

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2021-005**

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LCDR (O-4)

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on October 30, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated August 8, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a Reserve Lieutenant Commander (LCDR/O-4)<sup>1</sup> on active duty, asked the Board to make the following corrections to his record:

1. Backdating his date of rank to Lieutenant Commander (LCDR) from July 10, 2024 to August 1, 2019, and that he be awarded all backpay and allowances that flow from this correction;
2. Removing his June 1, 2017 through December 20, 2017 Removal from Primary Duties (RPD) Derogatory Officer Evaluation Report (OER), including any and all documentation relating to the RPD OER, including the addendum to the OER, the applicant's response to the RPD OER, and all adverse references to the RPD OER;
3. Removing his August 27, 2016 through May 31, 2017 OER and replacing it with a Continuity OER;
4. Removing a December 21, 2017 through May 31, 2018 "Not Observed" OER;
5. Changing the January 29, 2018 through May 31, 2018 OER from a Continuity OER to a Regular OER;
6. Changing his rank on his June 1, 2018 through May 31, 2019, and June 1, 2019 through May 31, 2020 OERs from LT to LCDR;

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<sup>1</sup> The applicant was a Lieutenant (LT/O-3) when he submitted his initial application to the BCMR. He has since been promoted to LCDR/O-4.

7. Reinstating him into the Legacy Retirement System from the Blended Retirement System (BRS) and if not reinstated into the Legacy Retirement System, granting him continuation pay at the LCDR pay rate instead of the payment he received at the LT pay rate;
8. Requiring the Coast Guard to issue a statement that the Continuity OER covering the relevant periods shall not be considered adversely against the applicant and entering that statement into his record;
9. Granting him early consideration by the Commander (CDR) promotion board;
10. Directing the Coast Guard to offer him an opportunity to complete the Performance-based Qualification System (PQS);
11. Awarding him the Port Security Unit (PSU) insignia;
12. Issuing him a Commendation Medal for his end-of-tour at the PSU;
13. That any and all backpay and allowances that he receives be paid back with the highest interest rate available to account for interest and inflation; and
14. Granting him the Coast Guard Defense Ops and Readiness Officer Specialty Code

A summary of the applicant's allegations is provided following the Summary of the Record.

### **SUMMARY OF THE RECORD**

On July 3, 2008, the applicant enlisted in the Coast Guard Select Reserve and was commissioned an Ensign.

On December 16, 2009, the applicant was promoted to Lieutenant Junior Grade (LTJG/O-2).

On June 16, 2012, the applicant was promoted to Lieutenant (LT/O-3).

On July 1, 2024, the applicant was promoted to Lieutenant Commander (LCDR/O-4).

#### ***Previous OERs***

On July 9, 2014, the applicant received his annual OER for the July 29, 2013 through May 31, 2014 rating period. The applicant received seven marks of 6 (out of a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark) and eleven marks of 7. The applicant also received a mark of 5 ("Excellent Performer: give toughest, most challenging leadership assignments") on the Comparison Scale.

On June 10, 2016, the applicant received his Annual OER for the June 1, 2014 through May 31, 2015 rating period. The applicant received nine marks of 6 and nine marks of 7. The applicant also received a mark of 5 out of 7 on the Comparison Scale.

On October 13, 2016, the applicant received a Detachment of Officer OER for the June 1, 2015 through August 26, 2016 rating period. The applicant received six marks of 6 and twelve marks of 7. The applicant also received a mark of 6 ("Strongly Recommended for Accelerated Promotion") out of 7 on the Comparison Scale.

### *Applicant Refuses to Approve Purchases*

On February 6, 2017, the applicant became aware that the XO of his new unit had ordered a storekeeper (SK) to purchase a shadow box for the retirement of a Coast Guard member who was no longer a member of the applicant's unit. When the SK1 informed the applicant of the XO's demand to purchase the shadow box, the applicant emailed the XO and simply stated, "Unfortunately we cannot use unit funds to pay for his shadowbox. He is not a member of our unit." The XO emailed the applicant later that evening and asked the applicant to provide the policy that prohibited the purchase. The applicant was unable to cite the specific policy but informed the XO it was in the "Financial Resource Management Manual." Later that same evening, the applicant emailed his XO and provided her with the specific regulation that prohibited the purchase.

On March 25, 2017, the applicant's XO went above the applicant's head and contacted District Command explaining to them that she and the CO wanted to provide the retiring officer with a proper gift because due to being in the Individual Ready Reserve (IRR) he technically had no unit and would not receive proper recognition for his retirement. The XO stated, "In my opinion CDR [C] should not be denied this benefit just because he currently is in the IRR. CDR [C] has had a dedicated career to the Nation with three OCONUS deployments and one domestic ISO CG Response to the [redacted] Oil Spill. We request PAC approval to proceed with the purchase of a shadow box for CDR [C]."

On March 28, 2017, District Command responded to the applicant's XO and confirmed that the retirement recognition purchase she requested was prohibited by policy and was authorized only for currently assigned members.

On April 6, 2017, the applicant became aware that unit personnel requested to use Overseas Contingency Operations (OCO) funds for a conference and for a domestic exercise. At this point, the applicant informed his command, as well as other unit personnel, that the unit was not authorized to use OCO funds for a local conference or a domestic exercise, but the applicant did provide alternative courses of action (COA) to accomplish what was requested, namely utilizing the regular AFC-30 funds,<sup>2</sup> ADT and IDT drill orders. Between April and May multiple emails were exchanged between the applicant, his commanding officer, unit personnel, and district commanders regarding the usage of certain funds, wherein the applicant's command was specifically told they could not use the funds they ordered the applicant to utilize.

On April 27, 2017, the applicant reached out to his local civil rights office and spoke to MKC G and received information on filing a complaint of discrimination and a hostile work environment.

On June 21, 2017, the applicant was interviewed by the Office of the Inspector General (OIG) regarding an ongoing investigation submitted by his predecessor. The investigation involved wrongdoing by the applicant's current XO and the unit's previous CO.

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<sup>2</sup> AFC-30 funds fall under the general unit-level operating maintenance (O&M) expenses. AFC-30 is included in PPA IV: Operating Funds and Unit Level Maintenance.

***Discrimination & Hostile Work Environment Investigation***

On July 28, 2017, the applicant filed an anonymous complaint of a discriminatory and hostile work environment with the Civil Rights Directorate Detachment Officer, MKC G, relating to texts that he had received from another member of the wardroom, LT M, wherein LT M referred to the applicant as “homo” on several occasions.

On August 1, 2017, the applicant’s area Commander, CAPT R, issued a memorandum, “Harassment & Hostile Work Environment Investigation – PSU [Redacted],” wherein he ordered a single officer standard investigation be conducted to investigate the allegations of discrimination and a hostile work environment anonymously submitted by the applicant, of which the applicant’s chain of command was aware was taking place.

On August 24, 2017, the Preliminary Investigating Officer (PIO) submitted his Investigative Report (IR) wherein he summarized his “Findings of Fact,” “Opinions,” and “Recommendations” regarding allegations that LT M had created a discriminatory and hostile work environment. The PIO interviewed approximately 14 separate individuals from the PSU, not including the alleged offender, including the applicant’s CO and XO. In addition to the applicant and evidence submitted in the form of text messages sent from LT M’s phone to the applicant’s phone, three of the PSU members interviewed substantiated the applicant’s claims that LT M had repeatedly used the word “homo” when referring to certain individuals. The remaining 10 individuals, including the CO and XO claimed that they had no knowledge of LT M using discriminatory language nor had they ever witnessed him create a hostile work environment. Regarding the applicant’s chain of command, the PIO found that “[n]o information discovered during the course of this investigation supports the allegation that CDR [W] and LCDR [S] were aware and/or tolerant of perceivable acts of discrimination, harassment or hostility in the workplace, or that they were in any way aware and/or tolerant of the words and actions of LT [M] as it pertains to this event.”

***Blended Retirement System ALCOAST***

On September 19, 2017, the Coast Guard issued ALCOAST 278/17 wherein the Coast Guard announced BRS continuation pay (CP) multiples, timing, and obligated service. The ALCOAST explained that to address retention at critical longevity points, Coast Guard members covered by BRS, receive this one-time, mid-career bonus at 12 Years of Service (YOS) as calculated from the member’s Pay Entry Base Date (PEBD) and upon acceptance of the member’s agreement to obligate for four additional years. The ALCOAST stated that members choosing to remain in the current “high-3” retirement system are not eligible for CP. Finally, the ALCOAST stated that all members, both active and reserve, exceeding 12 YOS in calendar year 2018 must enroll in the BRS prior to the 12-year mark to take advantage of CP.

***Retaliatory/Derogatory OER***

On September 19, 2017, the applicant received his contested OER for the August 27, 2017, through May 31, 2017, rating period. The applicant received six marks of 3 in “Planning and Preparedness,” “Adaptability,” “Professional Competence,” “Teamwork,” “Workplace Climate,” and “Judgment,” three marks of 4 in “Initiative,” and “Responsibility,” six marks of 5, two marks

of 6, and one mark of 7. The applicant also received a mark of 3 (the lowest mark on the “One of many high performing officers who form the majority of this grade”) out of 7, and a mark of 2 (“Promotion Potential”) out of 6.

### *Administrative Letter of Censure*

On October 18, 2017, the applicant’s CO, CDR W, issued the applicant an Administrative Letter of Censure (ALC) for alleged ongoing performance deficiencies. The ALC cited an April 18, 2017, formal counseling memorandum and the applicant’s OER as previous attempts by his command to address his poor performance. The applicant’s XO stated, “Since these efforts, I have not observed a desire on your part to improve,” and that her, the CO, and PSU “regrettably continue to be impacted by your disregard for priorities, and your poor planning, judgment and demeanor.” The ALC noted the command’s frustration with the applicant’s failure to act for over two weeks on a logistics priority, an alleged Health Insurance Portability and Accountability Act (HIPAA) violation by Complainant,<sup>3</sup> and a sign the applicant had placed on his workstation that prohibited any other unit members from using his computer.<sup>4</sup> The XO cited these examples as evidence of the applicant’s lack of teamwork, and evidence of his refusal to accept responsibility or express regret.<sup>5</sup>

### *Removal From Primary Duties*

On December 20, 2017, the applicant received an email from his CO, CDR W, informing him that he was being removed from his primary duties. The applicant was asked to remain professional and to refrain from inappropriate discussions with the enlisted staff and others.

On January 10, 2018, the applicant submitted a memorandum, “Disqualification of Rating Chain,” to CAPT C, his area commanding officer, wherein he requested that his rating chain be disqualified in accordance with Article 5.D.5. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A.<sup>6</sup>

On January 11, 2018, the applicant received a derogatory OER after his CO, CDR W, removed the applicant from his primary duties. The applicant received nine marks of 2 for

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<sup>3</sup> The alleged violation was investigated and led to no discipline and punitive action be taken against the applicant.

<sup>4</sup> The applicant did not “prohibit” anyone from using the workstation but simply requested that no one use the workstation without first asking him because the computer was his permanent workstation and during drill weekends, reservists would force his computer session to log off, resulting in unsaved work. The applicant’s request to be asked before being used was to give him an opportunity to save his work and log off prior to being used by other reservists.

<sup>5</sup> This information was gained from the OIG’s Report of Investigation. Pursuant to Article 1.E.4.b. of the Coast Guard’s Discipline and Conduct Manual, COMDTINST M1600.2, which states, “Administrative letters of censure shall not be included in the unit files or in any of the official records of the recipient, nor shall they be quoted in nor appended to fitness reports. No command shall forward any non-punitive censure, or copy thereof, to the Commandant or district commander...” the ACL was not included in the applicant’s permanent military record.

<sup>6</sup> Article 5.D.5. of COMDTINST M1000.3A states, “In instances where a rating chain member is unavailable or disqualified to carry out their responsibilities and if not already determined by the commanding officer, it is incumbent on the reported-on officer to identify the next senior officer in the chain of command that an exception to the rating chain may exist and an appropriate substitute for evaluating the reported-on officer must be designated. This issue should be raised by the reported-on officer during the reporting period or within 60 days after the end of the reporting period.”

“Planning and Preparedness,” “Results/Effectiveness,” “Adaptability,” “Professional Competence,” “Speaking and Listening,” “Teamwork,” “Initiative,” “Judgment,” and “Professional Presence;” five marks of 3 in “Using Resources,” “Looking out for Others,” “Directing Others,” “Workplace Climate,” and “Responsibility;” one mark of 4, two marks of 5, and one mark of 7. The applicant received the following comments:

Performance of Duties: Continued to display an inability to anticipate/identify relevant info; ROO w/held info & failed to consult w/peers & Command regarding priorities; failed to plan & coord berthing for 80+ mbrs two weeks from sked ADT requiring Command intervention. Inability to adapt/prioritize often led to inadequate results; failed to complete annual MOA w/ Air Force for reserve berthing; did not submit AF-90 budget request to Area IAW deadline, & failed to draft FY18 reserve drill schedule as directed by Command negatively impacting unit readiness. ROO’s negligence and failure to anticipate tasks led Command to reassigning multiple Logistics tasks (i.e. ADSEPs, sail list mgt, CG Aux coord) that resulted in 30+ hrs of lost critical trng time prior to deployment. Continued concern over ROO’s judgment and understanding of job req’s resulted in several counseling sessions which included documented command expectations and milestones; ROO’s response to counseling was defensive and argumentative; subsequent perf has demonstrated officer cannot be trusted to use sound judgment when prioritizing work. ROO solely resp for serious HIPPA/PII violation & did not acknowledge or take resp for actions when approached by Command. Writing remains excellent.

Leadership Skills: Failed to act upon and correctly brief Command on direct reports family hardship situation. Command established transfer as a priority and directed ROO to initiate hardship/special needs transfer. Five weeks passed; ROO failed to be proactive and update Command on status. Command intervention resulted in member receiving transfer date. Despite extensive coaching/counseling, ROO’s lack of teamwork and failure to complete job functions necessitated reassignment of duties (i.e. Yellow Ribbon coord, command concerns, mobilization planning for medical/admin, ATP berthing analysis, ombudsman coordination, Red Horse MOA renewal, etc.). Four officers had to assume ROO’s duties & resp to ensure unit was prepared for deployment, impacting these officer's normal assignments and decreasing overall unit readiness. Peers and internal customers routinely expressed frustration & dissatisfaction with ROO’s failure to take responsibility for actions that led to their assumption of Logistics duties.

Personal and Professional Qualities: ROO’s actions on three occasions have led Command to question integrity; misled others both w/in & outside of command on the units inappropriate use of funds; damaging unit reputation; ultimately determined accusations were not grounded in service policy (i.e. illegally using Morale & OCO funds). Decisions routinely displayed poor judgment; during unit pre-deployment phase ROO failed to engage w/Stakeholders; failed to procure required PPE & issued equipment for deploying mbrs; as well as procured equipment & gear that did not meet mission requirements wasting over \$28K in unit funds with no Command visibility. Actions contrary to core values; ROO argumentative & disrespectful during corrective counseling sessions; failed to acknowledge tasking, disobeyed direct orders, and uncooperative in interactions w/Command. Failed to monitor core work hrs.

Reporting Officer Comments: Despite continued counseling, coaching, and mentoring, ROO’s overall performance has continued in a downward trend. Unfortunately ROO has failed to exercise the leadership, judgment, and ability to discharge tasks and assignments expected for a member of this grade. Limited promotion potential and not recommended for independent duty or positions of greater leadership.

On January 12, 2018, CAPT C denied the applicant’s request to have his rating chain disqualified.

On March 19, 2018, the applicant emailed CAPT G, with the Office of Personnel Management, outlining the discrepancies contained within his RPD OER. The applicant asked CAPT G not to validate the PRD OER until he investigated the allegations outlined in the email.

On April 1, 2018, after learning that CAPT G would be validating the applicant's contested OERs, the applicant elected to enter the BRS.

On April 26, 2018, despite the applicant's contentions that his RPD OER was erroneous and unjust, CAPT G validated the applicant's contested OER.

On June 25, 2018, the applicant received a "TDY – AD & EAD [Extended Active Duty]" OER for the January 29, 2018 through May 31, 2018 rating period. The applicant received a mark of 6 ("One of few distinguished officers") out of 7 on the Comparison Scale and a mark of 4 ("Promote w/ top 20% of peers") on the Promotion Scale. The applicant also received the following comments:

Highest recommendation for promotion. LT [Applicant] is an exceptional officer whose leadership displayed unwavering [*sic*] commitment to serving w/ integrity. Trusted, highly competent expert & great asset as RFRS to enable D[redacted] execution of RES & travel policies; provided support to D[redacted], CGIS & Base [redacted] on ad assign & order processes resulting in 10+ RES component, RES lateral pkgs & new D[redacted] policy/SOP/training guide; ensured Reservist requirements clearly communicated & aligned w/ CG service-wide guidance. Precise cost effective estimate maximized \$700K to support CG's largest annual Reserve Boat Forces augmentation; resulted in 26 critical billets at 12 STAs & meet D[redacted] signif demand for surge staffing during highest op tempo in Great Lakes supporting 1/3 US registered boaters. LT [Applicant] initiated district-wide RES competency review to ensure training rqmts align w/ D[redacted] Planning Direction. Resolved & validated 200+ overdue RES drills enabling reallocation off \$ to most critical training needs. Self-starter; D[redacted] project officer for 06 retirement ceremony; coordinated RDML as presiding official & multiple flag officer guests; lauded by D[redacted] District Commander for execution resulting in national media coverage. Articulate speaker & poised CG officer as MC at O-4 retirement ceremony & volunteer on OCS interview panel. Crafted winning award nomination highlighting exceptional GS-12 accomplishments for Federal Executive Board Wings of Excellence award; GS-12 honored at large ceremony w/ 200+ attendees. Strongest recommendation for greater leadership roles. LT [Applicant] exemplifies servant leadership, solid core values & is performing at an O-4 level. He is an exceptional officer ready for hi visibility RPA, LE, & JTF positions. Excellent candidate for MBA graduate school, war colleges & MIT Sloan Fellows program.

On August 3, 2018, the applicant submitted a formal complaint with the OIG claiming that his XO and CO had retaliated against him for making protected communications.

### ***Performance Subsequent to Departing Problematic Unit***

On March 30, 2019, after recently transferring to a new unit, the applicant received a positive CG-3307 ("Page 7") for his actions between February 28, 2018 through March 11, 2018. The contents of the Page 7 are as follows:

From 28Feb2018 - 11Mar2018 you served as the Coast Guard's representative and Casualty Assistance Calls Officer during the death of one of our Coast Guard Civilians at [redacted] AREA. During this you provided the utmost care and support to the [redacted] family during their time of need and to the other Coast Guard members affected by this loss.

The loss of one of our own is a difficult time for the entire Coast Guard. These situations required a strong, compassionate individual like yourself to provide the leadership that truly defines who we are as an organization. You went above and beyond the call of duty to ensure the wellbeing of a Coast Guard family in honor of their loved one. You selflessly walked the spouse through the complicated Navy and Coast Guard

Survivor benefits process and accepted the role for coordinating the funeral and military honors on their behalf.

The gratitude for your support was personally passed to VADM [B] by Mrs. [J] and her family. They were extremely grateful and we all are appreciative of the consideration you provided the family. You were their Coast Guard rock to rely on as well as a shoulder to cry on. This professionalism and appreciation was further recognized with an individual letter to you from the [redacted] AREA VADM.

Your professionalism and willingness to assist the [redacted] family is a testament to your character and reflects highly on our core values of Honor, Respect, and Devotion to D[uty].

On July 18, 2019, the applicant received his annual OER for the June 1, 2018 through May 31, 2019 rating period. The applicant received one mark of 5, nine marks of 6, and eight marks of 7. The applicant also received a mark of 6 (“One of few distinguished officers”) out of 7 on the Comparison Scale and a mark of 4 (“Promote w/top 20% of peers”) out of 6 on the Promotion Scale.

### ***First OIG Investigation***

On September 24, 2019, the OIG issued its findings into allegations made by the applicant’s predecessor that the current XO and previous CO retaliated against him for making protected communications. The OIG substantiated the predecessor’s claim as they related to retaliation for reporting the CO for pressuring two Yeomen to falsify his weigh-in measurements so that he would be in compliance and for reporting the XO for putting in for drill pay when surveillance video showed she was not actually drilling as she stated she was.

### ***Additional OERs***

On July 22, 2020, the applicant received his annual OER for the June 1, 2019 through May 31, 2020 rating period. The applicant received five marks of 6, and thirteen marks of 7. The applicant also received a mark of 6 (“One of few distinguished officers”) out of 7 on the Comparison Scale and a mark of 5 (“In-Zone Reorder”) out of 6 on the Promotion Scale. Of relevance to the applicant’s case, he received the following comments from the Reporting Officer:

As Reporting Officer Comments: Highest recommendation & MUST SELECT for immediate promotion. ***Performs at a senior level & has proven ability to lead w/ inspiration, intelligence & compassion.*** Strongest endorsement for Adv Ed in law or MBA & Sloan Fellows prgm. Recommend staff leadership assignments at DXR, RPM or HQ. Tracking well for future command. Ideal candidate for operational leadership positions w/ in DSF, boat forces or Sectors as well as any Law Enforcement/Joint Task Force billets or high profile liaison, external/congressional affairs positions. Highly suited for SEC Logs, CPFRR Div/Branch Chief or Base XO. RES & CIV policy SME; proven ability to analyze issues & provide guidance to execute decisions. Leverages an incredibly diverse skill set & breadth of knowledge. RO is a role model in military & his community & an invaluable asset to future of CG & RES program. [Emphasis added.]

### ***Applicant’s OIG Investigation***

On March 27, 2023, the OIG submitted a 30-page report wherein it substantiated the applicant’s claims that his previous command had retaliated against him for making protected communications in violation of the Military Whistleblower Protection Act (MWPA) as outlined in 10 U.S.C. § 1034. The OIG report found that the applicant’s CO and XO were aware of the



applicant's protected communications as they related to the applicant's reporting of his command's inappropriate use of funds, his July 2017 AHHI complaint, December 2017 Equal Employment Opportunity retaliation complaint, and his interview with the OIG investigator relating to another OIG investigation being conducted against the XO and units previous CO. The OIG report further found that the evidence gathered established that the applicant's CO and XO took three unfavorable personnel actions against the applicant: issuing the applicant an unfavorable OER; issuing him an ALC; and removing him from his primary duties. Finally, the OIG report concluded that the unfavorable personnel actions taken against the applicant by his CO and XO would not have happened absent the applicant's protected communications. The pertinent findings of the OIG's Report of Investigation are recorded below:

1) **RMOs [Responsible Management Officials] did not have strong reasoning for the personnel actions.**

The evidence in the record failed to establish that the RMOs had strong support for the reasons behind the three personnel actions. The RMOs cited various examples of poor performance on Complainant's part to justify the negative actions taken against Complainant. In some instances, the RMOs directly cited Complainant's contact with [District] — a function of his job — as an example of poor performance. For instance, the April 2017 written counseling specifically admonished Complainant for submitting the ADOS spreadsheet to [District].<sup>7</sup> The evidence in this investigation revealed that Complainant was doing his job in contacting [District] in this instance, and that even if Complainant had not forwarded the ADOS spreadsheet, [District] would have denied the PSU's request to convert so many reservists anyway. The fact that the RMOs would hold Complainant accountable for seeking guidance from [District] to ensure the PSU did not run afoul of law, regulation, or Coast Guard policy is evidence that the RMOs did not have a legitimate, non-retaliatory basis for the personnel actions.

During the EO investigation, RMO 1 admitted to investigators that Complainant was specifically cited for poor performance because he consulted sources outside of the PSU Command for guidance:

There are 9 specific performance failures in the April 2017 memo that clearly show [Complainant] was undermining the chain of command and usurping the chain. There was a very clear demonstration of behavior that was not consistent with executing Commander's intent. Going back to the military, when you accept your rank, you swear to adhere to the lawful orders that are given to you by those superior to you.

In other words, Complainant was punished for performing the expected duties of a PSU Logistics Department Head. Three witnesses testified that for Complainant to have avoided negative personnel actions, he would have had to approve everything the Command asked for. The Armory Supervisor and Chief Gunner's Mate at PSU [redacted] (CG Mate) stated: "He would have needed to say yes to everything [the Command] wanted. That seemed to be the problem. Even if it was against policy, he needed to say yes."

...

The record also shows that RMO2 [CO] was upset at Complainant for allegedly using the word "illegal" to characterize some of Command's spending requests. Complainant disputes that he used the term "illegal," but even if he did, part of Complainant's job entailed ensuring that the PSU spent funds and procured items per relevant law, regulations, and policies. Admonishing Complainant for using the term "illegal" not only underscores this investigation's findings that the RMOs were upset at him for calling into question the appropriateness of their spending requests, but also had the potential to create a substantial chilling effect on a member's willingness to come forward to report suspected illegal activity.

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<sup>7</sup> While this investigation does not find that the April 2017 written counseling constitutes a personnel action under the MWPA, it does represent a precursor to the negative annual OER and ALC, and it memorializes the reasons the RMOs initially pursued the personnel actions resulting in the RPD OER.

In addition, RMO2 [CO] admonished Complainant in the April 2017 counseling letter and August 2017 OER for circumventing command by going to [District] for guidance on the ADOS spreadsheet and use of OCO funds, but then became frustrated with him in July 2017 for not taking initiative to contact [District] while researching another policy issue regarding the use of funds. RMO2's inconsistency on when it was appropriate for Complainant to take the initiative to contact [District] raises credibility concerns about the RMOs' stated reasons for Complainant's poor performance.

...

In the three personnel actions, the RMOs cited many other various reasons to hold Complainant accountable for alleged poor performance. The evidence produced by our investigation strongly suggests that the RMOs were "papering the file" with performance deficiencies that had not been observed in Complainant's career before and after his tenure at PSU [redacted].

...

Overall, the record does not demonstrate that the RMOs possessed strong support for taking the personnel actions.

...

**3) The RMOs had a strong motive to retaliate and demonstrated substantial animus towards Complainant.**

There is strong evidence of a motive to retaliate against Complainant by the RMOs. It is clear from the investigation that the RMOs were angry at Complainant for questioning their spending orders and consulting with [District] on those orders, even though Complainant was simply performing his job. For example, the RMOs blamed Complainant for "damag[ing] unit reputation" and they faulted him with losing over \$100,000 in ADOS training funds — although [District] would have denied these funds even if Complainant had not first brought the issue to [District's] attention.

The April 2017 letter of counseling — which specifically admonishes the Complainant for questioning the RMOs' spending orders and for consulting with [District] — indicates that the RMOs' anger and motive to retaliate against Complainant was present at least as early as April 2017. Complainant's subsequent participation in a DHS OIG whistleblower retaliation investigation and the AHHI and EO complaints (which both specifically accused the RMOs of wrongdoing) could have also created a strong motive on the part of the RMOs to retaliate against him. However, the record in this investigation shows that the RMOs were already motivated to retaliate against Complainant for questioning their spending requests from January-April 2017. Complainant's participation in the DHS OIG investigation, and his AHHI and EO complaints likely exacerbated an already retaliatory environment.

Finally, witnesses described intense animosity towards Complainant by the RMOs. Both CG Mate and Storekeeper recalled that the RMOs' demeanor became negative when Complainant had to inform them that he could not use funds in a way in which they requested. Storekeeper testified, "Hell yeah [the Command] picked on him." He clarified that the Command had no appreciation for how complicated procurement and spending regulations in the Coast Guard are and that Complainant took the blame for having to inform the RMOs that some of their spending requests were not in line with law, regulation, or Coast Guard policy and procedure.

...

**5) Summary of Causation Analysis.**

In considering all four factors in the analysis, DHS OIG finds that: (1) the RMOs did not have strong reasons to support taking the three personnel actions against Complainant; (2) the close timing between the protected-

communications and the personnel actions suggests a causal connection between them; (3) there was a strong motive to retaliate on the part of the RMOs, and the RMOs displayed strong anti-whistleblowing animosity; and (4) there is evidence that the RMOs treated Complainant unfavorably in comparison to similarly situated non-whistleblowers.

...

### *Secretary's Memorandum*

On July 5, 2023, the Secretary issued a memorandum, "Whistleblower Retaliation Report of Investigation, W18-USCGWPD-37156," to the Commandant of the Coast Guard wherein he ordered the Coast Guard to take the following actions in response to the OIG's findings:

1. Within 14 days of receipt of this memorandum, initiate any necessary action to correct the Complainant's personnel record, and provide notice to the Complainant of such action.
2. Within 30 days of receipt of this memorandum, provide a written response to me, addressing how and whether the Coast Guard's recently promulgated policy, Harassing Behavior Prevention, Response and Accountability, COMDTINST 5350.6, would have applied in this case.
3. Review command structure and oversight of Port Security Units and assess whether the organizational structure should be adjusted.
4. Take any appropriate action related to the service records of the two former members identified as Responsible Management Officials.

### **APPLICANT'S ALLEGATIONS**

The applicant claimed that upon arriving at his new Port Security Unit (PSU) where he ultimately faced retaliation, he noticed an immediate hostility toward him by the XO, which grew considerably worse over the course of his first few months at the unit. The applicant attributed this hostility to a lingering contempt that she had for his predecessor, who the XO closely associated with the applicant as a result of their command status as a Reserve Program Administrator (RPA). The applicant claimed that during his first few months at the unit there were a few instances where he became aware of minor historical issues that he wanted to make sure the XO had visibility on, but each time he brought the issues to the XO's attention, he was quickly rebuked by the XO and told the issues were not his concern. The applicant contended that it became increasingly apparent to him that what initially appeared to be a disconnect between the XO (a reservist) and active duty members was actually outright distrust and animosity.

The applicant explained that, in December 2016, the PSU's Administrative Officer left the unit, leaving the unit and the applicant's Logistics Department absent a critical position at a time when they were expecting an imminent Warning Order for the PSU's 2018 deployment to a high visibility military base. According to the applicant, generally, PSUs place an Admin Officer on active duty orders at least eight or nine months prior to a deployment to assist the Force Readiness Officer (FRO) with preparations and planning for the deployment and the enormous administrative taskings that come with it.

The applicant explained that as a result of PSU's Admin Officer leaving, he began pursuing options to secure a new one. According to the applicant, in January 2017, District Command notified him that they had extra Overseas Contingency Operations (OCO) funding available for

his unit that would allow him to bring a member on active duty to assist with the open Administrative Officer post, in addition to preparing for the unit's upcoming deployment. The applicant claimed that he informed his CO, XO, and Department Heads of the available funding on a teleconference, at which point the XO immediately stated that she knew of several unit members who had a desire to be placed on active duty due to their lack of employment, dislike of their civilian jobs, financial needs, or other issues. The applicant alleged that the XO stated she wanted to find out how much money their PSU could get from District Command and asked all department heads to solicit their departments for members who wanted to be placed on active duty eight to ten months before the deployment. Despite the XO's ambitions for the funds, the applicant stated that he reminded his command that the purpose of the funding was to fill the vacant Administrative Officer post. He claimed that he informed them that he would support their desires, but made it clear that not using the funds to replace the Administrative Officer would be extremely detrimental to the unit's ability to mobilize and deploy. The applicant alleged that despite many other warnings, the XO did not care and forged ahead to fund as many activations as possible. The applicant claimed that it was clear that the XO's priority was getting favored members of the unit on active duty orders and not actually filling the Administrative Officer post.

The applicant explained that on January 30, 2017, while he was on Temporary Duty (TDY) for training, his XO sent an email stating that she had compiled a list of unit members who desired to be placed on active duty orders. According to the applicant, the XO's list was largely comprised of members who the command wanted to "help out" by placing members who were otherwise unemployed or not happily employed in their civilian jobs on active duty orders. The XO's request amounted to \$900,000 in funds. The applicant stated that although the decision of who would be provided Active Duty for Operational Support (ADOS) orders was not his to make, the funding for an Administrative Officer was not included in the XO's request. The applicant claimed that the XO stated to him in the email that she was sending the list to District Command by close of business the following day.

The applicant stated that the next day he sent an email to District Command informing them that they would be receiving an ADOS list from his XO. The applicant asked District Command what logistical options existed to make sure his unit could quickly meet his command's priorities and make best use of the funds. The applicant claimed that he received a call from a LT with District Command to discuss the priorities and to inform him that generally PSUs only bring one or two members on ADOS orders that early, not the ten to fifteen requested by the XO, and that having an Administrative Officer on ADOS was critical. The applicant agreed with the LT and informed the LT that he had already voiced his concerns to his PSU Command. The District Command LT asked the applicant to send her a copy of the email he sent to his command voicing his concerns, which he did.

The applicant explained that a week later he complied with another request from District Command to send them a copy of his PSU unit's ADOS request list—the same list the XO had sent to District Command a week prior—because the list was sent to the wrong area within the PSU District Command. The applicant stated that at one point, after being asked, the XO confirmed that the ADOS list was only to capture what was needed to prepare for the deployment and did not include the ADOS requests for an upcoming "Boat College" in another state or other domestic events and exercises in which the command was planning to participate. The applicant contended

that these other requirements would ultimately drive the PSU's funding requests well over one million dollars. The applicant alleged that his attempts to comply with fiscal requirements and meet his leadership's unrealistic and often unlawful expectations regarding funding is the root of what caused the subsequent complaints and retaliation.

The applicant claimed that over the next several months, he witnessed numerous incidents and experienced hostilities within the command that were contrary to the Coast Guard's culture and violated the Coast Guard's Core Values. He claimed to have witnessed and reported incidents and statements of hate and intolerance, attempts to commit fraud, waste, and abuse, and experienced overt hostility and berating by his superiors, often in the presence of his subordinates. He further claimed to have experienced retaliation for voicing his concerns to District Command regarding the issues at the unit. He alleged that he had training opportunities rescinded, TDY assignment canceled, requests for off-season assignments denied, and was threatened with the cancelation of leave in conjunction with his wedding.

The applicant made the following allegations regarding his protected communications:

- Discussions with MKC G from the applicant's local civil rights office, who was visiting the applicant's unit to conduct civil rights training, wherein the applicant told MKC G that he had encountered hostility from his CO and XO, such as inappropriate text messages, and reports that a junior member of his team was experiencing harassment as well. The applicant alleged that when he tried to address the allegations of harassment made by the junior member, he was called into the XO's office and told the situation was none of his business and that the junior member was simply "too big for her britches."
- The applicant made a report to the office of civil rights and spoke with a Ms. J regarding an Anti-Harassment/Hate Incident (AHHI) and a hostile work environment complaint. At this point, the applicant filed a formal complaint which initiated a formal investigation.
- Upon being interviewed by LCDR M, the applicant disclosed the events that had transpired at the unit and provided him with text messages that proved that the AHHI had occurred. The applicant alleged that he provided text messages to LCDR M that LCDR M intentionally omitted from his investigation. The applicant claimed that he also discussed the ways in which his CO and XO had created a hostile work environment and some inappropriate physical touching by his XO to the applicant while at dinner with the rest of the wardroom. The applicant alleged that because the investigating officer was a lower rank than the individuals he was investigating, the CO and XO, it created a very likely prospect of undue influence, which would explain why LCDR M did not fully investigate the allegations of inappropriate physical contact made by the XO or the decision not to include the text messages provided.
- Civil Rights Complaint for retaliation that was initially informal, but the applicant ultimately decided to enter into the "formal" complaint process after the mediator selected by District Command failed to adequately address his concerns. The applicant alleged that his CO and XO were quite deceitful in their statements to the investigator which led to a one-sided and inadequate investigation. The applicant complained that the investigator was simply a "contractor" who did not find in his favor.
- Reports of gross misuse of funds that he made to District Command, that were sometimes in writing but were often verbal. The applicant claimed that his reports of misuse of funds

were not received well from the applicant's command, even pointing out his departure from communicating outside the chain of command in his annual OER.

- The applicant claimed that his command knew of the protected communications prior to unfavorable personnel actions. The applicant contended that prior to his first adverse OER in June 2017, he had already made protected communications outlined above. According to the applicant, due to the nature of the evidence provided, including certain text messages, it was immediately clear who the complainant was. In addition, the applicant was involved in an extensive interview by an investigator with the Office of the Inspector General (OIG) for claims made against the current XO and previous CO. The applicant alleged that the CO questioned him several times about the meeting and that he had reason to believe that other reservists informed the CO and XO of his extensive and lengthy conversation with the investigator.
- The applicant alleged that he did not submit a formal complaint to the OIG because of the harassment and retaliation he was already enduring within his unit. He stated that it was not until after he received Permanent Change of Station (PCS) orders and left the unit, that he filed a formal complaint.
- The applicant claimed that he was also retaliated against when he was relieved from his primary duties (PRD) and given two derogatory OERs—one for the regular reporting period and one required after one is removed from their primary duties. The applicant claimed that the Coast Guard allowed his command to take adverse actions against him after he made protected communications.
- Regarding his OERs the applicant made various claims regarding the timing and comments made in the OER.

The applicant concluded by stating that his reporting of his command for gross waste of funds and abuse of authority was the right thing to do and that he stood by his decisions. The applicant stated that he has shown that the legal and policy interpretations his command objected to because they were not what the CO and XO wanted were correct and were almost always made with concurrence and input of subject matter experts. He further stated that he has also debunked essentially all of the allegations included in his two derogatory OERs, providing that his record as it stands is manifestly unjust.

To support his application the applicant submitted multiple emails and documents establishing the motive of his CO and XO to retaliate against him. Given the extensive investigation and conclusion by the OIG that the applicant's CO and XO retaliated against him for making protected communications, the Board will not record those emails here, but will stipulate to the fact that the applicant's CO and XO had motive and cause to retaliate against the applicant. The applicant also submitted multiple character references from current high ranking Coast Guard officials wherein they attested to the applicant's character, professionalism, and commitment to the Coast Guard.

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

On July 12, 2024, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

The JAG explained that the records the applicant has requested be removed from his record following the OIG investigation, namely the annual OER for the August 27, 2017 through May 31, 2017 rating period and the January 11, 2018 RPD OER, were already removed from his record and therefore recommended that the Board administratively close those requests. Regarding the applicant's request to be promoted to LCDR, the JAG recommended that the Board grant partial relief by ordering the Coast Guard to convene Special Selection Boards (SSBs) to review the applicant's record absent the erroneous records contained in his record. Pending the outcome of these SSBs, the JAG recommended that if the SSBs recommend promoting the applicant in August 2019, that he be granted all backpay and allowances that would flow from these corrections.

The JAG argued that the applicant failed to prove error or injustice with the "Not Observed" OER for the December 21, 2017 through May 31, 2018 rating period and recommended that the Board deny relief relating to this request. The JAG contended that the applicant failed to meet the high bar required for the correction of an OER. The JAG explained that in the applicant's initial application he makes strong arguments for the removal of the May and December 2017 OERs but does not discuss the May 2018 continuity OER other than to request its removal. Furthermore, the applicant's supplemental request for relief does not mention the 2018 OER at all. The JAG argued that rather than providing clear and convincing evidence of error or injustice, the applicant presented no evidence of error or injustice with respect to the 2018 Continuity OER. The JAG stated to the contrary, Article 5.E.9.b of the Officer Accessions, Evaluations, and Promotions instruction, COMDTINST M1000.3A, permits the filing of a Continuity OER "in lieu of a biennial, annual, or semiannual if the officer was . . . unobserved for the entire period of report." Accordingly, the JAG argued that the issuance of the applicant's Continuity OER fell squarely within policy, and the applicant's request for relief relating to the Continuity OER should be denied.

Regarding the applicant's request that all OERs after August 1, 2019 be changed to reflect a rank of LCDR/O-4, the JAG recommended that the Board deny the applicant's request for relief because the applicant failed to meet his burden of proof and this kind of correction is not permitted within Coast Guard policy. The JAG stated that because the applicant was a LT at the time these OERs were completed they are neither erroneous nor unjust. Furthermore, the JAG argued that Article 6.B.13.n of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, does not contemplate the correction of OERs as a permissible outcome for officers recommended for promotion by an SSB. The JAG contended that even if the applicant is retroactively selected and his date of rank back dated, he is not entitled to have the ranks on these OERs corrected under CG policy.

The JAG further recommended that the Board deny the applicant's request for the opportunity to complete the Performance Based Qualifications and be awarded the PSU insignia because the applicant has failed to exhaust his administrative remedies required by 33 C.F.R. § 52.13(b). The JAG made the same arguments for the applicant's request to be granted Officer Specialty Code CG-OAR12 (Defense Ops and Readiness).

Regarding the applicant's request to be considered by the Commander (CDR/O-5) promotion boards, the JAG recommended that the Board deny the applicant's request for relief at

this time because the request is dependent upon the results of the SSBs. The JAG explained that if the applicant is selected for promotion by the SSB, he will have the same position on the active-duty promotion list (ADPL) as he would have had prior to the 2019 LCDR selection board. According to the JAG, this alone would render him eligible for the upcoming O-5 Selection board, making a separate request for relief unnecessary. The JAG stated that if the SSB chooses not to retroactively promote the applicant to LCDR, he will be ineligible to compete for CDR/O-5, making denial of this request at this juncture the appropriate action.

The JAG argued that the applicant's request to have a statement entered into his record that states the Continuity OER covering the relevant periods shall not be considered adversely against him should be denied because granting such relief would be in direct contradiction to Article 5.I of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST 1000.3A, which prohibits mentioning BCMR proceedings, applications, or decisions. The JAG contended that even if the Board were to find that such a statement is permissible under policy, the applicant has still failed to prove that the 2018 Continuity OER was erroneous or unjust.

Regarding the applicant's request to be awarded the Coast Guard Commendation Medal, the JAG recommended that the Board grant alternate relief. The JAG stated that here the Coast Guard has acknowledged retaliation against the applicant by the applicant's former command. The JAG noted that the retaliation is supported by an investigation and ample evidence to support the conclusion that the absence of a departure award directly flowed from the retaliatory behaviors of the PSU command, who would have originated any end-of-tour award for the applicant pursuant to Article 1.G. of the Coast Guard Military Medals and Awards Manual, COMDTINST 1650.25E. However, whereas the applicant requests that the BCMR award him a Coast Guard Commendation Medal directly, the JAG recommended that the BCMR grant alternate relief by ordering the consideration of an appropriate end-of-tour award for the applicant's PSU tour, as suggested by PSC. The JAG argued that this course of action conforms more closely to the BCMR's authority under 10 U.S.C. §1552(g).

The JAG recommended that the Board deny the applicant's request to have his retirement restored to the Legacy Retirement System from the Blended Retirement System (BRS). The JAG explained that in addition to the strict irrevocability of the BRS election decision outlined by PSC, the request is also incompatible with the applicant's earlier request for Continuation Pay at the LCDR/O-4 rate because continuation pay is only authorized for those who have elected to participate in the BRS.

The JAG further argued that the Board should deny the applicant's request to have his retroactive pay and allowances paid at the highest available rates to account for interest and inflation. According to the JAG, 10 U.S.C. §1552(c)-(e), 14 U.S.C. §2765, 33 C.F.R. §52.71, Section 6.B.13.n.(2) of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST 1000.3A, or the Coast Guard Pay Manual, COMDTINST 7220.29C, contemplate the award of backpay and allowances at the highest available rates over a given time following a successful BCMR ruling or SSB. Instead, the JAG stated that normal procedures indicate that the amount of basic pay, allowances, and other military compensation is calculated and paid on the first day of the month after the month in which the compensation accrues. Accordingly, the JAG



stated that the applicant's request for relief should be denied as contrary to policy regardless of whether or not the applicant is selected for retroactive promotion by the SSB.

Finally, the JAG recommended that the Board deny the applicant's request for priority to three assignments and that those assignments be credentialed positions in law enforcement, investigations, or counterintelligence, and/or command track development assignments. The JAG contended that the Board lacks jurisdiction to take such an action, which is prospective only and does not involve the correction of any record currently in existence. The JAG made the same arguments regarding the applicant's request for assignment to a Coast Guard funded graduate degree program. Like the request for assignment priority, The JAG contended that the Board lacks jurisdiction to take such an action, which is prospective only and does not involve the correction of any record currently in existence.

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

On July 15, 2024, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The Chair received the applicant's response on July 25, 2024.

The applicant objected to the minimal relief recommended by the Coast Guard arguing that it failed to recognize the substantial and irreparable harm to his career, caused initially by the gravity of the original incidents themselves and then subsequently compounded by the extensive delay in correcting his records. He further contended that his petition provided overwhelming evidence, including a thoroughly investigated and substantiated OIG investigation which was ultimately acknowledged by the Secretary, to establish an injustice and to refute any "presumption that military officials discharge their duties correctly, lawfully, and in good faith."

### ***Promotion to LCDR***

The applicant claimed that this Board had the opportunity to rule on his application and grant appropriate relief prior to August 2023, he would have had the opportunity to be considered by the August 2023 CDR selection board, thereby returning him to his proper place on the Register of Officers with his peers. The applicant argued that the lack of timeliness resulted in another missed milestone and further set his career back. Furthermore, the applicant contended that pursuant to Article 6.B.13. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, upon the direction of the Secretary in his July 5, 2023 memorandum to have his records corrected due to the outcome of the OIG investigation, PSC should have immediately convened a Special Selection Board (SSB), independent of his BCMR application, for his records to be considered for promotion to LCDR, with a recommended promotion date of August 1, 2019. The applicant claimed that this correction would have allowed him to be considered by the August 2023 CDR selection boards. Instead, he claimed that he has now missed what should have been his first opportunity to have his record considered by a CDR selection board.

### ***Reinstatement into Legacy Retirement System***

Regarding his request to be placed back into the Legacy Retirement System, the applicant acknowledged that the request would require that he reimburse the Coast Guard for his continuation pay bonus he received, but he is willing to make that payment. The applicant contended that he was forced into the position of opting into the Blended Retirement System (BRS), with well over a decade into his career because at the time he was without the ten years of matching contributions and retirement growing afforded under the BRS. He explained that his tremendously detrimental decision to switch from the legacy retirement system was a direct result of the service's recommendation that, being in grave risk of losing his ability to serve until retirement due to the derogatory evaluations, the BRS would offer him the ability to recoup some of his lost retirement benefits upon separation, whereas if he was separated due to non-selection under the legacy system he would have received nothing. The applicant emphasized that the extreme financial impact of the BRS upon his retirement benefits could not be overstated. He contended that had it not been for the retaliatory actions of his command that ultimately derailed his career, he never would have opted into the BRS.

### ***Removal of Continuity OER***

The applicant stated that while the Coast Guard removed the May and December 2017 derogatory OERs, it failed to address the verbiage written on the Continuity OER, which references Article 5.E.9. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A., which states, "Commander (CG PSC) may issue a continuity OER to implement judicial and administrative adjudications."<sup>8</sup> The applicant argued that this verbiage is entirely improper and conveys the notion that the continuity OER is adverse because he was somehow subject to administrative or judicial action such as a court-martial or other disciplinary action. The applicant contended that the verbiage on this continuity OER must be corrected to reflect that the existence of the Continuity OER is solely the result of administrative error by the Coast Guard and that it shall not be considered adversely against him, and that his performance during the covered period was consistent with the outstanding performance captured in his preceding evaluation.

Regarding the Coast Guard's claim that the applicant failed to meet the "high bar" required to have an OER corrected, the applicant argued that the "high bar" was met due to the fact that every detrimental career impact that occurred after the unjust and retaliatory actions taken by his command were a direct result of those actions. The applicant claimed that had it not been for the improper and illegal OERs and Removal from Primary Duties, he would not have been TDY, which led to the Continuity OER, nor would he have had an occasion for a "not observed" OER. Furthermore, the applicant stated that the "not observed" OER was completed well after his

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<sup>8</sup> Article 5.E.9. of COMDTINST M1000.3A states, "Continuity OER. This OER may be submitted in cases where full documentation is impractical, impossible to obtain, or does not meet OES goals. A continuity OER is not an occasion for report, and may only be submitted for a reason in Articles 5.E.2 to 5.E.7. of this Manual." The article cited by the applicant is actually Article 5.E.9.e. which is only one of approximately six examples for the use of Continuity OERs. Other examples of Continuity OERs include "c. A continuity OER may be submitted in lieu of a Departure/Separation from the Service OER for any officer with approved separation within the time standards listed in Article 5.C.4 of this Manual of the last regular OER submission, and d. Officers requesting reserve commissions, temporary separation, or being released from active duty (RELAD) may not apply these criteria."

departure from the PSU, and completed by PSU officers that were never in, nor would have ever been, in his rating chain or had the occasion to observe him. The applicant argued that it was entirely improper and in violation of policy for those officers to have completed an OER for him and for PSC to have allowed its entry into his record. The applicant claimed that the disputed OERs are further blemishes on his record that should never have otherwise existed.

### ***Correcting Rank on OERs after August 1, 2019***

The applicant argued that correcting his LCDR date of rank to August 1, 2019, will immediately create the error of each subsequent OER after that date, which must be corrected. The applicant further argued that without correcting his entire record to reflect the corrected date of rank, his record will have the glaring and unjust error of showing several OERs with incorrect rank and dates. The applicant contended that the fact that Coast Guard policy, including COMDTINST M1000.3A, “does not contemplate the correction of OERs as permissible...” does not mean that it is not permissible and the correct and necessary course of action. The applicant argued that in fact, for the Coast Guard to fall back on non-existent policy as its support for its failure to properly correct the injustice created by its own violation of policy and law is totally unconscionable. According to the applicant, the only right thing to do is correct every error in his record associated with the injustice.

### ***PSU Insignia***

The applicant claimed that had it not been for the unjust and improper removal of him from his position at the PSU, he would have completed all requirements for the PSU insignia; however, due to the unjust and improper removal from his position he is no longer able nor eligible to complete those requirements. The applicant stated that additionally, his career is further damaged because without the PSU qualification that he would have otherwise earned, he is no longer eligible for follow-on positions that require the qualification. There are no other administrative remedies beyond this board.

### ***Officer Specialty Code***

The applicant explained that the CG-OAR12 Officer Specialty Code was replaced by the CGSEI21 Officer Specialty Code (OSC) in 2021. He stated that he earned and was awarded the CGSEI21 code, which had the same requirements as the OAR12 specialty code. The applicant argued that by being awarded the CGSEI21 OSC, he has shown that he met the requirements of the OAR12 specialty code. The applicant alleged that had it not been for the improper removal of him from the PSU, he would have met the requirements in time to have the CG-OAR12 on his record before it was replaced. The applicant claimed that competing officers who served at the PSU during the same timeframe as he did have both OSCs. and the lack of award of the OAR12 OSC during his timeframe at the PSU would constitute a further blemish on his record and impair his ability to compete fairly for promotion to CDR and higher ranks.

***Promotion to CDR***

The applicant contended that the Coast Guard's failure to take timely and appropriate action, which was previously directed by the Secretary, to correct his record means that the only way to restore him to his previous location on the Register of Officers is by promoting him to CDR, effective July 1, 2024. The applicant claimed that the Coast Guard has, as recently as March of 2024, promoted an officer directly from LT to CDR, without a Special or Regular Selection Board. Additionally, in support of this argument, the applicant argued that he has performed over the past several years in LCDR positions and at a LCDR level. The applicant stated that despite his briefly filling a LT position subsequent to his departure from the PSU, that time, was spent performing the additional duties of a GS-13 position, which the applicant alleged is equivalent to a LCDR or CDR position, that was gapped by the incumbent who assumed active duty orders. The applicant claimed that without question, his performance in these positions was superior, at least at a LCDR level, and rated as such. He argued that he has more than proven his abilities to perform and lead at the CDR level.

***Statement Ordered by Board***

The applicant claimed that the statement he has asked to be entered into his record in no way violates Article 5.1 of COMDTINST M1000.3A. The applicant explained that he is not asking for comment on, or mention of any judicial or administrative hearing, or mention of a BCMR case. To the contrary, he does not want this or any other proceeding to be mentioned. The applicant further explained that the statement he is requesting is the truthful acknowledgement that the existence of the continuity OER and any other record corrections are solely the result of administrative error by the Coast Guard, which the Coast Guard is correcting and taking ownership of. The applicant claimed that had it not been for the errors and injustices committed by the service, the continuity OERs would never have existed in his record and they therefore must be corrected.

***End-of-Tour Award***

The applicant stated that while he appreciates the Coast Guard's acknowledgement that the lack of an end-of-tour award for the time he was at the PSU is attributable to the retaliation he faced, the suggestion that it is too impractical for the service to implement, and therefore should be denied, is shocking. The applicant argued that for the Coast Guard to suggest that he should be required to pursue further bureaucratic efforts to right the injustices that the Coast Guard has finally taken responsibility is tantamount to further injury. The applicant contended that the Coast Guard should be ordered to take the necessary steps to grant the award that he would otherwise have received.

***Interest and Inflation***

The applicant argued that assuming his is retroactively promoted to LCDR effective August 1, 2019, he has provided compelling reasons for granting appropriate compensation to account for historic interest and inflation. The applicant contended that PSC provided no support for their opinion that he was not entitled to the requested relief. Further, the JAG asserted that Coast Guard policy does not contemplate such compensation. As already argued previously, the

applicant stated that failure of Coast Guard policy to “contemplate” such relief is not a cogent reason for denying it, given the BCMR’s broad charter. Additionally, the applicant contended that the JAG cited to 10 USC §1552(c), which, contrary to the JAG’s claims, does in fact provide the Secretary the ability to pay, “a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits,” if found to be due a claimant. The applicant stated that although there is no way for the service to completely make him financially whole, just compensation to include interest as requested in his petition is warranted.

### *Assignment Priority and Graduate School*

The applicant contested the Coast Guard’s position that the applicant’s request for assignment priority and graduate school are “prospective only.” The applicant claimed that both requests for relief relate directly to the missed opportunities as a result of ineligibility due to the derogatory contents of his record. The applicant stated that from December of 2017 through present, which accounts for seven years of his career and life, pursuant to policy he was ineligible to apply for graduate school or apply for temporary separation. Additionally, he explained that assignments are a competitive process, and his derogatory record made him ineligible for the most rewarding assignments. The applicant claimed that in 2022, he was completely skipped in the assignment process but was instead provided separation orders, and only subsequently considered after all other assignments had been made. The applicant claimed that his assignment “e-resume” was not even viewed by assignment officers. He argued that by providing him with the opportunity to attend a Coast Guard funded graduate program of his choosing, at a time of his choosing, is proper and just.

## APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 1034 — Protected Communications: Prohibited or Retaliatory Personnel Actions.

...

**(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—

...

**(ii)** an Inspector General (as defined in subsection (j)) or any other Inspector General appointed under chapter 4 of title 5;

**(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;

...

**(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.

...

**(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 section 920, 920b, 920c, or 930 of this title (article 120, 120b, 120c, or 130 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.

...

**(4)(A)** An Inspector General receiving an allegation as described in paragraph (1) shall expeditiously determine, in accordance with regulations prescribed under subsection (h), whether there is sufficient evidence to warrant an investigation of the allegation.

...

Title 14 U.S.C. § 2120(b) provides the following guidance on Special Selection Boards:

...

(b) Officers considered but not selected; material error.

(1) In general. In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 2106, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that –

(A) an action of the selection board that considered the officer or former officer –

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

(2) Effect of failure to recommend for promotion. If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that

of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered –

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

...

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (September 2013), provides the following guidance on the Officer Evaluation System (OES):

**Article 5.B.5.** For this Chapter, commanding officers include area and district commanders, commanders of logistics/service centers, commanding officers of Headquarters units and subordinate units or organizations, and cutters. Commanding officers must:

a. Ensure accurate, fair, and objective evaluations are provided to all officers under their command. In using the OER, strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

...

Article 7 of the U.S. Coast Guard Port Security Unit Program Manual, COMDTINST M5400.17C, provides the following guidance on issuing the PSU insignia:

7.A. Overview: The PSU Insignia recognizes the specialized training and qualification required of individuals executing PSU operations in support of the Coast Guard's defense readiness mission. The PSU Insignia will be issued as a permanent award only. Members already entitled to the PSU Insignia are not required to meet the new requirements.

B. Description: The PSU Insignia description and manner of wear are outlined in Uniform Regulations, COMDTINST M1020.6 (series).

C. Eligibility: Upon meeting the requirements listed in Paragraph (D) below, the following Coast Guard officers and enlisted personnel (E-4 and above) are eligible to be awarded the PSU Insignia:

1. Individuals with 24 months of cumulative permanent assignment to a PSU.
2. Individuals with 12 months of cumulative OCONUS augmentation of a PSU Title 10 deployment.
3. Individuals with 18 months of combined permanent assignment to a PSU and augmentation of a PSU Title 10 deployment.

D. Qualification Requirements:

1. Successful completion of formal "C" school training required for assigned competency.
2. Certification in competency ( or competencies) required for assigned position.
3. Recommendation by the chain of command and a favorable determination from the commanding officer.

E. Administration: Issuing authority for the PSU Insignia resides with PSU commanding officers. Issuing authorities must ensure that all requirements have been met before certification and that supporting documentation is entered into DA.

...

On September 17, 2017, the Coast Guard issued ALCOAST 278/17 titled, "SITREP 6 - HUMAN CAPITAL STRATEGY - BLENDED RETIREMENT SYSTEM (BRS)," wherein it laid out the continuation pay multiples, timing, and obligated service. Specifically, and relevant to the applicant's claims, the ALCOAST stated the following:

2. The BRS offers CP as part of a service member's retirement entitlement and to address retention at critical longevity points. Coast Guard members, covered by BRS, receive this one-time, mid-career bonus at 12 Years of Service (YOS) as calculated from the member's Pay Entry Base Date (PEBD) and upon acceptance of the member's agreement to obligate for four additional years. The obligated service incurred under the BRS will run concurrently with any other service obligation, unless specifically prohibited. CP is in addition to any other career incentives or retention bonuses. Members choosing to remain in the current "high-3" retirement system are not eligible for CP.
3. The Active Component (AC) CP is 2.5 times the monthly basic pay for a member of that grade who has reached 12 YOS.
4. The Reserve Component (RC) CP is 0.5 times the monthly basic pay for a member of that grade who has reached 12 YOS.
5. All members, both active and reserve, exceeding 12 YOS in calendar year 2018 must enroll in the BRS prior to the 12-year mark to take advantage of CP. It is possible for a member to elect the BRS in 2018 but miss the CP window if the choice to enroll is made after the member's 12 YOS anniversary date.
6. A member who does not fulfill the service obligation is subject to full or partial repayment of CP.

...

### FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.
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.<sup>9</sup>
3. The application was timely filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

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<sup>9</sup> *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).



4. The applicant alleged that shortly after arriving at his new PSU he encountered a hostile work environment and retaliation from his command for making protected communications involving his CO and XO. This, according to the applicant, led to him receiving a poor OER and ultimately being removed from his primary duties. The applicant alleged that his CO and XO used his OER and the Removal from Primary Duties to intentionally harm his career and the OERs and all documentation relating to the RPD should therefore be removed from his record. When 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 the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.<sup>10</sup> 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."<sup>11</sup> To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation 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."<sup>12</sup>

5. Retaliation and OIG Investigations. The Board's review of the record shows that prior to the applicant arriving at the PSU at issue here, allegations of retaliation were raised by the applicant's predecessor and eventually substantiated by the OIG against the CO (different than the CO at issue here) and the XO (same XO at issue here). The Board's review further shows that after the applicant's predecessor left the unit, the XO's retaliatory behavior continued, this time targeted toward the applicant. The XO's ire was eventually adopted by the CO after the applicant pushed back on both the CO and XO's requested usages of funds for unauthorized purposes. The applicant's resistance to his command's spending habits and lack of regard for public funding led to the applicant receiving a poor OER for the August 27, 2016 through May 31, 2017 rating period with marks far below his previous OERs. In further retaliation against the applicant, he was removed from his primary duties and given a subsequent derogatory OER on January 11, 2018, with marks even lower than that of the regular OER he received just three months prior. In approximately October 2019, the applicant submitted a report of Whistleblower Retaliation against his CO and XO. The OIG's final investigative report, issued on March 27, 2023, substantiated the applicant's claims of retaliation, finding that both his CO and XO lacked strong reasons for taking adverse personnel actions against the applicant, displayed strong anti-whistleblowing animosity toward the applicant, and had a strong motive to retaliate against the applicant. Accordingly, the Board finds that the applicant has proven, by a preponderance of the evidence, that he was subjected to prohibited whistleblower retaliation.

6. August 27, 2016 through May 31, 2017 OER. The applicant alleged that his aforementioned OER was erroneous and unjust because it was used as a means to retaliate against him for making protected communications regarding his command's conduct. As stated above, to be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems

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<sup>10</sup> 33 C.F.R. § 52.24(b).

<sup>11</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>12</sup> *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).

inaccurate, incomplete or subjective in some sense,” but must prove that the disputed evaluation 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.”<sup>13</sup> The record shows that prior to and following the applicant’s time with an already troubled PSU, he averaged almost entirely marks of 6s and 7s, in addition to marks of 6 (“One of few distinguished officers”) out of 7 on the Comparison Scale. It is clear by the record that the applicant’s marks while under this command were a significant deviation from his previous and subsequent performance. These significant performance deviations support the applicant’s claims that the lower marks given by the PSU command were not an accurate reflection of his actual performance during the disputed rating period.<sup>14</sup> Of important note, the OIG Investigative Report found that, “The evidence produced by our investigation strongly suggests that the RMOs were ‘papering the file’ with performance deficiencies that had not been observed in Complainant’s career before and after his tenure at PSU [redacted].” Finally, the evidence shows that the command’s retaliations and hostility toward the applicant were sufficiently severe and pervasive to have reasonably adversely affected their rating of the applicant’s performance. Accordingly, the Board is persuaded that the applicant’s May 31, 2017 OER was adversely affected by his command’s retaliatory behavior. Therefore, the Board finds that the applicant’s OER for the August 27, 2017 through May 31, 2018 rating period should be removed from his record because it violated the second *Hary* prong when it was adversely affected by a factor “which had no business being in the rating process.”<sup>15</sup>

7. Removal from Primary Duties OER. For the same arguments and reasons outlined in Finding 6 above, the Board likewise finds that the applicant’s removal from primary duties was retaliation by his command for his protected communications. The Board’s position is supported by the OIG investigation which ultimately concluded that the applicant’s command lacked strong reasons for taking these adverse personnel actions. Therefore, the Board finds that the applicant has proven, by a preponderance of the evidence, that his removal from primary duties was erroneous and unjust and should be removed from his record, including all documentation from the applicant’s previous CO regarding the applicant’s removal from primary duties.<sup>16</sup>

8. Retroactive Promotion to LCDR. The Board has learned that after the disputed OERs were removed from his record pursuant to the Secretary’s July 5, 2023 memorandum, the applicant was promoted to LCDR on July 1, 2024. Although the Board does not have authority to unilaterally promote an applicant, it does have the authority to backdate an applicant’s date of rank if it finds it is in the interest to do so, which it does here. The record shows that absent the unlawful

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<sup>13</sup> *Id.*

<sup>14</sup> *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) (“[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.”). The Board has consistently held the position outlined in *Grieg*, but in situations like the one we have here, where an applicant’s allegations of retaliation, bullying, or a hostile work environment are substantiated by independent investigations, it is the position of this Board that it is more likely than not that the disputed OERs and rating periods were infected by factors that had no business being in the rating process.

<sup>15</sup> *See Hary*, 618 F.2d 704, 708 (Ct. Cl. 1980).

<sup>16</sup> The Board notes that the Coast Guard alleged that the negative OERs contained within the applicant’s record were already removed as a result of the Secretary’s July 5, 2023, memorandum. A July 14, 2023 memorandum, subject: Correction to Record notes that the OERs with the end of period date of 31 May 2017 and 20 December 2017 have been removed from the applicant’s record. However, given the numerous errors and injustices that occurred at the expense of the applicant, the Board finds it necessary to provide its own specific findings to ensure the applicant’s individualized requests are sufficiently addressed and that appropriate relief is granted.

retaliation the applicant endured under his previous command, it is very likely he would have been promoted to LCDR during the normal selection process that took place in April 2018 for the 2019 promotion year. This is supported by the fact that almost immediately upon the disputed OERs being removed from his record, the applicant was selected for LCDR. Furthermore, the injustices committed against the applicant went uncured for nearly six years and while he was denied promotion year after year due to the retaliatory personnel actions taken by his command, his previous XO, against whom two OIG investigations of retaliation were substantiated, was promoted to Commander. Throughout all these unfortunate circumstances, the applicant continued to serve with honor, taking pride in upholding the Coast Guard's Core Values of Honor, Respect, and Devotion to Duty, as reflected in his subsequent OERs. It is the Board's opinion that not backdating the applicant's date of rank but instead making him go through the long and arduous Special Selection Board process would only further delay the relief to which the record shows he is entitled. For these reasons, the Board finds that it is in the interest of justice to backdate the applicant's promotion to LCDR from July 1, 2024 to August 1, 2019, and reimburse him all backpay and allowances that flow from this correction.

9. Changing Rank on OERs from LT to LCDR. The applicant requested that once his promotion is backdated from LT to LCDR that all sequent OERs have their rank changed from LT to LCDR. The record shows that at the time of the disputed OERs, the applicant was performing in an O-4 billet, doing the job of an O-4. The record further shows that prior to the disputed OERs the applicant's OERs consistently stated that the applicant was performing at an O-4 level and was recommended for "accelerated promotion." For example, on the applicant's OER for the June 1, 2015 through August 26, 2016 rating period under the "Potential" comments section, the rating chain stated, "Highest recommendation for accelerated promotion. Highly respected RPA [Reserve Program Administrator] performing at an O4 lvl. Constantly exceeds expectations." This was the OER immediately preceding the initial contested OER. On his Continuity OER for the January 29, 2018 through May 31, 2018 rating period, the rating chain stated, "Strongest recommendation for greater leadership roles. LT [Applicant] exemplifies servant leadership, sold core values & is performing at an O-4 level."

Again on his 2020 and 2021 OERs the applicant received the following statements from his Reviewing Officer, "Highest recommendation & MUST SELECT for immediate promotion. Performs at a senior level & has proven ability to lead w/ inspiration, intelligence, & compassion," and "Select immediately for promotion; holds my highest recommendation. An officer who 'punches well above rank' & is trusted/empowered to solve challenges other seek to avoid." The Board notes that these statements were all made by different Reviewing Officers who held the rank of Captain/O-6. Because the applicant was at times filling O-4 billets and arguably being rated based on the work of an O-4 and because he consistently received comments reflecting performance that fell within or above the O-4 rank, the Board finds that given the long delay and irreparable damage done to his career, it is in the interest of justice that the applicant's OERs subsequent to his backdated promotion to LCDR be corrected to reflect a rank of LCDR instead of LT. Moreover, these corrections will remove any further injustices remaining in the applicant's record and allow him to fairly compete for the rank of CDR with his peers, which given his backdated date of rank ordered by this Board will happen almost immediately upon this correction, thereby putting him in the same position he would have been absent these injustices.

10. Necessary Redactions to OERs. After the applicant's LT OERs following August 1, 2019, have been changed to reflect a rank of LCDR, the Coast Guard shall redact from the Reviewer comments on the applicant's June 1, 2021, through May 31, 2022, OER "O-4." The Reviewer comment currently reads, "ROO has my highest recommendation for promotion ahead of peers! Already performing above grade, requested by command to fill critical O4 RCM position." The Coast Guard shall redact the sentence to read, "ROO has my highest recommendation for promotion ahead of peers! Already performing above grade, requested by command to fill critical RCM position." This redaction will remove any possible confusion for future selection boards regarding the applicant's rank at the time of the OER.

11. LCDR Promotion OER. Article 5.E.5. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, requires a promotion OER to be submitted "with the period of report ending on the last day at the previous grade." Here, after an independent OIG investigation substantiated the applicant's claims of retaliation, the Secretary issued a memorandum on July 5, 2023, wherein he ordered the Coast Guard to take necessary and appropriate action to correct the applicant's record. This ultimately led to the removal of the derogatory OERs and the applicant being promoted to LCDR effective July 1, 2024. This promotion will trigger the applicant to receive a Promotion OER with a promotion date of July 1, 2024. This OER will result in a contradiction of the previous relief granted by this Board in Finding 9 above because the applicant will have LCDR OERs beginning in August 2019 but not have a LCDR Promotion OER until 2024. This contradiction will undoubtedly lead to further prejudice of the applicant's record. Accordingly, the Board finds that it is in the interest of justice that the Coast Guard issue the applicant's OER for the June 1, 2023, through July 1, 2024, as a regular OER and not a Promotion OER. If the Coast Guard has already issued the applicant's Promotion OER for the applicable rating period, the Coast Guard should correct the OER to reflect a regular OER and not a Promotion OER.

12. CDR Special Selection Board. The applicant claimed that but for the Coast Guard's unlawful retaliation that ultimately derailed his career, he would have been considered by the 2024 CDR selection board with his peers. The record shows that had the applicant not received the two retaliatory and unsupported OERs he would have been promoted to LCDR during the normal promotion cycle in 2019. The Board's position is supported by the fact that immediately upon the removal of the retaliatory OERs, the applicant was promoted to LCDR. Pursuant to Article 3.A.4.a. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, "An officer on the ADPL becomes eligible for consideration for promotion to the next higher grade at the beginning of the promotion year in which they complete the following amount of service computed from date of rank in the grade in which serving." This same article states that a LCDR must complete four years of service from his/her date of rank before being considered for CDR. Here, the Board has granted the applicant relief in the form of backdating his date of promotion to LCDR to August 1, 2019. That means the applicant would have been eligible for promotion during the August 2023 CDR selection board for promotion to CDR in 2024. Accordingly, the Board finds that after the Coast Guard has effectuated all of the relief ordered in Findings 6 through 9 above, that in order to restore the applicant to the position he would have been but for the retaliatory actions of his command, it is in the interest of justice that the Coast Guard convene a CDR Special Selection Board to review the applicant's record in comparison to his peers that were evaluated by the 2023 CDR selection board. If the applicant would have been selected to CDR,

the Coast Guard should backdate the applicant's date of rank to the appropriate date beginning in 2024 and pay him all backpay and allowances that flow from this correction. If, however, the applicant is not selected, the Coast Guard is not required to take any further action.

13. "Not Observed" OER. The applicant alleged that the "Not Observed" OER for the December 21, 2017, through May 31, 2018, rating period was unjust and should be removed from his record because it prejudices him during promotion selection boards. According to the applicant, when selection boards see the variety of OERs in his record for similar rating periods it raises concerns and causes the selection panel to question why the officer was not being evaluated by his permanent rating chain. According to the applicant, the Reviewing Officer had never observed the applicant and the applicant had never even met the Reviewing Officer rendering the OER prejudicial. However, this kind of OER is authorized under Coast Guard policy. Specifically, regarding a supervisor's preparation of the OER, Article 4.E.1.g. states, "If observations are believed to be inadequate to render a judgment, the 'Not Observed' circle is used. The reason for the 'Not Observed' *must be briefly stated* in Section 2 or in the appropriate comments blocks." Article 4.E.2.g. further states, "Where the Supervisor has insufficient information to provide a mark or if observations are believed inadequate to render a judgment, the 'Not Observed' circle is used. The reason for the 'Not Observed' *must be briefly stated* in Section 2 or in the appropriate "comments" blocks." The record shows that the applicant's supervisor followed policy for this OER, writing "Member was not observed due to being TAD." While the applicant was not observed at this "assigned" unit, he was observed by his TDY unit and received a Concurrent OER reflecting his performance as permitted by policy. The applicant received high praise from his TDY rating chain, including high marks on the Comparison and Promotion Scales. Arguably any prejudicial effect this OER had on his record is more than offset by the TDY OER wherein he received high marks and laudatory comments. Like the Concurrent OER, the applicant's "Not Observed" OER was in his record when he was selected for promotion to LCDR, contradicting the applicant's claim that the OER is prejudicial to his promotion potential. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his "Not Observed" OER is erroneous or unjust.

14. Detachment/Concurrent OER. For the same reasons outlined in Finding 10 above, the applicant alleged that the Detachment/Concurrent OER for the January 29, 2018 through May 31, 2018 rating period was erroneous and unjust. However, the applicant has failed to prove that such prejudices are a reality and not mere speculation. Furthermore, Article 5.F.1. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, Concurrent OERs are permitted to be submitted outside of the regular submission schedule when an officer is "On active duty and performing temporary duty (TDY) away from a permanent station while being observed by a senior officer other than the regular reporting officer, (e.g., senior aviator deployed aboard a Coast Guard icebreaker). In this case, the concurrent report normally will be written upon the detachment of the TDY officer and cover only the period of temporary duty." The record shows that the disputed OER was issued in response to the applicant serving "TDY-AD & EAD." The applicant received highly laudatory comments from his CO of the temporary unit and a mark of 6 on the Comparison Scale in addition to a mark of "Promote w/top 20% of peers." In addition, the Board notes that the applicant was promoted with this OER in his record, further indicating that its prejudicial value, if any, is minimal and is unlikely to have any significant impact on his record.

Accordingly, the Board finds that as it pertains to this request the applicant has failed to prove, by a preponderance of the evidence, that the disputed OER is erroneous or unjust.

15. Continuity OER. The applicant requested that the Continuity OER in his record be changed to reflect a Regular OER. However, the applicant has failed to prove error or injustice regarding the Continuity OER. The applicant argued in his response to the advisory opinion that the reference to Article 5.E.9. of the Officer Accession, Evaluations, and Promotions Manual, COMDTINST M1000.3A, in the Continuity OER is highly inflammatory and prejudices his record. However, the applicant has failed to prove that he has been prejudiced by the OER's reference to Article 5.E.9. The applicant's subjective opinion that such a reference infers that he was subjected to administrative or judicial proceedings is not evidence that the OER is erroneous or unjust. The applicant's record contains no derogatory documents indicating that he was subjected to administrative or judicial proceedings, but is instead filled with OERs, awards, and commendations that praise and applaud the applicant's high performance and character. With the applicant's disputed OERs already removed from his record, there is no reason for a selection board to suspect that the disputed Continuity OER was issued for anything other than continuity purposes. Furthermore, as argued by the Coast Guard, Article 5.E.9.b of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, permits the filing of a Continuity OER "in lieu of a biennial, annual, or semiannual if the officer was . . . unobserved for the entire period of report." Thus, the issuance of the applicant's Continuity OER was within policy. Finally, as noted in Findings 10 and 11 above, the applicant was promoted with the Continuity OER in his record, contradicting the applicant's claim that the OER is unjustly prejudicial. For these reasons, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Continuity OER is erroneous or unjust.

16. Reinstating Legacy Retirement. The record shows that on April 1, 2018, after he was notified that his contested derogatory OERs would be validated and entered into his permanent military record, the applicant elected to leave the Legacy Retirement System and enter into the BRS.<sup>17</sup> The applicant claimed that he made this election because from his perspective, once the derogatory OERs entered his record, his career in the Coast Guard was over. In his view, if he entered the BRS, he would at least get the Continuation Pay bonus and any contributions made to the Thrift Savings Plan (TSP) before he was separated for failing to promote. The applicant explained that, but for his rating chain's illegal retaliatory personnel actions, he would not have had the derogatory OERs and would not have been worried about missing out on promotions. With the implementation of the BRS, a service member's retirement multiplier changed from 2.5 to 2.0 percent of the number of years served multiplied by the average highest three years of service. This leads to a lower monthly retirement payment under the BRS compared to the Legacy Retirement System. The Board is persuaded that given the timeline of when the applicant elected to enter the BRS and that absent the unlawful retaliatory actions taken by his rating chain, he would not have elected to enter the BRS. The record shows that the applicant was merely trying to extract the most he could from a career that he knew would be cut short due to no fault of his own. Thus, the applicant's election was one of compulsion and desperation caused by his rating chain's

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<sup>17</sup> The Legacy Retirement System was an all or nothing system. If a service member did not serve at least 20 years, they left with no retirement savings or contributions to recuperate. Under the Blended Retirement System, service members who serve at least two years will receive at a minimum the automatic contributions made by the government to a Thrift Savings Plan on behalf of the service member.

unlawful retaliatory personnel actions. Accordingly, the Board finds that although the Coast Guard did not technically err by honoring the applicant's election to enter the BRS, it would shock the sense of justice to further penalize the applicant for a decision he would not have made but for the Coast Guard's unlawful actions. For the reasons outlined above, the Board finds that it is in the interest of justice to restore the applicant to the Legacy Retirement System.

17. Continuation Pay. Because the Board has recommended that the applicant be reinstated into the Legacy Retirement System, the applicant should reimburse the Coast Guard for the Continuation Pay bonus received as a result of this change.

18. PSU Insignia. Regarding the applicant's request to be granted the PSU Insignia, the Board is not in the position to judge whether the applicant has or has not met the eligibility and qualification requirements outlined in Article 7.C. and D of the Port Security Unit Program Manual, COMDTINST M5400.17C. However, the Board finds that it is in the interest of justice that the applicant be permitted to submit a package in accordance with 7.E.1.e. of COMDTINST M5400.17C, which allows for personnel not currently assigned to a PSU to submit a package through their chain of command to the Commandant indicating completion of the requirements outlined therein. If the applicant fails to submit the necessary package or fails to establish that he met the eligibility and qualification requirements, the Coast Guard is under no obligation to issue the applicant the PSU insignia. However, the Board encourages the Coast Guard to review the applicant's record in light of the circumstances and determine if, absent the retaliatory personnel actions taken by the applicant's rating chain, he would have obtained the requisite eligibility requirements as required by policy. If the insignia is awarded, the date of the award should be backdated to reflect the date the applicant's satisfied the necessary qualification criteria.

19. Assignment of the CG-OAR12 (Defense Ops Readiness) Officer Specialty Code (OSC). As stated in Finding 12 above, the Board is not in the position to determine if the applicant has met the eligibility requirements for assignment of this code and the applicant failed to exhaust his administrative remedies by applying for the specialty code in accordance with policy. However, the Board finds that it is in the interest of justice that, pursuant to Article 4.C.2. of the Coast Guard Officer Specialty Management System Manual, COMDTINST M5300.3A, the applicant be permitted the opportunity to submit an Officer Specialty Code Application Form CGHQ-5319A for review by PSC and if denied that his record immediately be reviewed by a panel of officers as outlined in Article 4.C.2. of COMDTINST M5300.3A. Given the long delay in correcting the applicant's record, for expediency, no formal appeal outlined in Article 4.C.2. should be required in the applicant's case. If upon a formal and full review of the applicant's record by the panel of officers it is determined that the applicant did not meet the requirements for the Defense Ops Specialty Code, the applicant's request should be denied. If, however, either PSC or a panel of officers determines the applicant is entitled to the Defense Ops Readiness Specialty Code, the Coast Guard shall immediately issue the code into the applicant's record, backdated to the date the applicant satisfied the applicable criteria.

20. Commendation Medal/ End-of-Tour Award. Because the Board has found that his command unlawfully retaliated against the applicant which arguably impacted his end-of-tour award, the Board also finds that it is in the interest of justice for the applicant's record to be reviewed by the awards branch to determine the appropriate end-of-tour award the applicant should

have been awarded absent his command's unlawful retaliation. Accordingly, the Coast Guard shall submit the applicant's record to the awards branch to determine the appropriate end-of-tour award the applicant should have received upon his departure from the PSU absent the unlawful reprisal he faced from his rating chain.

21. Added Statement to Personnel Record. The applicant has requested that the Board order the Coast Guard to enter a statement into his record stating that the Continuity OER covering the relevant periods shall not be considered adversely against the applicant. However, as argued by the Coast Guard, the applicant's request would be contrary to Article 5.I.1. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST 1000.3A, which states that prohibited comments include mentioning BCMR applications. Entering a statement ordered by this Board would be putting future selections boards on notice that the applicant applied to this Board for relief, which could further prejudice his record. Furthermore, Continuity OERs are common practice and, as argued by PSC, are neutral in nature and do not reflect negatively upon the applicant unless the ratings or comments contained therein reflect poor performance by the member. The Continuity OER contained in the applicant's record contains no negative comments and as already stated, are common practice within the Coast Guard. Finally, the applicant was subsequently promoted to LCDR with this Continuity OER, indicating that it has little to no prejudicial value. For these reasons, the applicant's request to have a statement entered into his record prohibiting negative inferences regarding the Continuity OER should be denied.

22. Priority Assignments and Master's Program. The applicant requested this Board order the Coast Guard to grant him priority assignments and advanced education opportunities that he missed as a result of the derogatory OERs in his record. However, the Board does not have the authority to order the Coast Guard to make such decisions. The Board's authority is limited to correcting records and this request does not include the correction of a record. Accordingly, the applicant's request for relief should be denied.

23. Interest. The applicant has requested that the Board require the Coast Guard to pay him interest on all backpay and allowances on all monetary relief awarded, however, the Board's authority to award interest and penalties is limited to situations in which a court-martial conviction was set aside, and even then only when the court-martial was convened under the Articles of War, not the Uniform Code of Military Justice.<sup>18</sup> Therefore, the applicant's request for relief should be denied.

**(ORDER AND SIGNATURES ON FOLLOWING PAGES)**

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<sup>18</sup> See 10 U.S.C. § 1552(c)(4) ("If the correction of military records . . . involves *setting aside a conviction by court-martial*, the payment of a claim . . . shall include interest . . .") (Emphasis added.)



**ORDER**

The application of LCDR [REDACTED] [REDACTED] USCG, for the correction of his military record is granted in part as follows:

The Coast Guard shall—

- Remove the August 27, 2017 through May 31, 2018 OER, if it has not done so already;
- Remove the June 1, 2017 through December 20, 2017 Removal from Primary Duties Derogatory OER, if it has not done so already;
- Backdate his date of rank to LCDR from July 10, 2024 to August 1, 2019, to include all backpay and allowances due as a result of this correction;
- Correct all OERs after August 1, 2019 to reflect a rank of LCDR in lieu of LT;
- Redact the reference to O-4 in the Reviewer Comments on the applicant's June 1, 2021, through May 31, 2022 OER to read as follows: "ROO has my highest recommendation for promotion ahead of peers! Already performing above grade, requested by command to fill critical RCM position."
- Correct the applicant's 2024 LCDR Promotion OER to a Regular OER;
- Convene 2023 CDR SSB to have the applicant's record reviewed with his peers. If the applicant is selected for promotion to CDR, the Coast Guard shall backdate the applicant's date of rank and pay him all backpay and allowances that flow from this change;
- Reinstatement the applicant into the Legacy Retirement System, effective the day he originally elected transfer into the BRS;
- Recoup from the applicant the Continuation Pay bonus paid as a result of his election into the BRS;
- Submit the applicant's record to the awards branch to determine the appropriate end-of-tour award the applicant should have been awarded upon his departure from the PSU absent his command's unlawful retaliation;
- Permit the applicant to submit a PSU Insignia eligibility package; and
- Permit the applicant to submit an CG-OAR12 (Defense Ops Readiness) Officer Specialty Code (OSC) application form.

The remainder of the requested relief is denied.

**SIGNATURES ON FOLLOWING PAGE**

**SIGNATURES OF APPROVING BOARD MEMBERS**

August 8, 2024

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