the boats that collided were “not qualified in TPSB tactics in accordance with current PSU training standards.” The applicant alleged that in xxxx “there was no directive requiring or defining qualification in TPSB tactics.” There were only proficiency qualification standards (PQS) that did not supplant the official coxswain qualification

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<sup>10</sup> A mark of “7” on the comparison scale means that, in comparison with all the other commanders the reporting officer had known, the applicant was the best.

<sup>11</sup> On the reviewer’s page, a mark of 6 meant that, in comparison with other commanders, the applicant was “strongly recommended for accelerated promotion.”

standards. He stated that the PSU had adopted a two-tier system of “utility coxswains,” who were qualified in accordance with the manual and “permitted routine operation of the boats,” and “combat coxswains,” who could operate the boats “with live weapons and/or engage[] in combat simulation operations.” The boat operations scheduled for the day of the collision were routine and appropriate for “utility coxswains” to perform.

The applicant alleged that the AIR was erroneous in that it stated that there was no Training Supervisor on the scene. The applicant stated that the Boat Division Chief assigned another petty officer, PO1 P, to serve as the supervisor for the evolution as stated in an email from the Boat Division Chief included in the AIR.

The applicant alleged that the IO’s conclusions that the “Unit Master Training Plan was insufficiently detailed and not always followed” and that “Training SOPs at PSU xxx were not comprehensive and were not always followed” were later removed by the Commandant “due to the absence of factual support.”

The applicant complained that the IO based his finding that the PSU’s boat operating standards were insufficient in part on the lack communications. He alleged that this conclusion is unfair because the noise of the boats does not permit the crews to hear radio transmissions and that the problem was well known by the Coast Guard long before the collision. The applicant also complained that the IO faulted the lack of a “formal plan” for the evolution when there is no “requirement, practice or custom that required a written plan for this type of evolution. The statement is untrue in the context that there was no plan. A plan did exist for this evolution and it is described in [the Boat Division Chief’s email and the Command Duty Officer’s statement]” in the AIR.

The applicant argued that the fact that, following the safety “stand down,” he wrote a letter to the Area Commander about the results and the need for action at a higher level on three issues disproves the IO’s finding that the issues identified during the stand down had not been properly addressed by the command. The applicant also cited the fact that during Xxx xxxx in October xxxx, a coxswain from his PSU terminated an exercise when a Korean coxswain violated safety parameters as evidence that the issues raised during the safety stand down were properly addressed.

The applicant strongly objected to the IO’s implication that the PSU’s boats had a standing practice of using maritime traffic as training “vessels of opportunity.” He alleged that the AIR contained insufficient evidence of such a practice.

The applicant pointed out that the disputed OER is notably weaker than his prior OERs. He alleged that the weak marks and comments in the disputed OER do not comport with his PSU’s excellent operational performance during two deployments or with its administrative performance during his tenure, which he alleged was “compa-

rable or superior" to that of other PSUs. Moreover, the applicant alleged, his reporting officer never discussed any performance issues with him except with respect to the AIR.

The applicant argued that his OER should have been prepared by "the officer having greatest cognizance" of his performance. He alleged that because his PSU completed two operational overseas deployments during the evaluation period, both in support of xxxxxxxxxxxxxxxx, the Commodore of that organization should have prepared his OER. He alleged that neither the supervisor nor reporting officer on his rating chain were "ever physically on-site during the performance of duties reported."

The applicant concluded that the lower marks in the disputed OER were clearly caused by the erroneous findings in the AIR because the PSU had completed two highly successful overseas deployments during the evaluation period and the PSU's administration was comparable to or better than that of other PSUs.

### **VIEWS OF THE COAST GUARD**

On December 11, 2003, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG argued that to establish that the disputed OER is erroneous or unjust, the applicant must that it was "adversely affected by a 'clear and prejudicial violation of a statute or regulation, or alternatively, a misstatement of a significant hard fact.'" *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *see also Hary v. United States*, 618 F.2d 704 (Cl. Ct. 1980). The JAG stated that absent evidence to the contrary, the Board must presume that the applicant's rating chain evaluated his performance correctly, lawfully, and in good faith. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

The JAG stated that, under the Administrative Investigations Manual, an investigation is not actually "complete" until the Final Reviewing Authority takes action. He pointed out that the applicant admitted that "the final product 'corrected' errors in the pre-decisional stage of the investigation. This is proof of the system work[ing] as intended." The JAG pointed out that both the applicant's supervisor and reporting officer have flatly denied in their declarations (see below) that they considered the incomplete AIR in preparing the OER. He argued that the applicant has not proved that, contrary to their declarations, the rating chain members considered the AIR when preparing his marks. Moreover, the JAG pointed out that under Article 10.A.4.f.1. of the Personnel Manual, the rating chain was not prohibited from considering and mentioning the facts underlying the on-going investigation in the OER, though they were prohibited from mentioning the investigation itself. However, the rating chain in this case chose not to mention or even consider the facts reported in the incomplete AIR.

The JAG stated that the fact that the applicant received higher marks in prior evaluation periods does not prove that the disputed OER is erroneous or unjust. He stated that officers are marked against the written standards on the OER form—not against their prior performance or the performance of other officers. See *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981).

The JAG noted that the applicant did not submit a reply to the disputed OER as was his right under Article 10.A.4.g. The right to reply, he argued, “provides the Reported-on Officer ... the opportunity to affirmatively raise allegations of impropriety in an immediate and proactive manner. The JAG argued that the applicant’s failure to submit an OER reply “should be considered as relevant evidence that he accepted his rating official’s characterization of his performance as described in the OER at issue. While not determinative of his due process rights to apply to the BCMR, his ostensible failure to act is probative of his state of mind upon receipt of the disputed OER.”

The JAG attached to his recommendation and adopted a memorandum on the case prepared by CGPC. CGPC stated that the disputed OER was reviewed for errors and found to be in compliance with regulations on July 28, xxxx. Although a published copy of the applicant’s rating chain could not be found, the applicant’s rating chain was the same as that for the commanding officer of the Area’s only other PSU.

CGPC alleged that the applicant is “unable to demonstrate what specific inaccuracies exist” in the disputed OER. CGPC stated that, although the applicant alleges that his rating chain evaluated his performance as substandard and weak in the disputed OER, it contains no derogatory marks or comments. CGPC pointed out that neither the applicant’s supervisor nor reporting officer assigned him a mark lower than a 4 in the disputed OER and that the reporting officer recommended him for promotion to captain. CGPC argued that the assigned marks in the disputed OER are supported by the written comments and by declarations CGPC sought from the supervisor and reporting officer (see below).

CGPC noted that the applicant’s supervisor had served as both the supervisor and reporting officer for the immediately preceding OER, which covered the applicant’s service as prospective CO of the PSU, and that the reporting officer had previously served as the reviewer. CGPC argued that the applicant’s comparison of the marks in the disputed OER with marks he received on prior OERs is “irrelevant because OERs reflect a snapshot of performance for a Reported-on Officer at one assignment for one reporting chain during one reporting period.” CGPC noted that, although the marks are higher in the OER he received as prospective CO, his “duties changed substantially” when he became the CO. In addition, his reporting officer changed, and the term of the disputed OER was twice as long as that for the OER he received as prospective CO.

Regarding the AIR, CGPC stated that the disputed OER “makes no explicit reference to the [investigation] or to the mishap” and that nothing in the OER or in the declarations of the supervisor and reporting officer supports the applicant’s allegation that the AIR “played any role in the preparation of the OER.”

Regarding the applicant’s complaint that he was not counseled, CGPC stated that under Articles 10.A.2.d.2.e. and f., a supervisor is supposed to counsel a reported-on officer and provide performance feedback whenever the latter requests it and whenever the supervisor deems it appropriate. CGPC noted that Article 10.A.1.c.5. of the Personnel Manual provides that “performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area” and that “[n]o specific form or forum is prescribed for performance feedback except for ensigns and lieutenants (junior grade).” CGPC argued that the declarations of the rating chain “cite many instances in which they effectively monitored and managed Applicant’s performance,” even though they were based at a distance from the PSU.

### *Declaration of the Supervisor, Captain X*

The supervisor for the disputed OER, Captain X, who is now retired, stated that, although he was the applicant’s direct supervisor, “I did not routinely observe [the applicant’s] performance on a day-to-day basis. However, I did speak with him often, visited the unit periodically, and received occasional feedback on the unit’s performance from my staff and other ... Area staff components.” He described the applicant as “a hard-working, dedicated and capable officer who performed his job well.” Captain X also stated the following:

Like most officers, [the applicant] had areas where he was particularly strong and those that I felt were not so strong. He was a particularly good administrator and worked hard at ensuring his unit’s administrative responsibilities were correctly fulfilled. ... I also felt, however, that he was not as strong in some of the operational areas. In particular, his direct oversight of operational activities as well as his willingness to make quick, necessary operations decisions were areas I had come to believe were in this category. I did, however, feel that his skills/performance in these areas were acceptable and would strengthen as he spent more time in the Commanding Officer position ... . While I did not conduct any formal counseling sessions regarding this, I did have informal discussions with him where I encouraged a more hands-on approach to his operational leadership duties.

At the time of the [preparation of the disputed OER], I was aware that [the applicant’s] unit had suffered a serious boating accident during this particular reporting period and that an investigation had been ordered. The investigation had not been completed by the time the OER was due and I was fully aware that the accident and the surrounding details should not be considered in my evaluation of his performance. I felt that my views on [his] operational capabilities as well as his other skill areas were formulated with all the other input I received about his performance, including my own observations, comments by my staff who worked with [the PSU], and reports from the various exercises that [it] participated in.

I discussed the evaluation of [the applicant's] performance with [the reporting officer], at the time of the OER's submission. I felt then as I do now that my evaluation of [the applicant's] performance was both accurate and fair, and was not influenced by the boating accident that involved [his] personnel.

### ***Declaration of the Reporting Officer, Captain Y***

Captain Y, who is now retired, stated that the applicant's performance was very good overall and worthy of the recommendation for promotion in the disputed OER. He also stated the following about the preparation of the OER:

[A]t no time did I mention or rely upon the findings of the [AIR] dated 28 January xxxx for any of the observations in the OER. This investigation was incomplete and it was, therefore, inappropriate for me to use this for the OER in question. I did rely upon my personal observations, the observations of my staff and specifically those of [CDR R] concerning the outcome of xxxxxxxx Xxx xxxx to which [the applicant's] unit was assigned. [The Area Commander], my boss at the time, also provided comments following his and [CDR R's] trip [overseas] to observe the performance of our personnel during Xxx xxxx. I also relied upon the observations of [Captain S] USCGR who was assigned to my staff specifically to address Reserve issues for me. At no time did I find [the applicant's] performance to be "substandard." In fact, there were many areas [in] which I found his performance to be above average to excellent [such as during the MLC Compliance Inspection] which I felt was a direct reflection of [his] administrative expertise.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On March 3, 2006, the applicant submitted his response to the Coast Guard's advisory opinion.<sup>12</sup> He argued the JAG misstated the burden of proof he bears. He noted that in *Roth v. United States*, 378 F.3d 1371, the court held that the applicant had to demonstrate "sufficient evidence of probable material error or injustice." Furthermore, citing *Yee v. United States*, 206 Ct. Cl. 388, he argued that the "military correction boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief." The applicant stated that his case is analogous to that of *Skinner v. United States*, 219 Ct. Cl. 322, in which the court overturned a BCMR decision not to remove an officer's evaluation even though one member in the rating chain had erroneously believed that the plaintiff had evaded taking an unannounced pilot's qualification test when, in fact, the plaintiff had taken the test.

Regarding the Coast Guard's claim that the AIR was not considered by his rating chain, the applicant pointed out that the IO was a direct subordinate of Captain Y, his reporting officer. Therefore, when he prepared the disputed OER in May xxxx, Captain Y had detailed information about the collision, much of which was erroneous and was

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<sup>12</sup> See footnote 1.

later corrected by the Area Command in August xxxx. The applicant stated that although Captain Y has sworn that he did not rely on the AIR, he has not sworn that he did not rely on the underlying, erroneous information provided by the IO. The applicant argued that “[g]iven the seriousness of the event, [Captain Y] would have failed to perform his reporting duties properly had he not considered the underlying circumstances.” Therefore, he argued, the Board should presume that Captain Y considered the underlying circumstances as erroneously reported by the IO in preparing the disputed OER. Moreover, the applicant alleged, the reviewing authorities corrected only two of six errors in the AIR.

The applicant alleged that the fact that the collision is not mentioned in the disputed OER does not mean that it was not considered because the Personnel Manual does not require written comments to support a mark of 4, as a mark of 4 is officially considered average, or the “expected level of performance,” even though a 4 is “well below the norm of officers in the grade of Commander.” Therefore, absent other negative information about his performance, he argued, the Board should assume that the marks of 4 were based on the erroneous information in the AIR.

The applicant argued that the Board should consider the quality of his other OERs as evidence that the disputed OER is erroneous because the “entire system of officer promotions is built around the concept of continuity of performance. Officers are selected for promotion based on their past history with the expectation that their demonstrated history of performance will continue.” Moreover, he pointed out, the Board has sometimes considered an officer’s other OERs in past cases. He argued that past decisions “coupled with the statutory design of the officer promotion system, all support the argument that officer performance levels are expected to follow a trend, and that deviation from the trend must be accompanied by an explanation.”

The applicant stated that he did not file an OER reply because he received it in May xxxx and had only 21 days to file a response. However, he was not aware of the erroneous information in the AIR until after 21 days had passed. In addition, he pointed out that the OER reply is not a means to correct an erroneous or unjust OER, which can only be done through the Personnel Records Review Board or the BCMR.

The applicant argued that the fact that CGPC could not find a published rating chain is an admission that the rating chain was unsanctioned and, thus, that the disputed OER was produced in violation of regulations. The applicant argued that the fact that the other CO of a PSU in the Area had the same rating chain merely indicates that the violation was repeated, which “should not give legitimacy to the violation.”

The applicant argued that Captain X did not qualify as his supervisor in accordance with the description of that position in the Personnel Manual because the applicant only met him one time, at the applicant’s incoming change of command ceremony,

and only “spoke with him briefly, by telephone, twice during the reporting period[:] Once to report the TPSB collision and once during the course of the investigation to coordinate actions of the Investigating Officer.” Therefore, he argued, the Navy officer, Captain P, who served as his supervisor during the two-week deployment for xxxx xxxxxxxx in March xxxx and during the three-week deployment for Exercise Xxx xxxx in October xxxx was “the officer who most closely [met] the definition of “Supervisor” contained in the Personnel Manual.” For the same reasons, he argued that Captain P was most qualified to serve as his reporting officer, and was qualified to serve as both under Article 10.A.2.e.1.e. of the Personnel Manual.

The applicant pointed out that in BCMR Docket No. 2003-011, the Board ordered the Coast Guard to remove an OER that had been prepared by an unsanctioned rating chain and to replace it with one prepared by the published rating chain. The Board noted that the members of the published rating chain were available to prepare the OER and that the officers who had prepared the disputed OER “had no opportunity to observe his performance.”

The applicant alleged that in a recent conversation with Captain Y, he was told that when the Area Commander, who served as the reviewer for the disputed OER, attended xxxxx Xxx xxxx, he received some negative information about the applicant’s performance from Captain P, and that the Area Commander related this information to Captain Y upon his return to the Area. However, Captain P told him that his negative reports were about Commander R, another Coast Guard officer, and believes that the Area Commander may have confused him with the applicant.

In support of this claim, the applicant submitted a sworn declaration from Captain P, who wrote that as the senior xxxxxxxx officer at xxxxxx Xxx xxxx in October xxxx, he was very dissatisfied with the performance of one Coast Guard officer, Captain F (who was also the IO for the collision at the PSU). The applicant reported directly to Captain F during the exercise. Captain P wrote that, unlike Captain F, the applicant was proactive in planning for the exercise, and Captain P “noted no circumstances that could have generated negative comments or criticisms of [the applicant]” during the exercise.” However, Captain P stated, his negative comments about Captain F “could have been mistakenly attributed to [the applicant] by others simply because he was the only other Coast Guard Commanding Officer participating in the exercise.”

Captain P also stated that although he was not present on location during xxxx xxxxxxxxxxxxxxxx in March xxxx, he received a detailed briefing on the execution of the exercise and a critique of each of the units. He stated that no negative comments were made about the applicant during this deployment either.

Captain P further noted that, in his declaration, Captain Y stated that when preparing the disputed OER, he relied in part on reports from Captain S, who was assigned

to his staff specifically to address Reserve issues. Captain P stated that both the applicant and Captain S worked for him at NCW Group One in xxxx through xxxx. He stated that they had very different leadership styles, as Captain S made quick decisions while the applicant was “more thoughtful and deliberate,” but that they were “equally effective leaders and managers.” Captain P stated that Captain X’s comments in his declaration about the applicant’s operational decisionmaking “are highly consistent with the differing command styles employed by [Captain S and the applicant].” Therefore, although Captain X did not attend Xxx xxxx xxxx, he appears to have relied on Captain S’s assessment of the applicant’s performance.

On behalf of the applicant, Captain P prepared a proposed substitute OER for the disputed OER. The proposed substitute has four marks of 5, twelve marks of 6, and two marks of 7 in the various performance categories and a mark of 7 on the comparison scale.<sup>13</sup> In addition, Captain P prepared highly laudatory comments regarding the applicant’s potential for greater leadership responsibilities, including the comment that the applicant “possesses a mastery of the Naval Coastal Warfare/Port Security mission that is unmatched by other Coast Guard officers.”

The applicant stated that his FOIA request, which was incompletely fulfilled, concerned publications that would show how the PSU’s problems resulted from systemic, programmatic weaknesses that could only be fixed at a higher level rather than weaknesses in his own performance. He stated that PSUs “were made subject to training and qualification requirements that could not be sustained within the limitations of a reserve training schedule,” and that he had raised this issue at the xxxx PSU Commanding Officer’s Conference. He further alleged that documents he is seeking through FOIA would show that that he “had been diligent in the manner that I trained and qualified the TPSB crews.”

The applicant argued that the Coast Guard’s failure to respond completely and timely to his request for information under FOIA on January 8, xxxx, has put him in “a very untenable position” and “impeded [his] ability to meet [his] burden of proof.” Therefore, he argued that the Board should assume that he has proved the point that he was trying to prove through his FOIA request—that his “performance in the training and qualification of TPSB Coxswains and Crewmembers equaled or exceeded that of the other five PSU commanding officers.” Therefore, his performance marks in these areas should equal or exceed those awarded to other PSU COs.

The applicant stated that since almost three years have passed since his retirement, he is no longer requesting reinstatement to an active status since it would be “very disruptive to other officers presently serving” in the xxx community. Instead, he wants to be “reinstat[ed] to an active status only if selected for promotion to O-6.”

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<sup>13</sup> See footnotes 3 and 9 above.

Therefore, he argued, he should be entitled to “front pay” only up to the date that this Board renders a decision. The applicant also noted that if he had been timely selected for promotion to O-6 in xxxx, he would have been eligible to compete for O-7 after two years in grade. Therefore, he asked the Board to order the Coast Guard to convene special selection boards under 10 U.S.C. § 628 to consider him for promotion.<sup>14</sup>

### APPLICABLE LAW

Article 10.A. of the Personnel Manual (COMDTINST M1000.6A) governs the preparation of OERs. Article 10.A.1.b.1. provides that “[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Each OER is prepared by the reported-on officer’s “rating chain” of senior officers: the supervisor, the reporting officer, and the reviewer. Article 10.A.2.d.(1) of the Personnel Manual in effect in xxxx states that “[t]he Supervisor [for an OER] is normally that individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of directives and requirements.” Article 10.A.2.e.(1) states that “[t]he Reporting Officer is normally the supervisor of the supervisor.” Article 10.A.2.b. provides that area and district commanders and commanding officers are responsible for designating and publishing rating chains.

Article 10.A.4.c.4. instructs supervisors to make marks and comments for the first 13 performance categories on an OER as follows (virtually identical instructions are provided in Article 10.A.4.c.7. for reporting officers, who complete the rest of the OER):

(b) For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards--not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

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(d) In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her own observations, from those of any secondary supervisors, and from other information accumulated during the reporting period.

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<sup>14</sup> Title 10 U.S.C. § 628 authorizes “the Secretary of the military department concerned” to convene a special selection board when an officer is not considered for promotion due to an administrative error. However, for the purposes of Title 10 U.S.C., “The term ‘military departments’ means the Department of the Army, the Department of the Navy, and the Department of the Air Force.” 10 U.S.C. § 101(a)(8). Therefore, the Coast Guard is not authorized to convene special selection boards.

(e) Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

Article 10.A.4.c.8.a. instructs the reporting officer to complete the Comparison Scale on an OER by “fill[ing] 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.”

Article 10.A.4.f.1. provides that rating chain members shall not “[m]ention [in an OER that] the officer’s conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination investigations) except as provided in Article 10.A.3.c. Referring to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 10.A.4.g. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.”

Article 10.A.4.g. permits a Reserve officer on inactive duty to file a reply to any OER within 14 days of receipt of the official copy from CGPC “to express a view of performance which may differ from that of a rating official.” The reply is not an appeal, but it and any written responses to it by the rating chain are included in the officer’s file along with the OER.

Under Article 14.B.3. and COMDTINST 1070.10, officers may apply to the Personnel Records Review Board (PRRB) for the correction of any OER within a year of the date the OER was entered in the officer’s record.

## **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 alleged that the disputed OER is erroneous and unjust and asked the Board to replace it with one prepared by a Navy officer, Captain P. To estab-

lish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a “clear and prejudicial violation of a statute or regulation or, alternatively, a misstatement of a significant hard fact.”<sup>15</sup> The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.<sup>16</sup>

3. The JAG argued that the applicant’s failure to submit an OER reply “should be considered as relevant evidence that he accepted his rating official’s characterization of his performance as described in the OER at issue. While not determinative of his due process rights to apply to the BCMR, his ostensible failure to act is probative of his state of mind upon receipt of the disputed OER.” The applicant argued that the Board should not interpret his failure to file a reply as the JAG suggested because he did not have an opportunity to file a reply after he saw the AIR and because an OER reply is not a means of correcting the content of an OER. The applicant, however, is mistaken in alleging that he did not have a chance to file an OER reply after viewing the AIR. Under Article 10.A.4.g. of the Personnel Manual, an OER reply must be filed within 14 days of receipt of the official copy of the OER from CGPC. CGPC did not validate the applicant’s OER until July 28, xxxx, by which date, the applicant had already reviewed the AIR and sent the Area Commander a letter detailing his objections to the findings. Therefore, the applicant was well aware of the content of the AIR before his opportunity to file an OER reply arose. Nevertheless, as the applicant stated, filing an OER reply is not a means for correcting an OER. Rating chain members’ responses to OER replies, which are also filed in the reported-on officer’s record, sometimes result in more negative information being entered in the record as the rating chain members defend their original assessment of the reported-on officer’s performance. The PRRB, however, is a means for correcting an erroneous or unjust OER, and the applicant could have applied to the PRRB for correction of the disputed OER during the year following its validation by CGPC on July 28, xxxx. Although the applicant’s decisions not to file an OER reply and not to file a PRRB application do not constitute waivers of his right to apply to the BCMR for correction of the OER, both choices may be considered evidence that he considered the disputed OER to be correct and fair at the time he received it.

4. The applicant alleged that the disputed OER was prepared by an improper rating chain in violation of the Personnel Manual because CGPC stated in the advisory opinion that it could not find a “published” (written) copy of the rating chain. Absent evidence to the contrary, the Board presumes administrative regularity on the part of Coast Guard officials. 33 C.F.R. § 52.24 (b). The fact that in December xxxx the Coast Guard could not find a written copy of the applicant’s rating chain does not persuade the Board that one never existed; it does not prove that the rating chain was not

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<sup>15</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); see also *Hary v. United States*, 618 f.2d 704 (Cl. Ct. 1980).

<sup>16</sup> 33 C.F.R. § 52.24(b).

published and known to the applicant during the evaluation period for the disputed OER from June 17, 1998, to May 24, xxxx.

5. Moreover, even assuming *arguendo* that the rating chain was not published, failure to publish would in this case be harmless error as it is clear from the record that the applicant knew and was not surprised by the membership of his rating chain. The primary purpose of “publishing” a rating chain is to ensure that the reported-on officer is not unfairly surprised by the identity of the officers who evaluate his performance. There is no evidence of such surprise in the record; in fact, the record indicates that the applicant knew well the identity of his supervisor, Captain X, Chief of the Area Operations Force Branch, as he informed Captain X of the collision first. Because under Article 10.A.2.e.(1) of the Personnel Manual, the reporting officer is normally the supervisor of the supervisor, the applicant can hardly have been surprised that Captain Y, Chief of the Area Operations Division, served as his reporting officer. Moreover, the applicant never raised the issue until CGPC stated in the advisory opinion that it could not find a written copy of the rating chain. The applicant’s comparison of himself to the applicant in BCMR Docket No. 2003-011 fails because, in that case, the disputed OER was prepared by officers other than those named on the applicant’s published rating chain, who could and should have prepared the OER.

6. The applicant alleged that his rating chain was improper because his supervisor and reporting officer had little opportunity to observe his performance in person. He alleged that he saw his supervisor only once and spoke with him on the phone only twice during the evaluation period. In his declaration, the supervisor stated that “I did not routinely observe [the applicant’s] performance on a day-to-day basis. However, I did speak with him often, visited the unit periodically, and received occasional feedback on the unit’s performance from my staff and other ... Area staff components.” Article 10.A.2.d.(1) of the Personnel Manual states that “[t]he Supervisor [for an OER] is normally that individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of directives and requirements.” The applicant alleged that Captain X did not have sufficient contact with him to qualify under this definition. The applicant was the commanding officer of his own unit. Having less oversight—i.e., less frequent contact with one’s supervisor—is inherent in the trusted position of CO. The supervisor claims to have had regular contact with the applicant, and the applicant said nothing about email and other written correspondence.

7. In light of Findings 4 through 6, the Board finds that the applicant has not proved by a preponderance of the evidence that the constitution of his rating chain violated any provision of Article 10.A. of the Personnel Manual. Moreover, the Board notes that Captain P, whom the applicant claims would have been a more appropriate choice for supervisor, oversaw the applicant’s performance for only two weeks, from afar, during xxxxxxxxxxxxxx and for three weeks, in person, during xxxxxxxx Xxx xxxx

out of a nearly two-year evaluation period. Therefore, Captain P does not meet the definition of a supervisor under Article 10.A.2.d.(1) of the Personnel Manual for the evaluation period of the disputed OER.

8. The applicant alleged that the inaccuracy of the disputed OER is proved by comparing the lower marks with other marks in his record. He alleged that OERs are supposed to show a consistent performance trend. In the OER that the applicant received for the evaluation period ending August 31, 1997, he was assigned one mark of 4, seven marks of 5, fourteen marks of 6, and one mark of 7 in the performance categories and a mark of 6 on the comparison scale. In his next OER, for his work as the “prospective CO” of the PSU, his marks were lower, as he received two marks of 4, ten marks of 5, and six marks of 6 in the performance categories, and a mark of 5 on the comparison scale. In the disputed OER, as CO of the PSU, he received three marks of 4, ten marks of 5, and five marks of 6 in the performance categories and a mark of 4 on the comparison scale. Therefore, the Board finds that the numerical marks in the disputed OER are, overall, only slightly lower than those in his prior OER and can be considered no more inconsistent than had they been slightly higher than those in his prior OER. Furthermore, Articles 10.A.4.c.4. and 10.A.4.c.7. require the supervisor and reporting officer to assign numerical marks in the various performance categories by “compar[ing] the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period.” Therefore, the Board rejects the applicant’s allegation that the disputed OER must be erroneous because it does not contribute to a desirable trend of improving marks.

9. In the disputed OER, Captain Y assigned the applicant a comparison scale mark in the fourth spot—one place lower than Captain X had assigned him in his prior OER as prospective CO of the PSU. A comparison scale mark is the most subjective mark on an OER form as the reporting officer assigns it by “fill[ing] 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.” Personnel Manual, Article 10.A.4.c.8.a. Therefore, the fact that the applicant’s prior reporting officers, in comparing the applicant with all other officers of the same grade whom they had known throughout their careers, rated the applicant to be an “excellent performer” or better does not prove that Captain Y committed error or injustice in deciding that the applicant’s performance during the evaluation period for the disputed OER constituted that of a “good performer” when making the comparison.

10. The applicant alleged that his supervisor and reporting officer based their evaluations on erroneous information in the incomplete AIR. He alleged that the AIR contained the following errors that caused his rating chain to lower his marks:

(a) The IO reported that although the coxswains involved were “certified as UTB coxswains,” they were “not qualified in TPSB tactics in accordance with

current PSU training standards.” The applicant alleged that this finding is erroneous because at the time there were only proficiency qualification standards (PQS) to distinguish certified coxswains with tactical training (“combat coxswains”) from those without tactical training (“utility coxswains”); therefore the coxswains involved in the collision were properly certified as qualified coxswains in accordance with the manual. Moreover, he argued, since the boats were scheduled for routine operation on the day of the collision, instead of tactical training exercises, it was unfair to criticize the fact that the two coxswains were permitted to drive the boats.

Neither the Area Commander, as Intermediate Reviewing Authority, nor the Commandant, as Final Reviewing Authority, disturbed the IO’s findings regarding the coxswains’ qualifications. Given the applicant’s admission that proficiency qualification standards (PQS) for TPSB tactics existed and that the two coxswains did not meet them, the Board finds that the applicant has not proved that the finding that the coxswains were “not qualified in TPSB tactics in accordance with current PSU training standards” was erroneous. Moreover, the incomplete AIR cited “relative inexperience” on the part of the coxswains, rather than a lack of proper qualifications, as one of the many causes of the collision. In addition, the incomplete AIR contained no criticism of the fact that the two coxswains were allowed to drive the TPSBs. The applicant has not proved that, when the disputed OER was prepared in May xxxx, the incomplete AIR was inaccurate with respect to the qualifications or training of the coxswains.

(b) The IO reported that a “training supervisor was not on scene.” The applicant alleged that this finding is false because BMC C stated in an email that he had told PO1 P to supervise the evolution and because the evolution was a logistical one to “burn fuel” rather than a training evolution. Neither Reviewing Authority altered this finding. Moreover, PO1 P was not aboard any of the four boats operating around the ferry. Nor does the fact that the Area Commander later gave the most senior of the four coxswains an Administrative Letter of Censure persuade the Board that there was a designated supervisor on the scene. The Board finds that the applicant has not disproved the finding in the AIR that there was no training supervisor—or properly designated supervisor of any sort—on the scene.

(c) The IO reported that the “Unit Master Training Plan was insufficiently detailed and not always followed” and that the “Training SOPs at PSU xxx were not comprehensive and were not always followed.” The applicant alleged that the fact that these statements were later removed from the AIR by the Intermediate Reviewing Authority proves that they are false. However, the Intermediate Reviewing Authority stated that he removed these two “findings” from the AIR because they were “statements of opinion.” Opinions are not necessarily false. Moreover, the applicant’s supervisor and reporting officer had access to the Unit Master Training Plan and Training SOPs and so could assess the accuracy of these statements themselves. Furthermore, the record shows that the PSU’s TPSBs did fail to follow proper plans and procedures,

without excuse, as they intentionally operated in an aggressive manner around the ferry and had previously operated around a tug-and-barge and a cruiseship in a manner contrary to the rules of the road without the consent of the vessel operators. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that these two statements in the incomplete AIR were false even though the Reviewing Authorities decided that the sufficiency of the Unit Master Training Plan and the Training SOPs was a matter of opinion rather than fact.

(d) The IO reported as an opinion that “[s]afety issues/concerns identified at the safety stand down [on June 20, xxxx] have not been properly addressed by the command.” The applicant argued that this opinion was inaccurate because on August 6, xxxx, he sent a memorandum to the Area Commander noting that issues identified during the stand down that were internal to the PSU “will be addressed at the unit level” and discussing issues that needed to be addressed at a higher level. On June 21, xxxx, however, the Boat Division Chief had reported to the applicant, that during the stand down, it “was discussed at great length of a lack of discipline between coxswains when conducting ‘Force on Force’ drills. Not a constant, but regular violation recognized by all coxswains of safety zone distances were happening, and that this practice must stop. A stricter adherence to safety distances must be observed or disciplinary action could take place if warranted.” There is no evidence in the record that the applicant took any action in response to what amounted to a serious warning about the coxswains’ “regular” conduct from the Boat Division Chief. Neither Reviewing Authority contradicted the IO’s opinion. Therefore, the Board finds that the applicant has not proved that the IO’s statement about the safety concerns not being “properly addressed” following the stand down on June 20, xxxx, is erroneous or unjust.

(e) The IO reported that the PSU boats conducted tactical training around civilian and commercial “vessels of opportunity” without their knowledge or consent. The applicant alleged that this finding is erroneous because there is insufficient evidence in the record to support it. However, the record shows that the PSU’s boats operated contrary to the “rules of the road,” at an unsafe distance and speed near the ferry on Xxxxxxx, xxxx; near the tug-and-barge on Xxxxxxx, xxxx; and, according to one crewmember, around a cruiseship. Complaints of reckless driving and inappropriate targeting by the PSU’s boats were also received during the IO’s interviews with personnel at the MSO and Group and with the captains of commercial and civilian vessels. Neither Reviewing Authority objected to this statement in the AIR. The Board finds that the record contains ample evidence to support the IO’s finding that the PSU’s boats had conducted tactical training around civilian and commercial “vessels of opportunity” without their knowledge or consent. The applicant has not proved that the incomplete AIR was erroneous or unfair in this regard.

(f) The IO reported that there was “no training plan” for the evolution and that operating standards at the PSU were “grossly insufficient” due in part to a lack

of operational and training instructions. The applicant alleged that this finding was erroneous and unfair. He stated that no training plan for the evolution was necessary because it was a logistical evolution rather than a training exercise. However, he argued, the email of the Boat Division Chief and the statement of the Command Duty Officer prove that a plan did exist. In addition, he stated that boat operations were largely affected by the lack of adequate radio communications on the TPSBs, which was not the fault of the PSU.

The Boat Division Chief and BMC C indicated that the only instruction given was to "burn fuel." The Command Duty Officer, who was responsible for shore operations, stated that he "had read the plan of the day and was aware that Boat Division would be conducting training exercises." The fact that the unit had a "plan of the day" and that two members stated that they were going to burn fuel by conducting "area familiarization" does not persuade the Board that the coxswains were given any sort of plan. The Area Commander corrected the finding in the AIR that there was "no training plan" only by removing the word "training," apparently in response to the applicant's claim that the evolution was for "logistical" rather than training purposes. Therefore, it appears that the Area Commander expected there to be some sort of plan even for a logistical evolution and that the PSU's "plan of the day" and the direction to "burn fuel" did not amount to an adequate plan for the evolution. Neither Reviewing Authority objected to the IO's opinion that the PSU's operating standards were "grossly insufficient." In addition, the AIR does not place all blame for the collision on the PSU but clearly attributes many of the operational problems to a lack of training plans by TRADET and to inadequate radio communication equipment. These systemic problems were amply acknowledged in the AIR and therefore do not undermine the IO's opinion that the PSU's operating standards were nonetheless "grossly insufficient."

11. In light of the above, the Board finds that the applicant has not proved by a preponderance of the evidence that the incomplete AIR, which was reviewed by his rating chain before they prepared the disputed OER, contained any significant factual error that could have misled the applicant's rating chain about the underlying circumstances of the collision and the applicant's leadership of the PSU.

12. Moreover, the supervisor and reporting officer stated in their declarations that they chose not to rely on information in the AIR because they knew it was incomplete, and the OER contains no mention of the collision or of any of the findings in the AIR. The supervisor wrote that he believed that because the AIR was incomplete, "the accident and the surrounding details should not be considered in my evaluation of his performance." The reporting officer wrote that he did not "mention or rely upon the findings of the [AIR] dated 28 January xxxx for any of the observations in the OER." Therefore, even assuming *arguendo* that the AIR contained a factual error that reflected negatively on the applicant's performance, such an error would not justify removal of

the OER because the supervisor and reporting officer have sworn that they conscientiously avoided relying on the AIR because it had not yet been reviewed.

13. The applicant alleged that despite their express intentions, his rating chain must have relied on the AIR because they were privy to it. Under Article 10.A.4.f.1. of the Personnel Manual, rating chain members may not mention in an OER that the reported-on officer's performance is under investigation, but may include "comments on the conduct that is the subject of the proceeding. [The restriction] only prohibit[s] reference to the proceeding itself." Therefore, the rating chain was entitled to rely on underlying information in the AIR that reflected on the applicant's leadership in preparing the OER. Assuming *arguendo* that the applicant's claim about the impact of the AIR on his rating chain's assessment of his performance is true, it does not constitute a violation of the Personnel Manual.

14. The applicant argued that despite their express intentions, his rating chain must have relied on the AIR because some of his marks were lower than in his prior OER as prospective CO and because there was no other source of negative information about his performance. The applicant alleged that his rating chain never discussed any performance issues with him except with respect to the AIR. As stated in Finding 8 above, the marks in the disputed OER are overall only slightly lower than those the applicant received in his prior OER, which he received before the collision, and cannot be considered substantially inconsistent with it. The applicant's claim that his rating chain had no negative opinions or information about his performance other than the AIR is pure speculation. Moreover, since the applicant has not proved that the incomplete AIR contained any erroneous information that reflected poorly on his leadership, any reliance on the underlying information in the AIR by the rating chain in preparing the disputed OER would not justify its removal.

15. The applicant and Captain P alleged that his rating chain received false negative information about his performance at Xxx xxxx. They alleged that the Area Commander might have confused the applicant with another Coast Guard officer, about whose performance Captain P complained. The applicant alleged that his reporting officer, Captain Y, recently told him that the Area Commander told him that he had received negative reports about the applicant's performance at Xxx xxxx from Captain P, which Captain P denies. This alleged confusion is entirely unproven and speculative. Moreover, the laudatory language in the disputed OER about the applicant's performance at Xxx xxxx closely reflects Captain P's own positive comments about the applicant's planning for and success at Xxx xxxx and so strongly refutes the allegation that reports about the applicant's performance at Xxx xxxx were confused with reports about another officer.

16. The applicant alleged that the MAR, which was issued after his OER was prepared, was much more favorable to his command than the AIR. However, on

November 29, xxxx, the applicant submitted a written response to the MAR, which means that it must have been issued at least in draft (like the AIR) before the disputed OER was prepared. Moreover, in taking final action on the MAR, the Chief of Staff stated that the MAR cited “a general lack of command attention” and “leadership deficiencies that also contributed to the mishap.” In addition, he wrote that the PSU “was not operating in compliance with numerous operating and safety requirements, and the command had not ensured the proper training and qualification of the TPSB crewmembers.” Therefore, the Board rejects the applicant’s allegation that the MAR was more favorable about his command than the AIR.

17. The applicant alleged that his rating chain never counseled him about any performance issues except with respect to the AIR. Articles 10.A.2.d.2.e. and f. of the Personnel Manual state that a supervisor should counsel an officer and provide performance feedback whenever the latter requests it and whenever the supervisor deems it appropriate. Article 10.A.1.c.5. provides that “performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area.” The applicant’s supervisor stated, “While I did not conduct any formal counseling sessions regarding this, I did have informal discussions with him where I encouraged a more hands-on approach to his operational leadership duties.” The Board finds that the applicant has not proved that his supervisor denied him pertinent performance feedback and thereby violated any provision of the Personnel Manual.

18. The applicant argued that because the Coast Guard has delayed responding to his appeal of the Coast Guard’s response to his FOIA request, the Board should assume to be true whatever allegations he states that he believes he could prove if the Coast Guard had not delayed acting on his appeal. He states that he believes he could prove that his “performance in the training and qualification of TPSB Coxswains and Crewmembers equaled or exceeded that of the other five PSU commanding officers.” The Board refuses to make such a speculative presumption. Under the Board’s rules at 33 C.F.R. § 52.24(a), it “is the responsibility of the applicant to procure and submit with his or her application such evidence, including official records, as the applicant desires to present in support of his or her case.” The delegate of the Secretary has held that the burden of proof remains with the applicant and does not shift to the Coast Guard.<sup>17</sup> Moreover, even if the applicant did prove that the training and qualification of the coxswains and crewmembers at his PSU equaled or exceeded that at other PSUs, such evidence would not contradict any comment in the disputed OER. Nor would it prove that any mark of 4 or 5 he received should have been higher since the standards for the numerical marks on an OER form address all aspects of an officer’s performance and not just the training and qualification of a certain subgroup of his subordinates.

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<sup>17</sup> BCMR Docket No. xxxx-037, Decision of the delegate of the Secretary, citing *Muse v. United States*, 21 Cl. Ct. 592, 602 (1990).

19. The applicant made numerous allegations with respect to the actions and attitudes of various officers and members. Those allegations not specifically addressed above are considered to be not dispositive of the case.

20. The applicant has not proved by a preponderance of the evidence that his rating chain relied on the incomplete AIR or that the incomplete AIR contained any significant error that could have misled his rating chain about his performance if in fact they relied on it contrary to their stated intentions. The applicant has not proved the existence of any factual error in the OER. Nor has he proved that the OER was prepared by an improper rating chain in violation of the Personnel Manual. Therefore, the Board finds that the applicant has failed to prove that the disputed OER was adversely affected by a "clear and prejudicial violation of a statute or regulation or, alternatively, a misstatement of a significant hard fact."<sup>18</sup>

21. Accordingly, the applicant is not entitled to the removal or substitution of the challenged OER. Nor is he entitled to any of the consequent relief he claims, such as removal of his failures of selection and reinstatement in an active status. His requests for relief should be denied.

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

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<sup>18</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); see also *Hary v. United States*, 618 f.2d 704 (Cl. Ct. 1980).

**ORDER**

The application of retired xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

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Toby Bishop

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Steven J. Pecinovsky

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Richard Walter