

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-056

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on December 17, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 27, 2018, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a [REDACTED] who retired from the Coast Guard on [REDACTED] [REDACTED] asked the Board to correct his military record and grant relief by

- removing a Special Officer Evaluation Report (SOER) that documents his removal from his primary duty as the Executive Officer (XO) of a large cutter on January 23, 2014, and replacing it with a Continuity OER;
- awarding him a Commendation Medal and a cutter Wardroom Plaque documenting the end of his tour of duty aboard the cutter;
- directing the Coast Guard to reimburse him for the attorney fees he has incurred as a result of his chain of command's retaliation for making protected communications;
- reversing and removing the decision of the Personnel Record Review Board (PRRB) regarding his claims;
- asking the Inspector General (IG) to reopen his whistleblower complaint to gather further evidence; and
- convening a hearing pursuant to the Military Whistleblower Protection Act.

The applicant explained that on May 23, 2013, when he was a [REDACTED] [REDACTED] assigned as the XO of a cutter and temporarily serving as the Acting Commanding

_____ of the _____ of the _____ assault by one crewmember of another crewmember to the Area Command and _____ investigation _____ tive Se _____ anged for the seaman to receive victim support services. On May 25, 201 _____ ct confessed to having unlawful sexual contact with the seaman. _____

From May 26 to June 7, 2013, the applicant stated, he received multiple complaints from the crew _____ is agent, _____ who was investigating the assault, and other CGIS officials. The crew alleged “witness tampering via threats against cooperative _____ coercion to give false witness statements.” He stated that the CGIS agent failed to properly and promptly investigate the reported sexual assault. The app _____ he orally reported these complaints to the then Commanding Off _____ (CO”), _____ CO agreed with his concerns and relayed the complaints of potential misconduct by the C _____ ler in person on June 7, 2013.

The app _____ e CGIS was investigating, Captain X, an officer assigned to the _____ nmand, conducted a Command C _____ As _____ on the cutter from May 31 to _____ 7, 2013, which focused on the cutter’s senior _____ ship, including himself _____ 2013, the Capta _____ ed the Area Commander that the command climate aboard the cutter was positive.

_____ The applicant stated that in mid-June _____ he prior CO submitted _____ ment before departing the cutter. The applicant was promoted to CDR as expected on July 1, 2013. _____

The applicant stated that the new CO who reported aboard on June 18, 2013, dismissed the applicant’s concerns about how CGIS was conducting the investigation, admonished him, and decided to dismiss the matter _____ her. And sometime thereafter _____ CO suggested that the app _____ take leave. The next day, CGIS agents boarded the cutter, and the CO allowed them to search the applicant’s stateroom without probable cause or au _____ rization. He alleged that no CG-6012, “Application for Search Authorization,” was completed as required and that CGIS should have had to complete _____ and get a military judge to sign it. His Governme _____ ve were seized, however, and they took photographs of _____ personal property. The appl _____ ment devices were subjected to routine monitoring did not give his command a “blank check” to search _____ uter without pro _____ tion, or a valid _____ communications mentioned in the SOER were not discov _____ by his C _____ cause he was never the subject of an investigation, as his CO admit _____ no reason for the search, and called the search a retaliatory “fish _____ records show _____ SIS printed out and reviewed 137 pages of his Office Communicator System (OCS) logs with instant messages, but the CS “entry picked” _____ CS logs and used just 40 of the pages as a pretext for removing the applicant from his position. _____

On January 23, 2014, the CO told the applicant that he had lost confidence in the applicant's ability to serve as XO based on instant messages that had been extracted from the applicant's Government computer. The applicant alleged that when he asked to see the investigation and evidence on which the CO was basing his decision, the CO replied, "There is no investigation." The applicant stated that he was not allowed to see the evidence or to submit a sworn statement or try to rebut the allegations against him. He was relieved of his duties as XO and sent to a shore unit on temporary duty orders.

The applicant stated that on February 13, 2014, he submitted letters to two congressional representatives in which he identified himself as a whistleblower, alleged misconduct on the part of the [REDACTED] Area command and CGIS, and complained of retaliation by his rating chain. On February 25, 2014, he filed a whistleblower retaliation complaint against his CO, other members of his chain of command, the Area Commander, and with the IG of the Department of Defense. The DoD IG forwarded his complaint to the DHS IG. The applicant stated that because the officers on his rating chain were listed as either one of the accused retaliators or as witnesses in his complaint to the IG, they were disqualified from his rating chain.

The applicant stated that on February 26, 2014, his CO submitted the SOER documenting his removal from his primary duties for review. He stated that this CO erroneously considered and included performance that had occurred before the reporting period began in preparing the SOER.¹ He argued that doing so was impermissible under OER policy because there had been no investigation. The applicant argued that material gathered pursuant to or as a result of the investigation of the sexual assault could not be used as a basis for the SOER because he was not the subject of the investigation, he was only a witness and the whistleblower.

On February 27, 2014, he sent a congressional representative another letter and requested assistance to ensure that the IG thoroughly investigated his complaint, and she forwarded his letter to DHS. That same day, he received the Area Command's response to his Freedom of Information Act (FOIA) request for the evidence on which his CO had based his decision to remove the applicant as XO of the cutter. The response stated that 137 pages of OCS logs with his instant messages had been printed.

On April 8, 2014, the applicant alleged, the IG's office advised him that his complaint had been referred for investigation and assigned a complaint number.

On April 11, 2014, the applicant stated, he submitted his Addendum to the SOER and asked that the SOER and his Addendum be reviewed by a different chain of command because his rating chain should be considered "disqualified," but his request was ignored and the SOER was later reviewed and signed by the Area's Chief of Operational Forces. That same day, the applicant alleged, his pending transfer orders to a [REDACTED] billet as a liaison to one of the other Armed Forces were rescinded, and he was reassigned to a billet that was an [REDACTED]'s billet, not commensurate with his pay grade as a [REDACTED], even though there were vacant [REDACTED] billets he could have filled.

¹ Article 2.B. of the OER Manual prohibits SOER comments referring to an officer's "performance or conduct which occurred outside the reporting period."

On April 18, 2014, the applicant alleged, senior Coast Guard officials in the Area Command and Coast Guard Headquarters became aware of his whistleblower retaliation complaint when DHS forwarded a second congressional inquiry to Coast Guard Headquarters and asked the Coast Guard to reply.

On June 4, 2014, the applicant stated, he submitted an OER Reply to the SOER, in which he protested his rating chain's refusal to remove themselves from his rating chain despite being disqualified.

On February 20, 2015, the applicant stated, he submitted an application to the PRRB raising these same issues, but on July 31, 2015, the PRRB denied his request. The applicant alleged that the PRRB considered only his CO's written declaration, even though it was his CO who retaliated against him by initiating the search of his stateroom without probable cause or authorization and his removal from his duties. He alleged that the PRRB also ignored his valid legal arguments and supporting evidence of retaliation, including statements by the prior CO, a Work-Life counselor/Sexual Assault Response Coordinator (SARC), and a chaplain's assistant wrote on his behalf. The applicant argued that their statements prove that he made the protected communications about the sexual assault and CGIS misconduct and confirm his allegations and interpretations of law and policy. The applicant also complained that the PRRB's position was improper and that they did not prepare their report properly.²

The applicant concluded that the record shows that the Coast Guard violated the Military Whistleblower Protection Act by taking the following negative personnel actions in retaliation for his having reported a sexual assault on May 23, 2013, and the CGIS agent's misconduct on June 7, 2013:

- Conducting a retaliatory search and seizing stateroom on the cutter without probable cause or valid search authorization;
- Removing him from his primary duties on January 23, 2014;
- Entering the derogatory SOER in his record; and
- Rescinding his pending transfer orders on April 11, 2014, and reassigning him to a billet.

In support of his allegations, the applicant submitted many documents, the most relevant of which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant was appointed a lieutenant junior grade in the Coast Guard Reserve on [REDACTED] [REDACTED]³ and immediately began serving on extended active duty as a marine inspector. He was transferred to a cutter in September [REDACTED]. After being selected for promotion on the active duty promotion list, he was promoted to lieutenant and integrated into the regular Coast Guard on [REDACTED].

² The applicant couched many of his complaints in arguments and allegations about the arbitrariness of the PRRB decision, but the BCMR considers every case *de novo*.

³ The applicant initially signed an oath of office as an ensign but his rank was subsequently corrected to lieutenant junior grade pursuant to BCMR Docket No. 2000-030 based on his inter-service transfer from the Naval Reserve.

In [REDACTED] [REDACTED] Coast Guard Achievement Medal for his tour of duty aboard the cutter. [REDACTED]

From [REDACTED] the applicant served as a liaison officer to a joint training group. He was awarded [REDACTED]s first Coast Guard Commendation Medal and a Navy and Marine Corps Commendation Medal for this tour of duty.

[REDACTED], the applicant [REDACTED] as the Operations Officer of a large cutter. He received his second Coast Guard Achievement Medal for this tour of duty. From [REDACTED] he served as the Commanding Officer of a patrol boat. He received his second Coast Guard Commendation Medal for this service and was promoted to [REDACTED]

[REDACTED], the applicant was assigned to Duty Under Instruction and completed a master’s degree. From [REDACTED], the applicant served at a Headquarters unit, and he received his second Commendation Medal for this service.

From [REDACTED], the applicant served as the Operations Officer of a cutter. In [REDACTED] he was selected for promotion to [REDACTED]. In [REDACTED] while awaiting promotion to [REDACTED], the applicant reported for duty as the XO of [REDACTED] cutter with a crew of [REDACTED] members.

Report of Sexual Assaults and Harassment

[REDACTED] wing:

- On May 23, 2013, a CGIS agent, [REDACTED] sent an email asking the applicant to “e-mail me the names of all involved as you know presently.” The applicant replied that during his conversation with the female seaman and in the presence of a victim’s advocate, the [REDACTED] that a [REDACTED] had made inappropriate [REDACTED] of sexual nature; an [REDACTED] had made “inappropriate comments of a sexual/threatening nature, to wit: ‘I’m going to find out how much of a slut and drunk you are.’”; an [REDACTED] had made inappropriate comments of a sexual nature about her body and had sent her and her roommate inappropriate texts; and [REDACTED] had made inappropriate comments of a sexual nature [REDACTED] chest repeatedly and grabbed her breasts and buttocks; a [REDACTED] had propositioned her [REDACTED] buttocks; and an [REDACTED] had claimed to have naked photographs of her. [REDACTED]
- The [REDACTED] [REDACTED] email exchange to the Chief of Operational Forces [REDACTED] [REDACTED] He stated that he would keep them informed of the status of the [REDACTED] investigation. The Chief of Operational Forces replied by thanking [REDACTED] [REDACTED] the Area [REDACTED] Staff and the legal staff, one of whom [REDACTED] would contact the applicant to see if he needed assistance. [REDACTED]
- On June 14, [REDACTED] applicant’s prior CO, who was still the CO of the cutter at the time [REDACTED] had discussed “the way ahead for the [REDACTED] the CGIS Director, and that another agent would arrive that [REDACTED]

day with “additional people to help with the investigation. ... Given the sensitivities of this case, interactions you’ve had with the agent on scene to date and the need to have the facts of the case established prior to the ship’s sailing in just a few weeks, pls provide all the cooperation necessary to bring the investigation to resolution soonest. If at any time you have questions or concerns – pls give me a call.” Later that day, the Area Chief of Staff sent the prior CO an email about the results of a “command climate” investigation on the cutter. He stated that Captain X had “finished his write up last night and out briefed the VADM this afternoon. He only found indications of a positive command climate.”

Command Climate Report

On May 30, 2013, the Area Commander directed Captain X to conduct an investigation of the command climate aboard the applicant’s cutter to

investigate aspects of command climate which may have created an environment accepting of sexual assault and sexual harassment. This may include interviewing past and present members of [the crew]. Your investigation should not encompass any allegations of sexual assault. If an allegation of sexual assault arises during your investigation, stop your investigation and contact CGIS and [the Area’s] Staff Judge Advocate immediately. Your investigation shall be conducted in parallel to an ongoing CGIS investigation on a not to interfere basis. You shall contact [the CGIS agent] to ensure appropriate coordination between the two investigations. You may recommend appropriate administrative or disciplinary action.

On June 14, 2013, Captain X submitted to the Area Commander a report on his investigation of the command climate aboard the applicant’s cutter. Captain X reported that he had interviewed 45 crewmembers and that 44 had reported a positive command climate. The only negative report, he claimed, came from a victim’s advocate (VA), who “outlined many concerns with the command.” The VA had accompanied the seaman to the XO [the applicant] on May 23, 2013, who in turn “made the required notifications to Work-Life, CGIS and Legal.”

Captain X’s findings of fact include numerous findings about the seaman who reported sexual assaults and harassment on May 23, 2013. He wrote that his interviews with other crewmates showed that she socialized with her roommate’s team; she was a good performer; she had told crewmates that she was a victim of a previous assault; she had previously reported an [REDACTED] for sexual harassment; she had flirted with crewmates at a bar shortly after reporting the assault; she had shown “attention seeking behaviors” according to even “the higher levels of the command”; and she reportedly had wanted to make a restricted report but it was made unrestricted.⁴

Captain X also noted several other incidents: a male reported inappropriate locker room behavior; two members of a team were in an inappropriate romantic relationship; one member had asked another if she had sex during her period; the seaman had been bitten by a male crewmate [REDACTED]; a non-rate reported that another crewmate had made inappropriate comments to

⁴ According to the Chapters 1.D., 1.E., and 3.C. of the Sexual Assault Prevention and Response Program manual, COMDTINST 1754.10D, a member who has been sexually assaulted may make a “restricted report” to designated Victim Advocates, Employee Assistance/Work-Life personnel, and healthcare professionals, in which case CGIS is not notified. If the member reports a sexual assault to her chain of command or law enforcement, however, it is an “unrestricted report,” and CGIS is notified.

at [redacted]; the non-rate described the cutter's rumor mill as an "adult high school"; a [redacted] overhearing [redacted] correct [redacted] reported witnessing a junior officer inappropriately touching a petty officer, [redacted] denied it and said the junior officer was "her friend"; a female petty officer [redacted] repeatedly called by just her first name by a junior officer and when being piped over the intercom; a chief reported "rumors of alcohol-related misconduct"; and the applicant stated that a female civilian had reported inappropriate comments from a junior officer during [redacted]

[redacted] stated that the CO and XO had fostered a climate focused on preventing sexual assault and harassment by discussing such matters and alcohol use regula [redacted] [redacted] regularly documenting required training; participating in tra [redacted] with fo [redacted] negative comments"; frequently interacting with and being accessible to the crew; expressing [redacted] alt and harassment; and espousing a command philosophy of respecting shipmates. The Command Climate Report has many attachments regarding the command, including the following:

[redacted] puts show that the cutter was in co [redacted] nce [redacted] training requirements and that [redacted] all but three crewmembers (99.2%) had com [redacted] the required sexual as [redacted] assessment [redacted] h training. Training had been conducted at an all-hands meeting in November 2012, and additional training had been conducted by the SARC at an all-hands meeting on April 26, 2013.

The cutter's unit policies address various matters, including interpersonal relationships, alcohol, drug abuse, hazing, computer usage, as well as sexual assault prevention and response and the difference between restricted and unrestricted reporting.

- A survey of the cutter's crew conducted in September 2012 shows that 25% of the females reported having experienced gender discrimination aboard the cutter within the [redacted] % re [redacted] d having experienced s [redacted] d none had [redacted] ted the incidents, except that one had reported the incident to her supervisor [redacted] and was dissatisfied with the resolution. In addition, 100% of the fe [redacted] respondents stated that there was a "perception of barriers to reporting sexual assault." Half or more of the female responder [redacted] ted the following barriers to reporting a sexual assa [redacted] e, or fear [redacted] fear of being reduced in the eyes of the com [redacted] ler or colleagues"; fear [redacted] done"; and [redacted] wanting [redacted] others in trouble.

- An appendix to the survey includes the following quotations of members' written comments: [redacted] I hear gay, racist, sexist, and agist jokes constantly on the [redacted] hey help pass the day. Please don't make them [redacted] ay." "I have witnessed [redacted] on numerous [redacted] gay slurs and suggestive comments towards females. This comman [redacted] er an enviro [redacted]

Captain X conc [redacted] ed that there were n [redacted] aments indicating that females were subjected to sexual touching or grom [redacted] workplace apart from the on-going CGIS investigation

...nde...ate preached and promulgated by the CO and XO was focused on preventing... and Sexual... not got... level and possible factors include a weaker chief's mess, some poor leadership... and by-standers not taking action. ... In some respects, the high morale and...rit de corps, combined with some of the statements made are counter-productive to a criminal investigation. Similarly, the number and nature of comments I received which were critical of the victim and the victim advocate who brought her forward, are a clear... ahead of... organization." Captain X noted that the CO had made public statements in defense of the crew's right to drink alcohol.

Captain X made many recommendations, including transferring both... and... to get a fresh start and removing the VA from the... numerous...rt show that he asked the witnesses specifically for information about the command, the sea...witnesses highly praised the CO's and XO's strong commitment to preventing sexual assault and sexual harassment and repeated, adamant support for the zero-tolerance policy, and many offered scathing opinions of the seaman at...stated that female crewmembers were treated with respect. The...statements include the following:

- The VA... she had approached the seaman because the seaman had changed from being "very outgoing" to in a "shell," which had been getting worse. The seaman started to cry and told her how she had been treated by male c... her if she wanted to consult the SAR... seaman refused because...

...everything ... and tried to get her sent off the boat." The seaman agreed to speak but only to the XO (...applicant), whom she trusted, and on the w...VA explained to her the difference between restricted and unrestricted reporting. When the VA approached the applicant, he asked whether she had explained the difference in reporting, and so she returned to the seaman... the...rence and, in particular,..." to the XO... was no going back." When they entered his office, the applicant again told the seaman about restricted versus unrestricted reporting, and the se...n was so upset that she made an unrestricted report by telling him everything that had been happening. After they left his office...went to see the SARC, where the VA "was reprimanded... [seaman] wanted to have a restricted report." The VA stated...at while working, male...

...lk "a lot about how aft...le [berthing] is the disgrace of the boat and that all the females in...

- A female... zero tolerance for sexual assault at every quarters. She wrote that... accusations of sexual harassment aren't warranted due to how she behaves around the...mments that are sexual in nature that she constantly makes. Regarding... used, she said... crime. And you can't fix stupid." She called the seaman's VA crazy and said that the VA keeps notes in a green notebook of things that happen throughout... day.

- A non-rate stated that a condom had been placed in her shower gear. She had heard only one of the men make inappropriate comments and that his very first comment to her had been “nice tits.” She had heard him make inappropriate comments to the seaman but “people don’t want to get other people in trouble.” She stated that there were many rumors as if it were an “adult high school,” which made it harder on the female crew-mates. She stated that the applicant had an open door policy and that the command would stop any inappropriate behavior if they were told about it.

Regular OER and [REDACTED] Assignment Panel

On June 18, 2013, the applicant received a regular, annual OER from his prior CO, who was retiring as of July 1, 2013. His prior CO assigned the applicant four marks of 5, twelve marks of 6, and two marks of 7 in the various performance dimensions,⁵ and a mark in the fifth spot (of seven) on the comparison scale, denoting an “excellent performer.” The prior CO stated that the applicant had shown “[s]olid performance in exceptionally demanding & difficult assignment/first year”; noted that he had been selected for promotion to CDR; and recommended him for promotion to O-6 “with peers.”

On January 10, 2014, the Personnel Service Center issued the results of the [REDACTED] Assignment Panel, which had convened on January 7, 2014, and stated that the assignments had been [REDACTED] ws that the applic[REDACTED] been assigned as a [REDACTED]
[REDACTED]

CGIS Investigation of Obstruction of Justice

On January 27, 2014, CGIS updated an August 7, 2013, re [REDACTED] an allegation made by the Area Chief of S [REDACTED] 1, 2013, that the prior CO had committed obstruction of justice by obstructing CGIS’s investigation of the sexual assault and harassment complaints reported on May 23, 2013. The agent wrote that the “investigation [REDACTED] [REDACTED] the applicant] was complicit with the actions of [the prior CO]. [The applicant] has subsequently been rel[REDACTED] of his duties as Executive Officer. [The applicant] has not been [REDACTED] titled as CO-SUBJECT until further review of this investigation by [the Area legal staff].” The ROI states the following:

- On June 5, 2013, CGIS agents attempting to interview the crew about the allegations of sexual assault and harassment experienced witnesses refusing to provide information.
- On June 6, 2013, the prior CO sent this message⁶ to someone on the Work-Life staff: “Well, [Area] Legal was all geared up about my comments that I have a Constitutional Right to drink (which I do) – I doubt [redacted] knew anything about that. [Area] L [REDACTED] [REDACTED] as also spooled up about the fact that I tell my crew not to talk if they don’t want.” The ROI states that the CGIS agents [REDACTED] were unaware of [the prior CO’s] crew brief informing they were not required to cooperate with CGIS. This OCS chat implies someone at [REDACTED]

⁵ On an OER form, officers are rated on a scale of 1 (worst) to 7 (best) in eighteen different performance dimensions, such as “professional competence,” “teamwork,” and “judgment,” which are defined in written standards on the form.

⁶ According to the ROI, the messages of Captain X and the applicant were obtained on November 27, 2013.

Legal] was aware of [the prior CO's] actions and did not disclose that information to CGIS.”

- On June 7, 2013, one of the witnesses advised CGIS “that on 03 June 2013, [the prior CO] instructed [the cutter's] crew they were not required to cooperate with a CGIS sex assault investigation.”⁷ Also on that date, CGIS asked to interview the applicant, who said he was unavailable because of his workload but agreed that the prior CO had done what the witness alleged. The applicant's OCS logs showed that the same day, he sent an assistant in the chaplain's office this message: “CGIS is butt hurt that some of our crew is refusing to speak with them. And think that maybe ‘the command’ here is telling members not to talk to them.”
- On June 8, 2013, the applicant sent this message to someone: “Your husband is on his way up now. I think he is getting pissed again about the CGIS goons.”
- On June 11, 2013, the applicant sent this message: “The goons are coming to take me away to the funny farm. They wanted me to ‘come up to the office’ last Friday. I refused to go;).”
- On June 14, 2013, immediately after being asked by CGIS for an interview, the applicant sent a message to Captain X, who had completed the command climate survey, who asked the applicant to call him instead.
- On June 15, 2013, the applicant sent an officer assigned to another Sector this message: “I am going in for my interview at 1400 today. They are going to try and ‘prove’ there is a command climate from the CO/XO that facilitates excessive alcohol consumption which likely is the causative factor in the sexual harassment case.”
- During his interview with CGIS on June 15, 2013, the applicant “became confrontational, interrupted, and did not respond to some of the CGIS questions.” The applicant stated that the command was in compliance with Chapter 5 of the Sexual Assault Prevention and Response Manual, COMDTINST M1754.10D, and that he had followed the manual's checklist in Enclosure 3 when responding to the report of sexual assault on May 23, 2013. The ROI notes that this checklist requires COs “to instruct crews to fully cooperate with any investigation involved with reported sexual assaults.” The ROI also notes that later, on July 26, 2013, the applicant called this manual “some obscure COMDT instruction.”
- On June 18, 2013, the applicant sent Captain X a message stating that his interview had gone well and that he had debriefed another captain about the content of his interview.
- On July 26, 2013, the applicant sent an officer in a different Sector this message about his interview with CGIS: “They tried all the detective tricks too, and were frustrated when I saw it for what it was and called them on it or refused to play ball. In reality it was obvious they were used to just getting non-rates in the room and scaring the shit out of them. I think they had no idea of how to handle a Commander who talked over and interrupted them constantly. Once he wanted me to repeat my chain of events: ‘for the record’. I

⁷ Chapter 5.C. of COMDTINST M1754.10D requires Commands to the checklists in Enclosure 3 when responding to a report of sexual assault, and Checklist #3 in Enclosure 3 states that the command must “[a]dvise those who may have knowledge of the events leading up to or surrounding the incident to fully cooperate with any investigation.”

plie [redacted] and if he couldn't listen effectively the first time, he needed to review h [redacted]

- Following [redacted] IS's initial report dated August 7, 2013, CGIS was asked to investigate [redacted]. As a result of a search conducted on an unknown date, on November 27, 2013, CGIS obtained OCS logs with the IMs of the prior CO and the applicant from the CGIS Electronic Crimes Section. The ROI states that the applicant's OCS logs from October 2011 to November 2013 contained over 20,000 chats, which "range from general USCG on [redacted] business, disparaging homosexual remarks, racist [redacted] appropriate sexual behavior/misconduct, disrespect toward senior officers, and unauthorized disclosure of an ongoing criminal investigation." The ROI also claimed that the mess [redacted] from June and July 2013 revealed that the applicant had "obstructed a CGIS investigation."

- On December 18, 2013, CGIS [redacted] climate investigation conducted by Captain X in June 2013. The ROI notes that Captain X had been ordered by the Area Chief of Staff focus on command climate issues and to not interfere with the CGIS [redacted] that Captain X's report that the command climate of the [redacted] in June had been "extremely positive" was [redacted] supported by the findings of fact.

The ROI states that "[t]hroughout this investigation instances of alcohol [redacted] inappropri [redacted] romantic relationships, fraternization, hazing, homophobic slurs, unreported sexual assaults, unreported sexual harassment, victim blaming, and an isolationist policy in regards to 'outside the lifelines' unit partnerships [redacted] with respect to this investigation appear [redacted] contradicted by the f [redacted] investigation were asked by [Captain X] to opine regarding the victim and victim advocate to include m [redacted] of dress, social interactions, mental stability [redacted] history. This does not appear germane to the [command climate] objective and is indicative of a victim/victim advocate focused investigation." In addition, Captain X had referenced interviews with the Work-Life staff, the [redacted] CO [redacted] the applicar [redacted] one of which were includ [redacted] were the other [redacted] views."

The investigation of obstruction of justice was not closed until June 5, 2014. The agent reported that no action [redacted] against the prior CO, as he had retired on July 1, [redacted] of the seaman's claims was also not finalized until the [redacted] of 2014, when the prim [redacted]

Removal from Duty

On Jan [redacted] e [redacted] dum, "I [redacted] Removal from Primary Duties," advised the applicant that he was [redacted] tant to Article 1.F.2. of COMDTINST M1006.8 (hereinafter, t [redacted] [redacted] and [redacted] [redacted] "retained" his leadership authority as the XO. The CO stated that his decision was [redacted]

I ... predicated [redacted] on the information contained in your Government computer's office communicator log [redacted] the content of your logs [redacted] undermines my confidence in your judgment, leadership abilities [redacted] onal conduct, and adherence to Coast Guard core values. I [redacted] and I am deeply troubled by their contents.

The [redacted] displays discriminatory language, disrespect toward superior officers, and references to potentially criminal behavior. You also inappropriately discuss open criminal investigations with members of the Coast Guard not authorized to receive the information. I have lost confidence in your abilities to perform your assigned duties. [redacted] Accordingly, you are relieved of your present position as executive officer and all [redacted] responsibilities on board [the cutter]. In addition, you shall be subject to a forthcoming derogatory officer evaluation report in accordance with Articles 5.A.3.c. and 5.A.3.e. of [COMDTINST M1000.3; hereinafter, the Officer Manual].

[redacted] and you [redacted] other orders from the Coast Guard's Personnel Service Center – Officer Personnel Management Division. [redacted]

Upon being removed from his position, the applicant was temporarily assigned as a [redacted] at a Sector Command for 155 days until he was issued permanent transfer orders. He received primarily marks of 5 on his OER for [redacted] temporary assignment, dated June 27, 2014; a mark of "strong performer" on the third spot on the comparison scale; and a recommendation for promotion "with peers."

Applicant's Letters to Congress

On February 13, 2014, the applicant sent letters with identical texts to his congressman and senator alleging that he was suffering reprisal after having reporting an alleged sexual assault against a crewmember to CGIS on May 23, 2013. He stated that CGIS initiated an investigation into the alleged assault but it developed into an investigation of non-existent obstruction of justice by the prior CO. After he refused to provide supporting evidence during an interview with CGIS, they searched his stateroom and seized his hard drive to "teach [him] a lesson" because he had brought an attorney to the interview and had refused to lie. He alleged that nothing of value was found on his hard drive, and it was returned. However, he was then removed from his position as XO and received a derogatory SOER based on transcripts of his OCS messages with personal communications to fellow officers. His CO told him that he had used "discriminatory language" against male homosexuals and displayed "disrespect toward senior officers" for expressing my disagreement with the manner in which certain political agendas are being aggressively pressed in the Coast Guard contrary to service norms. Further, he accused me of discussing "open criminal investigations with members of the Coast Guard not authorized to receive the information" for having expressed my frustration with the Coast Guard's gross mismanagement of the investigation and the adverse effect it had on my crew's morale and good order and discipline. I was removed from my position. It is obvious that [redacted] despite my not having been under investigation – the [redacted] ignored my [redacted] finding [redacted] could use to exact retribution. In this case it was my reservations regarding the Coast Guard's waste of service resources on an unfounded investigation and my personal opinions [redacted] that caused [redacted] The applicant noted that his transfer orders had also been cancelled and he would be sent to a junior officer billet.

The congressman's office acknowledged [redacted] of this letter [redacted] he had [redacted] applicant's behalf and requested a report. The senator's office provided a similar response on February 24, 2014, and stated that they had contacted the Coast Guard on his behalf [redacted]

The [redacted] response had forwarded 97 pages of the OCS logs provided by CGIS, and the [redacted] which had been [redacted] the CO [redacted] unintentionally overlooked and were being forwarded, along with a second [redacted] pages.

Processing of First Letter and Applicant’s Second Letter to Senator

[redacted] for forward [redacted] copy of the applicant’s complaint to the Department and asked that it be thoroughly investigated. This inquiry was electronically [redacted] [redacted] Guard for response on April 18, 2014, and the tasking was transferred to the IG’s office on April 24, 2014.

[redacted] sent a second letter to the senator. He noted that the Coast Guard had claimed that his electronic [redacted] searched as a result of a “duly authorized investigation,” but alleged that it was the investigation of the sexual assault he had reported. He stated that the Coast Guard’s response made him concerned that he was being retaliated against [redacted] had reported the alleged sexual assault but also because he had [redacted] about CGIS engaging in waste [redacted] of [redacted] and gross mismanagement in [redacted] the investigation. He stated that the response to his FOIA request should [redacted] had retrieved his [redacted] communications in late November 2013 and then emailed them to the Area Command and “actively lobbied against [him].” He argued that the Coast Guard had violated the Military Whistleblower Protection Act and asked the [redacted] to investigate his complaint.

IG Acknowledges Receiving Complaint

On April 8, 2014, the Office of the Inspector General acknowledged receiving a whistleblower complaint from the applicant, notified him of the assigned complaint number, and referred [redacted] to statutory provisions [redacted] of the Military Whistleblower Protection Act regarding prohibited [redacted] actions and the IG’s obligations upon receiving a complaint.

SOER Addendum and Endorsements

[redacted] use the SOER is a derogatory report, the applicant was [redacted] to submit an Addendum [redacted] of an Addendum to the SOER. He advised his CO that he had received 97 pages of his IM logs through a [redacted] CO of basing his [redacted] SOER on performance [redacted] time period. (The applicant apparently had not yet received [redacted] IM [redacted] cess and [redacted]. The applicant also sent a complaint about this issue to PSC.

[redacted] the applicant stated that he had reported multiple sexual assaults of a female crew member by a male crew member [redacted] for the course of [redacted] several months [redacted] resulted in a CGIS investigation. He stated that the CGIS investigation remained open for months without resolution, and he expressed concerns through his chain of command that the CGIS agents were not [redacted] investigating the assaults, but the CO dismissed his concerns and no [redacted] had yet been taken against the accused.

The applicant stated in his Addendum that after he expressed his concerns about the investigation, which he reasonably believed to be wrongdoing by CGIS, the CGIS agents retaliated against him by making him a target of the investigation, reviewing his personal instant messages on his Government computer, and providing them to his CO. He stated that on January 23, 2014, the day he was removed from his duties, the CO told him that he had not been the subject of any investigation. The applicant stated that his messages have no nexus to the alleged sexual assaults, and there was no reason for CGIS to target him or to provide the messages to his CO. He argued that “but for” his filing of the sexual assault complaint, CGIS would never have discovered his messages and so they should not have been used against him in the SOER. He called the m [REDACTED] “purely private conversations unrelated to official government business.” He alleged that a lot of the messages were sent outside of the reporting period for the SOER and included protected communications to the chaplain’s office and the SARC.⁸ The applicant stated that because the CGIS agents’ actions were authorized or approved by senior officers in the Area Command, the SOER and his Addendum should “be considered by officers outside of the [Area] chain of command.”

The applicant’s CO endorsed the Addendum and forwarded it up for review on April 17, 2014. In the endorsement, he stated that the SOER is fair and accurate and based on the content of 40 pages of instant messages obtained from the applicant’s Government computer. He stated that the messages he reviewed did not include any communications between the applicant and the chaplain’s office or the SARC and that all of the messages with inappropriate, discriminatory, and disrespectful comments by the applicant had been made within the marking period for the SOER. The CO stated that the applicant’s “comments referencing potentially criminal behavior occurred outside the marking period (May 2013), but came to [the CO’s] attention during the marking period.” The CO stated that the applicant had no expectation of privacy when using his Government computer. He also paraphrased some of the comments in the SOER about the applicant’s conduct.

The Reviewer for the SOER endorsed and forwarded the Addendum on April 22, 2014. He stated that as Reviewer, it was his job “to ensure the OER reflects a reasonably consistent picture of the reported-on officer’s performance and potential.” The Reviewer noted the applicant’s request that the SOER and Addendum be reviewed by someone outside of his chain of command. The Reviewer also quoted the rules regarding the disqualification of rating chain members at Article 5.A.2.e.(1) of COMDTINST M1000.3A. The Reviewer stated that he was neither unavailable nor disqualified under that rule. He stated that he fully supported the CO’s decision to remove the applicant from his duties based on the content of the instant messages and that the SOER is accurate.

IG’s Response to the Senator

On May 15, 2014, the Inspector [REDACTED] heral responded to the Senator’s [REDACTED] inquiry on the applicant’s behalf. The IG acknowledged receiving the applicant’s complaint and stated that it would be reviewed.

⁸ The Sexual Assault Response Coordinator (SARC) is assigned to “Work-Life,” also called the Employee Assistance Program.

SOER Reply and Endorsements

On July 1, 2014, [redacted] submitted a Reply to the SOER for inclusion in his record. He stated that the [redacted]'s retaliation for reporting sexual assaults and raising valid concerns about the "internal misconduct and corruption" of CGIS investigators. He stated that the SOER was "issued as a pretext to support his removal" as the XO. He stated that his rating chain had not protected [redacted] for the seizure of [redacted]'s living quarters and computer and that he had become a target of the investigation without any probable cause. He stated that he had [redacted] of any investigation and that he had not been allowed to review the evidence against him or to provide information that would rebut the evidence. He stated that [redacted] rating chain's actions were retaliation against him as a whistleblower. [redacted] sexual assault [redacted] stated that both the CO and the Reviewer should have been disqualified from his rating chain upon [redacted].

On June 9, 2014, the CO endorsed and forwarded the applicant's OER Reply. He repeated his claim [redacted] and accurate and completed in accordance with policies. The [redacted] signed a similarly succinct endorsement on [redacted], 2014.

Transfer Order, [redacted] Billet

On July 20, 2014, the applicant reported for duty as a [redacted] which was a billet normally filled by a [redacted]. He was responsible for [redacted] and he supervised one junior officer, one enlisted member, and two civilians. The applicant applied for several [redacted] billets in the spring and summer of 2014 but was not [redacted] for them.

Application to the Personnel Records Review Board

On February 20, 2015, the applicant submitted an application to the PRRB with many of the same or similar arguments to those in his BCMR application. He requested reinstatement of the SOER with a Continuity OER; a Commendation Medal; a Wardroom Plaque; and reimbursement for attorney [redacted]. The applicant submitted his own sworn statement to [redacted] three others.

In a sworn declaration, the [redacted] CO of the cutter highly praised the applicant's performance as [redacted] while he was on [redacted] duration [redacted] call from the applicant, who was Acting CO, stating [redacted] (female E-3)"; that he had reported the matter to the Area Commander [redacted] had referred the seaman to the SARC; and that he had requested [redacted] [redacted] praised the applicant for following these "textbook correct" procedures and asked to be kept informed of any developments before he returned to the [redacted] on May 20, 2015.

The [redacted] stated that [redacted] accused male crewmember confessed on the second day of the [redacted] investigation, [redacted] "seized the entire crew's emails and [redacted]."

ma [redacted] d,” including the XO. The prior CO thought that this was “incredibly [redacted] ranted” and [redacted] as before and thought that CGIS was on a witch hunt because Congr [redacted] into military sexual assaults. The applicant told him that some of the [redacted] that they had been treated unfairly by CGIS and/or felt pressured to provide untrue statements. Therefore, the applicant decided to bring his attorney with him to his own CGIS interview because he thought that the CGIS agents had become [redacted]. The prior [redacted] that he and the applicant thought that CGIS “was no longer properly investigating the sexual assault. As I believed that [redacted] al misconduct on the part of CGIS, I relayed my concerns directly” to the Area Commander before the new CO assumed command on June 18, 2014. [redacted] stated that later, but before he retired from active duty, [redacted] part of CGIS.

The prior CO stated that after being removed from his duties, the applicant told him that immediately after the change of command, the new CO had encouraged him to take leave and CGIS agents had searched his stateroom and extracted his instant messages. He stated that the extraction of the applicant’s instant messages had been unjust and retaliatory. The prior CO noted that a CO may authorize a search, such as in exigent circumstances, but “the preference in the Coast Guard is to have a Military Judge grant the search authorization.” He stated that during his 27 years on active duty, he had never seen an officer’s stateroom, emails, or instant messages searched without probable cause.

The prior CO stated that the ap [redacted]’s “whistleblowing acti [redacted] tion as a witness and his criticisms of what he reasonably believed to be misconduct by CGIS does no [redacted] stitute an ‘inappropriate discussion of open [redacted] investigations’ and/or ‘core values’ violation as his rating chain alleges.” He stated that he believes that the applicant’s rating chain should have been disqualified.

[redacted] the SO [redacted], the prior CO stated that t [redacted] ve been rat [redacted] his performance and not his private thoughts and/or personal views. He [redacted] that there is no evidence that the applicant’s personal views affected his primary duties.

- The Base SARC [redacted] stated that he had a close working relationship with the applicant because they [redacted] was the [redacted] of a large cutter. He [redacted] about the [redacted] as shown by an instant message he exchanged with the applicant on June 14, 2013. He stated that their communications were among those collected by CGIS and [redacted] his FOIA request. He stated that these [redacted] munications and that to the best of his knowledge, he [redacted] their confidentiality. The SARC stated [redacted] several months after the applicant [redacted] he learned that the applicant had been removed from his [redacted] duties. He stated that he [redacted] retrieving the [redacted] between [redacted] unethical and contrary to policy. He stated that CGIS’s [redacted] ns appeared unjust and might be linked to the applicant’s report of the sexual assault.

ecis [REDACTED]

[REDACTED] B issued a decision denying his request for relief. Regarding the search of [REDACTED] ent equipment, the PRRB stated that the instant messages reviewed by the CO [REDACTED] n “legally extracted” from the applicant’s computer. The PRRB disagreed with the applicant’s claim that his instant messages on his Government computer were purely private conversations, noting that members have no right to or expectation of privacy under [REDACTED] Directive [REDACTED] which states that “[e]mployees do not have any right to [REDACTED] or expectation of privacy while using any Government office equipment [REDACTED] or email.” The PRRB noted that the use of discriminatory language based on race, gender, or other protected classes in communications is prohibited [REDACTED] and punishable under Article 92 of the UCMJ. The [REDACTED] onto his [REDACTED] nt repeatedly acknowledged the following warning:

You are accessing a U.S. Government (USG) Information System (IS) that is provided for USG-authorized use only. By using this IS (which includes any device attached to this IS), you consent to the following conditions: The USG routinely intercepts and monitors communications on this IS for purposes including, but not limited to, penetration testing, COMSEC monitoring, network [REDACTED] ons and defense, personnel misconduct [REDACTED] (M), [REDACTED] ment (LE) and counter-intelligence (CI) operations. At any time the USG may inspect and seize data stored on [REDACTED] Communications [REDACTED], or data stored on, this IS are not private, are subject to routine monitoring, interception, and search, and may be disclosed or used for any USCG-authorized purpose.

Regarding the SOER, PRRB stated that it was properly prepared and reflected an accurate picture of the applicant’s performance. It stated that the 40 pages reviewed by the CO had included inappropriate comments, discriminatory language, disrespectful comments towards superior officers and inappropriate discussion of open CG criminal investigations, which were “detrimental to good order and discipline [and] significantly undermined confidence in his judgment, leadership abilities, professional conduct, and willingness to adhere to CG core values.” The PRRB noted that only one of the 40 pages of instant messages that the CO had reviewed contain[REDACTED] messages dated outside of the reporting period and stated that the CO’s consideration of that page did not violate policy because it was discovered during the reporting period [REDACTED]

The PRRB dismissed the applicant’s arguments about retaliation, claiming that his reporting of the seaman’s [REDACTED] ations and his complaints about CGIS did not constitute “protected communications” u[REDACTED] statute was [REDACTED] applicable because the applicant filed his complaint with the CG [REDACTED] uation period [REDACTED] also sta[REDACTED] of the rating chain was disqualified from preparing the SOER because the applicant submitted his complaint after the reporting period for the SOER ended.

Regarding [REDACTED] in the applicant’s transfer orders, the PRRB stated that his assignment as [REDACTED] n been issued pursuant to the decisions of the [REDACTED] Assignment Panel convened by the [REDACTED] (OPM) on January 10, 2014, before the SOER was received. The PRRB stated [REDACTED] expected vac[REDACTED] filled p[REDACTED] after the SOER was received and OPM determined that his assignment orders should be changed. OPM “had to consider placing [the applicant] into an open [REDACTED] position. An [REDACTED] being assigned to an [REDACTED] position does occur in various special circumstances and particularly when [REDACTED] positions have been filled. Rank mismatches are not [REDACTED]

ente [redacted] to O5 positions, as well as O4s being assigned to O3 positions.” [redacted]

Regar [redacted] ests for a medal and a Wardroom Plaque, the PRRB said that no policy entitl [redacted] these things.

Regarding his request for reimbursement for his attorney fees, the PRRB said that the “fees c [redacted] or any erro [redacted], or mistreatment by the CG.” [redacted]

CO

The PRRB attached to its decision a sworn declaration [redacted] and sig [redacted] the SOER is valid, fair, and accurate and was “based on observed performance and the content of [redacted] gally extracted from the applicant’s Government computer.” The CO noted that the 40 pages did not include any of the applicant’s messages to the Base chaplain’s office or the SARC. The CO stated that the applicant had “use [redacted] ge in Instant Messages sent during the marking period on m [redacted] asions” and revealed a lack of s [redacted] t for [redacted] uard policies and disrespect [redacted] rd superior officers. He stated that all of the in [redacted] iate, discriminatory, an [redacted] comments in the [redacted] messages that he reviewed were made within the marking period for the SOER. He stated that the applicant’s “comments referencing potentially criminal behavior occurred outside the marking period (May 2013), but came t [redacted] [redacted] after seeking guidance from CG-OPM [redacted] eferenced these comm [redacted] [redacted] that the applicant’s messages showed that he had “failed to meet the character standards established by the Offi [redacted] valuation System,” including the Coast Guard Cor [redacted] of honor, respect, and devotion to duty. He also called the applicant’s conduct had been “detrimental to good order and discipline” and had undermined the CO’s confidence in his judgment, leadership, and ability to perform his assigned duties. [redacted]

Retirement

The applicant su [redacted] a request to retire and retired from the Coast Guard [redacted]. He received an excellent OER and his third Coast Guard [redacted] mmedation Medal for his s [redacted]

Statement of Eny [redacted]

On Aug [redacted] P [redacted] cant’s [redacted] t she had had several conversations with the applicant, both in [redacted] heir workstations and that conversations between a member and [redacted] [redacted] to COMDTINST 1730.4B. She stated that the applicant showed her c [redacted] of her messages among [redacted] [redacted] collecte [redacted] [redacted] was released to the applicant under FOIA. She stated that this was the first time she was aware [redacted] [redacted] communications being reviewed by CGIS. She alleged that it prove [redacted] that CGIS had been unethically and [redacted] [redacted] monitoring their communications. [redacted]

[REDACTED] GUARD

[REDACTED]ney for the Judge Advocate General (JAG) submitted an advisory opinion in [REDACTED] that the Board deny relief in this case.

The JAG stated that the applicant's OCS logs were obtained during an obstruction of justice investigation of the prior CO. The JAG stated that this investigation arose out of a command climate [REDACTED] of a sexual assault. In the course of this investigation, the JAG stated, CGIS found that the applicant had been complicit in the obstruction of justice. [REDACTED] stated that the content of the applicant's logs supported this finding and included "disparaging homosexual remarks, racist comments, inappropriate social media conduct, disrespect toward senior officers, and unauthorized [REDACTED] of an investigation [REDACTED]."

The JAG also adopted the findings and analysis in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC agreed with the PRRB claimed that the SOER was prepared in accordance with [REDACTED] that the applicant has not submitted sufficient evidence to overcome the presumption that his rating chain prepared [REDACTED] correctly, lawfully, and in good faith. PSC disagreed that the applicant's rating should have been disclosed. PSC stated that no member of the rating chain was part of an investigation regarding the applicant. PSC stated that reviewing the applicant's IMs was "a vested authority of the Coast Guard's and his command." PSC stated that such IMs [REDACTED] correspondence and can be inspected and seized [REDACTED] any time."

PSC also claimed that the "protections afforded to the applicant by the Whistleblower Act were not applicable at the time the applicant's command obtained his personal IMs, as the applicant did not file a complaint with the Inspector General until 27 February 2014 and the IMs were obtained prior to that date." PSC stated that the IMs were "obtained lawfully and were not done in reprisal for the applicant's sexual assault reports."

PSC argued that there is no justification for granting relief in this case, including the applicant's request for a medal and plaque, which are discretionary and not entitlements, and his request for attorney fees.

APPLICANT'S RESPONSE TO THE BOARD'S ADVISORY OPINION

After being granted extensions, the applicant responded to the Coast Guard's advisory opinion on October 2, 2015, stating that the Board should ignore PSC's memorandum because [REDACTED] by the Deputy Commander of PSC, whose immediate superior, Commander [REDACTED], is one of the officers the applicant accused of retaliation to the IG because he created an unwritten command culture that discourages calls to CGIS regarding the applicant's report of the sexual assault. The applicant stated that the Deputy Commander should be impeached and [REDACTED] lobbied against Commander, PSC's promotion to flag rank, and the applicant himself "participated as a witness in a separate (and currently open/ongoing [IG] investigation [REDACTED])." The applicant submitted a letter dated July 24, 2015, in which [REDACTED] and Ranking Member of the Senate [REDACTED].

██████████ not to promote the officer who was the Area Chief of Staff in 2013 and is ██████████, PSC, to the ██████████ on the date of ██████████ the applicant.

The applicant ██████████ many of the arguments made in his application, including arguments about the search being unlawful and without probable cause. He argued that under *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces held that a member ██████████ privacy even ██████████ government system and that probable cause is required to search a member's electronic communications. He alleged that CGIS could ██████████ chain of command to target him and search his stateroom, which is a miscarriage of justice. He alleged that if his chain of command thought that he ██████████ an offense in 2013, they were required to initiate an investigation ██████████ had reported ██████████ he was Acting CO.

The applicant argued that the Coast Guard failed to show that its actions against him were not caused by his report of the sexual assault. He stated that the "Coast Guard's unlawful actions in response to ██████████ activity immediately afterward have overcome the perceived ██████████ regularity and shifted the burden of ██████████ to ██████████ Guard," which has "failed to ██████████ independent causation of its actions as being ██████████ to applicant's law ██████████ reports of a sex ██████████ and of mismanagement/misconduct." He noted that PSC's argument that he was not protected by the Military Whistleblower Protection Act until he filed a complaint with the IG is "legally erroneous and misleading" because the ██████████ and, not just the IG. He argued that the ██████████ nature of the act ██████████ charges against the accused crewmember who admitted to the sexual assault. He stated that no charges ██████████ preferred against the crewmember until more than ██████████ after the offense, when the Coast Guard was aware that he had submitted his complaint of retaliation to the IG. To support his claim of retaliation, the applicant submitted three additional statements:

- ██████████ email dated June 5, 2013, the Deputy General Counsel emailed numerous officers stating that the Vice Commandant had requested a fuller brief ██████████ for the Commandant on all pending sexual assault cases. He proposed that the JAG's office and CGIS would provide the brief ██████████ June 17, 2013, and that the Deputy Commandant ██████████ report would also attend. He asked for "data on categorical ██████████ numbers of pending ██████████ adversely impact the Service or draw congressional or other interest. The applicant argued that ██████████ Commandant and other ██████████ a brief ██████████ that there was undue command influence; and that ██████████ the potential ██████████ of the victim and prosecution of the accused." He alleged that ██████████ command began targeting him and authorized the search of his stateroom ██████████
- ██████████ 2016, a CWO wrote that the applicant has been a mentor to him for eleven years. He stated that he spoke with the applicant several times in the summer of 20██████████ and the applicant was under significant personal and professional stress." The applicant ██████████ that he was the target of reprisals by his chain of com-

[redacted] and [redacted] d questionable behavior by the CGIS agents. The applicant complain[redacted]'s unlawful [redacted] [redacted] es like suspects, and coercion of witnesses. The CWO agreed with t[redacted] n his statements, the Area Command and CGIS may have committed [redacted] ct, and he told the applicant how to file a report with the IG. Months later, after the applicant was removed from his duties, the applicant told the CWO that the applicant's disclosures to him had been cited as the basis of his removal.

- In an und[redacted] statement, a former lieutenant wrote that he was [redacted] Guard Headquarters in July 2013 and communicated with the applicant through IMs. The applicant told him that "he himself was becoming an unfair target of retaliation after he re[redacted] [redacted] assault." The former lieutenant stated that the applicant "do not disclose specifics regarding the details of the alleged sexual [redacted] it" but "gave me specific examples of what he felt was misconduct by Coast Guard senior officials and investigators in response to his report of a sexual assault and expressed his personal belief of a culture of internal corruption and reprisal inside the Coast Guard officer corps." Months later, after being removed from his duties, the applicant told the former lieutenant that the applicant's complaints to him and other trusted colleagues about "unethical behavior by CGIS investigators" had constituted "inappropriate discussion of open criminal investigations."

The applicant submitted a copy of the Command Climate Report, which is summarized in the Summary of the Record above, and stated that it refutes the IAG's claim that the obstruction of justice investigation arose out of the command climate investigation. He said [redacted] the Area Commander tried to suppress this report, which contradicts the advisory opinion and includes laudatory information about the applicant. To support this claim, he submitted a letter from the Area Command denying the applicant's March 28, 2015, FOIA request for the Command Climate Report under exemption #5, which is for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The applicant stated that he appealed the decision and received the report.

The applicant alleged, that contrary to PSC's claim, there were many open [redacted] billets that he could have been assigned to in 2014. The applicant submitted the following documents to support this claim:

- ALCGOFF [redacted] discusses a "potential off season assignment opportunity ... for a [redacted] to serve as [redacted] and invites officers to submit resumes."
- AL [redacted] discusses a "potential off-season assignment op [redacted] to serve as [redacted] and invites officers to submit resumes."
- ALCGOFF [redacted] discusses a "potential off-season assignment opportunity ... for a [redacted] to serve as [redacted] officers to submit resumes."
- ALCGOFF [redacted] discusses a "potential off-season assignment opportunity [redacted] for a [redacted] to serve as the Executive Officer at [redacted] and invites officers to submit resumes."

[REDACTED] LC [REDACTED], discusses a “potential off-season assignment opportunity ... for a [REDACTED] to serve as [REDACTED] [REDACTED]” and invites officers to submit resumes.

- E-resume submission reports dated September 6, 2013, March 10, 2014, April 10, 2014, May 5, 2014, May 7, 2014, May 13, 2014, May 29, 2014, June 6, 2014, August 12, 2014, August 19, 2014, and December 9, 2014, show that the applicant applied for a variety of positions, primarily [REDACTED] positions, as well as those advertised in the above-listed ALU [REDACTED] FFs. He noted that he was “in billet mismatch [REDACTED],” his submissions dated August 19, 2014, and later were endorsed by his supervisor at the time.
- In an email dated May 16, 2014, the Response Ashore Assignment [REDACTED] the applicant that another officer had been assigned as the [REDACTED] [REDACTED] applicant replied, asking him to keep the applicant in mind for other positions.

The applicant argued that the contents of his IMs should not have been used against him because they [REDACTED]s,” as his CO noted. The applicant alleged that these “personal [REDACTED] were based on his religion and [REDACTED]s [REDACTED] Coast Guard discriminated [REDACTED]st him on the basis of his religion and political [REDACTED]ion. He argued that he [REDACTED] to support the C [REDACTED]’s political agenda on a personal and private basis.

The applicant stated that the retaliation he suffered c [REDACTED] [REDACTED]sed and the Department of Veterans Affairs awarded him a serv [REDACTED] [REDACTED]mination of service-connection is additional evidence that the actions taken against him were retaliatory. To support [REDACTED]is claim, the applicant submitted the following medical [REDACTED]ds:

- Medical notes dated September 3, 2015, state that the applicant was diagnosed with an [REDACTED] after [REDACTED] sought treatment for [REDACTED], which he [REDACTED]tuted to being a victim of retaliation for filing a sexual assault report, publicly humiliated, and demoted in rank.
- Medical notes dated November 24, 2014, state that the applicant sought counseling [REDACTED] due to [REDACTED]tion by his chain of command and planned to retire the next year. [REDACTED] counseling for [REDACTED]ase of [REDACTED]r life circumstance problem.”

- In [REDACTED] [REDACTED] [REDACTED] 10, 2016, the Department of Veterans Affairs advised the applicant [REDACTED] [REDACTED] [REDACTED]

[REDACTED] all requested relief. He also stated that the Board should forward a copy of [REDACTED] grant relief in [REDACTED] that app [REDACTED]y action will be taken. He also stated that if the Board denies relief, it should ask the IG to reopen the investigation of his whistleblower complaint, which, he alleged, would substantiate his claims.

ADDITIONAL LAW AND POLICY

Military Whistleblower Protection Act

The Military Whistleblower Protection Act, codified at 10 U.S.C. § 1034, states the following in pertinent part:

(b) Prohibition of retaliatory personnel actions.--(1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing--

(A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted;

(B) a communication that is described in subsection (c)(2) and that is made (or prepared to be made) to--

(i) a Member of Congress;

(ii) an Inspector General (as defined in subsection (i)) or any other Inspector General appointed under the Inspector General Act of 1978;

(iii) a member of a Department of Defense audit, inspection, investigation, or law enforcement organization;

(iv) any person or organization in the chain of command;

(v) a court-martial proceeding; or

(vi) any other person or organization designated pursuant to regulations or other established administrative procedures for such communications; or

(C) testimony, or otherwise participating in or assisting in an investigation or proceeding related to a communication under subparagraph (A) or (B), or filing, causing to be filed, participating in, or otherwise assisting in an action brought under this section.

(2)(A) The actions considered for purposes of this section to be a personnel action prohibited by this subsection shall include any action prohibited by paragraph (1), including any of the following:

(i) The threat to take any unfavorable action.

(ii) The withholding, or threat to withhold, any favorable action.

(iii) The making of, or threat to make, a significant change in the duties or responsibilities of a member of the armed forces not commensurate with the member's grade.

(iv) The failure of a superior to respond to any retaliatory action or harassment (of which the superior had actual knowledge) taken by one or more subordinates against a member.

(v) The conducting of a retaliatory investigation of a member.

(B) In this paragraph, the term "retaliatory investigation" means an investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication.

(C) Nothing in this paragraph shall be construed to limit the ability of a commander to consult with a superior in the chain of command, an inspector general, or a judge advocate general on the disposition of a complaint against a member of the armed forces for an allegation of collateral misconduct or for a matter unrelated to a protected communication.

non. Such consultation shall provide an affirmative defense against an allegation that a member requested, directed, initiated, or conducted a retaliatory investigation under this section.

(c) **Inspector General investigation of allegations of prohibited personnel actions.**--(1) If a member of the armed forces submits to an Inspector General an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall take the action required under paragraph (4).

(2) A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:

(A) A violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920 through 920c of this title (articles 120 through 120c of the Uniform Code of Military Justice), sexual harassment, or unlawful discrimination.

(B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(C) A threat by another member of the armed forces or employee of the Federal Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians or damage to military, Federal, or civilian property.

Use of Government Communications Equipment

The Department of Homeland Security Management Directive 464 states that “[e]mployees do not have any right to nor expectation of privacy while using any Government office equipment including Internet or email services. Furthermore, use of Government office equipment, for whatever purpose, is not secure, private, or anonymous.” And section VI.G.6. prohibits “[c]reating, copying, or transmitting any material or communication that is illegal or offensive to fellow employees or to the public, such as hate speech, material that ridicules others based on race, creed, religion, color, sex, disability, national origin, or sexual orientation.”

COMDTINST 5375.1D, Limited Personal Use of Government Office Equipment and Services, allows a member to make minimal personal use of Government Office Equipment. a. prohibits at all times and warns of adverse administrative or criminal consequences for

...to fellow employees ... legal discrimination is any intentional action or omission that results in the adverse treatment of a person because of race, color, religion, sex, national origin, disability, or age or gender in the course of official actions or omissions.

...act (conduct or speech) of intolerance committed against a person, a group of individuals, or property which is motivated, in whole or in part, by the offender's race, religion, sex, national origin, disability, or sexual orientation and which is intended to or is more likely than not to result in the intimidation of

Article 1.D.3 of the Manual, COMDTINST M1600.2, prohibits “[c]ommitting any intentional act of intolerance or speech, when on duty, when in

at a [redacted] llation, when utilizing a government communications system, or when com[redacted] h another n[redacted] which: [redacted] or in part, by the offender’s bias against the race, color, sex, religion, natio[redacted] sexual orientation of a person or persons.”

Sexual Assault and Sexual Harassment

[redacted] assault Pr[redacted] and Response Manual, COMDTINST M1754.10D, provides checklists of steps that unit commands must take following the report [redacted] checklist #1 provides steps concerning the victim and requires the command, *inter alia*, to notify CGIS and consult the SARC. Checklist #2 provides [redacted] an alleged offender. Checklist #3 concerns the “Command Climate [redacted] and stat[redacted] a, discourage gossip, remind members that discussion of the incident could compromise the ir[redacted] who may have knowledge of the events leading up to or surrounding the incident to fully cooperate with any investigation.”

Re [redacted] Officer from Primary Duties

Article 1.F.2.1 of the Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A (“Assignments Manual”), states that an “officer may be considered for permanent removal from primary duties under the following circumstances [redacted] primary duties such that their performan[redacted] significantly hinders missi[redacted] (normally at least six months), it becomes clear to the command that the officer has neither the ability nor des[redacted] perform assigned duties, or (3) The officer’s action[redacted] significantly undermine their leadership authority.”

Article 1.F.2.d. of the Assignments Manual states that a CO may temporarily remove an officer from his primary duties at [redacted] CO’s discretion at any time if the CO determines that the require[redacted] of Article 1.F.2.b. have been met. The CO must submit an SOER and inform the officer of the “process and the way forward.” PSC makes the fi[redacted] decision on p[redacted] removal from primary duties.

Article 5.A.3 of the [redacted] Accessions, Evaluations, and Promotions Manual, COMDTINST M [redacted] states a CO or high [redacted] are an SOER foll [redacted] including performance or conduct resulting in the officer [redacted] martial [redacted] ment; before an officer’s consideration by a selection board or pan[redacted] at OER in his record; and “to document significant historical perf[redacted] [redacted] when a previous OER was prepared and submitted.” Paragraph (1)(b) [redacted] e. states that any SOER that documents an officer [redacted] from primary duties is always considered “derogatory” and so the rules for derogatory OERs, which allow the officer to submit an Addendum,” must be followed.

Under Article 5.A.7.c. of the Officer Manual, “Derogatory Reports,” any SOER that documents an officer’s removal from primary duties is derogatory and must state the following in block 2: “Per Article 5.A.7.c. of Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), this OER is a derogatory report.” Article 5.A.7.c.(2) states that the reported-on officer is allowed to submit an Addendum for any derogatory report “to explain the failure or provide their views of the performance in question.” The Addendum is forwarded up the rating chain for additional comment and endorsement before being entered in the officer’s record with the SOER.

Under Article 5.A.7.e. of the Officer Manual and Article 5.A.C. of the OER Manual, a reported-on officer may file a Reply to any OER to include “performance-oriented comments.” Like an Addendum, a Reply is forwarded up the rating chain for additional comment and endorsement before being entered in the officer’s record with the SOER.

Article 5.A.2.e. of the Officer Manual, “Rating Chain Exceptions,” states that if a member of a rating chain is unavailable or disqualified, a substitute shall be designated, and paragraph (2)(b) defines “disqualified” as follows:

“Disqualified” includes relief for cause due to misconduct or unsatisfactory performance, 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 5.A.7.f.11. of the Officer Manual provides that the rating chain shall not “[d]iscuss reported-on officer’s performance or conduct which occurred outside the reporting period except as provided in Article 5.A.3.c. of this Manual.” This same restriction appears in Article 2.B.11. of the OER Manual except that the reference has been corrected to Article 5.A.3.e. of the Officer Manual.

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant’s retirement.⁹

2. The applicant requested an oral hearing before the Board. He claimed that he should receive a hearing pursuant to the Military Whistleblower Protection Act, 10 U.S.C. § 1034(g). The provisions of § 1034(g), “Correction of records when prohibited action taken,” are inapplicable because they apply only when the IG has issued a report finding that a prohibited action has been taken. Instead, 33 C.F.R. § 52.21 applies, and pursuant to that rule, the Chair denied the applicant’s request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹⁰

⁹ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

¹⁰ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

3. The applicant alleged that his removal from his primary duty as the XO of a cutter on January 23, 2014, the SOER documenting his removal, and his subsequent reassignment, *inter alia*, are erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.¹¹ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."¹² In addition, to be entitled to removal of an SOER, an officer cannot "merely allege or prove that an [SOER] seems inaccurate, incomplete or subjective in some sense," but must prove that a disputed SOER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹³

4. As explained below, the Board finds that the applicant has not proven by a preponderance of the evidence that he was retaliated against because he relayed a seaman's report of sexual assaults and sexual harassment; because of any complaint about CGIS; or because of his later complaints to the IG and his congressional representatives. While the report of sexual assaults and sexual harassment happened first in time, he has not substantiated a proper nexus proving retaliation because the preponderance of the evidence shows that his prior CO's obstruction of CGIS's investigation of the seaman's report, the applicant's seeming complicity in that obstruction, and CGIS's discovery of prohibited IMs he had been sending on Government equipment caused his removal from primary duties and preparation of the SOER. Nor has the applicant shown that his removal or the SOER were caused or affected by religious or political discrimination. To clarify matters, the Board has first made findings of fact about the events before making findings of law addressing the applicant's arguments and allegations.

Findings of Fact About Events

5. **Seaman's Report and First CGIS Investigation:** The record shows that on May 23, 2013, while the applicant was Acting CO, a VA brought a female seaman to him to make a report. After the applicant made certain that the seaman wanted to make an unrestricted report, the seaman told him that at least seven different crewmembers had either sexually assaulted or sexually harassed her. The applicant initially followed the checklist in Enclosure 3 of the Sexual Assault Prevention and Response Manual, COMDTINST M1754.10D, and so consulted the SARC and reported the matter to CGIS and to the Chief of Operational Forces, who was above the CO in his chain of command. The Chief of Operational Forces thanked him and notified the Area Chief of Staff and legal office. Based on the seaman's report of multiple offenders and incidents, CGIS began a criminal investigation and, according to the applicant, one of the seven accused crewmembers admitted to having assaulted the seaman the very next day. According to a CGIS report, crewmembers informed CGIS agents investigating the seaman's allegations that on June 3, 2013, the CO at the time ("prior CO") had told the crew that they did not have to cooperate with the CGIS investigation. The CO's advice to the crew violated the requirements of

¹¹ 33 C.F.R. § 52.24(b).

¹² *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹³ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

INS [redacted] mand must “[a]dvice those who may have knowledge of the events leading [redacted] ding the inc [redacted] any inv [redacted] 2013, the CO noted that the Area legal team was “spooled up” about his adv [redacted] e 7, 2013, the applicant admitted to CGIS that he was present when the CO [redacted] the crew that they did not have to cooperate and claimed to be too busy for an interview. On June 8 and 11, 2013, the applicant sent IMs referring to the CGIS agents as “goons” and indicating that he was avoiding being interviewed by CGIS. There is no docum [redacted] e applicar [redacted] CO at the time complained to the Area Command about how CGIS was conducting the investigation of the seaman’s report. [redacted]

6. **Command Climate Investigation:** On May 30, 2013, t [redacted] directed Captain X to conduct an administrative command [redacted] whether [redacted] had “created an environment accepting of sexual assault and sexual harassment.” Captain X was [redacted] he allegations of sexual assault, not to interfere with the criminal investigation, and to stop his investigation immediately if anyone made an allegation of sexual assault. The record shows that Captain X failed to follow these directio [redacted] crewmembers for their opinions of the seaman and her VA, as [redacted] investigating their character and tr [redacted] ness [redacted] f limiting his questions to the [redacted] hand climate. Many of the crewmembers told [redacted] in X that the CO and [redacted] and adamantly [redacted] the crew about policies regarding alcohol abuse, sexual assault, and sexual harassment. On June 14, 2013, Captain X reported that the command climate was positive. The ROI shows that CGIS agents disagreed with his as [redacted] with the crewmembers had revealed [redacted] ces of alcohol abuse/ [redacted] , unreported sexual assaults, unreported sexual harassment, victim blaming, and an isolationist policy in rega [redacted] ‘outside the lifelines’ unit partnerships.” When t [redacted] nt submitted a FOIA request for Captain X’s report in 2015, his request was initially denied by the Area Command, but he later received it.

7. **CGIS’ Second Investigation:** On June 11, 2013, t [redacted] Chief of Staff accused [redacted] CO at the time with obstruction of justice, in violation of Article 134 of the Uniform Code of Military Justice, because the CO had advised the crew on Ju [redacted], 2013, that [redacted] y did not have to cooperate with the CGIS investigation of sexual assault and sexual harassment aboard the cutter, instead of encour [redacted] them to do so. His advice violated the requirements of [redacted] 4.10D. [redacted] therefore CGIS began a second investigation int [redacted] CO’s alleged obstruction [redacted] ion. he was [redacted] XO of t [redacted] cutter, he had been present when the CO had advised the crew that they did [redacted] had not contrad [redacted] e, he avoided be [redacted] rds, he “talked over and interrupted them constantly” wh [redacted] v [redacted] target of [redacted] ultimately CGIS concluded that he had been complicit in his prior [redacted] justice.

8. **CGIS Conducts Search and Seizure.** Pursuant to [redacted] investigation of the obstruct [redacted] or justice, on an unknown date, CGIS agents searched and seized Government equipment assigned [redacted] CGIS [redacted] had retired at the end of June 2013. On November 27, 2013, CGIS received CGIS [redacted] IMs extracted from their Government equipment [redacted] CGIS [redacted] Crimes Section. CGIS received 137 pages of the applicant’s

██████████'s data ██████████ and they contained over 20,000 chats, which “range from general USCG off ██████████ disparaging ██████████ comments ██████████ behavior/misconduct, disrespect toward senior officers, and unauthorized ██████████ criminal investigation.” CGIS agents also found that the applicant’s messages ██████████ from June and July 2013 showed that he had obstructed the CGIS investigation into the seaman’s allegations of sexual assault and sexual harassment. CGIS sent 40 of the 137 pages to the applicant’s new CO for review in January 2014. In March 2014, pursuant to ██████████ received ██████████ pages and then the 40 pages reviewed by his CO, but he did not submit them into evidence. ██████████

9. **Applicant’s Removal and SOER:** After reviewing the 40 ██████████ applicant’s IMs, on January 23, 2014, the CO removed him from ██████████ their comments ██████████ showed that the applicant’s actions had “significantly undermined” his leadership authority as ██████████ lose confidence in the applicant’s judgment, leadership, professional conduct, and adherence to the Coast Guard’s core values. The CO stated that the IM’s showed that applicant had used his Government equipment to express dis ██████████ and disrespect toward superior officers and to discuss an open criminal investigation with members of the Coast Guard ██████████ not authorized to receive the information. The CO prepared the SOER to document applicant’s removal from ██████████ duty pursuant to ██████████ A.7.c. of the Officer Manual and signed it on February 26, 2014. He assigned the applicant mostly high marks of 6 and 7 but a standard mark of 4 for “workplace climate”; low marks of 3 for “judgment,” “responsibility,” a ██████████ of “unsatisfactory performance/conduct” and “potential for increased ██████████ Addendum to the SOER, making many of the allegations made in his application to the Board, including an argument that his rating chain should be disqualified from ██████████ the SOER because he had complained about them to the IG and his congressional representatives. The CO and Reviewer forwarded it with endorsements affirming the correctness of the SOER. On June 4, 2014, the applicant submitted an OER ██████████ the allegations, and the CO and Reviewer forwarded it with endorsements briefly reaffirming the correctness of the SOER. ██████████

10. **Change in Transfer Orders:** Following his removal from the cutter, the applicant’s prior orders to a ██████████ billet as a liaison to another military service were cancelled. ██████████ temporarily transferred to a shore unit until he received permanent transfer orders to a ██████████. He applied for several ██████████ billets that were advertised in the spring and summer of 2014—billets as ██████████ the XO of the ██████████ and numerous ██████████ selected for them. However, he “fleeted up” to serve as the ██████████ of the ██████████ was denied. He requested retirement and voluntarily retired on ██████████. During this last month of service, he was diagnosed with an ██████████

Applicant’s Formal Complaints: After his removal but before receiving the SOER, the applicant ██████████ to his congressional representatives complaining of an illegal search and retaliation ██████████ in of command for reporting a sexual assault, ██████████ to the Department and ultimately to the Coast Guard for

[REDACTED] On [REDACTED] complaint on the IG’s hotline accusing his chain of command and CGIS of retaliating against [REDACTED] a sexual assault victim for his full search of his primary duties. The IG’s office apparently reviewed the matter but determined no further investigation. On February 20, 2015, the applicant applied for relief to the PR [REDACTED] a statement from his prior CO strongly endorsing his request and a statement from the Base SARC stating that the applicant had shown him an IM that the applicant had sent him and that it was unethical and contrary to policy for CGIS to have reviewed and used their communication records to deny the applicant’s request based in part on a declaration from the CO reaffirming the accuracy of the SOER and in part on an erroneous finding regarding [REDACTED] the MWPA.

Findings Regarding Applicant’s Arguments

12. **Protected Communication:** [REDACTED] applicant that under the Military Whistleblower Protection Act, 10 U.S.C. § 1034 (hereinafter, MWPA), his relaying of the seaman’s report of sexual assaults and sexual harassment to CGIS and to his chain of command constituted a “protected communication” and that the MWPA prohibited his rating chain and [REDACTED] from retaliating against him for relaying the seaman’s report. Likewise, the applicant’s complaints to his congressional representatives and the IG were protected communications under the MWPA. [REDACTED] Board notes that the applicant also alleged that he made complaints about CGIS in the summer of 2013 that were “protected communications” under the MWPA. The record before the Board shows that the applicant complained to [REDACTED] units in July 2013, but complaints to [REDACTED] outside the chain of command. [REDACTED] presented no evidence showing that he or his prior CO made a “protected communication” to the Area Command about CGIS in the summer of 2013 by reporting CGIS agents [REDACTED] violating the law, mismanaging their investigations, grossly wasting funds, or abusing their authority to the Area Command or any other authority listed in § 1034(b)(1)(B) of the MWPA, but such a complaint would have been a “protected communication” under the MWPA.

13. **Second Investigation Not Retaliatory:** The Board finds that the applicant has not proven by a preponderance of the evidence that his chain of command or CGIS initiated the investigation of the obstruction of justice allegations in retaliation for the applicant’s report of the seaman’s unrestricted report of sexual assault and sexual harassment. Retaliatory investigation is defined in § 1034(b)(1)(A)(v). Under § 1034(b)(2)(B), a “retaliatory investigation” is defined as “an investigation conducted for the purpose of punishing, harassing, or otherwise penalizing or forcing for making a protected communication.” The record shows that [REDACTED] CGIS conducted an investigation for the purpose of assessing the CO’s obstruction of justice. The Area Command initiated the second investigation of [REDACTED] [REDACTED] applicant had advised CGIS agents that the CO had advised the crew that they were not required to cooperate with CGIS, instead of “[advising] those who may have knowledge of the events leading up to or surrounding the incident to fully cooperate with any investigation.” [REDACTED] COMDTINST M1754.10D. Therefore, the Board finds that CGIS’s second investigation was not retaliatory for the CO’s obstruction of CGIS’s first investigation.

investigation resulted from and was fully justified by the CO's advice to the crew. CGIS's investigation of obstruction of justice was not retaliatory and was not prohibited under the MWPA.¹⁴

14. **Search Legal and Not Retaliatory:** The Board finds that the applicant has not proven by a preponderance of the evidence that the search and seizure of the Government equipment assigned to him was retaliatory or unlawful. As explained below, probable cause was *not* required to conduct the search because the applicant had no reasonable expectation of privacy with respect to his IMs. And even if probable cause had been required, the CGIS agents had probable cause to conduct the search; the CO was authorized to allow them to conduct the search based on oral statements; and no law prevents a CO, when taking administrative action, from considering evidence that might be inadmissible at court-martial.

a. **No Reasonable Expectation of Privacy:** The Board finds that the applicant had no reasonable expectation of privacy with respect to messages he sent from the Government equipment assigned to him and so CGIS did not need probable cause to conduct the search. Rule 314(d) of the Military Rules of Evidence, titled "Searches not requiring probable cause," states that "Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search" and also "whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search." The Department's Management Directive 4600.1, which applies to military members as well as civilian employees of the Coast Guard,¹⁵ states in section VI.D. that "[e]mployees do not have any right to nor expectation of privacy while using any Government office equipment, including Internet or email." The applicant argued that he had a reasonable expectation of privacy under *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006). In that case, the defendant's unauthorized computer use had been found during a search, rather than routine monitoring, and the warning the defendant had received upon logging onto her Government computer addressed only monitoring and did not mention "search." "[I]n light of the particular facts of this case," the court in *Long* concluded that the defendant had had a reasonable, subjective expectation of privacy.¹⁶ In the applicant's case, however, the warning he repeatedly acknowledged when logging on expressly states that his communications were subject to search, not just monitoring; that they could be inspected and seized at any time; and that they could be disclosed or used for any authorized purpose. Because the applicant had no reasonable expectation of privacy with respect to his communications on his Government equipment, his CO and CGIS were not legally required to have probable cause to search and seize it.

b. **No Privileged Communications to SARC or Chaplain's Assistant:** The applicant has not proven by a preponderance of the evidence that CGIS or his new CO improper-

¹⁴ The Board notes that the applicant repeatedly claimed that his new CO told him "there is no investigation." The claim is unproven but, assuming it is true, the Board cannot conclude thereby that the CO was intentionally misleading the applicant. The record shows that the CO did not actually receive the ROI—just 40 pages of the applicant's IMs—and the CO may have meant that he had no ROI to show the applicant; that the applicant was not the subject of the investigation; or that there was no ROI to show him because the investigation was still open.

¹⁵ COMDTINST 5375.1D notes in paragraph 1 that it "refines the policy on personal use of government office equipment and services by all Coast Guard (CG) personnel (military or civilian) and contractors (under CG contract) in accordance with [Management Directive 4600.1 and other DHS directives]."

¹⁶ *Id.* at 63, 65.

gally [redacted] and the chaplain’s assistant. First and foremost, the applicant’s IMs to the SARC and the chaplain’s assistant were made [redacted] but pursuant to his performance of duty in responding to the seaman’s report of sexual harassment. Therefore, only the seaman herself—the person seeking redaction—could claim the privilege under Rules 503, 513, and 514 of the Military Rules of Evidence. Second, even if the applicant could claim a privilege with respect to his IMs to the SARC and the chaplain’s assistant, CGIS could not feasibly have searched the applicant’s IMs for obstruction of justice without reviewing all of the IMs, and only the use of privileged communications as evidence against the applicant at court-martial is prohibited. And finally the Board notes that, while IMs to the SARC and the chaplain’s assistant were apparently in the 137 pages of IMs reviewed by CGIS, [redacted] has not claimed or proven that those IMs were in the 40 pages that CGIS searched.

c. **Probable Cause:** [redacted] interference of the evidence shows, however, that the applicant’s CO and CGIS did have probable cause to search and seize his Government equipment from his stateroom. CGIS was investigating an allegation of obstruction of justice because he told the crew that they did not have to cooperate with CGIS investigation of allegations of sexual harassment, and the applicant, as second in command, had witnessed the obstruction and done nothing. After being asked for the CO’s advice on June 7, 2013, and admitting that he had witnessed it, he avoided being interviewed. And when being asked about the obstruction by CGIS agents on June 15, 2013, he called COMDTINST M1754.10D “some of [redacted] and (in his own words) “talked over [redacted] interrupted them constantly [redacted] prior CO’s obstruction of justice might be found in the applicant’s own IMs, as well as the prior CO’s, and had probable cause to search the Government equipment assigned to the applicant, which he kept in his stateroom on the cutter. With no “protected communications” showing that the applicant complained about how CGIS was conducting the investigations before the search and seizure of his Government equipment, the Board finds that he has not proven interference of the evidence that the search and seizure of the Government equipment assigned to him was retaliatory, a “fishing expedition,” or conducted without probable cause.

d. **Probable Cause Authorized Search:** The applicant has not proven by a preponderance of the evidence that his new CO improperly authorized the CGIS agents to search and seize [redacted] “Application for Search Authorization,” and have it signed by a military judge. A CG-6012, however, is required for a CO, and under (e) of the Military Rules of Evidence, a CO, such as the new CO, may authorize CGIS agents to search [redacted] of probable cause to search on oral statements. Therefore, even [redacted] had a reasonable expectation of privacy with respect to his Government equipment. [redacted] could legally authorize the CGIS agents to search and seize it from the applicant’s stateroom based on oral statements made by the CGIS agents and without signing a CG-6012.

e. **Administrative Act Prohibited:** Under Rule 315(h)(4) of the Military Rules of Evidence, if a search warrant had been required, “the execution of a

search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.” The Board knows of no constitutional or statutory requirement that prohibits a CO from considering evidence that might be inadmissible at court-martial due to the lack of a search warrant when deciding to administratively remove an officer from his duties or in preparing an SOER. In fact, a CO may even punish a member at mast based on evidence that would be inadmissible at court-martial under the Military Rules of Evidence because of the lack of a search warrant.¹⁷ Similarly, although the search of the applicant’s IMs by CGIS was not retaliatory, even if it had been, CGIS’s violation of the MWPA by conducting a re[REDACTED] search would not have legally prevented the new CO from taking appropriate administrative action based on evidence illegally collected by CGIS.

15. **Properly Removed from Primary Duties:** The applicant has not proven by a preponderance of the evidence that his temporary removal from his primary duty by his new CO on January 23, 2014, or his subsequent permanent removal by PSC were retaliatory or based on his religious or political beliefs. As he noted, Captain X concluded in June 2013 that the command climate of the cutter was positive, but officers may be removed from their primary duty if their “actions significantly undermine their leadership authority.”¹⁸ The applicant was not removed from his primary duty until after CGIS sent his new CO 40 pages of IMs that the applicant had sent using Government equipment. Although the applicant alleged that his [REDACTED] val was discriminatory because the IMs reflected his political and religious beliefs, he did not submit the [REDACTED] that they showed [REDACTED] araging homosexual [REDACTED] [REDACTED] sexual behavior/misconduct, disrespect toward senior officers, and unauthorized disclosure of an ongoing criminal investigation.” This characterization of the IMs by CGIS is presumptively correct.¹⁹ Such IMs constitute numerous violations of DHS Management Directive 4600.1; Article 1.D.3.c.(6) of the Discipline and Conduct Manual, COMDTINST M1600.2; and COMDTINST 5375.1D, which authorizes limited personal u[REDACTED] [REDACTED] also prohibits discriminatory language in a[REDACTED] tions, including personal communications, on Government equipment and makes the use of such language punishable under Article 92 of the UCMJ. The applicant also complained that one of the 40 pages considered [REDACTED] [REDACTED] e sent in a prior evaluation period, but no law or policy prevents an officer from being removed from his p[REDACTED] based in whole or in part on performance that occurred before the evaluation period. Although the applicant claimed that these IMs were purely private, the new CO stated that the applicant’s actions in sending these IMs had “significantly undermined” his leadership authority, and the Board agrees. The CO reasonably concluded that an officer who repeatedly violates regulations by sharing racist and disrespectful views with other Coast Guard members on Government equipment and who discloses sensitive information about an open criminal investigation to people unauthorized to receive the information cannot be trusted to lead a cutter’s crew and so lacks “leadership authority.”

16. **SOER Should Not Be Removed:** The Board finds that the applicant has [REDACTED] [REDACTED] a preponderance of the evidence that the SOER (including the Addendum and Reply with the rating chain’s endorsement) [REDACTED] s retaliatory or a product of religious or political bias. [REDACTED]

¹⁷ MANUAL FOR COURTS-MARTIAL UNITED STATES, 2012 ed., page V-4.

¹⁸ Assignments Manual, COMDTINST M1000.8A, Chapter 1.F.2.b.(3).

¹⁹ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

As noted above, the Board will not correct a disputed SOER unless the applicant proves that it was adversely affected by a “misstatement of significant hard fact”; factors “which had no business being in the rating process,” such as retaliation or religious discrimination; or a prejudicial violation of a statute or regulation.²⁰ And in BCMR Docket No. 151-87 (and many similar cases since), the Board found that even if a correction is required, an entire OER should “not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” As explained below, the Board finds that one comment in the SOER constitutes a misstatement of the law and should be removed on that basis, but there are no grounds for removing the entire SOER.

a. **SOER Not Retaliatory:** The applicant has not proven by a preponderance that any of the marks or comments in the SOER or the rating chain’s endorsements of his Addendum and Reply were retaliatory for any of the applicant’s protected communications. An SOER documenting his removal from primary duties was required by Article 5.A.3.e.(1)(b) of the Officer Manual, COMDTINST M1000.3A. In addition, the applicant’s IMs, as characterized by CGIS and the CO, justified the low numerical marks for judgment, responsibility, and professional presence and the CO’s comparison scale mark. Comments supporting the low marks were required by Article 2.F.2. of the OER Manual. The descriptions of the applicant’s IMs by CGIS and the CO are presumptively correct, and the applicant has failed to rebut that presumption.²¹ Therefore, the preponderance of the evidence shows that the rating chain’s preparation of the SOER was required by policy and properly based on his misconduct as evidenced in the 40 pages of IMs that the CO received from CGIS.

b. **SOER Not Discriminatory:** The applicant complained that the SOER comment that he “must align personal beliefs and values with CG direction and core values” proves that his rating chain discriminated against him based on his political and religious beliefs. As noted in finding 15, above, however, the applicant’s IMs reflect not only his own personal opinions but numerous violations of DHS Management Directive 4600.1, Article 1.D.3.c.(6) of the Discipline and Conduct Manual, and COMDTINST 5375.1D, which prohibit discriminatory language even in personal communications using Government equipment. Nor has he submitted the IMs to show that they reflect his religious or political beliefs. As a Coast Guard officer, the applicant was required to adhere to and uphold the Coast Guard’s policies and core values of honor, respect, and devotion to duty in the performance of his duties, which included his use of Government equipment even for IMs to friends. And so the SOER comments that he “demonstrated lack of support of CG policies” and “failed to adhere to CG core values” in his IMs are proper and accurate. But an officer is not legally required to align his actual personal beliefs and values with Coast Guard policy and values. He may hold contrary beliefs and values, as long as they are not reflected in his performance of his duties, including his communications to other members on Government equipment. Therefore, the Board finds that the phrase “must align personal beliefs and values with CG direction and core values” should be removed from the SOER because it inaccurately states the legal requirements. But the inclusion of this phrase in the

²⁰ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

²¹ 33 C.F.R. § 52.24(b); *Arens*, 969 F.2d at 1037; *Sanders*, 594 F.2d at 813.

SOER does not persuade the Board that the CO removed the applicant from his primary duty based on his religion or politics or prepared the SOER based on his religion or politics. The preponderance of the evidence shows that the SOER marks and comments were based on the applicant's repeated misconduct in using Government equipment to send prohibited IMs showing not only racist, discriminatory language, but also disrespect toward superior officers and inappropriate discussion of open criminal investigations with personnel not authorized to receive the information. Therefore, the applicant has not proven by a preponderance of the evidence that the marks and comments in the SOER resulted from religious or political bias on the part of his rating chain. Although the phrase, "must align personal beliefs and values with CG direction and core values," should be removed because it misstates the legal requirements of an officer, its inclusion in the SOER does not persuade the Board that his CO removed or evaluated him on illegal grounds and does not warrant removing the entire SOER from the applicant's record.

c. **Rating Chain Not Disqualified:** The applicant has not proven by a preponderance of the evidence that his CO and the Area Chief of Operational Forces should have been disqualified from serving on his rating chain and preparing the SOER. Under Article 5.A.2.e.(2)(b) of the Officer Manual, a rating chain member is "disqualified" if he or she has been relieved for cause due to misconduct or unsatisfactory performance, is "an interested party to an investigation or court of inquiry, or [in] 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." The applicant argued that his rating chain was disqualified because, after being relieved for cause, he wrote letters complaining about them to his congressional representatives and filed a complaint with the IG. The Board is not persuaded, however, that under Article 5.A.2.e.(2)(b), an officer may disqualify his own rating chain just by filing complaints about the rating chain after being removed from his primary duty. The Board finds that the applicant has not proven by a preponderance of the evidence that either his CO or the Area Chief of Operational Forces had been relieved for cause, was "an interested party to an investigation or court of inquiry" within the meaning of Article 5.A.2.e.(2)(b), or had a personal interest or conflict that raised a substantial question as to whether the applicant would receive a fair and accurate evaluation when they signed the SOER and their endorsements to his Addendum and Reply.

d. **SOER Properly Referenced Past Performance:** The applicant has not proven by a preponderance of the evidence that the SOER is erroneous or unjust because his CO considered and relied in part on an IM he sent in May 2013, before the evaluation period for the SOER, when writing the SOER. Under Article 5.A.7.f.11. of the Officer Manual and Article 2.B.11. of the OER Manual, when writing an OER, rating chain members shall not "[d]iscuss reported-on officer's performance or conduct which occurred outside the reporting period," except as provided in the rules for SOERs.²² The rules for SOERs authorize preparation of an SOER both to remove a member from his primary duties and "to document significant historical performance or behavior of substance and consequence which were unknown when a previous

²² The reference to Article 5.A.3.c. in Article 5.A.7.f.11. of the Officer Manual should instead state Article 5.A.3.e. because when the manual was revised in 2013, the articles were renumbered and the exception to the restriction on discussing performance that occurred outside the reporting period, which appears in the rules for SOERs, was renumbered as Article 5.A.3.e. However, the restriction on discussing performance that occurred outside the reporting period except in Article 2.B.11. of the OER Manual, M1611.1A, issued in October 2013, correctly cites Article 5.A.3.e. of the Officer Manual.

OER was prepared and submitted.”²³ Nothing in the rules states that when removing a member from his primary duties, the rating chain may not also consider and document historical performance that was unknown to his rating chain when his previous OER was prepared, and there is no evidence that the applicant’s prior CO had seen the IM at issue when he prepared the applicant’s regular OER in June 2013. The new CO, who wrote the SOER, stated that all of the IMs with inappropriate, discriminatory, or disrespectful language that he reviewed were dated during the evaluation period for the SOER and that only one of the IMs he reviewed was sent earlier, in May 2013. The CO stated that this earlier IM inappropriately referenced “potentially criminal behavior.” But the SOER reports more than one such reference in the applicant’s IMs and also states that he “inappropriately discussed open criminal investigations” with personnel not authorized to receive the information.²⁴ As noted above, the new CO is presumptively correct in his characterization of the applicant’s IMs, and the applicant has not submitted those 40 pages of IMs to try to rebut that characterization in the SOER. The applicant has not proven by a preponderance of the evidence that the SOER comment about “references to potentially criminal behavior” is prohibited by the Officer Manual or the OER Manual even though one such reference apparently appeared in an IM he sent in May 2013, before the start of the evaluation period for the SOER.

17. **Change in Orders Not Retaliatory:** The Board finds that the applicant has not proven by a preponderance of the evidence that PSC’s cancellation of his orders to serve as a [REDACTED] and transfer to a [REDACTED] billet were unauthorized [REDACTED] communications, or a result of religious or political discrimination. The information in the SOER provided PSC with significant negative information about the lack of judgment, responsibility, and professional presence that the applicant had shown in sending prohibited IMs on Government equipment to fellow officers. The negative information in the SOER amply justified PSC’s determination that the applicant should not be placed in the [REDACTED] position he had been selected for in early [REDACTED] before the applicant’s CO received the 40 pages of IMs and submitted the derogatory SOER. Likewise, the negative information in the SOER justified PSC’s decision to issue the applicant transfer orders to a billet in a [REDACTED] where he would not be supervising hundreds of members even though it was a billet normally filled by a [REDACTED]. The applicant has not shown that the change in his orders was unauthorized, retaliatory for protected communications, or a result of religious or political discrimination.

18. **Voluntary Retirement:** The applicant stated that he retired because of the allegedly retaliatory actions taken by his chain of command and PSC. The applicant has not proven by a preponderance of the evidence that any of the actions taken against him were retaliatory for protected communications or a result of religious or political bias, however. Furthermore, the Board notes that even if he had proven retaliation or religious or political bias, he would not be entitled to reinstatement on active duty because he voluntarily requested retirement. In *Wright v. [REDACTED]*, 81 Fed. Cl. 369 (2008), the plaintiff had appealed his NJP for sending pornography in emails from his Coast Guard computer on the basis that his punishment was too harsh.

²³ Officer Manual, Article 5.A.3.e.

²⁴ The Board notes that these SOER comments are somewhat supported by the statements of the applicant’s friends, who acknowledged that he complained about CGIS’s investigation of the obstruction of justice and their search of his Government equipment in the summer of 2013, during the evaluation period for the SOER.

While awaiting a delayed resolution of his appeal, Wright submitted a request to retire because his enlistment was ending and if his appeal were resolved unfavorably he might not have been allowed to reenlist or extend his enlistment for the four more months of service he needed to attain a twenty-year retirement.²⁵ The applicant's request to retire was approved, and he was retired about one month after his NJP was overturned. This Board had denied Wright's request for constructive service credit because his "choice to request retirement rather than to wait for the outcome of his NJP appeal does not render his retirement involuntary."²⁶ In upholding the Board's decision, the U.S. Court of Federal Claims stated, "a decision to retire is not rendered involuntary merely because the servicemember is faced with an undesirable choice."²⁷

19. **Lack of IG Investigation:** The Board finds that it has no authority to direct the IG to reconsider the applicant's complaint, as the applicant requested. Under 10 U.S.C. § 1552, the Board is only authorized to correct the Coast Guard's military records—not the IG's. And under the MWPA at 10 U.S.C. § 1034(g), the Board may only ask the IG to gather additional evidence if the IG has already investigated the matter and issued a report substantiating that a prohibited action was taken.

20. **PRRB Decision:** The Board finds insufficient grounds for removing the PRRB's decision from the applicant's record. This Board considers every case *de novo* and is not an appellate forum for the PRRB. While the Board does have the authority to remove the PRRB's decision from the applicant's record and does not agree with the PRRB's reasoning regarding the applicability of the MWPA, the applicant has not shown that the PRRB's decision fails to accurately reflect that board's reasoning. The applicant has not proven by a preponderance of the evidence that the presence of the PRRB's decision in his record constitutes an error or injustice.

21. **Commendation Medal and Wardroom Plaque Discretionary:** The applicant has not proven by a preponderance of the evidence that his command's decision not to award him a medal or a Wardroom Plaque upon his departure from the cutter constitutes an error or injustice in his record. As the PRRB noted, no policy entitled the applicant to a medal or Wardroom Plaque. Instead, medals and tokens of appreciation such as a Wardroom Plaque are discretionary. Given the conduct that caused the applicant's removal, the Board is not persuaded that the CO abused his discretion by failing to recommend the applicant for an end-of-tour medal or to award him a Wardroom Plaque for the cutter.

22. **No Grounds for Paying Attorney Fees:** The Board finds that the applicant is not entitled to have the Coast Guard reimburse him for his attorney fees. The Board's rule at 33 C.F.R. § 52.23(a) states, "Applicants may be represented by counsel at their own expense." The only exception to this rule, which applies to applicants whose claims of retaliation or discrimination have been substantiated in a report by the IG pursuant to the MWPA, does not apply in his case.

²⁵ See Final Decision in BCMR Docket No. 2007-050.

²⁶ *Id.*

²⁷ *Wright v. United States*, 81 Fed. Cl. 369, 375 (2008), citing *Cruz v. Dep't of Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) ("This court has repeatedly held that the imminence of a less desirable alternative does not render involuntary the choice made."). See also *Scarseth v. United States*, 52 Fed. Cl. 458, 468 (2002) (citing *Christie v. United States*, 207 Ct. Cl. 333, 338 (1975), for its determination that "the exercise of an option to retire is not rendered involuntary by the impending prospect of a less desirable alternative").

23. **Other Allegations and Arguments:** The applicant made numerous allegations and arguments with respect to the actions and decisions of CGIS, his chain of command, and other officers. Those allegations not specifically addressed above are unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.²⁸

24. **Conclusion.** The applicant has not proven by a preponderance of evidence that any of the actions at issue in this case—including CGIS’s investigation of obstruction of justice and search and seizure of his Government equipment, his removal from primary duties, his rating chain [REDACTED] ation of the SOER, PSC’s decision to change to his transfer orders, and his retirement—were reprisal for his protected communications or based on his religion or political beliefs. The only correction warranted is removal of the phrase “must align personal beliefs and values with CG direction and core values” from block 10 of the SOER because it misstates the legal requirement of a Coast Guard officer. No other relief is warranted.

(ORDER AND SIGNATURES ON NEXT PAGE)

[REDACTED]

²⁸ 33 C.F.R. § 52.24(b); see *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board’s ultimate disposition”).

ORDER

The application of [REDACTED] USCG, for correction of his military record is denied except that the phrase “must align personal beliefs and values with CG direction and core values” shall be removed from block 10 of the Special OER dated January 23, 2014, so that the remaining sentence will end with the words “to contribute positively to CG.”

April 27, 2018

