

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 1999-029

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on December 7 1998, upon receipt of the applicant complete application for correction of his military record..

This final decision, dated January 31, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a lieutenant (LT) on active duty asked the BCMR to correct his record by removing a special officer evaluation report (special OER) for the period [REDACTED]

EXCERPTS FROM RECORD AND SUBMISSIONS

Background

On [REDACTED], the applicant was involved in a helicopter crash. On this date, as the aircraft commander, he was flying a mission in support of the local Marine Safety Office. Another lieutenant was the co-pilot and was the member actually flying the helicopter at the time it crashed.

During the mission of [REDACTED], the aircraft suffered an instrument malfunction and the helicopter descended into the terrain. There were no injuries, but there was major damage to the aircraft. Following the crash, there were concurrent safety and administrative investigations into the incident. During the administrative investigation, the applicant was given Miranda-type warnings, pursuant to Article 31 of the Uniform Code of Military Justice, but he was not designated a party to the investigation.

The applicant alleged that during the safety investigation, the co-pilot of the aircraft gave a privileged statement that should not have been included in the administrative investigation, pursuant to COMDTINST M5100.47. The applicant stated that the co-pilot's statement was used, without the applicant's consent, in the administrative investigation and was the basis on which the Commander [REDACTED] determined that the applicant was at fault in the incident. According to the applicant, the Commander [REDACTED] ordered the applicant's commanding officer (CO) "to reflect the incident in the [applicant's] next OER" (not a special OER). The applicant further alleged that the CO exercised undue command influence by ordering the applicant's rating chain to prepare the special OER.

The applicant stated that the reporting officer improperly submitted the special OER on [REDACTED] before the administrative investigation was completed.¹ He alleged that this was a violation of Article 10-A-3b of the Personnel Manual. The administrative investigation was finally approved on [REDACTED]

Applicant's Arguments

1. The applicant stated that the CO did not follow the directions of the Commander, [REDACTED], to reflect the incident in the applicant's next OER. Instead, the CO submitted a special OER, which was a violation of the Commander's directive. He argued that had the CO complied with the directive of the District Commander, references to the accident would not have been emphasized as they were in the special OER.

On the special OER, which was completed [REDACTED] the applicant received a 3 in the category of operational specialty/expertise. All other categories were marked non-observed. The OER contained the following comments:

While serving as Aircraft Commander aboard [REDACTED] during the early morning hours of [REDACTED] encountered an aircraft instrumentation malfunction while in instrument meteorological conditions. During this emergency, he lost situational awareness and did not recognize that the co-pilot at the controls had inadvertently entered a descent into the terrain. The impact resulted in strike damage to the aircraft. There were no deaths or significant injuries.

¹ According to the CO, the first version of the OER that was submitted to Coast Guard Headquarters, was returned to him for compliance with the published rating chain. Subsequently, all three members of the rating chain apparently signed the OER on [REDACTED]

My personal experience with this officer affirms the administrative investigation's review of training documents and performance records that found no trend of substandard performance. In fact, he has often excelled. I conclude that this was an isolated incident, not indicative of his overall ability or performance.

This report is submitted as required by Art 10-A-3b(3) of the Personnel Manual.

After submitting the special OER, on [REDACTED] the applicant's CO requested that the Commander, Coast Guard Personnel Command (CGPC), remove and return the special OER. The CO alleged that the special OER was submitted in violation of Article 10-A-3b(3) of the Personnel Manual in that the investigation was not completed before the report was submitted. Also, it was the opinion of the CO that a special OER should not have been submitted at all because the administrative investigation exonerated the applicant by the absence of a finding of misconduct.

On [REDACTED] CGPC denied the CO's request to have the special OER removed from the applicant's record. CGPC stated that the OER had been validated and placed in the applicant's record. He further told the CO that the applicant would need to ask the BCMR to remove the special OER. Also, CGPC stated that he disagreed with the CO that the special OER was prepared in violation of the Personnel Manual. He stated that "Article 10-A-3b.(3) simply requires that the investigation be complete for the purposes of making appropriate, objective, supportable and relevant performance observations and that "subsequent reviews of the investigation do not preclude performance documentation."

With respect to the exoneration of the applicant, CGPC stated that "a finding of misconduct is irrelevant in this case as to a determination of exoneration. The identification of co-pilot error as the cause of the mishap is grounds to indicate that the investigation did not exonerate the officers."

The CO gave the applicant a copy of the response from CGPC. The CO wrote in the corner of that memo the following comment: "Here's what I got back. If you want to pursue further you can initiate action and make the same points I did and see if the . . . BCMR agrees with you and me and disagrees with [CGPC]. You can also add that the OERs were improperly done due to wrongful command influence on part of CO on [the supervisor] and [reporting officer]." The applicant alleged that these comments by the CO admitted that he asserted command influence on the drafters of the OER. The applicant further asserted that if the CO had followed the instructions of the District Commander, the references to the mishap would not have been emphasized in the special OER.

2. The applicant argued that even though the Administrative Procedures Act requires agencies to follow their own regulations, the Coast Guard violated both CONDTINST M5100.47 and the Personnel Manual in this case.

The applicant alleges that the Coast Guard violated COMDTINST M5100.47 by wrongfully including and using the co-pilot's privileged statement in its administrative investigation. The applicant further alleged that the co-pilot's privileged statement was wrongfully used as the basis for the comments in the disputed OER. The applicant alleged that neither he nor the co-pilot consented to the use of the co-pilot's privileged statement in the administrative investigation. The applicant argued that without the co-pilot's statement in the administrative investigation, the investigating officer and reviewing authorities might well have come to a different conclusion with respect to the cause of the plane crash. The applicant stated that once an error has been established, the BCMR is under a duty to correct the record, and it is barred from speculating whether the error was harmless. He cited *Kindred v. United States*, 41 Fed. Cl. 106 (1998) in support of his position.

The applicant asserted that the Coast Guard violated Article 10-A-3b(3) of the Personnel Manual by submitting the special OER before the investigation had been completed. Article 10-A-3b(3) of the Personnel Manual states that "[a] special OER is required upon final completion of criminal, other disciplinary, or investigative action which does not exonerate or acquit the reported-on officer and which relates to the reported-on officer's performance or any other matter on which he or she may be evaluated." The applicant argued that as noted by his CO, in a letter to the Commandant dated, [REDACTED] the submission of the special OER was in error because it was submitted before the investigation had been finalized and because the approved findings of the investigation had exonerated him of any misconduct. The applicant argued that the Coast Guard's rejection of this position was arbitrary and capricious and a violation of its regulations.

The applicant alleged that the Coast Guard also violated Article 10-A-4(g) of the Personnel Manual by submitting the special OER without having first made the applicant a party to the investigation. The applicant submitted a copy of a letter written by CGPC (in another situation), which according to the applicant supports his contention that he should have been a party to the investigation prior to submitting the special OER. In that letter, CGPC wrote:

In order for an OER to be required under [Article 10-A-3b.(3), Personnel Manual] two tests must be met. First, an investigative action must have failed to exonerate the Reported-on Officer. . . . Second, the Reported-on Officer must have been made a party to the investigation. This implicit requirement devolves from the restriction in Article 10-A-4g.(1) . . . against mentioning an investigation in which the Reported-on officer was not accorded full party rights. . . . If submission

of a special OER is desired, it must be completed in accordance with Article 10-A-3b.(5) of [the Personnel Manual] and must include a flag officer in the rating chain.

3. The applicant alleged that because he has a property and liberty interest in his active duty status, he was entitled to certain due process rights. He stated that the Supreme Court has held that statutory entitlements can give rise to a property interest under the due process clause. *Goldberg v. Kelly*, 397 U.S. 254 (1970). He asserted that provisions of various Coast Guard manuals and instructions dealing with retention and career enhancement issues are sufficient to trigger such protection.

The applicant also claimed that he has a liberty interest in his continued governmental employment. He alleged that the OER implicated a liberty interest since it affects the individual's good name and imposes a stigma. The applicant stated that a liberty interest in governmental employment is implicated if the individual's good name, reputation, honor or integrity are at stake, or if the governmental action could impose a stigma or other liability that could prejudice other employment opportunities. *Perry v. FBI*, 781 F.2d 1294, 1300 (7th Cir. 1986). The applicant argued that he meets both prongs of the liberty interest as enunciated in *Perry*. The applicant asserted that since he has established that he has legitimate liberty and property interests in his continued career, the due process clause of the Fifth Amendment to the Constitution attaches to his case, and he is entitled to the due process as prescribed by the Secretary.

The applicant stated that the alleged command influence, in this case, prejudiced his right to due process under the Fifth Amendment to the Constitution. *United States v. Osburn*, 33 M.J. 810, 812 (A.F.C.M.R. 1991) and *Cole v. United States*, 171 Ct. Cl. 178, (1965). He also argued that the Coast Guard violated his due process rights by improperly submitting the special OER. He stated that the special OER should be set aside.

The Coast Guard Investigation

On [REDACTED] the Commander, [REDACTED], ordered a single individual administrative investigation, pursuant to Chapter 4 of the Administrative Investigations Manual, into the January 13, 1995, helicopter crash. The Commander did not order the designation of parties to the investigation. The Commander further advised the investigator to "cooperate with the Mishap Analysis Board . . . and to the extent feasible coordinate the collection of . . . evidence, except witness statements which are taken by the Mishap Analysis Board under the promise of confidentiality."

The investigating officer's administrative report is dated [REDACTED] In that report, he offered the following opinions about the accidents.

The primary cause of this mishap was the aircrew's failure to maintain situational awareness in the face of (at worst) a non-extremis causing in-flight emergency. The exact cause of the divergence in the torque indications observed by this crew is more or less irrelevant. Even had [REDACTED] lost one of its engines, the flight profile of [REDACTED] at the time provided more than an adequate cushion to allow for a safe landing at a suitable airport.

For his part, I believe that the pilot in command [the applicant] failed to adequately complete the "Big Four" and that this was a critical link in the chain of events leading up to the accident. Though he called for the right procedure, I do not believe that [the applicant] carried through with each step. He should have called for specific target values with reference to altitude and airspeed and insisted that the co-pilot acknowledge and achieve these values before moving on to the next step. Instead by merely glancing over the first steps . . . without seriously focusing on them, he violated the most elementary rule in handling any aircraft emergency; aviate first.

The investigating officer recommended to the Commandant that the applicant have his designation downgraded to that of first pilot until he has successfully completed a proficiency course and a thorough standardization check.

On [REDACTED] the Commander, [REDACTED] as the convening authority for the investigation, wrote that the cause of the mishap was pilot error. He further stated that the in-flight emergency did not constitute, in and of itself, an in extremis threat to the airworthiness of the helicopter. He stated that "[I]t was the focus of the flight crew on the emergency to the exclusion of other vital indications that caused the aircraft to strike the ground." The Commander wrote that the flight crew should have developed the mental discipline to fully carry out the proper procedures to react to indicator anomalies and minor in-flight emergencies.

The commander then directed that the applicant's CO reflect the incident in the applicant's next OER. He also recommended that the Commandant direct the CO to make an entry in the Mishap Record Section of the applicant's Aviator Flight Log Book documenting the strike damage to the helicopter and citing the applicant's failure to avoid inadvertent contact with the ground. He also noted that the investigating officer's recommendation that the applicant's designations be downgraded, and that he successfully complete a proficiency course, had already been implemented by the applicant's CO.

After the investigating officer submitted his report, there was concern by the Chief, Office of Aviation Management, that the Investigating Officer had used a statement given by the co-pilot to the MAB (Mishap Analysis Board) without first obtaining the consent of the co-pilot for release of the statement. The investigation, as originally submitted, contained two versions of the statement given by the co-pilot to the MAB and one summarized statement of an interview between the investigating officer and the co-pilot. The more detailed MAB statement contained the co-pilot's hand-written release of that statement for use by the Investigating officer. The other MAB statement contained no such connotation.

On [REDACTED] the Chief of the Office of General Law, ruled that although there was no evidence that the co-pilot's non-annotated statement was improperly released, he recommended that that statement be removed from the administrative investigation. He did not rule that the other annotated MAB statement or the summarized interview had to be removed and it remains as part of the administrative investigation. The Chief of the General Law Division stated that the removal of the non-annotated statement would ensure that it was not used without the co-pilots' consent. Also, the removal of the non-annotated statement would preserve the integrity of the MAB. The Chief of the General Law Division found that the administrative investigation was complete and legally sufficient, even with the removed statement. He noted that the investigating officer did not rely on the removed statement for the basis of any of his findings of fact.

The Chief Counsel noted that there was no indication that the co-pilot was granted confidentiality during the MAB. The Chief Counsel stated that "[n]onetheless, witness statements are not the type of factual information that is routinely released from a limited use Mishap Analysis Report."

On [REDACTED] the findings of fact, opinions, and recommendations contained in the investigative report, as acted upon by the convening authority, were approved.

Views of the Coast Guard

On June 25, 1998, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the comment - "[m]y personal experience with this officer affirms the administrative investigation's review of training documents and performance records that found no trend of substandard performance[]" - be removed from the special OER. According to the Chief Counsel these comments are prohibited by the Personnel Manual because they mention the investigation without having made the applicant a party to the administrative investigation. He recommended that the remainder of the applicant's request be denied.

The Chief Counsel stated that a special OER was the proper administrative method to document the applicant's performance. According to the Chief Counsel, this aspect of the applicant's performance could not have been documented in a subsequent regular OER because doing so would have constituted evaluating performance that occurred in another reporting period. This would have constituted a violation of the Personnel Manual. See Article 10-A-4g.(3)(g), Personnel Manual. The Chief Counsel stated that the applicant's command could not document the applicant's performance in the regular OER, which included the date the mishap occurred, because the command did not have "objective information upon which to base an evaluation of [the applicant's] performance."

The Chief Counsel stated that Article 10.A.3b of the Personnel Manual required the submission of a special OER in this case. This provision calls for a special OER "upon final completion of criminal, other disciplinary, or investigation action which does not exonerate or acquit the reported-on officer and which relates to the reported-on officer's performance or any other matter on which he or she may be evaluated." The Chief Counsel argued that a special OER was required in this case because the investigation was 1) complete for the purposes of making appropriate, objective, supportable and relevant performance documentation, and; 2) the applicant was not exonerated as to his airmanship. In this regard, the Chief Counsel pointed to the investigative findings that "the primary cause of the mishap on [REDACTED] was the aircrew's failure to maintain situational awareness in the face of (at worst) a non-extremis causing in-flight emergency." The Chief Counsel further stated that the investigating officer found that the applicant "[f]ailed to adequately complete the 'Big Four' and that this was a critical link in the chain of events leading up to the accident."

The Chief Counsel asserted that the applicant's allegation -- that his CO exerted undue command influence on the rating chain for the special OER by improperly directing that a special OER be submitted when it was not authorized -- is meritless. The Coast Guard argued that the applicant has not challenged the content of the special OER but rather the fact that it was submitted.

The Chief Counsel stated that Article 10.A.3b. of the Personnel Manual permits higher authority within the reported-on officer's chain of command to direct the submission of a special OER under certain circumstances. The Chief Counsel stated that it was appropriate for the Commander, [REDACTED], to direct that the applicant's airmanship of [REDACTED] be documented, notwithstanding the fact that the Commander inaccurately stated "the ministerial submission requirement of Article 10 of the [Personnel Manual] by directing that "[t]his incident be reflected in (applicant's) next OER." The Chief Counsel stated that upon receiving the Commander's directive, the applicant's CO directed that the

applicant's supervisor and reporting officer to submit a special OER rather than include the performance in a subsequent regular OER.

The Chief Counsel stated that the applicant is incorrect when he alleges that the statement offered by his co-pilot to the Mishap Analysis Board (MAB) was improperly included in the administrative investigation. He stated that the controlling regulation, COMDTINST M5100.47 is clear and unambiguous that an offer of confidentiality is not automatically offered to all witnesses; the MAB must affirmatively confer that offer to the witness. The Chief Counsel stated the MAB did not offer the applicant or the co-pilot confidentiality with respect to their statements. Thus, the Chief Counsel concluded that neither the applicant's nor the co-pilot's statement was confidential and they could be used in the administrative investigation.

Moreover, the Chief Counsel stated that the co-pilot gave the administrative investigating officer permission to use his MAB statement. The Chief Counsel stated that the co-pilot made a handwritten notation on the cover sheet to his statement giving the investigating officer permission to use the statement. Additionally, the Chief Counsel stated that the final reviewing authority for the administrative investigation ordered the co-pilot's non-annotated statement removed. He further stated that none of the findings by the investigating officer relied on the co-pilot's non-annotated statement. The Chief Counsel argued that the board should conclude that the applicant's rating chain based their evaluation on objective, non-confidential evidence.

In addition, the Chief Counsel stated that reporting officials may base their evaluations upon reliable reports and records. See Article 10-A.2e(2)(a), Personnel Manual. He argued there is no prohibition against using an administrative investigation as a basis for performance information in an OER. Article 10.A.4g(1) simply prohibits mentioning the investigative proceeding in the OER, if the reported-on officer was not made a party to the proceeding.

The Chief Counsel stated that the applicant was not entitled to "party rights" during the informal investigation, since parties are not designated in an informal investigation. The Chief Counsel stated that the issue of when a special OER is required is not dependent on the designation of parties.

A statement from the applicant's CO for the period under review was attached to the Coast Guard advisory opinion. He stated that he was "thoroughly and completely aware of the incident and performance in question as [he] was intimately involved in the supervision and evaluation of these two officers in his capacity as their commanding officer."

The CO stated that he mentioned the applicant's participation in the mishap in his regular OER which ended on [REDACTED] although the administrative investigation of this mishap was still in progress and causal factors had not been determined.

The CO stated that after his senior officer reviewed the administrative investigation, he directed that the actions of the applicant and the co-pilot be reflected in the next regular OER. The CO stated that this posed something of a dilemma, because the Personnel Manual prohibits referring to events in an OER that occurred outside of that reporting period. Therefore, he elected to submit a special OER.

The Chief Counsel also attached to the advisory opinion a statement from a LCDR who was assigned the task of reviewing the MAB to determine if confidentiality had been granted to the applicant or the co-pilot. The LCDR stated that she did not find "any documentation by the mishap analysis board in the report regarding any offer of privilege or confidentiality to any of the mishap aircrew members or witnesses." With respect to the co-pilot's statement, the LCDR stated further that

[t]he mishap analysis report also contains a transcript of a taped interview with [the co-pilot] conducted on [REDACTED] apparently conducted by a member of the Commandant appointed mishap analysis board (which relieved the permanent mishap board on [REDACTED]). The transcript contains a statement . . . by the co-pilot regarding a previous interview . . . indicating the subject of privilege was discussed [by a previous MAB member] at some point during their interview. . . . [S]omeone familiar with safety privilege might infer that privilege was offered. . . .

Applicant's Response to the Views of the Coast Guard

On November 22, 1999, the Board received the applicant's response to the views of the Coast Guard. He stated that it appeared that the Coast Guard was attempting to backtrack and misinterpret the events surrounding this incident to save themselves from embarrassment.

The applicant stated that he has not acquiesced in the finding that the accident resulted from a "loss of situational awareness" and challenged the accuracy of that statement.

The applicant stated that the Coast Guard's argument that - the applicant's rating chain was precluded from documenting the applicant's airmanship performance, with respect to the mishap, in the regular OER for the subsequent

reporting period - failed to take into consideration that the incident was already documented in the regular OER for the previous reporting period. The applicant argued that the special OER was superfluous and acted only to reemphasize the previous regular report.²

The applicant noted, as he did in his original brief, that regulations preclude submission of a special OER until an investigation is complete. The applicant stated that the Coast Guard did not disagree with this statement, but rather argued that the investigation was complete for the purpose of making appropriate objective supportable and relevant performance documentation. The applicant stated that there are no such limiting factors in the relevant Coast Guard directive.

The applicant restated the contention from his principal brief that a special OER is required only when the investigation does not exonerate or acquit the reported-on officer. He stated that the Coast Guard advisory opinion discussed the definition of exonerate but failed to mention the term acquit, which means "to set free, release or discharge as from an obligation, burden or accusation." According to the applicant, it is fair to say that he was acquitted, since the administrative investigation released him from further criminal processing.

The applicant stated that the Coast Guard asserted without citation or support that the allegation of command influence is meritless. He stated that command influence is facially present in this case. He pointed to the reporting officer's comment—"you can also add that the OER's were improperly done due to wrongful command influence on part of CO on Sup. & R.O"—to support his contention of wrongful command influence. The applicant stated that he has at least made a prima facie case of unlawful command influence, which has not been rebutted by the Coast Guard.

The applicant stated that the Coast Guard has attempted to imply that no confidentiality promise was made to the co-pilot regarding his statement to the MAB. However, the applicant noted that in an e-mail, supplied by the Coast Guard, a LCDR indicated that "a person familiar with the aircraft investigation procedures would have expected confidentiality." He noted the Coast Guard refused to release the MAB report under the claim of confidentiality. The applicant stated that the Coast Guard cannot have it both ways; either confidentiality was granted or it was not. He further argued that if confidentiality was not granted, the Coast Guard violated the Freedom of Information Act by withholding certain information from the applicant. He further argued that use of the co-pilot's statement without disclosing it to the applicant is in direct violation of the Supreme Court mandate in

² The only reference to the mishap in the applicant's previous regular OER, for the period [REDACTED] is located in block 3.h. This comments reads: "As [aircraft commander] of Class A Mishap [aircraft] ensured accounting of all [people on board] & maintained high group morale during three hour wait for rescue resource arrival."

Greene v. McElroy, 360 U. S. 474 (1959). According to the applicant, this case stated in part that "where governmental action seriously injures an individual, and the reasonableness of action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id.* at 496.

The applicant further argued that even if the co-pilot authorized the release of his statement, the provisions of COMDTINST M5100.47, Enclosure (2), Article 4a. still prohibits its release "outside of the safety program for any reason without the express consent of the Commandant (G-K) after consultation with the Office of the Chief Counsel. The applicant stated that no evidence of such consultation has been proffered by the Coast Guard.

The applicant attached an affidavit in which he swore that he had been offered confidentiality for his statement to the MAB. He stated that he understood that anything he stated in the MAB investigation was privileged and could not be used against him or released to any other person. He stated that as a result of the special OER he was not selected for a transition to fixed-wing aircraft.

COAST GUARD PERSONNEL MANUAL

Article 10-A-3b. of the Personnel Manual deals with special OERs. This provision states in pertinent part as follows:

Special OERs may be directed by the Commandant, commanding officers, higher authority within the chain of command, reporting officers. . . . The circumstances for the special OER must coincide with one of the below criteria. The authorizing article should be cited in Section 2 of the OER along with a brief description of the circumstances which prompt the OER's submission.

Subsection (3) of Article 10-A-3b provides as follows:

A special OER is required upon final completion of criminal, other disciplinary, or investigative action which does not exonerate or acquit the reported-on officer and which relates to the reported-on officer's performance or any other matter on which he or she may be evaluated. . . . This special report will cover the reporting period(s) or time frame, during which the conduct, which was the subject of the criminal, other disciplinary, or investigative action occurred. The evaluation shall be limited to those areas affected by the conduct which was the subject of the criminal, other disciplinary, or investigative action, since all other dimensions will be properly evaluated in the regular OER. This special OER is not required if the criminal, other disciplinary, or investigative

action was completed – and the subject conduct or performance occurred – all within a regular OER reporting period.

Article 10-A-4(g) deals with OER restrictions. It states that [r]eference to a final proceeding is only proper if the officer concerned has been made a party to and accorded full party rights during the course of the proceeding. . . . This restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings."

MISHAP INVESTIGATIONS, ENCLOSURE AND ENDORSEMENT PRECAUTIONS

Article 1.a. and b. of Enclosure (2) to COMDTINST M5100.47 states as follows:

Mishap Investigations. Mishap investigations and administrative investigations share a common goal of fact finding. However they serve different purposes within the Coast Guard and therefore must be treated differently. . . . The goal of a mishap investigation is to prevent future like mishaps, not to punish or assess liability. A mishap investigation traces the events from a time when things were going normally through the mishap evolution. This sequence of events is then analyzed for all contributory or causal factors that played a role in the mishap.

Administrative Investigations. Administrative investigations of accidents are conducted to gather facts for use during later administrative or legal proceedings. . . . Administrative investigations are administrative, not criminal, in nature. However, facts gathered by an administrative investigation can lead to a criminal investigation or formal charges.

Article 2.b. of this instruction states that the concept of privilege is intended to prevent the unnecessary disclosure of privileged information in mishap reports outside the safety program. This provision further states that

the concept of confidentiality is related to the concept of privilege. In some mishaps, the actual causal factors may never be discovered unless witnesses are assured that the information that they provide will be used for mishap prevention only. . . . A statement taken after an offer of confidentiality is provided to a witness will always later result in the assertion of the privilege in order to protect witness' statements from disclosure outside of the safety program. Confidential statements will not be released to any one, including government prosecutors, without

the express consent of Commandant (G-K) after consultation with the Office of the Chief Counsel.

Article 4 of this instruction states that "any mishap report involving military aircraft or military vessels is classified as a Limited Use MAR [mishap analysis report]." Subsection a. of this provision provides that an offer of confidentiality may be made by the Limited Use MAR on a witness-by-witness basis. According to this provision, "[o]nce confidentiality is offered, the statement will be privileged and is not releasable outside of the safety program for any reason without the express consent of the Commandant (G-K) after consultation with the Office of the Chief Counsel.

Subsection b. provides that "with the exception of factual information, Limited Use reports are privileged from disclosure in their entirety. This specifically includes, but is not limited to, the accompanying witness statements for which confidentiality was promised. . . ." This provision further states that the decision to release factual information for military justice and personnel administration purposes rests with [the] Commandant (G-K) after consultation with the Office of the Chief Counsel.

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, the investigative report, and applicable law:

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

2. The Chairman has recommended disposition of this case without a hearing. 33 CFR 52.31 (1993). The Board concurs in that recommendation.

3. The applicant's initial allegation that the co-pilot's confidential statement had been used without his consent is not substantiated. The evidence establishes that the co-pilot authorized the investigating officer to use the MAB statement that remains as part of the administrative investigation. This matter was complicated by the fact that the administrative investigation contained two statements that were given to the MAB by the co-pilot. One expressly authorized its use and the other did not. To ensure the integrity of the administrative investigation, the co-pilot's statement that did not contain his consent was ordered removed from the investigation. The integrity of the administrative investigation was not compromised because the investigating officer did not base any of his findings on the statement ordered removed.

4. The applicant asserted that even if the co-pilot gave a written release for use of the other MAB statement, the release would not be valid because the pertinent instruction reserves that right to the Commandant after consultation with the Chief Counsel. The Board notes that a mishap report involving any military aircraft is a "Limited Use Mar," which means that the MAB report is privileged from disclosure, except for factual information, including witness statements in which confidentiality has been promised. Article 4.a. of Enclosure (2) to COMDTINST 5100.47 states that "once confidentiality is offered, the statement will be privileged and is not releasable outside of the safety program for any reason without the express consent of Commandant . . . after consultation with the office of the Chief Counsel." The applicant argued that the Coast Guard violated its regulations when it permitted the co-pilot's statement to be included in the administrative investigation.

5. The applicant has misread this instruction. The only statements that are guaranteed free from disclosure are those made under an offer of confidentiality. The applicant has not provided persuasive evidence that the co-pilot's statement was made under a promise of confidentiality. The evidence submitted by the applicant in this regard is his own statement that he was provided confidentiality for his statement to the MAB. Without more, the Board is not persuaded that an offer of confidentiality made to the applicant also means a promise of confidentiality was made to the co-pilot. The other evidence on the subject of confidentiality is a statement from a LCDR, who reviewed the MAB at the request of the Chief Counsel, to determine whether confidentiality had been offered to the applicant and the co-pilot. This LCDR stated that she "did not find any documentation by the mishap analysis board in the report regarding any offer of privilege or confidentiality to any of the mishap aircrew members or witnesses." The Board is further persuaded that no offer of confidentiality was given to the co-pilot, because for the investigating officer to have included a privileged statement would have meant that he violated the order of the convening authority not to collect witness statements taken by the MAB under a promise of confidentiality. The Board notes the absence of a statement from the co-pilot claiming confidentiality.

6. Even if the MAB had released the co-pilot's statement in error, that release would amount to harmless error. If confidentiality were extended to the co-pilot, and there is no clear evidence that it was, it would be personal to the co-pilot and only he could claim the privilege with respect to his statement. The evidence is clear that the co-pilot authorized the release of his statement, thereby waiving the privilege of confidentiality.

7. Additionally, the investigating officer obtained an independent statement from the co-pilot. The co-pilot was interviewed personally by the investigating officer on [REDACTED]. That interview which was approved and edited by the co-pilot was reduced to a written summarized statement and included in the

investigative report. Accordingly, the Board finds that the investigating officer and the reviewing authorities could rely on the information provided by the co-pilot.

8. The applicant asserts that since the administrative investigation served as the basis for the special OER, the Coast Guard violated Article 10-A-3b(3) by submitting the special OER before the investigation had been finalized. This provision states that a special OER is required upon "final completion of criminal, other disciplinary, or investigative action which does not exonerate or acquit the Reported-on Officer and which relates to the Reported-on Officer's performance or any other matter on which he or she may be evaluated." Article 10-A-4.g(1) of the Personnel Manual states that "the finality of a proceeding is governed by regulations applicable to its convening."

9. The administrative investigation in this case was convened pursuant to COMDTINST M5830.1. (Investigations Manual). Article 1-J-2.B.(1)c. of this Instruction states that "[t]he final reviewing authority shall take final action to 'approve (or disapprove) the finding of facts (with [some] exceptions). . . . [T]he action or opinion or finding of the final action authority shall either state that it is 'based on the approved findings of fact,' or the action shall include a brief statement of the facts or reasoning which supports the action.'" Since the final reviewing authority has the power to approve or disapprove findings, opinions, and recommendations, the Board does not see how the investigation could have been considered complete prior to the final action of the reviewing authority. In this case, since the investigation was forwarded from the Commander, [REDACTED] to the Final Reviewing Authority, the Board concludes that it was not final until it was reviewed by that authority on [REDACTED]. Therefore, the Board finds that the special OER was completed and submitted prior to the finalization of the administrative investigation.

10. Chapter 10 of the Personnel Manual identifies six situations for the submission of a special OER. The one relied upon by the rating chain in this case calls for a special OER upon the final completion of the investigation which does not exonerate or acquit the officer and which relates to that officer's performance. As stated above, this investigation was not completed until the final reviewing authority took his action on [REDACTED]. However, the Board finds this error to be harmless because the special OER, which was completed on [REDACTED] could still have been submitted after the [REDACTED] final action of the final reviewing authority, and the outcome would not have been affected. The applicant claimed that due to the special OER, he was not allowed to progress to fixed-wing aircraft, he did not indicate when such a decision was reached. Neither has the applicant demonstrated that the evaluation of his performance in the special OER is inaccurate.

11. Contrary to the applicant's assertions, the Coast Guard could submit a special OER in this case without having made the applicant a party. Article 10-A-4(g) states that reference to a final proceeding in an OER is only proper if the officer has been made a party to and accorded full party rights during the course of the proceedings. (Emphasis added.) Accordingly, the Chief Counsel recommended that the comment - "[m]y personal experience with this officer affirms the administrative investigation's review of training documents and performance records that found no trend of substandard performance" - be deleted, since the applicant was not a party to the investigation. With the deletion of this comment, the special OER contains no reference to the investigation. Article 10-A-4(g) does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings." The Board has already determined that the error in submitting the special OER prior to the completion of the administrative investigation was harmless error, since the special OER still could have been submitted with the same content, except for the reference to the administrative investigation, on or after [REDACTED] the date the investigative report was approved by the final reviewing authority.

12. The applicant has not established that the special OER was submitted in violation of the Personnel Manual because he was exonerated by the administrative investigation. In fact, the administrative investigation faults the applicant "for failing to adequately complete the 'Big Four,' which was a critical link in the chain of events leading up to the accident." Such a finding goes to the applicant's performance as an aircraft commander and does not serve to exonerate or acquit him of any responsibility in causing the accident. Although the incident was mentioned in the applicant's regular OER covering the period from [REDACTED] to [REDACTED] it did not assign blame or give a full accounting of the incident. The rating chain could not do so at that time because the facts were not known. The investigation was not convened until [REDACTED]. Therefore, the only place an accounting of the incident could be given was in the special OER. Article 10-A-3(b) states in pertinent part that if the investigative action was completed and the subject performance occurred all within a regular reporting period, a special OER is not required. (Emphasis added.) As stated above, the investigation in this case was not completed until well after the regular reporting period covering the date of the accident ended. The Board finds that it was proper to reflect the applicant's performance with respect to the incident of [REDACTED] in a special OER.

13. The applicant's allegation that his CO wrongfully exerted command influence over the applicant's rating chain by directing them to submit a special OER noting the circumstances of the [REDACTED] mishap is without merit. Article 10-A-3(b) of the Personnel Manual permits the commandant, commanding officer, or higher authority within the chain of command to direct the submission of a special OER.

14. The applicant's commanding officer reasonably interpreted the Commander's order that the incident be reflected in the applicant's next OER to mean that the incident be reflected in a special OER. To have commented on the incident in the applicant's next OER would have violated the provision of the Personnel Manual that prohibits commenting on events in an OER that happened outside of the reporting period. This means that the only avenue left was a special OER. The Board finds that it was the intent of the Commander that the applicant's performance record reflect his part in the events that led to the helicopter crash on [REDACTED]. Therefore, the Board finds that by submitting the special OER, the applicant's CO complied with the spirit and intent of the Commander's order that the incident be properly reflected in the applicant's performance record.

15. The applicant alleged that his due process rights were violated with respect to the special OER. He claimed that he has a property and liberty interest in his continued employment with the federal government. The Board notes that the applicant's employment continues and was not interrupted as a result of the helicopter crash or the resulting investigation. He further alleged that he had a liberty interest in the special OER since it adversely affects his good name and imposes a stigma. An officer who is displeased with an OER has the right to file a reply. The applicant's military record does not contain a reply to the special OER. Therefore, the Board presumes he did not file one. The Board is not aware of any other due process rights that are applicable to the applicant's situation.

16. The applicant has not shown the information in the OER pertaining to the [REDACTED] helicopter crash to be inaccurate. Except for the comments in block 3h., the only other area evaluated in the special OER was the applicant's operational specialty/expertise in which he received a 3 (out of a possible high of 7).

17. The Board finds that the applicant has failed to establish an error or injustice that requires correction by the BCMR.

18. Accordingly, the applicant's request should be denied.

ORDER

The military record of [REDACTED] USCG, shall be corrected by removing the following comments from block 3.n. of the special OER for the period [REDACTED]:

My personal experience with this officer affirms the administrative investigation's review of training documents and performance records that found no trend of substandard performance. In fact.

The word he in the third line of the second paragraph shall be changed to the applicant's name and become the first word of that paragraph.

The remainder of the applicant's request is denied.

