

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-066

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed upon the BCMR's receipt of the applicant's completed application on February 9, 2000.¹

This final decision, dated October 11, 2001, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, an African-American lieutenant (LT; pay grade O-3) in the Coast Guard, asked the Board to correct his record by removing part of an officer evaluation report (OER 1) that he received for the period June 1, 1998, through August 12, 1999.² Specifically, he asked the Board to remove sections 7 through 10, which were prepared by his reporting officer, from OER 1. He also asked the Board to remove from his record his OER reply and any other correspondence relating to OER 1. In addition, he asked the Board to attach to the remainder of OER 1 a Letter of Commendation he received for his work during the period covered by the OER 1.

On August 14, 2000, the applicant submitted a copy of a civil rights complaint in which he asked that certain marks in his OER for the period June 26,

¹ On August 14, 2000, the applicant submitted significant new evidence in support of his allegations in accordance with 33 C.F.R. § 52.61(c). Therefore, he waived the ten-month deadline imposed under 14 U.S.C. § 425.

² Normally, LTs receive semiannual OERs for evaluation periods ending each May 31st and November 30th. It is not clear from the record why the applicant did not receive a semiannual OER on November 30, 1998. If, prior to the finalization of an OER, it is determined that the officer will be transferred within 92 days, the evaluation period is usually extended to cover the final weeks of service at the unit prior to transfer. Personnel Manual, Article 10.A.3.a.1.b.(2).

1997, through January 31, 1998 (OER 2) be raised.³ He asked that his mark for the performance category Using Resources be raised from a 4 to a 5,⁴ that his mark for Getting Results/Effectiveness be raised from a 4 to a 6, that his mark for Judgment be raised from a 4 to a 5, and that his mark for Responsibility be raised from a 4 to a 6.

SUMMARY OF APPLICANT'S ALLEGATIONS AND RECORD

The applicant alleged that his department chief, who served as the reporting officer (RO) on his rating chain for OER 1, made false and unjust comments in sections 7 through 10 of the OER due to bias and misunderstandings about his acceptance and assignment to graduate school and his departure from his unit to attend graduate school on duty under instruction (DUINS). He alleged that the comments do not reflect the quality of his work over the course of the 14-month, 12-day evaluation period. The disputed comments and marks in OER 1 appear below:

BLOCK	MARK	WRITTEN COMMENTS
7. Reporting Officer's Comments		"... Jumped gun upon notification of PG school; disregarded Dept Head's direction & negotiated early start date directly w/ program manager; required unnecessary time/attention of unit & D14 to explain, no, he could not start until fall. Not attentive to signals/desires of seniors; contentious, endlessly debated details."
8.a. Initiative	5	"... Worked contrary to command decision regarding Grad School report date; originally alternate, selected primary late in transfer season, discussed PCS dates w/ junior program mgr; failed to consider backfill needs, ignored cmd direction & committed to mtg early summer school; enrolled & committed money w/out hard copy orders; by-passed immediate chain of cmd 3 times; caused unnecessary work at unit, district, & HQ to change dates. Failed to show-up for last day of work, instead attended a Ch of Cmd in civilian attire, vice prescribed uniform. ..."
8.b. Judgment	4	
8.c. Responsibility	2	
8.d. Professional Presence	3	
8.e. Health and Well-Being	4	
12. Comparison Scale	3	A mark of 3 means the evaluatee in comparison with other officers is a "fair performer; recommended for increased responsibility."
11. Comments on Officer's Potential		"... Consider for assignment after others; experienced difficulty supporting chain of command, may need close supervision. Recommended for HQ or District staff positions. Consider for promotion after peers."

³ The applicant has not challenged the OER he received between OER 2 and OER 1 for his work from February 1 through May 31, 1998. The rating chain for the unchallenged OER consisted of LCDR M. as the supervisor, the XO/investigator as the reporting officer, and the CO as the reviewer.

⁴ Officers are rated in various performance categories on a scale of 1 to 7, with 7 being best.

Sections 3 through 6 of OER 1 were completed by the assistant chief of the department and include no negative comments or marks. These sections reflect primarily an officer's professional competence, planning ability, writing and speaking skills, treatment of subordinates, etc.

The applicant alleged that on March 29, 1999, he was advised by his RO that their branch was being downsized and possibly eliminated. The same day, the RO gave him a "graduate school package" for studying [REDACTED] and stated that he would be "interested to see" if the applicant accepted.

At this time, the applicant alleged, he had an Assignment Data Card (ADC) qualifying him for immediate transfer as a result of the settlement of a discrimination suit he had filed in 1998 because a prior supervisor, LT P., had questioned him about his opinions regarding abortion and other political matters. Under the terms of the settlement agreement, he alleged, he could transfer from his command as soon as the Coast Guard had identified someone to fill his position. The applicant submitted a copy of a "Resolution of Complaint of Discrimination," which indicates that LT P. had initiated "inappropriate discussions/comments in the work place (i.e., discussions about abortion and disparaging remarks concerning the Commander and Chief [sic])." The resolution resulted in an internal transfer of the applicant from one branch to another. It also stated that the applicant had "received counseling from the Executive Officer [XO] about the submission of Assignment Data Cards and about the normally 'slim picking' in off-season transfers. [The applicant and XO] agree and confirm [the applicant's] right to submit an ADC whenever he desires, and the command will provide an endorsement approving early rotation with a backfill requirement." The resolution further stated that if the Coast Guard failed to implement any of the enumerated actions, it would, upon the applicant's request, reinstate his complaint of discrimination.

The applicant alleged that after receiving the graduate school package, he faxed his acceptance to the program manager that evening. On the morning of March 30, 1999, he "followed-up on a phone message from ... [the] Program Manager for school." He alleged that when he called the program manager to say that he would accept the assignment, she began discussing when he would be available for school. After he told her that his unit was being downsized, she stated that she would "pin" him in to start DUINS during the summer session, which began on May 24, 1999.

The applicant alleged that on March 30, 1999, he also told his RO that he was accepting the graduate school package and informed him of the content of his conversation with the program manager, including the proposed start date. Several days later, the RO told him that the unit's XO did not think that the applicant could depart so soon. A week or two later, the RO stated that "barring orders," the proposed May 24th departure date was not acceptable. The applicant alleged that he told the RO that Coast Guard headquarters was already working on issuing his orders.

The applicant alleged that his orders to start school on May 24th arrived on April 30, 1999. The RO told him that the XO found the orders unacceptable, and the applicant asked for permission to speak with the XO. The XO told him that he might not be able to leave until the fall or the following year. Therefore, the applicant asked for permission to speak with their commanding officer (CO). The CO stated that his hands were tied because vacant positions at the unit were not being filled fast enough so they could not afford to lose him so soon. The applicant asked for permission to speak with their District division chief. Soon after he spoke with the division chief, the CO told him that he could report to school on August 12, 1999.

The applicant alleged that on May 18, 1999, the program manager told him that his orders to report to school on May 24th were still in effect. However, when he told his RO, the RO stated that if he reported to school, he would be "booked" and that he was not to speak to the program manager again. Therefore, because he did not know whether to obey the written orders from headquarters or his RO's threats, he asked his supervisor for permission to seek guidance from the district's legal office. He alleged that on May 21, 1999, his orders were changed to reflect a departure date of August 12, 1999.

The applicant alleged that this sequence of events proves that the comment in OER 1 that he jumped the gun and went around his chain of command is false. In addition, he alleged that by not allowing him to depart on May 24th, the Coast Guard violated the settlement agreement because headquarters had already identified someone to fill his position.

The applicant alleged that the negative comments in OER 1 regarding his departure from the unit were also unfair. Because his orders indicated that he was to report to school "no later than" midnight on August 12, 1999, he reported to school on August 12, 1999, and spent most of the day buying books and getting a parking pass. He alleged that his actions that day were based on what he reasonably thought the orders required and that he "had no intent to swindle a last day of work" from his previous unit.

Moreover, the applicant alleged that he had been properly checked out of his old unit on August 10, 1999, "having verbally discussed [his] last day of work with [the RO, XO, and CO, who] signed the checkout sheet and wished [him] well." He submitted a copy of his checkout sheet, which was signed by his RO on August 9th and by the XO and CO on August 10th. He alleged that he was given his orders at that time but came back the next day, August 11th, to clean out his locker and go to lunch with his peers. He alleged that he followed normal procedures in departing his unit and "was not trying to skip out of work." He pointed out that in more than 10 years of military service, he had taken only three days of sick leave. In addition, he alleged that because he had been properly relieved by a new lieutenant, nothing precluded him from reporting to school.

In the middle of the day on August 12, 1999, the applicant stated, he briefly returned to the unit with his family to attend a Change of Command cere-

mony. He alleged that he had not received a personal invitation but wanted to attend the ceremony. Because he had spent the morning at school and was returning to school later that day, he was dressed in civilian clothes for the ceremony.

The applicant alleged that he was not informed that anyone was bothered by his departure until two weeks afterward when the XO called him and angrily demanded that he attend a meeting to discuss the issue. He alleged that the meeting was scheduled for a time when he had a class. He alleged that his program manager told him not to attend the meeting the XO set up because his job was to focus on school. He alleged that a day of annual leave was subtracted from his total because he reported to school on August 12, 1999, instead of to his previous unit.

Later, the applicant received both a Letter of Censure and the disputed OER as a result of his actions on August 12, 1999. The letter stated that he failed to report for work on August 12th and that his assumption that he should report to school that day "was wrong and demonstrated poor judgment." The letter also pointed out that his school was just five miles from his old unit, that his PCS orders specifically stated that his departure date was August 12th, and that no travel time is allowed under the Joint Travel Regulations when officers are transferred between stations within the same city limits. The letter stated that his civilian dress at a Change of Command ceremony was "inappropriate." It also stated that no copy of the Letter of Censure would be included in his "unit file, [his] personnel record, or attached to or mentioned in [his] Evaluation Report."

The applicant alleged that the Letter of Censure and negative comments in OER 1 about his civilian dress at the ceremony were unjust because just weeks earlier his XO had attended a Change of Command ceremony in a dress uniform with Navy, rather than Coast Guard, buttons. The applicant alleged that he overheard the XO explain that his wife had bought it for him only the day before and that the XO was not reprimanded for this infraction. Moreover, he alleged that because he had already checked out from this unit, any mistake he made on August 12, 1999, should not be reflected in the OER covering his work there since his last day at the unit was August 11th. The applicant further alleged that the letter and OER 1 were unfair because he was told by his program manager not to attend the meeting and because the Letter of Censure indicated that the matter would not be mentioned in his military record or OER. He tried to appeal the Letter of Censure but received a letter from the unit's new commanding officer stating that there is no appeal procedure for a Letter of Censure and that the letter was necessary because of his "refusal to return to the office to be counseled concerning [his] departure."

The applicant alleged that the marks and comments ultimately entered in OER 1 by the RO were much lower than those the RO had earlier assigned him on a draft OER that was sent to the CO on May 13, 1999. He submitted a copy of the draft, which contains the following marks and comments:

BLOCK	MARK	WRITTEN COMMENTS
7. Reporting Officer's Comments		"... Jumped gun upon notification of PG school; by-passed command & negotiated directly w/ prgm manager; required unnecessary time and attention of unit & D14 to explain, no, he couldn't start until fall."
8.a. Initiative	6	"... Recognized for impeccable appearance & sharp military bearing; chosen as escort for [District Commander] Change of Command ceremony; uniform was always inspection ready. Always ensured that personal performance was optimized. Maintained slender build through routine exercise. Routinely educated others to effectively manage work related stress & maintain good health."
8.b. Judgment	4	
8.c. Responsibility	3	
8.d. Professional Presence	5	
8.e. Health and Well-Being	5	
12. Comparison Scale	4	A mark of 4 means the evaluatee in comparison with other officers is a "good performer; give tough, challenging assignments."
11. Comments on Officer's Potential		"... Give increased responsibility; w/ background, ideal candidate for follow-on IH assignments that supports marine safety; would also be asset to HQ or District marine safety or human resources staff. Recommended for promotion."

The applicant also alleged that an admiral's Letter of Commendation and a Commendation Medal that had been prepared for him were wrongfully withheld from him. He alleged that the Letter of Commendation was finally given to him four months late and that the chief warrant officer who gave it to him told him that the XO had told him to send it back to headquarters. The Letter of Commendation, dated July 27, 1999, commends him for his service on the Commandant's Diversity Advisory Council from November 1998 through April 1999. The applicant alleged that it should have been attached to OER 1. The applicant also submitted a draft citation for a Commendation Medal for his work at the unit from June 1998 through August 1999. The medal was never awarded.

On November 20, 1999, the applicant submitted a written reply to the disputed OER, containing the same allegations he presented in his application to this Board. However, it was rejected by the Coast Guard Personnel Command (CGPC) for failure to conform to the requirements of Article 10.A.4.g. of the Personnel Manual because it contained prohibited comments.

In support of his allegation that OER 1 is unfair, the applicant submitted a character reference from a commander who vouched for his integrity and responsibility as a "personal friend and neighbor." He also submitted copies of his XO's May 1998 endorsement letter for graduate school and two 1998 letters of recommendation for graduate school from his unit's branch chief and a former

reporting officer. The letters highly praise the applicant's performance and suitability for graduate study.

The applicant alleged that in addition to the discriminatory treatment he received for not wearing the proper uniform to a Change of Command ceremony, there were many other instances in which minorities were not treated fairly by the command. For example, he alleged that a white chief warrant officer had received a unit award one day after being awarded non-judicial punishment. He alleged that when the inspection documents of another white officer, LT P., were found to be missing after he left the unit, the XO told another officer to try to reconstruct the documents, rather than contact LT P.⁵ He also alleged that the XO himself had caused the entire office's computer system to shut down for hours by forwarding email messages to his home computer and yet had not received career-ending marks for his mistake.

The applicant alleged that these instances show that white officers were "thrown a life preserver" after major infractions while he was handed an anchor after a small infraction. He alleged that the XO had once referred to another African-American lieutenant as a "petty officer" and "the equivalent of a garbage man" and made such negative comments about the lieutenant's work that the XO's wife actually apologized to the lieutenant. He also alleged that his RO had bragged about causing another lieutenant, who is Asian-American, to be passed over for promotion. In support of this allegation, he submitted a letter from the Asian-American lieutenant, who stated that he had heard that the RO bragged about causing him to be passed over, that he believes that minority officers did not "get a fair shake" at the office, and that his removal from his position was unfair because he did not receive timely training, mentoring, or counseling. The applicant also alleged that when he himself returned from two weeks' emergency leave upon the death of his father the RO "welcomed [him] back to the [office] by asking if [he had had his] father's death verified by the Red Cross."

SUMMARY OF THE APPLICANT'S SECOND SUBMISSION

On August 14, 2000, the applicant submitted significant new allegations and evidence, including copies of documents concerning his complaint of discrimination, which he first filed on March 4, 1998. In his original complaint, he alleged that he had been the victim of discrimination on February 17 and March 2, 1998. He asked that marks in his OER for the period ending January 31, 1998 (OER2) be raised. In response to his complaint, the applicant's commanding officer initiated an informal investigation.

On May 6, 1998, the investigator (who was then the applicant's RO but later "fleeted up" and was serving as the XO during the summer of 1999) issued a report of his informal investigation. The investigator found that LT P. had discussed abortion twice with the applicant: once in the presence of a chief warrant

⁵ The applicant submitted an email message from the other officer supporting this allegation.

officer in early February 1998,⁶ when he stated that the President supported abortion and described a partial birth abortion procedure in detail, and a second time on February 17, 1998, with no one else present. On both occasions, the applicant did not state his own views on the subject. LT P. told the investigator that his questions were merely "rhetorical" and that their conversations were "casual." He stated that because the applicant had indicated he was Christian, LT P. thought they were having a friendly conversation and getting to know each other better.

The investigator reported that the applicant complained that LT P. delayed acting on his OER for three weeks and then in mid February sent him a "scathing" email about his OER input. LT P.'s email stated that he had met with the RO and they had agreed that there were "extremely serious problems" with the OER input provided by the applicant and another officer:

You have effectively given yourself 4s in every category and, as a result ..., have killed any chances for promotion, much less the ability to compete for law school.

As you know, the OER is VITALLY important to one's career. With the apparent lack of effort you have put into your OER, you are in effect "telling" us that you really don't care about the CG, your career, or your "shipmates." I have spent an inordinate amount of time on your OER at the expense of my family and my work projects. I could have easily, spending far less time, wrote the OER for you, but this action would not be doing you any favors. You simply have to learn this yourself.

We're giving you another chance to make your OER as good as it possibly can be. ... Whether it takes all 3 days or nights or not, I want an acceptable OER by Tuesday morning.

Prior to addressing your OER, I strongly suggest you thoroughly digest the [three example] OERs I have given you. ...

I think you understand that the comments I have made, although admittedly harsh, are intended not to discourage you, but to help you and your career. ... If you have any questions or comments, please come see me. If you want to meet with both [the RO/investigator] and I, then that will be arranged.

In late February, the investigator reported, the applicant's command was attempting to finalize OER 2 and asked him for better material for written comments. The applicant had provided "few specific comments" for the OER, and they contained numerous grammatical and spelling errors. Once while the investigator was discussing the draft with him in his capacity as RO, the applicant saw some of the draft marks and stated that they were lower than he had previously received.

⁶ The investigator apparently intended to interview the chief warrant officer about this conversation, but there is no evidence in the report that he was able to do so.

The investigator found that on March 2, 1998, LT P. counseled the applicant about his performance and the draft OER, and the applicant asked him whether abortion was the real, underlying issue. When the conversation became "heated," the applicant asked another officer, LCDR M., to observe the remainder of the meeting. LCDR M. reported to the investigator that while he was in the room, LT P. indicated that he was sorry about having discussed abortion in the office and repeatedly denied that the issue had anything to do with the marks in the applicant's draft OER. LCDR M. stated that LT P. tried to refocus the meeting on performance issues. However, the applicant returned the conversation to the abortion issue and then asked if LT P. had something against "my people." LCDR M. said that he thought the applicant was on a "fishing trip" and "almost badgering" LT P. to try to trip him up. He said that LT P. was agitated and finally lost his temper and said "You are full of s__t."

The investigator reported that the applicant made some suggestions for revisions to the draft OER and that some of these were adopted before OER 2 was approved.

The investigator concluded that the applicant's complaint against LT P. did "not meet the criteria for a civil rights discrimination complaint" because LT P.'s actions did not constitute discrimination on the basis of race, sex, religion, color, or country of origin. He also concluded that LT P. did not commit misconduct, although his comments were inappropriate and called for counseling. He stated his belief that OER 2 accurately reflected the applicant's performance and that the applicant was using LT P.'s stance on abortion as an excuse to challenge OER 2. The investigator recommended that the complaint be dismissed as unfounded.

The investigator explained in his report that he was serving as the investigator because the office's civil rights officer indicated that he too might have a complaint against LT P. However, the civil rights officer later told the investigator that he did not believe any discrimination occurred although he "was unhappy with [LT P.'s] counseling techniques."

On August 3, 2000, the applicant wrote a letter asking the Office of Civil Rights to extend the 45-day deadline for filing a discrimination complaint.⁷ He alleged that he had wrongfully been denied proper counseling by an EO officer when he filed his original complaint on March 4, 1998, because the EO counselor was also considering filing a complaint against LT P. He alleged that the investigator never fully addressed the "facts pertaining to religious discrimination" and made up his mind about the merits before beginning the investigation. The applicant alleged that it was improper for the unit to handle his complaint in this manner. He alleged that since filing his complaint, he had been subject to "a string of reprisal incidents." He alleged that at various times between June 29, 1997, and May 20, 2000, he was the victim of religious and racial discrimination

⁷ The applicant actually filed this complaint on September 16, 2000, after he submitted it to the BCMR. The DOT Office of Civil Rights dismissed his complaint for untimeliness on October 20, 2000.

by LT P., and of racial discrimination and reprisal by his CO, the RO/investigator who became the XO, his second RO, and LCDR M.

In his August 3, 2000, complaint, the applicant described in detail the allegations he had made in March 1998, as well as the allegations in his BCMR application about OER 1. He alleged that within a few weeks of arriving at the unit in June 1997, he had to complain to LCDR M. about his first supervisor, LCDR W., reprimanding him at an "uncomfortable distance" such that he could feel his supervisor's breath. A few days later, LCDR W. asked him to purge old documents from a vessel's file. When he said he could do it first thing in the morning, LCDR W. put his face about five inches from the applicant's and ordered him to do it right away. The applicant alleged that he told LCDR W. to back off and that he would not fight him. The applicant alleged that he reported this incident to LCDR M., as well, but "got the clear and distinct impression that he did not believe me."

The applicant also alleged that in September 1997, when a fire broke out on a vessel he was inspecting, he was criticized for evacuating his inspection team off the vessel rather than staying to help fight the fire. When the XO overheard him discussing the fire with LCDR M. and asked "what fire?" the applicant told the XO what had happened. Later, LCDR M. "dressed him down" and said he did "not like the way [the applicant did] business around here." The applicant stated that he was soon transferred to another branch.

The applicant stated that in February 1998, his new supervisor, LT P., held a conversation near his desk with a chief warrant officer about the President and [REDACTED]. When the applicant interjected that the facts were not yet known, LT P. called the President a "baby killer" and graphically described abortions. Later, the applicant alleged, LT P. asked him to stay after a meeting and began repeatedly demanding to know his views on abortion. The applicant told LT P. that he would not discuss his religious or political views at work. He alleged that as a result of this incident, he believes LT P. was not a fair judge of his performance for OER 2, and assigned him marks that were too low in several performance categories.

The applicant alleged that on March 2, 1998, LT P. met with him and told him that his "character was lacking," that his case review "stunk," and that he had "skipped out" on Industry Day. The applicant stated that he reminded LT P. that he had approved the applicant's leave on Industry Day well in advance and that he asked LT P. for details of how his case review "stunk." He alleged that LT P. shook his finger in his face, said "you are going to shut up and listen to me," at which point the applicant left and asked LCDR M. to join them. He alleged that after he told LCDR M. what had been said, LT P. said he was "full of shit."

The applicant alleged that he was also a victim of reprisal in that the XO and his RO/investigator contrived to include many unfair and false comments in OER 1. He repeated his allegations that when white officers make mistakes, the mistakes are covered up and the officers' careers flourish; but minority officers

get no breaks. He alleged that since his departure from the unit, the reprisals have continued. He alleged that at a Halloween party in 1999, the XO's wife had incensed his wife and "had the audacity to run her fingers through my daughter's hair." He also alleged that the XO once shouted his own name to startle the applicant's wife, whose back was turned at the time, and then spelled it out.

Along with the copy of his EEO complaint, the applicant submitted two affidavits from a fellow officer, who stated that he believed the applicant had been the victim of a "witch hunt." He alleged that the applicant's first supervisor, LCDR W., was "unusually vindictive for an O-5" and often intimidated people. He alleged that LCDR W. biased the applicant's next chain of command, including LT P., against him.

The applicant also submitted a copy of a letter from the chief of the Headquarters Support Command Personnel Reporting Unit and copies of two pay records. The chief stated that the applicant's pay records indicate that, for pay purposes, his last day of duty at his previous unit was August 11, 1999, and that as of 5:30 a.m. on August 12, 1999, he had transferred and was on DUINS. The chief stated that "[a]lthough almost all TAD and PCS orders indicate to report no later than 2400 hours, everyone is aware that you can report at any time earlier."

The applicant also submitted a copy of an email message from a chief warrant officer who had worked for Personnel Reporting Units for about 22 years. The chief warrant officer stated that in his experience, most officers are allowed one day to sign up for classes and that he had "never heard of anyone not being allowed to depart PCS from their command at the time liberty is granted the day prior to their PCS reporting date."

In addition, the applicant submitted a copy of the endorsement letter by which the new commanding officer of the unit, who signed OER 1 as the reviewer, forwarded the applicant's OER reply to CGPC on December 17, 1999. The reviewer stated in his endorsement that he had been briefed by his staff on the matter and believes that the OER 1 accurately reflects the applicant's performance. He stated that he expected "mid-grade officers to act in a mature and professional manner and to have a much greater knowledge of transfer policies and procedures than what was demonstrated" by the applicant. The reviewer also stated that no backfill was identified for the applicant until May 7, 1999, and that the backfill did not arrive until mid July 1999. He alleged that the Letter of Censure was prepared in accordance with the rules in the Personnel Manual.

VIEWS OF THE COAST GUARD

On August 8, 2001, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for lack of proof.

Factual Allegations by CGPC

The Chief Counsel attached to his advisory opinion a memorandum prepared by the Coast Guard Personnel Command (CGPC) about the facts of the case. CGPC alleged that in 1998, as a result of LT P.'s inappropriate comments, the applicant's command agreed to endorse his request for early rotation provided that his position was "backfilled." Thereafter, his command supported his application to post-graduate school. On October 8, 1998, the results of the school selection board were announced, and the applicant was chosen as an alternate. However, on March 22, 1999, he became a "primary" and on March 29, 1999, he received a package offering him a DUINS assignment. CGPC alleged that the applicant's RO told him when he gave him the package that he "should wait until they had agreed to a date before contacting the program manager to accept." The package instructed the applicant to contact his program manager to discuss what classes he should take and advised him to "anticipate assignment to DUINS during summer/fall 1999."

CGPC alleged that the applicant failed to follow instructions in that he contacted the program manager by fax on the evening of March 29, 1999, and by phone early the next morning and committed to a starting date for DUINS without the consent of his command. CGPC alleged that during his phone call with the assignment officer, the applicant indicated that he had already signed up for summer classes and suggested that he could take these classes while on DUINS instead of taking them on his own initiative in off-duty hours.⁸ CGPC alleged that the program manager accepted this suggestion assuming that the applicant's command had agreed and, with the applicant's agreement, arranged for his DUINS orders to be issued with a May 24, 1999, reporting date. CGPC alleged that there was no urgency for the applicant to act because the offering letter stated that the applicant had ten days from the date of receipt, March 29, 1999, to respond.

CGPC admitted that the October 8, 1998, announcement stated that "[t]he actual date of assignment to PG school will be coordinated between the member, the program manager (PM), and the appropriate assignment officer (AO)," but alleged that "[i]mplied is the assumption that individuals selected to school will discuss rotation and reporting dates with their commands prior to committing to a specific date with the PM or AO, as individuals have no autonomous authority to make assignment decisions or set PCS dates." CGPC alleged that program managers and assignment officers usually negotiate starting dates directly with the officers in question and "take it on faith that prospective [post-graduate] students are working with their commands to establish detachment and reporting dates that are mutually agreeable. When asked by the Chief, Officer Evaluation Branch, several [assignment officers] indicated that the rarely, if ever, consult with XO's or CO's of units when setting up [post-graduate] orders, because

⁸ In its memorandum, CGPC referenced declarations allegedly signed by the XO, RO, supervisor and emails from the applicant and the RO to the XO. However, the Coast Guard did not submit any of these declarations or emails with its advisory opinion.

individual officers know they are required to work closely with their commands to coordinate detachment and reporting dates."

CGPC stated that when the orders were issued on April 30, 1999, the applicant's command, not knowing that he had independently negotiated his own start date, told the assignment officer that they could not comply because there was no backfill provided. The command told the assignment officer that there had been no communications between it and the school program manager regarding the applicant's starting date and offered to release the applicant in time for the fall term. On May 7, 1999, the command was notified that a replacement for the applicant had been identified and would arrive in mid July. Ultimately, the District division chief had to negotiate an August starting date between the applicant's command, CGPC, the assignment officer, and the program manager. On May 21, 1999, the applicant's orders for May 24th were canceled.

CGPC alleged that the evidence indicates that the applicant "misrepresented himself as speaking for the command when he negotiated a 24 May reporting date" and then "deceived his rating chain once he became aware of their objection to a May departure, and continued to pursue that date despite this awareness. Once the [assignment officer] became involved, Applicant again misrepresented himself as speaking for the command, and further reinforced 24 May as the optimal reporting date. When the orders to report on 24 May were issued, Applicant played the [assignment officer, program manager, district staff and command against each other, until direct intervention by his CO with the [District division chief] led to cancellation of the orders. Based on this, it is reasonable and appropriate for the [RO] to include a reference to these events in [OER 1]."

CGPC alleged that the applicant, in conversations and email correspondence with his RO and XO, had specifically stated that he wanted his last work day to be August 12, 1999, because class registration at his university began on August 13th. On May 28, 1999, he was issued orders indicating that his departure date from his unit was August 12, 1999, and that he was to report to school no later than midnight on August 12th. CGPC alleged that to execute the orders, the applicant only had to be at work on August 12th and report to school the next morning for class registration. No travel time was necessary or allowed because his unit and university were within the same city. CGPC alleged that "[w]ithin the military personnel management system, all days are to be accounted for, particularly around transfers." CGPC pointed out that if taken literally, the applicant's claim that he had "checked out" on August 10th and was free to depart his unit would leave August 11th, as well as the 12th, unaccounted for. CGPC alleged that the applicant's chain of command expected him to be at work on the 12th and that his failure to report to work or clear his intentions with his command showed poor judgment. CGPC alleged that the fact that the applicant's checkout sheet was fully initialed on August 10th and his farewell luncheon was on August 11th did not make it reasonable for him not to go to work on the 12th. CGPC alleged that it was reasonable and appropriate for the applicant's lapse of judgment to be reflected in OER 1.

CGPC alleged that the applicant's decision to appear at a Change of Command ceremony in civilian clothes also showed poor judgment. "If his schedule that day prevented him from taking the time to change into his uniform, he could have simply not attended the ceremony" since his attendance was not required.

CGPC alleged that the applicant was not entitled to a Commendation Medal because it was not supported by his command. CGPC further alleged that the Letter of Commendation had already been entered in the applicant's record and that attaching it to the OER would cause a redundant entry. CGPC alleged that because the letter "is not an end of tour award, having it attached to this (or any) OER would not carry the weight Applicant contends in future reviews of Applicant's record." However, CGPC stated that the applicant's request to have the letter attached to OER 1 was "not unreasonable."

CGPC alleged that, contrary to the applicant's allegations of discrimination, his command was "very supportive of [his] personal and professional desires." However, whenever he "was confronted with a decision to act within the policies or custom of the Service or to disregard them ... he chose the latter."

CGPC alleged that the applicant's OER reply violated Article 10.A.4.g. of the Personnel Manual and so was never entered in his record. He alleged that the applicant was given an opportunity to revise his reply but refused and applied to the BCMR instead.

Chief Counsel's Arguments

The Chief Counsel argued that the following standards should apply to an application for correction of an OER:

To establish that an OER is erroneous or unjust, the Applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992); CGBCMR Dkt. No. 86-96. In determining whether Applicant has met this burden, Applicant's rating officials are strongly presumed to have acted correctly, lawfully, and in good faith in executing their duties. Arens v. United States, 969 F.2d 1034, 1037 (1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). ... Absent a showing that error or injustice affected the challenged record, it is inappropriate for the Board to change the evaluations of those responsible for evaluating the reported-on officer under Coast Guard regulations. See, e.g., Opinion of the Deputy General Counsel in CGBCMR Dkt. No. 84-96, citing Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).

The Chief Counsel alleged that there is "insufficient evidence in the record that supports Applicant's allegation of a discrimination campaign against him, let alone a causal connection to the evaluation he received" in OER 1. He alleged that the applicant's "evidence" of discrimination amounts to mere assertions by himself and one other officer. Therefore, the Chief Counsel argued, the applicant

has not overcome the presumption that the officers on his rating chain acted lawfully, correctly and in good faith in evaluating his performance.

The Chief Counsel alleged that some of the negative comments in OER 1 refer to the applicant's actions from March 29, 1999, until his command disapproved his May 24th departure date. Therefore, the fact that he later followed the chain of command in protesting his command's decision regarding that date is immaterial to the fact that he initially "jumped the gun" and did not follow the chain of command. The Chief Counsel argued that the applicant's command did not renege on the promise to support a transfer out of the unit because no replacement was provided to fill the applicant's position until mid July.

The Chief Counsel alleged that the applicant failed to prove that August 12, 1999, was not his departure date as shown in his orders and that he was not therefore expected and required to report for work at the unit on that day. He alleged that the applicant had failed to prove that appearing at the Change of Command ceremony in civilian clothes was not contrary to military custom and protocol.

The Chief Counsel concluded that the applicant failed to prove that any of the comments in OER 1 are erroneous, contrary to law or regulation, or the result of unfair bias. The Chief Counsel did not address the alleged errors in OER 2.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 9, 2001, the Board provided the applicant with a copy of the views of the Coast Guard and invited him to respond within 15 days. On August 23, 2001, the applicant responded.

The applicant alleged that after his previous command called him and demanded that he attend a meeting, his new command—his program manager—contacted the previous unit on his behalf and then told him to disregard the request.

The applicant alleged that to execute his transfer orders as interpreted by the Chief Counsel, he would have been required to work a full day at his unit and then go to the university in the evening to "begin the process of registration." He alleged that such an expectation would be "inconsistent with CG policies, document's [sic] and the Personnel Management Information System (PMIS)." He alleged that his belief that he could spend August 12th at school was reasonable and consistent with his orders since they said he should report no later than midnight.

The applicant repeated his allegation that anything that happened on August 12th should not appear on OER 1 because, according to the pay records, his last day at the unit was August 11th. He also alleged that the Joint Federal Travel Regulations supported his allegation that his tour of duty on DUINS began on his report date, August 12th. Therefore, he alleged, the end date of OER 1 should be changed to August 11, 1999, and the comments should be

removed. He alleged that the pay records are conclusive evidence of his status on August 12, 1999, because they are "the administrative foundation for all CG personnel." He pointed out that on the DUINS OER he received subsequent to OER 1, the starting date, which he had typed in as August 12, 1999, was corrected by hand to show August 13, 1999. He alleged that this correction violates Article 10.A.5.c.1.i. of the Personnel Manual, under which the starting date shown on a DUINS OER should be the "actual date of reporting to the school ... as shown by endorsement on orders."

The applicant alleged that the fact that registration began on August 13, 1999, is misleading because sometimes professors want to consult with students before they sign up. In addition, he alleged that students commonly buy books before registering for classes to "preserve" them for themselves and then return the books if they cannot get into the class. He also alleged that he had to stand in line for a parking permit on August 12th. The applicant alleged that prior to starting classes, he also had to show proof of immunizations, stand in line for a student identification card, and attend student open houses.

RELEVANT REGULATIONS

Article 10.A.1.b. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) in effect in 1994 states that "[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

Article 10.A.4. of the Coast Guard Personnel Manual describes how members of a rating chain should prepare an OER. Article 10.A.4.d.(7) states the following:

(b) For each evaluation area, the Reporting Officer 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 Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. . . . After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form in ink.

• • •

(d) In the "Comments" sections following each evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a "4." The Reporting Officer shall draw on his/her own observations, from information provided by the Supervisor, and from other information accumulated during the reporting period.

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

Article 10.A.4.d.(9)(a) contains the following instructions for filling out the comparison scale on OERs: "The Reporting Officer shall fill in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known."

Article 10.A.2.g. states that disqualified officers may not serve on a rating chain. "Disqualified" is defined as "being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation."

Article 10.A.4.g. allows reported-on officers to file a written reply to their OERs to "provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official." It specifies that "[c]omments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. ... Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted."

Article 10.A.4.c.1.j. provides that for a regular OER, the reporting period "commences the day after the ending date of the previous regular OER and ends on the date of the occasion for the current report."

Article 10.A.5.c.1.i. provides that for DUINS OERs, the "Date Reported" block shall "[i]ndicate the actual date of reporting to the school ... as shown by endorsement on orders." Article 10.a.5.c.1.h., however, provides that the "Period of Report" block should show a reporting period that "commences the day after the ending date of the previous regular OER."

Article 10.A.4.c.3.a.(1) states that "[p]ersonal award citations issued in accordance with the Medals and Awards Manual, COMDTINST M1650.29, or other U.S. Armed Services equivalent may be attached to an OER for the period in which received even if the performance cited does not relate to the period."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The record indicates that in February 1998, the applicant's supervisor, LT P., twice engaged in inappropriate discussions of abortion and the President's views and behavior with him. The applicant alleged that LT P. asked him for his views but that he declined to state them. He also alleged that an overbearing supervisor at his previous chain of command, LCDR W., had biased

LT P. and the rest of his rating chain against him. The applicant alleged that because he would not agree with LT P. about abortion and because of the bias, several of his marks in OER 2, which covered his performance from June 26, 1997, through January 31, 1998, were too low.

3. The record indicates that LT P. prepared a draft for OER 2 without any knowledge of the applicant's views on abortion and before the applicant complained about their discussions. There is no evidence in the record that they ever argued about abortion. The investigator concluded that the applicant was using the inappropriate discussions as an excuse to challenge his marks in OER 2. The applicant submitted a statement from another officer who indicated that LCDR W. was vindictive and overbearing. The officer suggested that the applicant was the victim of a "witch hunt" but provided no grounds for this conclusion. Moreover, he did not state that the applicant was treated any differently by LCDR W. than were other subordinates. The investigator's interviews revealed that several subordinates were unhappy with LT P.'s leadership style, but none of them stated that LT P. was particularly biased against the applicant.

4. The Board finds that the applicant has not proved that his rating chain committed any errors or injustices in preparing OER 2. He has not proved that prior to the preparation of OER 2, any member of his rating chain was biased against him or "disqualified" from serving on it under Article 10.A.2.g. of the Personnel Manual. He has not overcome the presumption that his rating chain acted lawfully, correctly, and in good faith in evaluating him. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). Although the applicant filed a complaint against LT P. after seeing the draft OER, an officer should not be able to retroactively disqualify a member of his rating chain by filing a complaint. Moreover, the applicant did not submit any evidence to prove that OER 2 contains any factual errors or to prove that his performance was not accurately reflected by the marks and comments in OER 2. In fact, the record, including LT P.'s email to the applicant, indicates that the applicant's rating chain worked hard to make OER 2 a strong evaluation that would facilitate his promotion.

5. The applicant alleged that the negative comments in OER 1 about how he negotiated his starting date for DUINS are erroneous, misleading, and unfair. However, the record indicates, and he did not deny, that he contacted his program manager and agreed to a start date—causing orders reflecting that start date to be issued—before informing his chain of command that he intended to accept the graduate school package and before consulting them about an acceptable departure date. The applicant's actions were contrary to military protocol and procedure. Moreover, he did not deny that when his RO handed him the graduate school package, he instructed him to discuss a possible departure date with the command before contacting the program manager.

6. The applicant alleged that the Coast Guard reneged on a promise made during the resolution of his prior EEO complaint because it did not allow him to accept DUINS orders on May 24, 1999, after a replacement for his position was identified on May 7, 1999. The resolution stated that "[the applicant and

XO] agree and confirm [the applicant's] right to submit an ADC whenever he desires, and the command will provide an endorsement approving early rotation with a backfill requirement." No replacement had been identified when the applicant attempted to set his departure date without his command's consent on March 30, 1999, and no replacement had been identified when the orders were issued on April 30, 1999, or when the command told CGPC that the orders were unacceptable. However, even though a replacement was identified before the orders were cancelled, the promise in the resolution was not broken. The resolution does not state that the command was obligated to facilitate the applicant's transfer upon the mere identification of an officer who could fill the position at some future date. The record indicates that the applicant's replacement did not arrive until mid July.

7. In light of findings 5 and 6, above, the Board finds that the applicant has not proved that the negative comments in OER 1 concerning how he negotiated his departure date from the unit and starting date for DUINS are erroneous or unfair. The preponderance of the evidence indicates that he did "jump the gun," disregard instructions, and work contrary to his command regarding his departure date, as the comments in OER 1 indicate.

8. The applicant alleged that the comment in OER 1 about his attendance at a Change of Command ceremony in civilian attire is unjust because the unit's XO had recently attended a similar ceremony in a dress uniform with Navy, rather than Coast Guard, buttons. The Board finds the applicant's attempt to draw a comparison between these two situations absurd. The XO apparently decided to honor the occasion by wearing a new dress uniform to the ceremony, but his wife unfortunately bought one with Navy buttons. His decision to wear the new uniform despite the Navy buttons does not reflect a significant error in judgment. The applicant, on the other hand, voluntarily appeared at a Change of Command ceremony in civilian attire. His action violated military protocol and the express instructions on the invitations issued. Whether he ever saw an invitation is immaterial. He had recently attended a similar ceremony and clearly knew he was required to be in uniform. Such an error in judgment may properly be reflected in an OER.

9. The applicant alleged that the comment in OER 1 about his failure to report on his last day is unjust. He alleged that his interpretation of the orders as permitting him to spend August 12, 1999, at school rather than at work were reasonable since he had completed the checkout sheet and his replacement had arrived. Moreover, he alleged that his action in reporting to school on the morning of August 12th was correct since the Coast Guard's pay records reflect his transfer as occurring at 5:30 a.m. on August 12th. In support of his allegations, he submitted a statement from the chief of Headquarters Support Command Personnel Reporting Unit, who discussed the pay records and stated that "[a]lthough almost all TAD and PCS orders indicate to report no later than 2400 hours, everyone is aware that you can report at any time earlier." He also submitted a statement from a chief warrant officer who indicated that he believes most officers are allowed one day to sign up for classes and that officers are

generally allowed to leave their old commands the day before reporting to their new commands.

10. The record indicates that registration for classes at the applicant's school began on August 13, 1999. Therefore, and because his school was in the same city as his unit, his District division chief, his command, the program manager, and the assignment officer negotiated orders that made both his departure date and reporting date August 12, 1999. The orders specified that he was to report to school no later than midnight on that day. Such orders are not unusual when members are transferring posts within the same city.

11. The Board finds that given the language of the orders, the applicant was required either to report for work at his unit on August 12th or, at least, to negotiate and clarify in advance with his supervisors what day and time he would stop working at the unit. That he had completed his checkout sheet in advance and had already been taken to lunch by his colleagues is irrelevant to the question of when he was allowed to depart his unit. Likewise, his allegation that he had things he could accomplish at school even though class registration had not started is irrelevant since he did not receive his command's permission to depart his unit on August 11th and spend the 12th at school accomplishing those things. His apparently casual assumption that he could spend the day as he liked because his orders said he should report to school "no later than" midnight showed poor judgment, which could properly be reflected in OER 1.

12. The applicant's reliance on Coast Guard pay records to justify his actions is misplaced. Pay records are supposed to reflect facts, not vice versa. That Coast Guard pay records normally show a transfer as occurring at 5:30 a.m. when orders like the applicant's are issued does not mean that the applicant was justified in assuming he could spend August 12, 1999, at school.

13. The applicant alleged that the negative comments about his actions on August 12, 1999, should be removed, and the end date of OER 1 should be changed to August 11, 1999. He alleged that his activities on August 12th could only be reflected on his DUINS OER since he reported to school on that day. However, under Article 10.A.5.c.1. of the Personnel Manual, the date appearing in the "Date Reported" block on an OER need not be the same as the starting date of the reporting period shown in the "Period of Report." Under Article 10.A.4.c.1.j., his unit could properly include his day of departure within the reporting period for OER 1, and Article 10.A.5.c.1.h. expressly permits the reporting period for a DUINS OER to "commence[] the day after the ending date of the previous regular OER." Therefore, since his previous unit properly included his departure date, August 12th, in the reporting period for OER 1, it is not an error or injustice for his actions on that day to be reflected in OER 1.

14. The applicant alleged that the negative comments should be removed from OER 1 because a Letter of Censure he received stated that the matter would not be mentioned in his record. However, the Letter of Censure stated only that no copy of the letter itself would be included in the applicant's record. It did not state that the applicant's behavior would not be mentioned in an OER.

15. The applicant alleged that the Letter of Censure was unfair because he was told not to attend the meeting his previous command demanded since it would interfere with his classes. The applicant did not submit any evidence indicating that he was ordered by his new chain of command not to meet or speak with his previous command about the nature of his departure.

16. The applicant alleged that the negative comments were included in OER 1 due to discrimination. He alleged that at his unit, white officers were not reprimanded or adversely affected after committing serious errors. He also alleged that he had been subject to reprisal. He did not prove any of these allegations, nor did he prove that he would have been informed of any negative repercussions incurred by his fellow officers who made mistakes. He has not proved that he was discriminated against by his command. Nor did he prove that any of the members of his rating chain for OER 1 were disqualified by bias or conflict of interest under Article 10.A.2.g. of the Personnel Manual. Although the XO of his unit had previously investigated the applicant's EEO complaint and concluded that it was unfounded, the XO was not a member of his rating chain for OER 1 and his investigation of a complaint against LT P. cannot be considered to have created a conflict of interest with the applicant.

17. The applicant asked that his OER reply be removed from his record along with OER 1. However, because his OER reply did not comply with Article 10.A.4.g. of the Personnel Manual, no copy was ever entered in his record. The record further indicates that the applicant chose not to revise his reply so that it would conform to the requirements.

18. The applicant asked that the admiral's Letter of Commendation dated July 27, 1999, be attached to OER 1. The letter was apparently received by the applicant's command prior to the final approval of OER 1 and could have been attached to it. Although Article 10.A.4.c.3.a.(1) of the Personnel Manual makes the attachment of awards and commendations permissive and the letter appears elsewhere in the applicant's record, the Board finds that in the interest of justice, the letter should be attached to OER 1. Such attachment draws a reviewer's attention to the letter and may mitigate the effect of the negative comments in OER 1. Therefore, his command's failure to attach the letter to OER 1 cannot be considered completely harmless.

19. Accordingly, the applicant's request should be denied except that the Letter of Commendation dated July 27, 1999, in his record should be made an attachment to OER 1.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of JSCG, for correction of his military record is granted in part.

The admiral's Letter of Commendation dated July 27, 1999, which already appears in his record shall be attached to his OER covering the period June 1, 1998, through August 12, 1999. In block 2 of that OER, the word "None" shall be removed and the Letter of Commendation shall be properly cited.

No other relief shall be granted.

