

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

---

Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 1998-067**

---

**FINAL DECISION**

**██████████ Attorney-Advisor:**

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on March 20, 1998, upon the BCMR's receipt of the applicant's application.

This final decision, dated December 17, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST FOR RELIEF**

The applicant, a xxxxxx in the Coast Guard, asked the Board to correct his record by removing a special officer evaluation report (disputed OER) received while serving as the xxxxxxxx at the xxxxxxxx.<sup>1</sup> The applicant also requested that the Board remove from his record any other documents referring to his removal as xxxxxxxx. The disputed OER, which covers the period June 15, 199x, to March 16, 199x, would be replaced with one marked "For Continuity Purposes Only."

---

<sup>1</sup> The following xxxx and staff members of the xxxxx are mentioned in this Final Decision:

"The applicant" was the xxxxxxxx at the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

"The xxxx" was the xxx of the Xxxxxxxx of the Xxxxxx. He and his xxxxxx committed several xxxx violations during the applicant's tour at xxxxx.

"The xxxxxx" was the xxxxxx of the xxxx at the time of the xxxx violations.

"XXX" was the Xxxxxxxx of the Xxxxxx, a xxxxxx, and the applicant's commanding officer. He served as the reporting officer and the reviewer on the rating chain for the disputed OER.

"VVV" was the first Assistant Xxxxxxxx to serve during the applicant's tour at xxxxx. He was the assistant to XXX at the time of the xxxx violations by the xxxx and his xxxxxx.

"YYY," the Assistant xxxx xxxxx, was the applicant's assistant at xxxxx. He conducted the mast of the xxxx and his xxxxxx.

"ZZZ" was the second Assistant Xxxxxxxx to serve during the applicant's tour at xxxxx. ZZZ served as the supervisor on the rating chain for the disputed OER.



commanding officer, XXX served as the reporting officer and the reviewer for the disputed OER.

The applicant alleged that, on October 8, 199x, after the continuing infractions were discovered, he reported the misconduct to the Assistant XXXXXXXXX (VVV). A few days later, VVV told the applicant that “we are making too much of the misconduct.” On October 17, 199x, the applicant alleged, a xxxx investigation charged the xxxx with “XXXX violations and XXXX [violations] for multiple unauthorized XXXXXXXXXXXXX.”

The applicant alleged that a few days later, he met with XXX and VVV to discuss the xxxx’s misconduct. XXX told the applicant “that in his opinion the misconduct was not XXXXXXXXX because it did not involve physical harm to personnel.” As a result, the applicant directed the Assistant XXXXXXXXX XXXXXS (YYY) to drop the charge of xxxx XXXXXXXXXXXXX against the xxxx. At a second meeting with XXX concerning the charges against his XXXXX, the applicant alleged, XXX told him that the remaining charges were “multiplicious . . . piling on.” XXX also told him that “he considered his XXXXXXXX’s misconduct to be nothing more than ‘xxxx will xx’ or ‘xxx will XXXXXXX.’”

On October 25, 199x, YYY took the xxxx and his XXXXXXX to mast. He found that the xxxx had committed a “XX for unauthorized XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.” YYY awarded the xxxx punishment including XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. On the same day and for the first time ever, VVV asked for a memorandum on the mast from YYY. The applicant alleged that the affidavit signed by VVV (see summary below) shows that VVV “served as a vector for the expression of [XXX’s] views on the treatment of his xxxx’s case.”

The xxxx appealed, arguing that the xxxx was his personal xxxx and not the XXXXXXXXX that had been disapproved. The applicant alleged that on October 29, 199x, XXX visited the applicant and the YYY in the applicant’s office “fishing” for their plans on how to deal with his XXXXX’s appeal. The next day, YYY and the applicant wrote and edited the final ruling denying the xxxx’s appeal.

The applicant alleged that, on November 1, 199x, XXX “came into [his] office unannounced, sat down, glared at him, and asked where [the applicant’s] ruling was on his XXXXX’s mast appeal. [XXX] told [the applicant] that the punishment was too harsh and that [the applicant] had only five days to rule on the appeal, just like in the XXXXX, and that since the five days had expired, the punishment would have to be vacated.” When the applicant informed XXX that the ruling was substantially finished, XXX became “visibly angry, upset and threatening.” He argued that his XXXXX’s appeal was good because he had been ordered to get the “XXXXXX” out of his XXXXXXXXX, not his own XXXXX. In response to XXX’s visit, the applicant alleged, he telephoned YYY and told him “that they had to approve the appeal or face serious consequences from [XXX].” YYY told him that the regulations for xxxx did not include a five-day deadline for rulings on appeals.

On November 2, 199x, the applicant alleged, he rewrote the ruling on the appeal because of the pressure from XXX. He reduced the charges found to have been committed to one Xxxxx, and he substantially reduced the punishment.

The applicant further alleged that the Office of the Inspector General of the Department of Transportation (DOT) had investigated some of the applicant's allegations and concluded that XXX "did in fact intervene to protect his xxxxx in disciplinary proceedings." This finding, the applicant alleged, is contrary to a statement XXX signed on August 28, 199x, which claims that he never discussed his xxxxx's case with the applicant.

### *Allegations Concerning the Applicant's Relief from Duty at xxxxxxxxxxxxxxxxxxx*

On November 22, 199x, VVV left xxxxx and was replaced by ZZZ. The applicant alleged that in January 199x, XXX directed ZZZ

to conduct a covert investigation of [the applicant] based on an anonymous letter sent to the Department of Transportation Inspector General. He interviewed approximately 18 people, some with a grudge . . . but spoke to no one who directly worked with [the applicant] except . . . (a xxx Officer). [The applicant] was never asked to respond to the anonymous allegations and was denied the rights of a party to an investigation. [The xxx Officer] was approached by two xxx members to "pile on." [ZZZ] was biased: he told [the applicant] that he had "heard all about [him]" before [ZZZ] even reported aboard. [The applicant] never saw the anonymous letter until after he was summarily relieved.

The applicant alleged that on xxxxxx, 199x, he was removed as xxxxxxxxxxx xxxxx in a very public and embarrassing manner.

### *Allegations Concerning the Disputed OER*

Soon after the applicant was reassigned, the disputed OER was prepared by ZZZ, who served as supervisor, and XXX, who served as both reporting officer and reviewer. The applicant alleged that XXX's intervention on behalf of his own xxx disqualified him from serving on the applicant's rating chain for the disputed OER under Section 10-A-2.g.(2)(b) of the Personnel Manual. He alleged that "[g]iven [XXX's] pervasive involvement in the special OER and close working relationship with [ZZZ] (who served as the rating chain Supervisor), [XXX's] taint extends to the entire special OER, not just to the portions he completed as Reporting Officer/Reviewer."

The applicant alleged that the comments in the OER stating ". . . Bad match . . . no actionable wrongdoing, no scandal, but strong irreconcilable differences" prove that the OER is the result of a personal conflict between the applicant and XXX and not an accurate reflection of his performance.

## *Allegations Concerning PRRB*

Prior to applying to the BCMR, the applicant asked the Personnel Records Review Board (PRRB) to remove the OER from his record. On February 11, 1998, the PRRB issued a recommendation (see below) that the applicant's request be denied. The applicant alleged that the PRRB was wrongly constituted because only one of the five members was the applicant's superior. In addition, one of the members was at the time assigned to the Chief Counsel's office to draft advisory opinions to the BCMR.

## **VIEWS OF THE COAST GUARD**

### *Initial Views*

On May 6, 1998, the Chief Counsel of the Coast Guard recommended that the Board deny the applicant's request for relief. The Chief Counsel stated that the applicant had not "met his initial burden to prove error or injustice entitling him to the relief he requests . . . ."

The Chief Counsel stated that "the PRRB's recommendation has been reviewed and separately determined to be an adequate statement of the Coast Guard's advisory opinion, and is submitted [to the BCMR] as such." "For the reasons discussed in the PRRB's Findings, Conclusions and Recommendations . . . , the evidence indicates that the challenged OER was the product of [ZZZ's and XXX's] professional evaluations of Applicant's performance throughout the reporting period, not the product of personal bias."

The Chief Counsel also denied that it was improper to have a member of his staff who drafts advisory opinions to the BCMR serve on the PRRB. He noted that the PRRB's findings of fact are not binding on the BCMR.

In addition, the Chief Counsel alleged that the applicant "has not shown that the preliminary factfinding conducted by [ZZZ] was improper, much less that it indicates error or injustice in the challenged OER."

### *Revised Views*

On August 3, 1998, the Chief Counsel submitted a supplemental advisory opinion in which he amended the Coast Guard's advisory opinion to recommend that the disputed OER be removed from the applicant's record. The Chief Counsel admitted that XXX should not have been the reporting officer for the applicant's rating chain. He stated that, "[b]ased on the unique circumstances of this case," the Coast Guard would not object to removal of the disputed OER. However, he stated,

[t]he action to relieve [the applicant] from the assignment as xxxxxxxx xxxxxs is fully supported by documentation in the record from [XXX] and the statements of the two Assistant xxxxxxxxs as well as corroborating statements from [the Coast Guard's] investigation. Applicant has not shown that the action to relieve him was the product of any error or injustice and no relief from that action is warranted. However, the xxxxxxxx xxxxxs position is not a command billet and the only documentation of relief from those duties is the OER.

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

On August 5, 1998, the Chairman of the BCMR forwarded a copy of the Chief Counsel's supplemental advisory opinion to the applicant and invited him to respond. On September 9, 1998, the applicant submitted his response. He asked the Board to void his failures of selection for xxxxxx and to remove any references to them from both his own and the Coast Guard's records.

The applicant also alleged that OERs removed from records by order of the BCMR are retained "indefinitely in a separate file maintained for this purpose." Therefore, he said "the Board's writ is being defied, and second, . . . a phantom system of records has been established." He asked the Board to write its order to "leave no room for doubt as to what should be done with the removed OER."

The applicant further stated as follows:

The only issue remaining to be decided concerns references in the [AI] Investigation to [the applicant's] performance of duty as xxxxxxxx at xxxxxx. Those references should be removed. . . .

Fortunately, there is no need to resolve this aspect of the matter because the Coast Guard itself has acknowledged that the references in the [AI] Investigation to [the applicant's] performance as xxxxxxxx were gratuitous and irrelevant to the matters [AI] was directed to investigate. . . .

To the extent that [AI] exceeded the scope of [its] mandate by accepting and including comments on [the applicant's] performance of duty, those portions of the investigative report serve no purpose other than unfairly staining [the applicant's] reputation in the agency's official files. [AI] did not follow up on these comments, leaving them entirely untested. Moreover, [its] report was prepared without affording [the applicant] the core rights of a person whose performance of duty is being faulted.

On these admitted facts, it is impossible to reconcile the retention of this gratuitous, irrelevant, prejudicial and *untested* material with the Coast Guard's commitment to investigative fairness, not to mention the Board's statutory duty to correct error and remove injustice.

### **COAST GUARD'S RESPONSE TO THE APPLICANT'S ADDITIONAL REQUESTS**

On October 7, 1998, the Chief Counsel responded to the applicant's further submission. He reiterated that the only item in the applicant's military record that would refer to his relief from duty as xxxxxxxxx is the disputed OER. He also submitted an affidavit from the Chief of the xxxxxxxxxxxxxx Branch of the Coast Guard Personnel Command, who stated the following:

Part of my responsibilities include (1) coordinating actions necessary as a result of BCMR orders . . . (2) coordinating preparations for promotion boards (e.g., conducting a quality review of officer records to ensure no evidence of BCMRs are presented to selection Boards) and (3) documenting non-selection status in the Personnel Data System (PDS) data base.

Officers do not fail of selection to the grade of Xxxxxx and I know of no record which records non-selection to xxx. . . . [W]e do not produce non-selection letters for officers considered for xxx. The PDS module, which records non-selection for all grades, . . . does not possess a category for failure of selection for xxx. Since there is no record of non-selection to xxx, there is no record to be corrected.

The [AI] investigation . . . is not and will not become a part of [the applicant's] record. That investigation was not an investigation of [the applicant] and did not result in any personnel record entries in [the applicant's] record. . . .

If an order is received to correct [the applicant's] record . . . [t]he new original version of the material would be filed in the member's paper record and the electronic copy of the corrected record would be updated to match the paper version. . . . After the record correction is accomplished, records of the BCMR Order and actions taken would be filed in xxxxxxxxx (G-LMJ). . . .

The Chief Counsel called the applicant's request that the BCMR order the Coast Guard to remove all criticism of the applicant from the AI Report "an irrelevant and unnecessary addition to the original application for relief." The Chief Counsel further stated that the BCMR

lacks jurisdiction to take any action with regard to the content or action on the investigation conducted by [AI]. . . . [The memorandum which] forwarded [the AI Report] to the PRRB . . . is not the Coast Guard's advisory opinion to the BCMR in this case. . . . [N]either the PRRB nor the BCMR are investigative bodies. They accept information submitted in order to determine whether a correction to an applicant's military record should be made. The review of such information as may be submitted does not give the BCMR power to "correct" information submitted by the Coast Guard or the applicant. . . .

The Chief Counsel also argued that the applicant has never "presented evidence of his performance that is contrary to the comments contained in the investigation. . . . [Nor has he] shown that the action to relieve him from duties as xxxxxxxxx was the product of any error or injustice."

## APPLICANT'S FINAL RESPONSE

On October 15, 1998, the Chairman of the BCMR forwarded a copy of the Chief Counsel's response to the applicant with an invitation to respond within 15 days. The applicant responded on December 16, 1998.

In his response, the applicant alleged that the Coast Guard's claim that "there is no such thing as failing of selection for promotion with respect to the rank of Xxxxxx" is "literally true, *see* 14 U.S.C. § 262(a) (1994), but . . . misleading." He alleged that despite the statutory provisions, officers still refer to xxxxx as having been "passed over" for selection if the xxxxx were in the "promotion zone" for xxxxxx but were not selected. Therefore, the applicant stated, because there are no special selection boards in the Coast Guard, the Coast Guard should convene an ad hoc special selection board (and, if necessary, a second ad hoc special selection board) to consider him for promotion to xxx. The applicant alleged that, prior to the enactment of the statutory provision that requires the Army, Navy, and Air Force to convene special selection boards, the Department of Defense convened such ad hoc special selection boards. He alleged that nothing prevents the Coast Guard from taking the same approach.

With regard to the informal administrative investigation, the applicant alleged that it was mishandled in the following ways: (1) the investigator was junior to "the target"; (2) the investigator attended a retirement party for "the target" the day before he began conducting the interviews; (3) at the retirement party, the "then head of the agency let it be known publicly . . . that the target was one of his dearest friends"; (3) "the then head of the agency reviewed in draft the investigation into his old friend's conduct"; (4) the investigator failed to take accurate notes; and (5) the investigator never interviewed the xxxxx. The applicant denied the Chief Counsel's claim that the Board has no jurisdiction over the AI Report.

Finally, regarding the applicant's request that the Board submit comments to the Secretary, the applicant alleged that the Coast Guard had "failed to do anything in response to a series of disturbing issues at the Xxxxxx." He cited allegedly offensive material published in the 199x xxxxx; alleged favoritism to a xxxxx who was allowed to remain for a xxxxxx rather than be xxxxx; and the alleged failure to hold anyone accountable when xxx broke into the Xxxxxx's xxxxx and stole "xxxxxxxxxxxxxxxxxxxxx."

## REPORT OF THE ADMINISTRATIVE INVESTIGATION

On June 16, 199x, the xxxxxxxxxxxxxx of the Coast Guard ordered an informal, single-officer administrative investigation of several allegations that had been made in an anonymous letter dated April 22, 199x, to the Inspector General of DOT. One of the allegations concerned preferential treatment of the xxxxx, XXX's xxxxx, at the Xxxxxx. The investigator (a xxxxxx) was instructed to investigate "all the facts and circum-



stances surrounding these allegations.” The Xxx xxxxxxxxx particularly requested an “opinion as to whether these incidents are indicative of any systemic problems” at the Xxxxxx.

The investigator interviewed 28 persons at the Xxxxxx and summarized their statements in his report. The vast majority of the AI Report addresses allegations that have nothing to do with the applicant’s performance or XXX’s interactions with him. However, the investigator noted that “[a]lthough I was not investigating the [applicant’s] situation, 10 of the 28 interviewees did discuss his impact on the Xxxxxx during the short period he was [xxxxxxx] xx.” Most of the derogatory comments concerning the applicant arose in discussions of (1) the alleged preferential treatment of the xxxx in the appeal of his mast; and (2) the root causes of an apparent break down in the xxxxx at the xxxxx. The following is a sample of the derogatory comments made by the xxxx’s xxx, xxx, and staff about the applicant and his performance that appear in the AI Report:

- “[The applicant conducted a] xxxxxxxxxxxxxxxx.”
- “[The applicant] has a psychological problem.”
- “[The applicant is] nuts . . . terrible on implementation . . . . [The enlisted staff called him] xxxxxxxxxxxx.”
- “[The applicant] did more damage at [the Xxxxxx] in 3 or 4 months than can be imagined.”
- “[The applicant is] very difficult to deal with . . . a bully . . . . [H]e did not think much of xxxxxxxx and even less of xx women. . . . [His] way was the only way – every issue was taken personally then became a battle with him. . . . [She] cannot believe that one person could tear down what had been built up at [xxxxx] so fast. He was the worst leader she had ever seen. He berated anyone junior to him . . . . He was on a power trip! xxxxxxxxxxxx.”
- “[The applicant’s tour at xxxxx was] clearly a disruptive period. He had never seen anything like it in his twenty some odd years at [xxxxx]. There was deep division between . . . [the xxxxxxxx] of xxs and the xxx (of xxxx). [The applicant] could not see anything but his way.”
- “[The applicant was] very disruptive to [Xxxxxx]. How did he get away with the things he did? . . . A very stiff person, anxious all the time.”

The AI Report also includes the following comments relating to alleged preferential treatment of the xxxx in the consideration of his mast appeal:

- YYY told the investigator that he believes XXX “did get involved to influence [the applicant] . . . .” In addition, he stated that VVV had “relayed” the message to the applicant and YYY that the punishment was too severe.

- VVV stated that

[XXX] took painstaking care to keep out of anything dealing with his xxx. In the case of [the xxxx] having a xxx and xxxxx in his xxx, the Xxxxxxxx took pain not to be involved. In [VVV’s] opinion, [the applicant] made a mountain out of a mole hill. . . . [VVV] believes he . . . took a coaching role because the punishment for [the xxxx and his xxxxx] was not in line with the offense. [XXX] did not want to get involved. They were frustrated with the way the case was handled by Xxxx xxxxxxxx. Bottom-line, he felt no pressure from the Xxxxxxxx other than be professional about it. . . . [The applicant] always turned these situations into Xxxx xxxxxxxx against the xxxxxx. In fact [the applicant] had little or no respect for [XXX] – “the xxxxxxxx” [the applicant] was quoted as saying.

- XXX’s secretary stated that

the Xxxxxxxx was upset over the severity of the punishment for [the xxxx]. [The xxxx] wrote an appeal (to the [xxxxxxx] Xxxxxs) – she suspects [XXX] helped write it, but is not sure. . . . In hearsay,--staff and xxxxs – felt [the xxxx] should have received a stiffer punishment but he was the Xxxxxxxx’s xxxxxxxx. . . .

- XXX stated that

he had standing orders with the Assistant Xxxxxxxx and the [xxxxxxx] Xxxxxs that he be recused of anything dealing with his xxxxxxxx . . . . He noted that [the xxxx] was caught with a xxx in his xxx and punished. [The xxxx] appealed and the punishment was reduced. [XXX] was emphatic that he never talked to the [xxxxxxx] Xxxxxs, [the applicant], about his xxxxxxx!

On August 11, 199x, the investigator submitted his report to the Xxx xxxxxxxx. The investigator reported that most staff members at the Xxxxxx did not believe the xxxx had received special treatment. Nevertheless, he found that the staff of the xxxxxxxx xxxxs did feel pressure to give “special treatment” to the xxxxxxxxxx. The investigator gave as his opinion that XXX and VVV had viewed the severity of the xxxx’s case “very differently than the Xxxx xxxxxx staff and conveyed that opinion to them.”

Regarding the applicant, the investigator made Finding #60, which stated that, of the several interviewees who discussed the applicant with him, “[a]ll but one found him to have a disruptive influence on the Xxxxxx.” In Opinion #28, he stated that “[d]espite [the applicant’s] good and honorable intentions, the xxxxxxx Xxxxxx culture remained foreign to him and he did not comprehend the natural tension that exists between Xxxx xxxxxxx, xxxxxx and xxxxxxx for the xxxxx’ precious time.”

On August 26, 199x, the Xxx xxxxxxxxx reopened the investigation and asked the investigator to follow up on certain issues, including the exact extent and nature of communication between XXX, VVV, YYY, and the applicant concerning the punishment of the xxxx over the xxxxs violations. The investigator asked VVV and YYY to submit statements on this issue. On August 28, 199x, YYY submitted the following statement in response to that request:

I believe [XXX] was involved to influence [the applicant] to reduce [the xxxx's] punishment in regards to the disciplinary matter. This belief is based upon a meeting held between [VVV], [the applicant], and myself during the week of 28 October, 199x. . . . [VVV] strongly suggested that we reconsider our position, that he had discussed the issue with the xxxxxx and if we wished we could go right into the xxxxxx's office to resolve the issue but we would not like the answer. In addition, [VVV] indicated the xxxxxx's feelings were that the nature of the violations came under the heading of xxxxxx will xxxxxx . . . .

Other than [the applicant's] statement to me, I have no factual knowledge of the meeting between [the applicant] and [XXX] on 29 October 199x. I was on leave on 29 October 199x. I was aware of the meeting between them on 1 November 199x as I was in the [applicant's] office when the xxxxxx came in to address the issue. The substance of that meeting was that the xxxxxx told [the applicant] that the 5 day appeal period had ended, that [the applicant] had not responded within that time frame and that the punishment should therefore be set aside. [The applicant] indicated to the xxxxxx that the appeal response had been completed, albeit a day late, and the punishment had been reduced. I was present for this discussion.<sup>[3]</sup>

YYY also submitted the following statement concerning the mast and appeal:

. . . Eventually, however, the punishment was reduced after discussions were held between [VVV], and [the applicant], and a visit from [XXX] to [the applicant's] office during the appeal process. Both the Xxxxxxxxx and the Assistant Xxxxxxxxx indicated their belief that I had piled on charges to [the xxxx] in an effort to make an example of [the xxxx and his xxxxxx]. Both the xxxxxx and [VVV] made there [sic] feelings known to [the applicant] prior to his final ruling on the appeal.

On . . . 25 October 199x, VVV asked me for an E-Mail note on the punishment administered and my punishment reasoning. . . . It was the first time the xxxxxxxxx had ever asked for a memo concerning judgment with regard to xxxx mast proceedings.

While on leave, on 29 October 199x, [the applicant] called me at home and indicated that he had received several questions from [VVV] concerning [the xxxx's] case . . . . I passed on to [the applicant] my judgment in regards to the fairness of the punishment and felt that [the applicant] agreed with my position. . . .

---

<sup>3</sup> The Board notes that the applicant and YYY disagree about which meeting with XXX YYY was present at. However, they agree that YYY attended at least one meeting with XXX at which he discussed his xxx's case.

In response to the investigator's additional questions, VVV submitted the following statement on September 4, 199x:

. . . As further background, [the applicant's] overall performance was increasingly becoming a concern to the Xxxxxxxx and myself during the period in question. Additionally, [the applicant's] opinion of the Xxxxxxxx's leadership style had become very negative, and he discussed this with me in very explicit terms. . . . In my opinion, [the applicant] did not take sufficient action on my recommendations and their relationship continued to worsen prior to this case.

Regarding the case in question, I had heard about the infraction and queried [the applicant] about the details and his intended course of action. As the investigation and planned action unfolded, I increasingly became concerned about [the applicant's] judgment regarding the severity of the case and the proposed punishments. I met with him on several occasions to discuss the situation, and I believe that [YYY] attended one or more of these meetings. . . .

I recall discussing the case with the Xxxxxxxx on several occasions. He had two concerns: he didn't want to get involved with his xxx's situation, but, on the other hand, there was another xxxx involved and he was concerned about the staff's judgment and the overall fairness of the way the situation was being handled. I told him that I would investigate the situation and act on my own, if warranted, keeping him informed. I think that [the applicant] and I may have met together with the Xxxxxxxx on this matter, but I am not sure. In any event, in my opinion, [XXX] did not influence the outcome of the case in an inappropriate manner at any time in my presence. . . .

My primary disagreements with [the applicant] concerned the lack of evidence supporting charges of disobedience of an order and grave neglect of duty. . . . I strongly recommended that he not treat the case as he had planned. . . . Furthermore, I reiterated on numerous occasions that the Xxxxxxxx was concerned about fairness, but did not want to personally get involved with matters relating to his xxxxx in this case. I told him that I had no sense of pressure from the Xxxxxxxx and that my opinions were my own. . . . I informed the Xxxxxxxx of my opinions and actions, I informed [the applicant] of my intentions to do so in advance, and I invited him to join me in those discussions if he so desired. . . .

On October 1, 199x, the Xxx xxxxxx and the xxxxxxxxx of the xxxx approved the AI Report. However, Finding #60 and Opinion #28 were rejected because the "disagreement between [XXX and the applicant] which led to [the applicant's] being relieved as xxxxxxxxxx xxxxx, is outside the scope of this investigation." In addition, the Xxx xxxxxx analyzed the evidence as follows:

[The applicant's and XXX's] versions of the incident are diametrically opposed to one another. [VVV's and YYY's] are similar in that both indicate that [VVV] was the one who applied pressure on [the applicant and YYY] to mitigate the punishment, although [YYY] believes that [XXX] was involved behind the scenes, whereas [VVV] maintains he acted on his own initiative. [The applicant] stated that two meetings

occurred between [XXX, VVV] and himself prior to the date punishment was imposed on [the xxxx and his xxxxxx]; [VVV] stated that he thinks these meetings may have happened, but he isn't sure. [YYY] stated that [XXX] came to [the applicant's] office to discuss the case on 1 November. In terms of who was present, this would seem to correlate with the meeting that [the applicant] recalled occurred on or about 29 October. However, [YYY] indicated the subject of the meeting on 29 October involved the five days for appeal having elapsed, whereas [the applicant] indicated this was the subject of the 1 November meeting, at which [YYY] was not present. While [the applicant's and YYY's] versions of this meeting do not agree on all details, they agree sufficiently to indicate that while [XXX] may not have discussed his xxxxxxxxxxxxxx with [the applicant], *per se*, he did discuss [the xxxx's] case.

. . . The record could support an inference that [XXX] attempted to influence his xx's case from behind the scenes through his discussions with [VVV]. However, since both [XXX and VVV] deny that this was the case, and since [VVV] denies feeling pressured by [XXX], I do not draw this inference. . . . Finally, both [the applicant and YYY] stated that [XXX] came to [the applicant's] office sometime during the 29 October to 1 November time frame and told them that because five days had elapsed since [the xxxx and his xxxxxx] submitted their appeal, their punishment should be set aside. . . . This supports an inference that [XXX] personally brought pressure to bear against [the applicant] (although [the applicant] had already mitigated the punishment at this point) and lends credence to [the applicant's] contention that [XXX] had discussed [the xxxx's] case with him on previous occasions, although there is no way of verifying this. [Footnotes omitted.]

## MEMORANDA OF THE INSPECTOR GENERAL

On December 2, 199x, the Inspector General of DOT sent a memorandum to the xxxxxxxxxxx of the xxxxxxx in which he stated that XXX's assignment as Xxxxxxxxx of the Xxxxx while his xxx was xxxxx as a xxxx was "not consistent with the Coast Guard's policy." Regarding XXX's alleged intervention on behalf of his xxxxx, the Inspector General stated the following:

The investigative findings indicate that as Xxxxxxxxx, [XXX] communicated that he would recuse himself from any matter involving his xxxx. However, the investigative report also contains sufficient evidence to conclude that [he] did not adhere to his recusal on two occasions. The file reflects that [XXX]: 1) was directly involved in the decision not to hold his xxxxxx personally liable for the settlement in connection with the canceled xxxxxxxx;<sup>4</sup> and 2) had discussions with the xxxxxxxxxxx xxxxxs concerning proposed disciplinary action against his xxxxxx. . . .

---

<sup>4</sup> In March 199x, a xxx and the xxxxx's xxxx (whom the applicant had appointed xxxxxxx), without authorization, committed the Coast Guard to xxxx a certain xxxx to xxxxxxxx at the xxxxxx. Apparently, a xxxxxxxxxxx misled them into thinking that what they were signing was just an xxxxxxxxxxxxxxx. In fact, what they signed was a xxxxxxxx, which the xxxxx subsequently accepted. The xxxx was cancelled because the xxxxxxxx was determined to be inappropriate. The xxxxxx was sued for breach of contract, and it settled for approximately \$xxxx. The applicant alleged that, in violation of written Coast Guard policy, no disciplinary action against the xxxx was considered. In addition, although the policy permits

On June 29, 199x, the Inspector General wrote a second memorandum to the xxxxxxxx of the xxxxxxx. In it, he stated that, upon reviewing the AI Report, "it is our view that [XXX] could not help but be influenced by the events involving his xxxxxx, and thus could not have been objective in reviewing and marking [the applicant's] OER." The Inspector General pointed out that, contrary to evidence in the AI Report, XXX had denied ever discussing the performance of his xxxx with the applicant. The Inspector General concluded that XXX's "failure to recuse himself invalidates the entire OER and the subsequent rebuttal process." Therefore, he recommended that the disputed OER be removed from the applicant's military service record.

### CHIEF COUNSEL'S MEMORANDUM TO THE PRRB

Before applying to the BCMR, the applicant applied to the PRRB to have the OER removed from his record. The PRRB requested a copy of the AI Report from the Chief Counsel of the Coast Guard. On November 24, 199x, the Chief Counsel sent the PRRB a redacted version of the AI Report.<sup>5</sup> In a memorandum attached to the redacted report, the Chief Counsel stated the following:

. . . [Y]ou should note that the investigation was **not** convened to look into the facts and circumstances surrounding [the applicant's] relief from his duties as xxxxxxxx xxxxxs. . . . Accordingly, I find that they are not relevant to the deliberations of the PRRB and I am withholding these sections of the investigation.

Although the investigation was not convened to look into the facts and circumstances surrounding [the applicant's] relief from his duties as xxxxxxxx xxxxxs, several of the witnesses gratuitously offered the Investigating Officer their perceptions of [the applicant's] performance of duties as xxxxxxxx xxxxxs. . . . Because the issue of [the applicant's] relief from his duties as xxxxxxxx xxxxxs was outside the scope of the investigation, the Investigating Officer quite correctly did not follow up on these comments. Consequently, what we are left with are individuals' opinions which (1) do not cite specific examples of conduct which form the basis of the opinions, and (2) were not subjected to the crucible of the investigation process—*i.e.*, the gathering of pertinent facts and witness statements regarding [the applicant's] relief and the analysis of these facts and statements, from which informed findings of fact, opinions and recommendations could be drawn. Because this was not done, I find that while the individuals' opinions may be relevant to the issue of [the applicant's] interactions with xxxx personnel, their probative value is substantially outweighed by the danger of misleading the members of the PRRB. Accordingly, I have redacted these portions of the witness statements. . . .

### RECOMMENDATION OF THE PRRB

---

individuals who make unauthorized commitments to be held personally liable, the Xxxxxxxx decided that the settlement money would be taken from the Xxxx xxxxxxx rather than from the xxxx and the xxx.

<sup>5</sup> The redacted version received by the PRRB did not reveal any of the derogatory comments about the applicant and his performance appearing in the bulleted list in this Final Decision.

On February 11, 199x, the PRRB recommended denial of the applicant's request. The denial was based in large part on affidavits provided by XXX, VVV, and ZZZ (see below). The PRRB's recommendation was approved by the xxxxxxxx. The following are excerpts of the PRRB's recommendation:

. . . Applicant has not substantively challenged the contested OER's content. Instead, he has focused exclusively on the technical propriety of his rating officials.

• • •

The provision in the Personnel Manual that deals with rating chain exceptions discusses disqualification as a preemptive course of action, and does not require invalidation of reports in which a rating official, in retrospect, should have been disqualified. To do otherwise would allow the Reported-on Officer to determine the acceptability of a completed evaluation based simply on the nature of marks and comments provided.

### **AFFIDAVITS PROVIDED TO THE PRRB**

#### *Affidavit of XXX*

In an affidavit to the PRRB in response to the applicant's application for relief to that board, XXX stated the following:

. . . I recused myself from involvement with any decisions involving my xxxxx during his time at Xxxxxx . . . I have never had a discussion with [the applicant] not [sic] any xxxxxxxx xxxxxs, or their Staff, concerning the conduct or military performance of my xxxxxx.

During the later part of September 199x I began receiving disturbing information concerning [the applicant's] . . . inconsistent and irrational behavior with . . . Xxxxxx. Saying one thing then doing something else, degrading people in public, using foul and abusive language, and breaking down lines of communication between the xxxxxx and other elements of the xxxxx. . . .

. . . Early in November 199x [the applicant] entered into a tirade about how stupid the Coast Guard was concerning the policies. . . . Looking back it was apparent now that strong irreconcilable differences were present . . . .

• • •

In March 199x [the applicant] advised me that two projects were complete when in fact they were not. . . . [The applicant] had told his staff to put them on the back burner, that I would be leaving soon and that he could outwait me. That was the final straw and the culmination of events led to his relief and reassignment . . . .

#### *Affidavit of VVV*

VVV also submitted an affidavit to the PRRB. Much of the affidavit is identical to the statement VVV submitted to the AI investigator on September 4, 199x. Four pages of the affidavit detail the applicant's alleged shortcomings as xxxxxxxx xxxxxs.

The affidavit also includes the following responses to the applicant's allegations about XXX:

. . . I strongly disagree with [the applicant's] assessment of [XXX's] action. . . . I never personally observed any favoritism or otherwise illegal xxxxx acts on the part of [XXX] during the case. . . .

• • •

I recall discussing the case with [XXX] on several occasions. He had two concerns: he didn't want to get involved with his xxxxxx's situation, but, on the other hand, there were other xxxxs involved and he was concerned about the staff's judgment and the overall fairness of the way the situation was being handled. . . . I told him that I would investigate the situation and act on my own, if warranted, keeping him informed. I think that [the applicant] and I met with [XXX] on this matter, but I don't recall all the details.<sup>6</sup> I did not perceive any pressure from [XXX] at any time to improperly influence the case in his xxxxxxxxxxx's favor. . . .

• • •

[In his memorandum, the applicant] describes meeting with [XXX] and myself about the "multiplicious" charges. In fact, I had told him my opinion on several occasions prior to any meeting with [XXX] that he needed to sort out the central charges that were appropriate and pursue them . . . . I strongly recommended that he not proceed as he had planned . . . . I informed him of my intentions to keep [XXX] informed and I invited him to either join me in those conversations or meet with him alone if he so desired in continuation of my recommendations to improve relations with [XXX]. Clearly, both xxxxs needed a xxxxxx. In fact, I think [the applicant] further over-reacted and lessened the punishment too much after their appeal.

### *Affidavit of ZZZ*

ZZZ, who served as the supervisor for the disputed OER, also submitted an affidavit to the PRRB. In response to the applicant's allegations concerning an investigation of himself, ZZZ stated the following:

. . . On 27JAN9x [XXX] showed me an anonymous letter [about the applicant] that had been FAX'd from [a xxx xxxxxx ]. [XXX] said he had talked to [the xxx xxxxxx ] and that we should look into these allegations. We agreed on a list of people I would talk to informally to determine if an "official" investigation should be convened. I did not feel directed to conduct a covert investigation. More accurately, we agreed that I would conduct a preliminary fact-finding.

. . . I documented 31 interviews with 18 people. I interviewed [two people who worked directly with the applicant].

. . . There was no [official] investigation. . . . My preliminary fact-finding, and my recommendation, assisted [XXX] in deciding to administratively relieve and request reassignment of [the applicant]. I think this was generous to [the applicant] because, in my

---

<sup>6</sup> The Board notes that this statement differs from the one VVV gave to the AI investigator, which states that he "may have" met with the applicant and XXX but he is "not sure."





xxxxxxx [Assistant Xxxxxxxxxxs] . . . irretreivably burned bridges. . . . Weakness in people-skills: unable to work w/ others, over-controlling w/ own staff, combative, non-cooperative, created neg[ative] energy/hostile climate. Own agenda always 1st. . . . Poor leadership: wildly erratic behavior, near-intimidating/abusive, then apologetic/ingratiating. Autocratic, arrogant, . . . perfectionist, intolerant, . . . frustrated, inconsistent, overreactive, radiates stress in all directions. . . . extensive counseling no avail . . . brute force methods. Bullied/antagonized . . . sometimes inspiring . . . sometimes embarrassing . . . humiliating xxxxs . . . headache for all. Responsive when it suited him, otherwise slow. . . .

- “Self-absorbed . . . intimidating to [juniors], uncooperative w/ peers, critical of [seniors]. Items of starkly unprofessional behavior & language cemented ineffectiveness . . . no role model for xxxxxxxxxxxxxxxxxxxx.”

- “[R]emoved as [xxxxxxxxxx xxxxs] due to lapses in judgment & [leadership] . . . [The applicant] has great strengths, but they have not found application in this billet. Bad match . . . no actionable wrongdoing, no scandal, but strong irreconcilable differences.”

After being relieved from duty, the applicant was reassigned as a xxxxxx to conduct xxxxxx for the Chief of xxxxxx and the xxxxxxxx of the Coast Guard. His OER for the period March 17, 199x, through April 30, 199x, is number 10 in the chart on page 18, below. The comments in the OER are quite laudatory. Neither this OER nor any other document in the applicant’s file at this time (except the disputed OER) refers to his removal as xxxxxxxxxxxxxxxxxxxx.

**APPLICANT'S MARKS IN 10 OERs FROM 7/4/xx THROUGH 4/30/xx**

<b>CATEGORY<sup>a</sup></b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>	<b>9<sup>b</sup></b>	<b>10</b>	<b>AVE<sup>c</sup></b>
Being Prepared/Planning											
Using Resources											
Getting Results											
Responsiveness <sup>e</sup>											
Work-Life Sensitivity <sup>e</sup>											
Adaptability <sup>e</sup>											
Specialty Expertise/Professional Competence											
Collateral Duty <sup>e</sup>											
Warfare Expertise <sup>e</sup>											
Working with Others/Teamwork											
Human Relations/Workplace Climate											
Looking Out for Others											
Developing Subordinates											
Directing Others											
Evaluations											
Speaking & Listening											
Writing											
Initiative											
Judgment											
Responsibility											
Stamina <sup>e</sup>											
Health & Well-Being											
Military Bearing <sup>e</sup>											
Professionalism											
Dealing with the Public <sup>e</sup>											
Comparison Scale <sup>f</sup>											
<b>Average for OER</b>											

<sup>a</sup> Some categories' names have changed slightly over the years.

<sup>b</sup> Disputed OER.

<sup>c</sup> Average score of all OERs except the disputed one, which is shaded. Averages have been rounded.

<sup>d</sup> Score given was "NO," which means there was no opportunity to observe this trait. The applicant was in school at the xx during the period covered by the third OER in the chart.

<sup>e</sup> Category discontinued or nonexistent until later years.

<sup>f</sup> The Comparison Scale is not actually numbered. In this row, "2" means the applicant's performance was rated to be "satisfactory, but limited in assignment potential." A "5" means the applicant "has xxx POTENTIAL [and] should be given challenging assignments and considered [for xxx selection] with his peers." A "6" means the applicant is "recommended for xxx selection at a future board." A "7" means the applicant is "recommended for xxx selection at next board."

\* No mark was made.

**RELEVANT LAWS AND REGULATIONS**

## *United States Code*

Title 10 U.S.C. § 1552(a)(1) provides the following:

The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard. [Emphasis added.]

Title 10 U.S.C. § 628(a)(1) requires the Secretary of a "military department" "under regulations prescribed by the Secretary of Defense, [to] convene a special selection board under this subsection . . . to determine whether such officer should be recommended for promotion." Title 10 U.S.C. § 101(a)(8) states that "[t]he term 'military department' means the Department of the Army, the Department of the Navy, and the Department of the Air Force."

## *Coast Guard Personnel Manual (COMDTINST M1000.6A)*

Article 10-A governs the preparation of OERs. Each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), the reporting officer (the supervisor's supervisor), and the reviewer (the reporting officer's supervisor). Article 10.A.2.f.(1)(c) provides that "[f]lag officers will also serve as Reviewers on those reports for which they are Reporting Officers."

Article 10.A.2.g. provides for exceptions to the rating chain composition:

- (1) In instances where a Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out the responsibilities of a member of the rating chain, the next senior officer in the chain of command will designate an appropriate substitute who is capable of evaluating the Reported-on Officer. . . .
- (2) . . . "Disqualified" includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation.

## *Coast Guard Administrative Investigations Manual (COMDTINST M5830.1)*

Article 1.D.4.a. of the Administrative Investigations Manual requires an informal investigation to be conducted by "one or more commissioned officers."

Article 1.I.1. of the Administrative Investigations Manual provides the following instruction concerning the content of a report of an informal administrative investigation:

The investigative report must be made as complete as possible to ensure preservation of evidence relating to the incident investigated and to give authorities in the Coast Guard an adequate basis on which to take action. . . . These are suggestions, however, and are not all-inclusive. Any information that will aid in understanding or help reviewers analyze the report should be included. . . .

Article 4.C.5.a. provides the following rules of evidence for reports of informal investigations:

An informal administrative investigation is not bound by formal rules of evidence applicable before courts-martial, and may collect, consider, and include in the record any credible (reasonably believable) evidence which is relevant to the matter under investigation. . . . A witness statement should be signed by the witness, but may be certified by an investigator to be either an accurate summary of, or a verbatim transcript of, an oral statement made by the witness.

Section C.1.a. of Enclosure (9) to the Administrative Investigations Manual provides the following guidance to persons conducting an informal investigation:

. . . You should be interested in any information bearing on the subject matter of the investigation which either falls within the scope of the investigation or could lead to information falling within its scope. . . .

Section C.2.b. of Enclosure (9) advises investigators that “at the end of the interview, it’s always a good idea to allow witnesses to make any additional statement they may desire. Take careful notes, and write up a summary of the interview as soon as possible.”

Section D.1.a.2. of Enclosure (9) provides the following guidance with regards to findings of fact in an informal investigation:

. . . [T]he findings of fact must, themselves, be based on the evidence gathered. . . . You should be careful to exclude any matters of opinion from this section. Only matters whose truth is established by a “preponderance of the evidence” (i.e. matter which, in light of the evidence, have at least a 51% probability of being true) should be included. You should list all findings of fact which are relevant to the scope of the investigation.

Section D.1.a.3. of Enclosure (9) provides the following guidance with regards to opinions in an informal investigation:

Opinions are reasonable evaluations or conclusions, which are based upon the facts found, but which do not meet the degree of certainty required of a "fact". . . . You should list all opinions which are relevant to the scope of the investigation.

Article 1.J.2.b.1. provides that the convening authority and intermediate reviewing authorities of an informal investigation (in this case, the Xxx xxxxxxxxx)

shall forward the investigative report setting forth appropriate comments and recording approval or disapproval, in whole or in part, of the proceedings, findings of fact, opinions, and recommendations. These authorities may amend, expand, or modify findings of fact, and may comment on or make new opinions or recommendations without returning the record, so long as that action is supported by evidence of record. . . .

Article 1.J.2.c. provides that the final reviewing authority (in this case, the xxxxxxxxx of the xxxxxx) "shall take final action to 'approve (or disapprove) the findings of facts . . . .' The result sought is that the final action is either a 'stand alone' document which closes the case, or which is (at the least) complete without reference to prior opinions and recommendations."

### *Code of Federal Regulations*

Section 33 C.F.R. § 52.61(f) provides as follows:

If the Board deems it necessary to submit a comment or recommendation to the Secretary as to a matter arising from, but not directly related to, the issues in a case, it does so by separate communication.

## **FINDINGS AND CONCLUSIONS**

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10, United States Code. The applicant was timely.
2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 CFR § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant alleged that the rating chain for his OER for the period June 1, 199x, to March 16, 199x, when he served as xxxxxxxxx xxxxxxxs at the xxxxxxxxxxxx, was improperly constituted. He asked the Board to remove the disputed OER from his military record. As xxxxxxxxx xxxxs, he had been in conflict with the Xxxxxxxxxx over the amount of punishment due the Xxxxxxxxxx's xxxxxxxx, who was xxxx at the xxx.

This conflict, the applicant alleged, disqualified the Xxxxxxxx from serving as the reporting officer and reviewer for the OER. As a result of the conflict, he alleged, the entire OER was tainted because of the Xxxxxxxx's influence over the Assistant Xxxxxxxx, who served as supervisor for the OER.

4. The Chief Counsel of the Coast Guard recommended that the Board order the disputed OER to be removed from the applicant's personnel file "[b]ased on the unique circumstances of this case."

5. The record shows that there was a substantial personal conflict between the Xxxxxxxx and the applicant over punishment awarded to the Xxxxxxxx's X. The Board finds that the applicant has shown by a preponderance of the evidence that the Xxxxxxxx was "disqualified" from serving on his rating chain as someone with "a personal interest or conflict . . . [which] raises a substantial question whether the Reported-on Officer [received] a fair and accurate evaluation." Article 10.A.2.g., COMDTINST M1000.6A. Therefore, the Coast Guard committed an error when it permitted the Xxxxxxxx to serve on the applicant's rating chain. However, as the PRRB found, the applicant has not provided any evidence that the disputed OER is inaccurate in any way. Furthermore, the Coast Guard has presented considerable evidence that the OER is accurate. Nevertheless, because the Xxxxxxxx was disqualified from serving on the rating chain by Article 10.A.2.g. of the Personnel Manual, and in light of the Chief Counsel's recommendation that the Board grant this relief, the Board finds that the OER should be removed from the applicant's record.

6. The applicant also alleged that the Coast Guard retains copies of OERs removed by the Board in an alternate file. He asked the Board to draft its Order so that this would not occur with the applicant's disputed OER. The Chief Counsel did not respond directly to this allegation. However, he presented evidence indicating that records of BCMR Orders and resultant actions are kept in his office. The Board finds that no copy of the disputed OER should be kept in any file accessible by a selection board, as that would defeat the purpose of the Board's Order. However, the Board finds that it is entirely appropriate for the Chief Counsel to retain in his confidential files records of all actions taken by the Board, including copies of the OERs removed by the Board.

7. The applicant asked the Board to order the Coast Guard to destroy any record of his two failures of selection to xxx. The Chief Counsel presented credible evidence indicating that the Coast Guard does not keep records specifying who has not been selected for xxx. The Board finds that no relief is necessary with regard to the applicant's request in this respect.

8. The applicant asked the Coast Guard to convene an ad hoc special selection board for the applicant. As the applicant acknowledged, neither the Board nor the Coast Guard has statutory authority to convene a special selection board. Furthermore,

the Board is not convinced that it has the authority to order the Coast Guard to convene an ad hoc special selection board. Even if it did have such authority, the Board is not convinced that it would be appropriate to exercise it. In the absence of such relief, the applicant asked the Board, in effect, to conduct its own comparison and order the Coast Guard to promote the applicant. The Board notes that, as long as he continues to serve, the applicant will be considered for selection to xxxxxx by at least the next two selection boards. In light of these continuing opportunities for promotion, the Board finds that it would be inappropriate for it to substitute its judgment for that of a duly convened selection board of experienced Coast Guard officers, particularly when the resultant promotion would be to a xxx. Therefore, no relief is due with respect to this request.

9. The applicant requested that all references to his removal as xxxxxxxxxx be deleted from his record. The Chief Counsel stated that, other than the disputed OER, there are no references to the applicant's relief as xxxxxxxxxx in the personnel file. The Board finds that, other than the OER that is being removed, no other record in the applicant's personnel files refers to his relief as xxxxxxxxxx. Therefore, the Board finds that no relief is necessary with regard to this request by the applicant.

10. The applicant asked the Board not to have a copy of this Final Decision included in his personnel records. The Chief Counsel presented evidence indicating that Final Decisions of the BCMR are removed from personnel records before they are sent to selection boards. However, he did not state that a copy of this Final Decision would not be retained in the file at other times. In light of the highly prejudicial and confidential nature of some of the information contained in this Final Decision, the Board finds that no copy of it should be kept in the applicant's personnel record at any time or in any file accessible to the members of a selection board to xxx.

11. The applicant also asked the Board to have a copy of this decision attached to the PRRB's file concerning this case. The Chief Counsel did not address this request. The Board finds that, in the interest of justice, it would be appropriate for a copy of this Final Decision to be added to the applicant's case file at the PRRB.

12. The applicant asked the Board to remove all derogatory comments about him that appear in the report of the administrative investigation of the alleged preferential treatment of the Xxxxxxxx's xxxxx at xxxxx. The applicant alleged that the comments were gratuitous, irrelevant, untested, and unfair to him. The applicant also alleged that the investigation was mishandled in several ways.

13. The Chief Counsel argued that the Board has no jurisdiction over the records of an administrative investigation. He stated that the Chief Counsel's memorandum to the PRRB calling the derogatory comments gratuitous and irrelevant was not the Coast Guard's advisory opinion in this case. Furthermore, he stated, the applicant has presented no evidence indicating that the derogatory comments about his performance are false.



14. Under 10 U.S.C. § 1552(a)(1), the Board has authority to correct “any military record” of the Coast Guard. The Board finds that a record of an informal administrative investigation convened by the Xxx xxxxxxxxx into alleged misconduct at the Xxxxxx is a “military record” within the meaning of the statute.

15. The Board finds that none of the applicant’s allegations with respect to the rank of the investigator and his conduct violates the regulations with regard to informal administrative investigations. In addition, the Board finds that none of the alleged errors in the investigation would so bias the investigator against the applicant as to render his summaries of the interviewees’ statements untrustworthy or his motives in gathering the information suspect.

16. The Board finds that, while the derogatory comments about the applicant might be considered gratuitous, irrelevant, and unfair for the purposes of the PRRB, they are quite relevant for the purposes of the investigation. The investigator was instructed to investigate “all the facts surrounding” an allegation of preferential treatment of the xxx and to indicate whether there might be any “systemic problems” at the xxxxxxxxxxxxxxxxx. The applicant himself had alleged that he was pressed to give preferential treatment to the Xxxxxxxx. Moreover, as xxxxxxxxx, the applicant’s job performance (like that of any authority at the Xxxxxx) was within the scope of any investigation intended to identify “systemic problems” at the xxxxx.

17. In addition, the Board finds that the Coast Guard’s regulations regarding informal administrative investigations encourage investigators to allow interviewees to speak freely regarding their concerns, to gather all relevant evidence or evidence that may lead to relevant evidence, and to record the evidence in their reports. Articles 1.I.1. and 4.C.5.a., and Enclosure (9), COMDTINST M5830.1. The Board also notes that in accordance with Article 1.J.2.b.1., COMDTINST M5830.1, the Xxx xxxxxxxxx disapproved the investigator’s finding and opinion regarding the applicant’s job performance. Therefore, the Board finds that the Coast Guard has not committed any error or injustice by preserving the record of the administrative investigation, including the derogatory comments made about the applicant.

18. The applicant asked the Board to comment to the Secretary about the alleged wrongdoing in this case and certain Coast Guard policies. The Board finds that with respect to this case and the identified policies, the Coast Guard has not committed any errors that require such comment.

19. Therefore, the Board finds that the applicant is entitled to have the disputed OER removed from his record and not be placed in any record that is accessible to any member of a selection board to xxx. In addition, a copy of this Final Decision should not be placed in the applicant’s personnel file or in a file accessible to a selection

board to xxx, but should be placed in the PRRB's file on the applicant's case. No other relief should be granted with respect to the applicant's requests.

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

## ORDER

The application for correction of the military record of XXXXXXXXX, USCG, is granted in part as follows:

- The OER covering the period from June 15, 199x, to March 16, 199x, shall be removed from the applicant's military record. It shall be replaced by one marked "For Continuity Purposes Only" in accordance with the terms of Article 10.A.3 of the Coast Guard Personnel Manual (COMDTINST M1000.6A). This OER shall not be retained in any file accessible to the members of a selection board to xxx.
- No copy of this Final Decision shall be included in any of the applicant's personnel files or in a file accessible to the members of a selection board to xxx.
- A copy of this Final Decision shall be placed in the applicant's case file at the PRRB.

The remainder of the applicant's requests are denied.

