DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-084

[redacted]

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 10 U.S.C. § 425. The Chair docketed the application after receiving the application on February 16, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 15, 2017, 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, who is a former lieutenant in the Coast Guard Reserve and is currently a member of the Air Force Reserve, asked the Board to remove from his Coast Guard record a derogatory Special Officer Evaluation Report (SOER) covering his service from January 31 to September 8, 2011. The applicant alleged that the SOER should be removed because it violates the terms of his Resolution Agreement with the Coast Guard, which resulted in his resignation and honorable discharge in exchange for his agreement not to pursue a civil rights complaint. He also alleged that the SOER was based on unsubstantiated accusations; bias, animus, and improper actions on the part of his rating chain;[1] and erroneous information resulting in unjust ratings.

The applicant explained that his Sector Commander received an anonymous complaint dated November 5, 2011, claiming that a Reserve officer, who is described in the letter as a "Russian sergeant" of a particular police department and "a supervisor in the administrative unit for your reserve unit," had bragged that he had taken two weeks of military leave from his job as a police officer and had spent the time closing on his new home, instead of performing military duties. The letter states that the officer—

[1] A Coast Guard officer is normally evaluated by a "rating chain" of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally the supervisor's supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations. The system provides for "multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting." U.S. Coast Guard, COMDTINST M1000.3, Article 5.A.2.a.

> just makes up military orders when he wants to and the police department has no choice but to let him take time off on the arm. I am not sure how his days off work because my boyfriend almost always ended up taking one of his vacation weeks to complete his military drills. Ironic how this sergeant used the military to take the lieutenant's exam a day after everybody else took the test and then he took the exam without ever opening up a book to study.

The letter also claims that the Reserve officer was involved in a fraudulent disability claim against the police department.

The applicant stated that based on the information in the letter, the command concluded that he was the accused Reserve officer and initiated an investigation by the Coast Guard Investigative Service (CGIS). CGIS advised the police department on September 4, 2012, that during an interview on July 3, 2012, the applicant had admitted to signing his supervisor's signature on "must drill" and "did drill" letters documenting the applicant's drills but claimed to have done so with permission, although the supervisor denied having given the applicant permission to sign his signature on the letters. A prior supervisor claimed that her signatures on letters for the police department appear to have been altered and stated that she "kept meticulous reserve records and copies of all the letters sent to her reserve personnel's civilian employers." CGIS noted that during a six-month period, the applicant had been paid for drills on ten days when he had never signed onto the Coast Guard network and that he claimed that he had been "at an unspecified 'training, forgot his CAC or that [his supervisor] had authorized him to complete his reserve drills at home.'" The applicant stated that of all of the accusations in the anonymous letter, these were the only findings reported to the police department by CGIS. He stated that "all of the outlandish allegations made in the anonymous complaint were proven false," and he was never charged with being paid for drills that he did not attend.

Based on the CGIS Report of Investigation (ROI), the applicant stated, his command recommended his separation for cause on April 25, 2013, based on "moral dereliction not consistent with the Coast Guard core values, in that he falsified records to misstate facts for the purpose of deceiving his employer" and for failing to sign into the network with his CAC card during every drill he was paid for. The applicant alleged that it is unclear whether any of these allegations could have been proven at a separation board because he had "been at all drills that he was paid for and all facts in the 'did perform' correspondence were accurate."

On May 20, 2013, the applicant stated, he rebutted the recommendation for separation, "outlin[ed] the administrative/clerical issues with the subject correspondences and reaffirming that no fraud occurred," and noted that he had never been counseled about how to handle these issues even though each commander "had their own customs or policies as to how to handle the issue."

On June 5, 2013, the applicant stated, his rating chain initiated the disputed SOER, which accused him of falsifying official documents and of fraudulently claiming compensation for eleven days of military duty. He submitted an Addendum with comments rebutting the allegations in the SOER on July 15, 2013, and on November 18, 2013, he was told that the rating chain was revising the SOER in light of his comments. The applicant argued that the revision of the

SOER was contrary to policy because, after he submitted his comments, the SOER should have been forwarded to the District Commander for review.

The applicant stated that on November 29, 2013, he was given the revised SOER, in which all of the references to fraudulently claiming duty days had been removed, but allegations of forgery and general allegations of misconduct had been added. The applicant submitted his revised Addendum for the SOER on December 9, 2013. After his rating chain forwarded the SOER with the applicant's Addendum without further comment, it was validated and entered in his record on April 4, 2014.

On or about May 19, 2014, the applicant stated, he was notified that the Personnel Service Center (PSC) intended to convene a special board of officers to consider his removal for cause. Based on "his treatment during the entire investigation process and the anti-Russian and anti-Semitic tone throughout," he filed a civil rights complaint in August 2014. Because of this complaint and PSC's intention to convene a special board, he, the Coast Guard, and the Department of Homeland Security "agreed to resolve the matter through a global resolution/settlement agreement." In the agreement, the applicant stated, he agreed to withdraw all of his claims and his command agreed to favorably endorse his request to resign his commission; he was to receive an honorable discharge with a separation code denoting an "unqualified resignation"; and the Sector command was to ensure that two memoranda documenting the recommendation that he be separated for cause not be entered in his personnel data record (PDR).

Because the Resolution Agreement states that the "facts and circumstances associated with the two memoranda will not be used as the bases for any other disciplinary or administrative action against him," the applicant argued that allowing the SOER to remain in his record violates both the letter and the spirit of this agreement. He argued that pursuant to the agreement, all of the "facts and circumstances associated with the two memoranda" regarding the initiation of his separation for cause should have been removed from his PDR. He argued that the facts and circumstances cannot be included in the SOER without referencing the underlying facts and circumstances of the two memoranda, and so the SOER must be removed from his record.

Following this agreement, the applicant stated, he was honorably discharged from the Coast Guard Reserve in October 2014, and in November 2014 he "resolved his dispute with the [police department] and was required to forfeit twenty-five vacation days."

The applicant also alleged that his supervisor "recently recanted his initial sworn statement to CGIS during further investigation by the [police department] and stated that he was pressured by [the Sector] leadership to write [the] derogatory evaluation report." He stated that after being interviewed by an attorney for the police department, his supervisor had called and said that he felt terrible that the applicant had been wrongly accused; that he had told the attorney that the applicant had not committed any unethical acts or crimes but was a victim of a faulty and malicious investigation; and that he had not admitted the same to CGIS because he had been under intense pressure from his superiors and threatened with adverse consequences for his career.

In support of these allegations, the applicant submitted his own sworn declaration and various official documents, the most important of which are included in the summary below.

SUMMARY OF THE RECORD

The applicant enlisted in the Reserve on March 6, 2003; was appointed an ensign in the Reserve on May 26, 2005; was promoted to lieutenant junior grade on November 28, 2006; and was promoted to lieutenant on May 28, 2009. In 2011, the applicant was serving as the Logistics Reserve Section Lead at a large Coast Guard Sector, where he supervised nine petty officers.

CGIS Report of Investigation

On November 16, 2011, CGIS began an investigation into allegations that the applicant had falsified Coast Guard documents and submitted them to his civilian employer, a police department, after the Sector command received the anonymous letter (excerpts above) about the "Russian sergeant," a descriptor used by the letter writer because she did not know how to spell the applicant's name. CGIS agents conducted numerous interviews with officers and enlisted members of the command in late 2011 and early 2012 and periodically briefed the command. Two supervisors reported that they had not given the applicant permission to sign their signatures and that their signatures on certain "must drill" and "did drill" letters were either not their own or had been altered. The supervisor who signed his drill letters until she left in May 2011 stated that she had not signed any of the "did drill" letters that appeared to bear her signature, that she would not have done so because they were erroneously formatted, and that she kept copies of the letters and meticulous records of the applicant's drills because he "batched" his drills, instead of drilling on regular weekends. The subsequent supervisor stated that he had once told the applicant that he could submit a drill letter to the police department with his name on it because the supervisor did not have easy access to a scanner, but he had never authorized the applicant to sign the letters for him. This supervisor identified two letters showing his name handwritten in capitals as not being his own.

Other witnesses provided information about the "must drill" and "did drill" letters; incorrect formatting that made some of the letters appear illegitimate; the applicant's drill dates; his request for duty on the date of the police lieutenant's examination, which was refused; the potential involvement of a yeoman who worked with the applicant and also spoke Russian; and inappropriate staring and sexual comments made by the applicant in Russian to a yeoman. The CGIS agent noted that a yeoman who had worked with the applicant and stated that he might have provided the applicant with the template for the letters could have been involved in the production of the false documentation, and the "fact that they are both fluent in the Russian language suggests the possibility of a personal relationship beyond the workplace." The agent noted that this yeoman claimed that some of the drill letters did not look legitimate, knew details about the anonymous letter that the agent had not revealed, and had previously spoken about some of the matters mentioned in the letter with the applicant's neighbor and the applicant.

The CGIS agent attached a print-out of all of the dates that the applicant had logged onto the CGDN network with his CAC card from January 2010 through December 2011. He noted that it showed that the applicant had logged onto the network on all of his duty dates except May 16, 17, 26, and 27, 2011; August 14, 15, 16, 17, and 18, 2011; and September 12 and 15, 2011.

On July 2, 2012, the CGIS agents interviewed the applicant after he acknowledged his rights in writing. The applicant stated that he has a hard time getting his "must drill" and "did drill" letters signed by supervisors because he is the highest ranking member who drills on his drill weekends. He would write the letters at home and submit them by email or fax for signature. The supervisor who signed the letters up through May 26, 2011, was very exacting about the format, would return incorrectly formatted letters for revision, and required him to provide her with a photocopy of every letter. When advised that this supervisor had denied signing the "did drill" letters, the applicant replied that she was delusional. When advised that the other supervisor had denied authorizing the applicant to write his name in the signature block on two of the letters, the applicant stated that the supervisor was lying. When asked about logging into the Coast Guard network on drill weekends, the applicant stated that he normally did so except during Fleet Week or the United Nations General Assembly. When shown the eleven drill dates on which he had never logged in, the applicant replied that he was either in training, had forgotten his CAC card, or had been authorized to drill at home those dates. The agent reported that there was no record of any training on the eleven dates in question.

On July 5, 2012, a CGIS agent briefed the commanding officer (CO) of military personnel at the Sector about the investigation. On July 10, 2012, he briefed a District attorney. The CGIS Special Agent in Charge reviewed and signed the summary of the applicant's interview and other final entries in the ROI on August 30, 2012. On September 4, 2012, CGIS sent a copy of the ROI to the police department where the applicant worked.

Regular OER

While the investigation was underway, the applicant's regular, biannual OER dated May 31, 2012, was signed by his rating chain in late June and early July 2012. It includes two standard marks of 4, fourteen marks of 5, and two marks of 6 in the various performance categories[2] and a mark in the middle, fourth spot on the officer comparison scale,[3] denoting a "good performer."

Discharge Recommendation

In a memorandum dated April 25, 2013, the CO recommended to PSC that the applicant be separated for cause because the applicant had "demonstrated moral dereliction not consistent with the Coast Guard's core values. He intentionally falsified USCG documents/official records to misstate facts for the purpose of deceiving his employer, the … Police Department. Additionally, [the ROI] revealed [the applicant] was absent from signing on to the CGDN computer terminal a total of 11 times in a six month period (he stated that he signs on to the CGDN computer with his CAC card for every drill) and was paid for reserve drills those days." The CO

[2] Coast Guard officers are evaluated in 18 different performance categories, such as "Teamwork" and "Judgment," on a scale of 1 (worst) to 7 (best). A middle mark of 4 means that the officer's performance met the expected high standards of all Coast Guard officers for that category. COMDTINST M1000.3, Article 5.A.4.c.(4)(g).

[3] On an OER comparison scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his or her career. Although the marks on the scale are not numbered, there are 7 possible marks, ranging from "performance unsatisfactory for grade or billet" to "best officer of this grade." COMDTINST M1000.3 Article 5.A.4.c.(8)(a).

stated that to correct these problems the applicant had been counseled to request official documentation only from his supervisor and had had to be reminded several times to not solicit anyone but his supervisor for a signature. Although the applicant continued to complain that his supervisor was not being helpful, the supervisor had submitted his emails informing the applicant "how to properly request a letter to his employer." The CO noted that the applicant would be allowed to submit a rebuttal.

On May 20, 2013, the applicant rebutted the recommendation for discharge and asked that he not be required to show cause for retention given the evidence, his ten years of honorable service, and the lapse in time since the allegations came to light. He argued that convening a show-cause board would be improper because his command did not initiate disciplinary proceedings after the investigation was completed in August 2012, because he was not timely or formally counseled about his alleged deficiencies, and because no deficiencies occurred after he was informally counseled by his supervisor. The applicant stated that if he had been charged, he would have received due process, allowed to see all of the allegations and evidence against him, and given an opportunity to explain his situation and be heard by the command. He stated that the discharge recommendation was "due to a miscommunication and misunderstandings that could easily be clarified if handled properly within my unit."

Regarding the police department examination, the applicant stated in his rebuttal that when he learned that the examination was scheduled for October 29, 2011, which was a Saturday, the Sabbath, he asked to take it on October 30, 2011, instead, as a reasonable accommodation. His request had nothing to do with the Coast Guard and there was no documentation showing that he had claimed he had Reserve duty on October 29th. He stated, "The one training slot I requested for that month was cancelled, and if I had attended, then I could not have completed the promotion exam on 30 October because … the training went through the 30th." He argued that the fact that he had been drilling for sixteen months without issue since the problem was discovered "demonstrates that this matter is at best a minor misunderstanding that should be resolved within my unit."

Regarding his drills in May, August, and September 2011, the applicant stated that the documentation shows that he performed those drills, that he had submitted documentation and emails showing that he performed the drills, and that his supervisors had not denied that he performed them. He argued that "[i]f the only question remaining is whether [he] logged into a CGDN system by CAC or Username/Password on those dates, then such trivialities do not merit the disproportionate response of separation from service." He stated that the evidence proved that he had not defrauded either the Coast Guard or the police department at any point and that his command should have given him a meaningful chance to rebut the allegations instead of initiating his discharge.

The applicant submitted several documents with his rebuttal including the following:

- A letter to the applicant from the police department dated November 18, 2008, granting his request for a reasonable accommodation for the Sabbath and major Jewish holidays.
- An email from the applicant dated May 13, 2011, in which he asked to attend a certain training course from October 11 to 30, 2011.

- A supervisor's letter to the police department, dated January 18, 2010, stating that the applicant did perform active duty from January 11 through 18, 2010.
- The same supervisor's letter to the police department, dated January 6, 2011, stating that the applicant must perform active duty from January 24 through 28, 2011, and on January 31, 2011, and the follow-on letter stating that he did perform active duty those dates.
- Travel orders issued on March 29, 2011, for the applicant to perform annual active duty training from May 16 to 27, 2011.
- A supervisor's letter to the police department dated April 4, 2011, stating that the applicant must perform active duty from May 16 through 26, 2011, and the subsequent supervisor's letter, dated May 26, 2011, stating that the applicant did perform active duty those dates.
- A form from the police department showing that the applicant was away on military leave from May 16 through 26, 2011.
- A print-out of Coast Guard training showing that the applicant completed Don't Ask, Don't Tell Awareness training on May 16, 2011.
- An email dated May 16, 2011, from the applicant's Coast Guard email account, advising an ensign that the applicant would be available on May 26 and 27, 2011, to serve as "USCG rep at United Nations."
- Two emails dated May 26, 2011, from the applicant's Coast Guard email account to his personal email address, forwarding an email from his supervisor and another email with "Instructions on installing CAC at home."
- An email dated May 26, 2011, from the applicant's supervisor to the other members, thanking them for meeting with him and the applicant that week.
- A Sector Fleet Week volunteer schedule showing that the applicant would be at a particular location on May 27, 2011, and a photograph of him at that location.
- A supervisor's letter to the police department dated August 4, 2011, stating that the applicant must perform active duty from August 14 through 18, 2011, and the same supervisor's letter, dated August 19, 2011, stating that the applicant did perform active duty those dates. (On the latter, the supervisor's name is printed in all capital letters above the typed name.)
- An email from the applicant's Coast Guard email account dated August 13, 2011, stating that he needed a password for the Direct Access database.
- A print-out of Coast Guard training showing that the applicant completed Suicide Prevention training at 8:53 a.m. on August 15, 2011.
- A supervisor's letter to the police department dated September 8, 2011, stating that the applicant must perform active duty from September 11 through 15, 2011, with the supervisor's name printed in all capital letters above the typed name, and the subsequent letter, which is not dated but is signed by the supervisor, stating that the applicant did perform active duty those dates.
- An email from the applicant's Coast Guard email account dated September 15, 2011, regarding a Coast Guard solicitation for a position.

- An email from the applicant's Coast Guard email account dated September 16, 2011, forwarding a list of the readiness status of the Sector's reservists.

SOER

On April 4, 2014, PSC validated and entered the disputed SOER in the applicant's record. The SOER states that it was prepared in accordance with Article 5.A.3.e.(4) of COMDTINST M1000.3 "to document behavior of substance and consequence based on findings of misconduct inconsistent with the CG's core values in that [the applicant] falsified CG documentation to his civilian employer; the full & exact nature of which were not known to the rating chain until after the regular OER was submitted."[4] The SOER includes low marks of 2 for the performance dimensions "Judgment" and "Responsibility" and below-standard marks of 3 for "Using Resources," "Results/Effectiveness," "Professional Competence," and "Professional Presence." The Sector Senior Reserve Officer assigned him a mark in the second spot on the officer comparison scale, denoting a "marginal performer." These marks are supported by many negative comments, including the following:

> [The applicant] failed to plan & coordinate with supervisors the documentation required to verify completion of IDT drills as scheduled. … member signed/wrote name of two different supervisors' names, without their consent, on four CG Memos, falsified correspondence was subsequently provided to civilian employer in order to verify completion of reserve drills. Member was provided guidance to complete this task correctly and squandered many of own CG hours without solving a routine (for a JO) written task. Questionable credibility: [His] misconduct displayed a complete lack of honor and devotion to the values exemplified by the Coast Guard; member did not uphold moral standards expected of any CG member. … His actions show a lack of integrity that is the foundation for any CG Officer. [His] inability to discern inappropriate conduct makes him untrustworthy and unable to effectively serve as a member or leader within the CG. … Displayed severe lapse of judgment … Mbr unable to hold self accountable for actions … Failed to uphold the public trust and engaged in service discrediting behavior; by falsifying documents, member demonstrated moral and professional dereliction not consistent with CG core values, particularly honor and devotion to duty. … His lack of integrity is not commensurate with that expected of even the most junior member of the Coast Guard. Limited potential is indicated by his compromised integrity. [He] is not recommended for promotion to O4.

In his Addendum dated December 9, 2013,[5] the applicant noted that the SOER had been substantially revised following his submission of comments on July 15, 2013. He argued that the

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[4] Article 5.A.3.e. of COMDTINST M1000.3 states that commanding officers and higher authorities may direct the submission of an SOER under certain circumstances, which include the following at Article 5.A.3.e.(4):

> To Document Significant Historical Performance. Special OERs may be submitted to document significant historical performance or behavior of substance and consequence which were unknown when a previous OER was prepared and submitted. … The OER should address only the performance dimensions relevant to the special OER since all other performance dimensions will have been addressed in the previously submitted OER. The special OER should be initiated by the original rating chain unless they are unavailable or disqualified. … The reviewer must be a flag officer.

[5] Article 5.A.7.c. of COMDTINST M1000.3 provides that when a Supervisor and Reporting Officer complete a derogatory OER, the Reporting Officer provides a copy to the officer and advises the officer about the option of preparing an Addendum for inclusion with the OER. The Supervisor and Reporting Officer may address any matter raised in the Addendum in their endorsements to the Addendum and then the Reporting Officer forwards the OER to the Reviewer, who ensures that the derogatory information is substantiated and that the OER marks and comments

SOER should not have been prepared under Article 5.A.3.e.(4) of COMDTINST M1000.3 because the facts revealed in the CGIS ROI were known to his command when his regular OER was completed in June and early July 2012. He stated that he was originally accused of having not performed drills for which he was paid but that he had cleared his name and those allegations were not included in the revised SOER. The applicant stated that his first supervisor has simply forgotten that she signed the "did drill" letters and that, when he printed his subsequent supervisor's name above the typed name on the drill letters, he thought that it was obviously not a signature and he was not intending to mislead anyone.

The applicant also provided a copy of the SOER Addendum he submitted on July 15, 2013, in response to the first draft of the SOER that he was shown. It is similar to his revised Addendum in that he claims that no SOER should have been prepared because his rating chain was aware of the facts before they prepared his regular OER dated May 31, 2013; that he had not logged into the network on the eleven identified dates either because he forgot his CAC card or because he did not need to do so; that he was never counseled about the issue in 2011; that the CGIS agent had failed to interview certain members who would verify that he had worked on those dates; that he had submitted documentation showing that he had worked on those dates; and that his supervisor had told him that he could submit the drill letters without his signature, so the applicant had simply printed the supervisor's name in all capital letters above the typed name on two occasions. He admitted that writing his supervisor's name on the letters had caused confusion but stated that he had never intended to represent that his supervisor had signed the letters; that he had no reason to falsify the letters because his supervisor had approved the drills and had never questioned his drills; and that his supervisor's lack of easy access to a scanner had caused the problem, so it should not reflect negatively on the applicant. He also insisted that his first supervisor was wrong in denying that she had signed the letters and that it is clearly her signature on them. Finally, the applicant stated that he had not claimed that he had military duty to delay taking the police examination; he had requested and received a one-day delay because of the Sabbath. He stated that inclusion of this allegation in the SOER based solely on an anonymous letter is improper. (There is no mention of the police examination in the final version of the SOER.)

The final version of the SOER was forwarded up the rating chain, who endorsed the Addendum without comment. The applicant was counseled about the SOER and signed it on April 1, 2014, before it was forwarded to PSC, which entered it in his record on April 4, 2014.

Show-Cause Board Notification

In a memorandum dated May 19, 2014, PSC advised the applicant that it would convene a "Board of Determination to decide whether or not you should be required to show cause for retention in the Coast Guard Reserve" and that he was allowed to submit a communication to the Board within thirty days of the memorandum. PSC also advised him that he could request to resign his commission in lieu of further adverse administrative action within thirty days.

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are consistent. If the Reviewer finds otherwise, the Reviewer returns the OER to the Reporting Officer for additional information or clarification, and the reported-on officer has an opportunity to revise the Addendum. Article 5.A.7.h. states that PSC reviews the OER and may also return it to the rating chain for revision.

Resolution Agreement

On August 14, 2014, the applicant and four representatives of the Coast Guard signed a Resolution Agreement to resolve the applicant's civil rights complaint. The Coast Guard agreed to authorize the applicant's unqualified resignation and honorable discharge and to—

> ensure that [Sector] memo 1401 of 25 April 2013 and [Sector] memo 1401 of 11 April 2014, the two memoranda that collectively represent [the Sector's] recommendation for the [applicant's] separation for cause, are not placed in the [applicant's] Personnel Data Records (PDR). The facts and circumstances associated with the two memoranda will not be used as the bases for any other disciplinary or administrative action again[st] him.

In exchange for the promises of the Coast Guard, the applicant agreed to the following:

- He would submit an unqualified resignation request within fourteen days of the agreement, withdraw his claim of discrimination, and not initiate any civil court litigation against the Coast Guard or the Department concerning the claim of discrimination.
- He agreed that "the terms of this agreement are in full settlement of all pending claims filed regarding his employment that arose up to the signing of this agreement."
- He agreed not to use the terms or fact of the agreement as evidence or proof of discrimination, retaliation, or any other prohibited personnel practice in any administrative or judicial proceeding against the Coast Guard or the Department.
- He agreed to pay his own attorney's fees.
- He agreed that upon compliance with the terms of the agreement, he waived and released any claims or causes of action for back pay, damages, or costs that he raised or could have raised through the date of this agreement.
- He agreed that if he believed that the Coast Guard had failed to comply with the terms of the agreement, he would notify the Department's Civil Rights Officer within thirty days after he knew or should have known of the alleged noncompliance.

The resolution further states that the parties "agree that the terms and conditions set forth in this resolution agreement form the complete and final basis for settlement, and there are no other agreements between the parties, express or implied, oral or written."

VIEWS OF THE COAST GUARD

On July 7, 2017, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with the recommendation in a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC stated that the Board should deny relief because the Resolution Agreement makes no mention of the SOER, which had been entered in the applicant's record four months earlier. PSC stated that because the SOER had already been signed by the applicant and entered in his record, it does not constitute "further administrative or disciplinary action" pursuant to the agreement. Regarding the SOER, PSC stated that it is presumptively correct, that his rating chain is pre-

sumed to have acted correctly and lawfully in completing it, and that the applicant "has not substantiated an argument or sufficient evidence to show otherwise."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 24, 2017, the Board received the applicant's response to the views of the Coast Guard.[6] The applicant stated that the Coast Guard believed that the applicant had submitted four attendance verification letters that were not signed by his supervisors, but there was no evidence that he was ever paid for drills that he had not actually performed. He stated that the SOER was based solely on the ROI before any administrative proceedings, and he had had no opportunity to rebut the accusations. He stated that the supervisor had told him that he could submit a drill letter with his name on it but did not mean that the applicant could sign the letter. Four years later, this supervisor recanted his prior accusations, which caused the police department to drop the charges against the applicant.

The applicant alleged that it "has now become clear that [his] Command felt that providing the necessary verification documentation to [him] which was required by the [police department] was too arduous and agreed to allow [him] to complete these documents on his own in violation of Coast Guard policy. When these circumstances came to light during the initial investigation, [the two supervisors] and the Coast Guard failed to acknowledge that the Coast Guard and the Command contributed to the circumstances."

The applicant argued that by allowing the SOER to remain in his record, which includes some of the same derogatory information that appears in the two memoranda regarding his discharge, the Coast Guard violated the spirit and the letter of the Resolution Agreement.

FINDINGS AND CONCLUSIONS

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

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 discovery of the alleged error and injustice.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.[7]

3. The applicant alleged that the continuing presence of the SOER in his record is erroneous and unjust, that the allegations in the SOER are unsubstantiated, that it is a product of bias and animus, and that its preparation violated Coast Guard policies. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed infor-

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[6] The Chair had granted the applicant an extension of the 30-day period for response pursuant to 33 C.F.R. § 52.26.

[7] *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).

mation 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.[8] 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."[9] To be entitled to relief, the applicant cannot "merely allege or prove that an [SOER] seems inaccurate, incomplete or subjective in some sense," but must prove that the 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.[10]

4. For the reasons explained below, the Board finds that the applicant has not proven by a preponderance of the evidence that the SOER is erroneous or unjust:

a. Resolution Agreement: The Resolution Agreement, dated August 14, 2014, requires the Coast Guard not to enter two memoranda regarding the applicant's discharge proceedings into his PDR, and they are not in his PDR. Significantly, the agreement does not mention the SOER, which the applicant had signed earlier on April 1, 2014, for entry in his PDR by PSC on April 4, 2014. This timeline refutes the applicant's claim that the SOER was entered in his record after the Resolution Agreement was signed. The applicant argued that the SOER violates the agreement because it states in paragraph #4, "The facts and circumstances associated with the two memoranda *will not be used* as the bases for any other disciplinary or administrative action again[st] him." (Emphasis added.) But the use of the future tense shows that the Coast Guard was prohibited from taking further administrative or disciplinary action against the applicant on the basis of the facts and circumstances noted in the memoranda in the future once the agreement was signed. This provision did not require the Coast Guard either expressly or implicitly to remove the SOER from his PDR. And agreeing not to enter two memoranda in the applicant's PDR that would have contradicted the voluntary, unqualified nature of his resignation is substantially and qualitatively different from agreeing to remove a valid performance evaluation from his PDR.

Other provisions in the Resolution Agreement also refute the applicant's claim that the SOER should be removed from his PDR pursuant to the agreement: Paragraph #2 states that "[b]y executing this agreement, the parties hereby agree to resolve all of the issues raised between the parties *through the date of execution of this agreement*." (Emphasis added.) Similarly, paragraph #7 states that the applicant "agrees that by signing this Resolution Agreement, the terms of this agreement are in full settlement of all pending claims filed regarding his employment that arose up to the signing of this agreement." In paragraph #8, the applicant acknowledged having "full knowledge and understanding of [the Resolution Agreement's] terms and conditions, after having the opportunity to have this agreement reviewed by [his] legal advisors." In paragraph #13, he "agree[d] that the terms and conditions set forth in this resolution agreement form the complete and final basis for settlement, and there are no other agreements

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[8] 33 C.F.R. § 52.24(b).

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

[10] *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).

between the parties, express or implied, oral or written." And in paragraph #15, he acknowledged that he had "had an opportunity to review this agreement with a representative, each statement is understood and accepted by him, and he voluntarily and without duress, reservation, or coercion, agrees to settle this matter subject to the terms and conditions herein." These provisions show that the applicant was represented by counsel and understood that the Coast Guard was not agreeing to remove the SOER or do anything else not expressly stated in the Resolution Agreement. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard's refusal to remove the SOER violates either the spirit or the letter of the Resolution Agreement.

b. Allegations of Misconduct: The applicant argued that the SOER should be removed because the allegations against him were unsubstantiated and he was never given an opportunity to rebut them. He was offered the opportunity to rebut them, however, during his CGIS interview, in his two Addenda to the SOER, in his statement responding to his command's notification of discharge proceedings dated April 25, 2013, and in a communication to a show-cause board. His rebuttals were apparently unpersuasive to his command and PSC, and he opted to resign instead of submitting to a show-cause board. In his rebuttals, the applicant claimed that the first supervisor, who denied signing two of his "did drill" letters, is simply wrong, but the record indicates that she maintained his drill attendance records meticulously because he did not drill regularly on weekends like a typical reservist and that she retained copies of all of the "must drill" letters she had signed but had no copies of the "did drill" letters that the applicant submitted to the police department. She also noted that the signature appeared different on those letters. The applicant claimed that his next supervisor once agreed to let the applicant submit drill letters with the supervisor's name on them and that the applicant misunderstood and so wrote the supervisor's name in capital letters in the signature block on two drill letters without any intention of deceiving anyone. But there was no purpose to writing his supervisor's name in the signature block except to mislead the police department to think that the letters had been signed. And it apparently worked because the applicant was later required to forfeit twenty-five vacation days by the police department to have charges against him dismissed. In light of these circumstances, the Board cannot conclude that the allegations against the applicant in the SOER were unsubstantiated.

c. Bias and animus: The applicant alleged that the SOER was a product of bias and animus against him because he is Russian and Jewish. The anonymous letter writer identified him as the "Russian sergeant" and "a supervisor in the administrative unit for your reserve unit" but explained that she did so because she did not know how to spell his name. The investigation showed that the YN1 had previously discussed taking military leave from the police department with the applicant and his neighbor, and the investigator noted that they spoke Russian and might have a personal relationship outside of the office. However, the applicant submitted no evidence showing any ethnic or religious bias or animus on the part of the investigator, his chain of command, or his rating chain, and there is none in the record. Based on the record, the Board cannot conclude that the SOER was a product of bias or animus.

d. Authorization for SOER: The applicant argued that his command had no authority to prepare the SOER under Article 5.A.3.e.(4) of COMDTINST M1000.3 because the information in the ROI was known to the applicant's rating chain when it prepared his regular

OER dated May 31, 2012, in June and early July 2012. However, the content of the applicant's interview with the CGIS agent was unknown when the rating chain prepared the regular OER, and the ROI was not finalized by CGIS until August 30, 2012. Therefore, even though the agent apparently kept the command informed of the investigation, all of the facts revealed in the ROI and relied on by the rating chain were not known to the rating chain until after the applicant's regular OER was prepared. And so the rating chain was authorized to prepare an SOER for the applicant under Article 5.A.3.e.(4) of COMDTINST M1000.3.

e. SOER processing: The applicant alleged that his rating chain erroneously processed the SOER because, after he submitted his first Addendum, the SOER should have been sent directly to PSC instead of being revised and returned to him so that he could revise his Addendum. Under Article 5.A.7.c. of COMDTINST M1000.3, however, after signing a derogatory SOER, the Reporting Officer first provides a copy to the officer to prepare an Addendum and only later does the Reporting Officer submit the SOER to the Reviewer for review. The Reviewer may return the SOER to the Reporting Officer for additional information or clarification before forwarding the SOER to PSC for review, and if the Reporting Officer or Supervisor revise the SOER when the Reviewer returns it, the reported-on officer has an opportunity to revise the Addendum. PSC also may review a derogatory SOER and return it for revision. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his rating chain erred by revising the SOER after receiving his first Addendum since he was properly afforded the opportunity to revise his Addendum, as required by Article 5.A.7.c.

5. The applicant made many allegations with respect to the actions and attitudes of the CGIS agents and members of his command. Those allegations not specifically addressed above are unsupported by substantial evidence that overcomes the presumption of regularity and/or are not dispositive of the case.[11]

6. The applicant has not proven by a preponderance of the evidence that the 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.[12] Therefore, his request to have the SOER removed from his record should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

[11] *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").

[12] *Hary*, 618 F.2d at 708.

ORDER

The application of former [redacted] for correction of his military record is denied.

December 15, 2017

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