DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

[redacted]

BCMR Docket No. 1999-101

FINAL DECISION

[redacted]:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on April 28, 1999, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated May 17, 2001, is signed by three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, a [redacted] in the Coast Guard, asked the Board to remove a special officer evaluation report (OER) he received because of his involvement in a . He also asked the Board to remove his failure of selection for promotion to lieutenant commander, which he alleged was caused by the presence of the unjust special OER in his record.

SUMMARY OF THE RECORD

On , the applicant was assigned to a Coast Guard air station after having recently completed advanced training. He initially served as the . In , he qualified as a .

On , the applicant, then a lieutenant junior grade, was serving as the . The District Commander ordered that the crash, a Class A Mishap,[1] be investigated by a Mishap Analysis Board (MAB). He also convened an informal administrative investigation of the mishap (AIM).

The applicant and other crewmembers were interviewed by both MAB investigators and an AIM investigator. The unit's MAB investigator, , deposed the

[1] A Class A mishap is any accident that damages an aircraft so badly that it is rendered "uneconomically repairable." Safety and Environmental Health Manual (COMDTINST M5100.47), Article 2-K-2.a.

applicant on . A second MAB investigator, deposed him again on . The AIM investigating officer (IO), interviewed the applicant on . Prior to that interview, the applicant signed an acknowledgement that he had read and understood these three statements:

1) Statement of Witness Rights. This document informed the applicant of the scope and purpose of the administrative investigation, including making determinations about cause, misconduct, and responsibility. It stated that an AIM differs from a MAB in that the testimony provided the AIM IO is not protected from use in disciplinary proceedings. It stated that the information he provided to the MAB would not be shared with the AIM IO and that if he was "unsure of the potential uses of any testimony or other evidence," he should contact the district legal office before providing the information to the IO. It stated that he was not a designated party to the investigation but his performance was "subject to inquiry." It also advised him that the results of the AIM could (a) result in disciplinary action, (b) negatively affect his rights and privileges, and (c) jeopardize his personal reputation and professional standing. It also informed him that he could decline to provide any information that "might tend to incriminate."

2) Privacy Act Statement. This document concerns the potential effect of the applicant's testimony to the IO on any future disability benefits, severance pay, retirement pay, veterans' benefits, etc.

3) Rule 301 of the Military Rules of Evidence. This rule concerns the privilege against self-incrimination provided by the Fifth Amendment to the Constitution. Although it is primarily concerned with court-martials, it states among other things that "[t]he privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness."

On , the applicant's regular OER (which is not in dispute) for the period , was submitted to Headquarters. He received a mark of 4 (on a scale of 1 to 7, with 7 being best) for the performance category Operational/Specialty Expertise. The only reference to the crash in this OER is that . Other than the special OER, this is the only reference to the crash in the applicant's personal data record.

On , the AIM IO submitted a report on his investigation of the crash to the District Commander. The IO reported that the applicant was when it crashed on . The IO found that the applicant had not committed misconduct but that

> [t]he primary cause of this mishap was the aircrew's failure to maintain situational awareness .

The IO included as enclosures to the report the following four statements attributed to the applicant. He wrote in the report that both Enclosures (7) and (8) were "released to Admin Investigation by [the applicant] on ."

- Enclosure (7) appears to be a complete, unedited copy of the transcript of the applicant's interview with a MAB investigator on . Other than the IO's notation, there is no indication in the AIM Report that the applicant released the transcript to him.

- Enclosure (8) is a copy of the transcript of the applicant's second interview with a MAB investigator on . The applicant made several minor corrections to the transcript by hand before giving it to the IO. In addition, he deleted half of one page, three or four words from another, and a couple of sentences from a third. Across the top of the first page of this transcript, he wrote "Released to [the IO] " and signed his name.

- Enclosure (9) is a copy of a timetable of the applicant's activities from 10:00 p.m. two days before the accident up to the moment of impact. Across the top of it, he wrote "Released to [the IO] " and signed his name.

- Enclosure (10) is a summary of the applicant's statement to the IO. It includes several minor handwritten corrections made by the applicant. In his statement to the IO, the applicant indicated that, just prior to the mishap, he was ."

On , the applicant was promoted to the rank of , having been selected by a promotion board the year before.

On , the District Commander signed an "Action of the Convening/ Intermediate Reviewing Authority," approving the findings of fact, opinions, and recommendations in the AIM Report and forwarding it for "final review" by the Commandant. He included the following statements:

> The primary cause of the total loss of was pilot error through a loss of situational awareness.

On , the applicant's rating chain signed the disputed special OER, evaluating his performance for January .[2] The commanding officer (CO) of the air station served as the reviewer, the station's executive officer served as the reporting officer, and the public works officer served as the supervisor. The applicant was assigned a mark of 3 in the performance category Operational/Specialty Expertise and marks of N/O (meaning "not observed") in all other performance categories. The mark of 3 was supported by the following comments:

> While serving as . During this emergency, he lost situational awareness and did not recognize that he had .

[2] This was the second draft of the special OER. The first draft was rejected by the Personnel Command because it was signed by officers not on the applicant's official rating chain.

> My personal experience with this officer affirms the administrative investigator'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.

On , Coast Guard Headquarters validated the special OER. On , the CO wrote a letter to the Coast Guard Personnel Command (CGPC), asking that the special OER be removed from the applicant's record. He stated that the rules require submission of such OERs only upon final completion of an investigation that does not exonerate the officer in question. The CO stated that the special OER was faulty because the investigation was still pending when it was submitted and because the investigation did not find evidence of misconduct by the applicant. The CO suggested that the applicant's regular OER covering , be revised to better reflect the incident and that the special OER be removed as "duplicative" and inconsistent with the District Commander's order.

On , CGPC sent a letter to the CO stating that the special OER had already been validated and could not be removed from the applicant's record "without following the procedures for correction of military records." In addition, CGPC stated that there was no "administrative irregularity" with regard to the OER, under Article 10-A-3.b.(3) of the Personnel Manual. CGPC stated that the rule "simply requires that the investigation be complete for the purposes of making appropriate, objective, supportable and relevant performance observations. Subsequent reviews of the investigation do not preclude performance documentation." CGPC also stated that the lack of a finding of misconduct does not mean that the applicant was exonerated because pilot error was identified as the cause of the accident.

On , the CO sent an e-mail message to the applicant containing the following:

> 1. The administrative investigation on the loss of included the statements that you gave to the mishap (safety) board. However, there is no indication that you willingly gave those statements to the investigator, as I recall that you did.
>
> 2. Could you please send [ ] at [the Office of Aviation Management] an e-mail indicating that you gave these statements to the admin investigator freely? ...

On , the Assistant Commandant for Operations signed the "Action of the Final Reviewing Authority," approving the findings of fact, opinions, and recommendations in the AIM Report. He ordered that Enclosure (7) to the report, the applicant's first statement to the MAB, be removed because there was "no record of release or authorization to use this statement beyond the safety analysis process."

APPLICANT'S ALLEGATIONS

The applicant alleged that the special OER violated Article 10-A-4.g.(1) of the Personnel Manual because "it is forbidden to comment on any pending disciplinary action or ongoing investigation." He argued that the OER violated this rule because the

OER was submitted in , and the administrative investigation into the cause of the crash was not finalized until . The applicant stated that, although his regular OER was already complete by the time the District Commander ordered that the incident be reflected in his "next OER," he would not object to having that regular OER modified if the special OER were removed and if he were afforded the right under Article 10-A-4.h. to submit a reply to the modified regular OER.

Moreover, the applicant alleged, the AIM exonerated him because it found no misconduct on his part. Therefore, as the applicant's CO indicated in his memorandum to CGPC dated , no special OER was required. Absent misconduct, the applicant argued, the decision to prepare a special OER is up to the discretion of the CO. Therefore, he argued, because his CO repudiated the special OER, it should be removed from his record. CGPC's refusal to remove the OER at the request of the CO who initiated it is unjust, he alleged, given the CO's admission that he exerted wrongful influence on the applicant's supervisor and reporting officer to submit the special OER.

The applicant alleged that, when the District Commander ordered the incident to be mentioned in his "next OER," the point was moot because his regular OER for the period in question had already been completed, and OERs may not refer to an officer's performance during a previous period. He alleged that the submission of the special OER "drew far more attention to the incident than either [the District Commander] or the [CO] thought proper."

The applicant also alleged that the special OER must be removed from his record because he was never made a party to the AIM. Because the applicant was not made a party to the investigation, he had no right to counsel, to present or cross-examine witnesses, or to receive and respond to the AIM Report. Under Article 10-A-4.g.(1), he argued, OERs may only make reference to final proceedings if the officer was made a party to the proceedings and accorded full party rights. In support of this allegation, the applicant submitted a copy of a letter from CGPC to the commanding officer of a different air station. The letter states that an OER prepared by that commanding officer was being returned as deficient because the OER referred to an investigation to which the reported-on officer was not made a party. CGPC stated that being a party to the investigation is "an implicit requirement [that] devolves from the restriction in article 10-A-4.g.(1)" of the Personnel Manual. The applicant alleged that, like the OER referred to in the letter, his own special OER should have been rejected by CGPC as deficient because it refers to an investigation to which he was not named a party.

The applicant further argued that the special OER should be removed because it was based on statements the applicant made to the MAB. He alleged that, as indicated in the action of the final reviewing authority dated , there is no evidence that he authorized use of his , statement for any purpose beyond that of the MAB. Therefore, the inclusion of this statement in the AIM Report violated the "safety privilege" that attaches to such statements. *See* COMDTINST M5100.47, Enclosure (2); *see generally United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182 (D.C. Cir. 1987).[3]

[3] In these cases, the courts held that the statements of witnesses to a safety investigation who had been promised confidentiality could be withheld from discovery in a civil suit and from release under FOIA

The applicant incorporated by reference the following arguments concerning the safety privilege included in the application to the BCMR in another case, BCMR Docket No. 1999-029:[4] Under the regulation, the other applicant argued, "statements provided as part of the safety investigation cannot be used against the persons making them." He alleged that the e-mail message sent to him and the applicant in this case by of the Office of Aviation Management on , proves that there is no evidence that the applicant willingly released his MAB statement to the AIM IO. He also alleged that neither he nor the applicant in this case provided the information to the IO. Without the information contained in the MAB statements, he alleged, the IO "may well have come to a different conclusion" about the cause of the crash.

VIEWS OF THE COAST GUARD

On January 14, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case. The partial relief he recommended is for the Board to redact the following words from the special OER: "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."

Citing *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992), the Chief Counsel argued that, "[t]o establish that an OER is erroneous or unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation." Furthermore, he argued, the applicant must "overcome the strong, though rebuttable, presumption that rating officials acted correctly, lawfully, and in good faith in executing their duties." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). He also argued that "even if some error or injustice is found ..., in determining appropriate relief, the Board should be extremely circumspect in removing valid performance information. Any remedy should be tailored to meet the concerns raised by the established error." The Chief Counsel cited the final decision in BCMR Docket No. 151-87, where it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material."

The Chief Counsel alleged that the evidence supports the conclusion that the due to the applicant's "negligent airmanship" and that the special OER "is factually accurate and represents the honest professional judgment of those responsible for evaluating Applicant." He argued that the applicant has not disputed the truth of the statement in the special OER that he "[l]ost situational awareness and did not recognize that ." Thus, "the Board should conclude that the

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because such releases would jeopardize the safety program by discouraging witnesses from revealing the full cause of mishaps.

[4] On June 20, 2000, in response to a request from the applicant, the applicant in BCMR Docket No. 1999-029 and his attorney sent the Board authorization to consider "all affidavits, briefs, correspondence and other documents submitted in his case in the petition of [the applicant in this case, BCMR Docket No. 1999-101]."

disputed Special OER contained a factually accurate evaluation of Applicant's performance."

The Chief Counsel argued that Article 10-A-3.b.(3) of the Personnel Manual "mandates the submission of a special OER upon final completion of an administrative investigation that does not exonerate or acquit the reported-on officer." He argued that the approval of the AIM Report by the convening authority on , rendered the IO's finding of negligence on the part of the applicant complete "for the purpose of establishing appropriate, objective, supportable and relevant information to document Applicant's performance in a Special OER." This conclusion, he alleged, is supported by Article 1-K-1.a. of the Administrative Investigation Manual, which grants a district commander authority to take final action on all investigations convened by the district. He alleged that "implicit in Article 1-K-1.a. is that the investigation is 'complete' for personnel action purposes when the Convening Authority signs and approves his findings of fact, opinions, and recommendations." Therefore, he alleged, because the investigation was complete for the purpose, and because the applicant was found to have been negligent and was not exonerated by the investigation, his command was required to submit the special OER under Article 10-A-3.b.(3) of the Personnel Manual. The Chief Counsel argued that the further review of the AIM Report by the Commandant was analogous to an appeal of a court case and did not mean that the investigation remained incomplete after the District Commander's action on .

The Chief Counsel argued that the AIM Report was based on non-confidential evidence. He alleged that the applicant released both of his MAB statements to the AIM IO, which were included as Enclosures (7) and (8) in the AIM Report. However, he alleged, the final reviewing authority ordered the removal of one of the MAB statements from the report because "there was no separate documentation regarding the release of enclosure (7)." The applicant's release of the MAB statement used as Enclosure (8), the Chief Counsel stated, is proved by his handwritten note on the cover sheet. Enclosure (8), he argued, was properly obtained by the IO and provided sufficient basis for the special OER. He pointed out that Enclosure (7) was not cited as the basis for any of the findings in the AIM Report. Thus, he concluded that the applicant's rating chain did not err or commit injustice when it relied on the report to prepare the special OER. Article 10-A-4.g.(1) of the Personnel Manual, "simply prohibits mentioning the investigative proceeding in the OER if the Reported-On Officer was not made a party to the investigation." It does not, he argued, prohibit mentioning the underlying conduct.

The Chief Counsel alleged that the applicant was not entitled to party rights because the AIM was an informal investigation under Article 2-B-2.c. of the Administrative Investigations Manual. Moreover, he alleged, even if it had been a formal investigation, the designation of parties would have been within the discretion of the convening authority under Article 2-B-3. He argued that party rights are immaterial as to whether a special OER is required when an officer has not been exonerated by an investigation under Article 10-A-3.b.(3) of the Personnel Manual.

The Chief Counsel further alleged that the applicant's rating chain committed no error or injustice by documenting the incident in a special OER rather than one of the applicant's regular OERs. He alleged that when the regular OER that encompassed the day of the crash fell due, his rating chain lacked objective information on which to base

an evaluation of the applicant's airmanship during the crash, as required by Article 10-A-1.b. of the Personnel Manual. In addition, the incident could not be documented in the next regular OER because Article 10-A-4.g.(3)(g) prohibits mentioning an officer's performance during a previous evaluation period. Therefore, the only permissible way for the applicant's command to document the incident in an OER was to prepare a special OER under Article 10-A-3.b.(3) of the Personnel Manual.

The Chief Counsel argued that no "undue influence" was exerted to cause the applicant's rating chain to prepare the special OER. Article 10-A-3.b. of the Personnel Manual, he stated, "permits higher authority within the Reported-On Officer's chain of command to direct the submission of a Special OER under certain circumstances." He stated that the District Commander was a member of the applicant's chain of command with authority to direct the CO to document the applicant's performance in an OER. He alleged that the fact that the District Commander directed such documentation in the "next OER" rather than in a special OER is irrelevant and did not render the CO's correct submission of a special OER improper.

AFFIDAVIT BY THE COMMANDING OFFICER

At the request of the Chief Counsel's office, the CO signed a statement in which he explained that the applicant's role in the was not addressed in the regular OER covering that period because the cause of the mishap had not yet been determined when the regular OER was prepared. When the District Commander ordered that the mishap be reflected in the applicant's "next OER," the CO determined that he should prepare a special OER because the regular OER covering the time of the accident had already been submitted and the mishap could not be mentioned in a future OER because OERs may not reflect performance during past evaluation periods.

Regarding preparation of the special OER, the CO explained that the applicant's proper rating chain included the public works officer as the supervisor, the executive officer as the reporting officer, and the CO as the reviewer. He initially chose to alter the rating chain by having the operations officer serve as the supervisor, he himself serve as the reporting officer, and "a senior member of the district commander's staff" serve as the reviewer because the operations officer and the CO directly supervised the applicant in his aviator capacity, while the public works officer did not. The CO stated that the revised rating chain carefully deliberated the wording of the special OER. However, it was rejected by Headquarters because it was not signed by the applicant's official rating chain. Therefore, the special OER was re-typed, signed by the members of the published rating chain, and resubmitted. The CO suggested that the public works officer, who was not consulted during the preparation of the special OER but signed it as the supervisor, and the executive officer, who was consulted but did not sign the first special OER, may have been "greatly influenced" by the previous determinations of the altered rating chain. Moreover, the CO indicated that he would have objected if they had attempted to change the wording of the special OER.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 19, 2000, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 15 days. The applicant sought an

extension and submitted an "interim reply" on February 17, 2000. In his interim reply, the applicant repeated his argument that the special OER violated regulations by mentioning a pending investigation and by mentioning an investigation for which the applicant had not been afforded the rights of a party. He also argued that the OER should be removed because the CO "has stated *in haec verba* that the special OER was the product of 'wrongful command influence' exerted on the supervisor and the reporting officer."

The applicant stated that he was told that his statements at the mishap board were privileged. He stated that after the crash, his supervisor, , told him that, while it was in his best interest to cooperate fully with the safety investigators, "anything said to anyone else could be used against [him]." He also alleged that before he was deposed for the MAB, told , the unit's MAB investigator, that the applicant should be granted the safety privilege for his initial statement. Later, when he was interviewed , he was told that the conversation was privileged and to be used for safety purposes only. Moreover, he alleged, , the president of the Headquarters Mishap Board in , recently told him that, although he could not recall what language was used, his intent during his initial briefing of the pilot and co-pilot after the crash "was to convey to them that their statements would be subject to the safety privilege, would be used only for the purpose of determining safety issues, and would not be used against [them]."

The applicant argued that the fact that one of his statements "indicates a waiver of confidentiality" and the other does not clearly implies that there was no waiver of confidentiality for the statement that is silent about waiver. As further evidence of the confidentiality of the MAB statements, he submitted a copy of an e-mail message sent by , who now serves in the , to the Chief Counsel's office on . The e-mail message contains the following statement:

> Per your request yesterday, I have thoroughly reviewed subject mishap report for any evidence which would indicate that the statements made by [the pilot] or [the applicant] were specifically granted confidentiality or privilege by the mishap analysis board which investigated the mishap. I did not find any signed documents or enclosures which either directly offer or directly acknowledge the granting of confidentiality or privilege to [them]. I 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.
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> • • •
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> The mishap analysis report also contains a transcript of a taped interview with [the applicant] conducted on , apparently conducted by a member of the Commandant appointed mishap analysis board (which relieved the permanent mishap board on). The transcript contains a statement made by [the applicant] regarding a previous interview conducted by [ ] (a member of the unit permanent mishap board), indicating the subject of privilege as it related to the mishap investigation was discussed by [ ] at some point during their interview. As with [the pilot's] statement, someone familiar with safety privilege might infer that privilege was offered.

The applicant stated that he could not complete his reply to the Chief Counsel's advisory opinion without seeing the transcript referred to in this message. He submitted a request under FOIA for the transcript and argued that any refusal by the Coast Guard to release the transcript on the grounds of confidentiality "would be at war with its assertion that [the applicant] had not been promised confidentiality." Moreover, he

alleged that the e-mail is "substantial evidence that a reasonable person would infer from the transcript of the interview that [the applicant] had been offered privileged treatment for his statement." He further argued that because the applicant was offered confidentiality for his first statement, "the burden shifts to the Coast Guard to demonstrate that any and all *subsequent* statements [he] gave were entirely uninfluenced by the fact that he had previously been given to understand that his contribution would be treated as privileged (*i.e.*, not to be used for any purpose other than the mishap analysis)." The applicant argued that the Coast Guard failed to carry this burden.

The applicant alleged that the Chief Counsel's claim that there is no evidence he was promised confidentiality is false. He alleged that the Chief Counsel's office recently interviewed who had deposed the applicant for the MAB, and that he reported that his intent had been to grant the safety privilege to the applicant. The applicant submitted with his interim reply signed statements by and who asserted that the statements attributed to them in the reply are true.

The applicant argued that the decision to use his MAB statements in the AIM Report was bad policy because it will "erode the mishap analysis process, to which the free and prompt flow of information from the participants is obviously critical." The use of his statement "will send a message to the aviation community that one cooperates with a mishap analysis board at one's career peril." He indicated that he would complete his reply after receiving the Coast Guard's response to his FOIA request.

On July 17, 2000, the applicant completed his reply to the advisory opinion and submitted a page of the transcript of one of his MAB depositions. In the deposition, while describing what occurred after the crash, he stated the following:

> .... We started some of the Navy mishap paperwork but never completed it. We got examined by the flight surgeon for neurological damage, checked our eyes and our balance and all of that kind of stuff, and got x-rayed. I gave a statement to who said it was the beginning of the safety investigation and talked about privilege and asked if I wanted to make a statement. I said I would and I gave him a statement. ...

COAST GUARD'S SUPPLEMENTAL RESPONSE

On August 11, 2000, the Chief Counsel responded to the applicant's new evidence and allegations. He stated that his recommendation remained unchanged that the Board grant partial relief by removing only the sentence referring to the AIM, consistent with the Board's decision in the pilot's case, BCMR Docket No. 1999-029.

The Chief Counsel stated that he had not previously addressed the safety privilege issue because in his initial application, the applicant did not raise the issue directly but only referenced the brief of another applicant. The Chief Counsel explained that because without the other applicant's permission discussion of that brief would have violated the Privacy Act, the Chief Counsel did not address the safety privilege in his initial advisory opinion. In addition, he argued that because the applicant did not properly raise the issue of safety privilege himself, the burden of production on the issue could not have shifted to the Coast Guard. Therefore, until the applicant raised the issue of the safety privilege properly, the Chief Counsel argued, the Coast Guard was not required to reveal the content of e-mail message. The Chief Counsel further

stated that because the BCMR had received permission from the applicant in BCMR Docket No. 1999-029 to refer to and use the materials submitted in that case, he would now address the safety privilege.

The Chief Counsel stated that under Article 10-A-4.g.(1), an officer need not be made a party to an AIM to have the conduct revealed by the investigation mentioned in an OER. He stated that in BCMR Docket No. 1999-171, the Board found the Coast Guard's reliance on facts uncovered in an investigation in preparing an OER permissible even though the officer was not afforded party rights.[5] Therefore, he argued, once the reference to the AIM has been deleted from the special OER as he recommended, it will not be improper even though the applicant was not afforded party rights.

The Chief Counsel alleged that, although in its final decision in BCMR Docket No. 1999-029, the Board seems to have assumed that the MAB released the applicant's statements to the IO, in fact, it was the applicant himself who gave the IO copies of his MAB statements. The Chief Counsel alleged that the applicant "willingly and knowingly provided the AIM IO four separate statements/documents *only after having his rights explained to him.*" He argued that this allegation is proved by the applicant's signature, dated , on a Statement of Witness Rights, Privacy Act Statement, and Rule 301 of the Military Rules of Evidence. Those statements, the Chief Counsel argued, informed the applicant (a) about the difference between safety and administrative investigations with respect to their purposes and witnesses' rights; (b) that the MAB would not share any information he provided it with the AIM IO but that any information he himself provided the IO could be used against him in a disciplinary proceeding; (c) that if he had any questions regarding his rights, he should contact the district's legal office; and (d) that he had the right to remain silent rather than provide incriminating information. Therefore, he argued, the applicant is estopped from denying that he knowingly and willfully released the information he provided to the IO.

The Chief Counsel also alleged that the lack of a written release on one of the MAB statements originally included in the AIM Report does not prove that the applicant did not release the other MAB statements. He argued that the releases signed by the applicant on Enclosures (8) and (9) of the report prove that the IO and reviewing authorities properly relied on the information provided by the applicant. The Chief Counsel also argued that grant of confidentiality was personal to the applicant, who has not proved that he lacked authority to release his own MAB statements to the IO. Therefore, the Chief Counsel argued, the Board should conclude that the applicant's rating chain had sufficient non-confidential information provided by the applicant and other witnesses on which to base their appraisal in the special OER.

Finally, the Chief Counsel alleged that the applicant's argument that a denial of full relief would undermine the safety investigation program is specious because "[l]ike Applicant, any member of the aviation community faced with a similar circumstance would have the same right as Applicant had to decline to make a statement to the AIM investigating officer." He alleged that the applicant's decision to provide his MAB statements to the IO "has no bearing or effect on service policy."

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[5] In finding 4 in the final decision in BCMR Docket No. 1999-171, the Board held that under Article 10-A-4g.(1) of the Personnel Manual, "the fact that the applicant was not a party to the CGIS investigation or the informal investigation for that matter is irrelevant to the disputed OER."

The Chief Counsel also provided the Board with a box containing an unredacted copy of the AIM Report and its many enclosures. In a memorandum stapled to the box, he stated it that he was providing it, as he had done in BCMR Docket No. 1999-029, with the understanding that it would not be released to the applicant. He stated that he believed that the applicant had a copy of the redacted copy of the report that had been provided the applicant in BCMR Docket No. 1999-029 in response to a FOIA request.

APPLICANT'S FINAL RESPONSE

On August 15, 2000, the Board sent a copy of the Coast Guard's response to the applicant, not including the box or the memorandum stapled to it, and invited him to respond within 15 days. The applicant was granted an extension and responded on October 2, 2000. In his response, he first made several "procedural observations": first, he alleged that the Board should have ordered the Coast Guard to turn over the document that was the subject of his FOIA request; second, he alleged that the Board should have sent him a copy of the memorandum on the box of the AIM Report;[6] and third, he alleged that he had not actually received a redacted copy of the AIM Report from the applicant in BCMR Docket No. 1999-029 when he received that applicant's brief.[7]

The applicant alleged that the fact that he first raised the safety privilege issue by referring to the brief of another applicant did not justify the Chief Counsel's failing to address the issue and submit e-mail message in his original advisory opinion. He alleged that the Chief Counsel's claim that, because of the reference to another applicant's brief, the Chief Counsel could not address the issue without violating the Privacy Act was "frivolous" because it was his own confidentiality, not that of the other applicant, that was "at stake."

The applicant alleged that the Chief Counsel failed to prove that the AIM IO made no use of his statements to the MAB. He alleged that the Chief Counsel bears the burden of proving that the promises of confidentiality made to him by the MAB were not violated. He alleged that the Statement of Witness Rights, Privacy Act Statement, and Rule 301, which he acknowledged receiving prior to his interview with the IO, do not constitute a waiver of the confidentiality he was promised by the MAB. He further alleged that the fact that he released "things" individually to the IO "is inconsistent with any claim that he waived the privilege as to everything he said in the MAB."

The applicant further alleged that "[s]o far as we can determine, the only document from the MAB file that [he] released to the AIM IO was the one marked as Exhibit (9) to the investigation." He argued that the Chief Counsel has not proved that the IO did not glean information from the applicant's other MAB statements and that it was insufficient for the Coast Guard merely to remove Enclosure (7) from the AIM Report. Therefore, he alleged, the Board "must determine whether the IO's improper access to that statement led to *other* evidence in the AIM investigation, and whether that other information in turn bore on the decision making regarding [the applicant's] special

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[6] A copy of the memorandum was sent to the applicant by e-mail directly from the Chief Counsel's office on September 29, 2000.

[7] At the request of the applicant and with the approval of the Office of the Chief Counsel, the Board sent the applicant copies of Enclosures (9) and (10) of the AIM Report on September 29, 2000.

OER." He argued that the Chief Counsel has not proved that the applicant's rating chain did not rely on any "fruit of the poisonous tree" in preparing the special OER but relied only on unprivileged and independent sources of information about the accident. Therefore, given the "need for absolute adherence to the rules of confidentiality," he argued, the special OER should be removed from his record.

Finally, the applicant argued that because he does dispute the facts on which the special OER was based, it was improper under Article 10-A-4.g.(1). He argued, in essence, that under that article, only facts that are undisputed by the officer whose performance is being evaluated may serve as the basis of a special OER when the officer is not made a party to the investigation.

APPLICABLE LAW

Safety and Environmental Health Manual (COMDTINST M5100.47)

Chapter 2-Y of the Safety and Environmental Health Manual states the following:

> Other Required Reports. Often, when a mishap occurs, reports other than the mishap report are required to be submitted by other Coast Guard directives. This duplicate reporting requirement arises because the results of the mishap analysis and the content of the mishap report may not be used as the basis of adverse action against individuals. The Administrative Investigations Manual (COMDTINST M5830.1 series) contains a comprehensive summary of these investigations and reports.

Enclosure (2) of the manual, entitled "Mishap Investigating, Reporting and Endorsement Precautions," includes the following provisions:

> 1. Mishap Investigations and Legal Investigations.
>
> a. 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 mishap investigatory process seeks to find out why a mishap occurred so similar mishaps can be prevented in the future. The goal of a mishap investigation is to prevent future like mishaps, not to punish or assess liability. ...
>
> b. Administrative Investigations. Administrative investigations of accidents are conducted to gather facts for use during later administrative or legal proceedings ... [and] are administrative, not criminal, in nature. However, facts gathered by an administrative investigation can lead to a criminal investigation or formal charges.
>
> 2. Safety Privilege.
>
> a. Introduction. A thorough understanding of the concept of privilege and confidentiality as used in the safety program is essential for the proper investigation of mishaps. These concepts are critical to the success of the Coast Guard safety program. All parties involved in both the mishap or administrative investigation and the mishap review must understand and respect the privileged and/or confidential nature of this information.

b. Concept. The concept of privilege is intended to prevent the unnecessary disclosure of privileged information in mishap reports outside of the safety program. ... Mishap Analysis Board (MAB) members and endorsers might be reluctant to include their true opinions and recommendations in their formal report if they believed the information could be used for other than safety purposes. ... 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. Individuals may be reluctant to reveal information pertinent to a mishap because they believe certain uses of the information could be embarrassing or detrimental to themselves, their fellow service members, their command or employer, or others. 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 anyone, including government prosecutors, without the express consent of Commandant (G-K) after consultation with the Office of the Chief Counsel.

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4. Limited Use Reports: Any mishap report involving military aircraft or military vessels is classified as a Limited Use MAR. ...

a. Confidentiality offer and privilege for witness statements. Confidentiality is not automatically offered to all witnesses. A Limited Use safety board must evaluate each proposed offer of confidentiality on a witness-by-witness basis. If the board determines that a witness' statement is necessary to the investigation and if it is believed that the witness will not provide a candid statement without an offer of confidentiality, then the board may make an offer of confidentiality to the witness. 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 (G-K) after consultation with the Office of the Chief Counsel. ...

b. Privilege for the MAR. 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 as well as actual recordings from cockpit voice recorders (CVR) and any transcripts taken there from. ...

Administrative Investigations Manual (COMDTINST M5830.1)

Article 1-G-4.i. of the Administrative Investigations Manual states that an investigation is ordinarily required whenever a Coast Guard aircraft is involved in an accident. Article 1-E-1.c. provides that "[a]n informal investigation will ordinarily be adequate in most cases, including most death cases, and many casualties of an operational nature which are of less serious consequence. Most instances requiring investigation can be adequately addressed by this type [of] investigation." [Emphasis in original.]

Article 1-D-4 requires an informal investigation to be conducted by one or more commissioned officers, who use informal procedures and interviews to report findings, opinions, and recommendations to the convening authority. Article 1-E-2.b.(2) prohibits the designation of parties during an informal investigation. However, if an investigation "involves such disputed issues of fact that a substantial risk of injustice to a person or persons would exist if they were not afforded the rights of a party during the investigation, a court of inquiry or a formal investigation should be ordered, and parties should be designated." [Emphasis in original.]

Article 1-C-4.a. provides the following:

> Certain inquiries, which are controlled by other regulations, may not be combined with an administrative investigation. In these cases, a separate administrative investigation should be ordered only if specific reasons exist warranting the separate investigation. ... For example, in the case of a major casualty which is being investigated by a mishap investigation pursuant to the Safety and Occupational Health Manual, COMDTINST M5100.29 (series),[8] an administrative investigation may be ordered for the purpose of ascertaining whether there was negligence or misconduct on the part of any personnel. ... (In this instance, to the extent allowed by the Safety and Occupational Health Manual COMDTINST M5100.29 (series), the evidence and findings of the mishap board should be made available to the administrative investigation and may be used and relied upon by that investigation in pursuing its objectives. See paragraph 6-A-6. Similarly, evidence and findings of other investigations listed in paragraph 1-C-4.b, when made available to the administrative investigation, may be used and relied on by that investigation in pursuing its objective.)

Article 1-C-4.b. includes mishap investigations among those types of investigations that must be conducted separately from administrative investigations, in accordance with Article 1-C-4.a.

Article 6-A-6, which governs the relationship of administrative investigations to mishap investigations, provides the following:

> a. While mishap investigations conducted pursuant to the Safety and Occupational Health Manual, COMDTINST M5100.29 (series), and administrative investigations must be conducted separately and independently, each shall have access to all real and documentary evidence and shall have separate opportunities to question and to obtain statements from all witnesses. Generally, statements of witnesses obtained with a promise of confidentiality, and matters which would reveal the mishap board's deliberative processes, will be unavailable to the administrative investigation. The Safety and Occupational Health Manual sets forth the materials which may be shared with the administrative investigation. See COMDTINST M5100.29, paragraphs 2-J-5.b and 2-J-3.
>
> b. In conducting the administrative investigation, care shall be exercised to respect the privileged character of the mishap investigation. No witness shall be questioned as to whether the witness has participated in, or testified before, any mishap investigation.
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> d. In circumstances where a mishap investigation is also being conducted, ... [i]t may be assumed that the mishap investigation will adequately address the causes of the incident. In addition to obtaining evidence from the mishap investigation, the administrative investigation may adopt any findings or conclusions of the mishap investigation which are made available to it. ...

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

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[8] The Safety and Occupational Health Manual, COMDTINST M5100.29 (series), has been succeeded by the Safety and Environmental Health Manual, COMDTINST M5100.47 (series). *See* COMDTINST M5100.47, Paragraph 2.

> 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.

Article 5-A requires the report of an administrative investigation to include a finding concerning whether any injuries or illnesses arose in the line of duty and whether they were the result of misconduct, for the purpose of determining entitlement to health and disability benefits. Article 5-C-1 provides that "misconduct," for the purposes of the article, means wrongful conduct and does not mean ordinary negligence or carelessness. Article 5-K provides that "[a] favorable determination as to misconduct and line of duty does not preclude disciplinary action nor does a favorable determination have any bearing on the issue of guilt or innocence."

Article 6-I-3 requires an administrative investigator to base a finding of negligence on evidence that a member's conduct "fail[ed] to conform to the standard of care which a reasonable, prudent, accountable person would have exercised under the same or similar circumstances."

Article 1-J-2 provides the following:

> b. Specific Action by Convening and Intermediate Reviewing Authorities.
>
> (1) The convening and intermediate reviewing authorities [the District Commander] 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. . . .
>
> (2) For the benefits of subsequent reviewing authorities, convening and intermediate reviewing authorities shall state clearly (in separate statements or paragraphs) any action taken, or to be taken, and/or recommendations made as a result of matters contained in the record. ...
>
> c. Specific Actions by Final Reviewing Authority. The final reviewing authority shall take final action to "approve (or disapprove) the findings of facts (with the following exceptions)". Opinions and recommendations should not be addressed in the final action except to the extent necessary to properly resolve issues and take action. ....

Article 1-K, entitled "The Investigative Report -- Allocation of Final Reviewing Authority," provides the following:

> 1. Officers in Command Other Than the Commandant. Subject to the limitation contained in paragraph 1-K-2:
>
> a. A district commander has authority to take final action on all investigations convened by the district or by district units.
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> • • •

> On [investigative reports] for which the Commandant is final reviewing authority, officers listed in paragraphs 1-K-1.a through 1-K-1.d may, and normally should, take final action on those aspects of the report which are within their cognizance.
>
> 2. Commandant. The Commandant will act as the final reviewing authority only for the following types of administrative investigations: ... Class A or B mishaps ... .

Article 1-L-2 states that the Office of General Law acts as the final reviewing authority for investigative reports on behalf of the Commandant. In that role, the office

> will review each record for completeness and compliance with this manual and then route it to all Headquarters divisions with an apparent interest in the matter (including the facility managers, safety program managers, and/or the training and professionalism manager where appropriate) for review and comment. Routing shall terminate with the cognizant operating, facility or support program manager, who will prepare the final action. Commandant (G-CSP) [Safety Program office] shall review all reports of incidents which are class A or B mishaps as defined in chapter 2 of COMDTINST M5100.29. Any significant differences between the findings of the report and the findings of the mishap investigation shall be reported to the Chief of Staff for resolution. [The Office of General Law] will assist the cognizant program manager in the preparation of the final action, or in cases of reports to be signed by the Chief Counsel, will prepare the final action. ...

Coast Guard Personnel Manual (COMDTINST M1000.6A)

Article 10-A of the Personnel Manual governs the preparation of OERs. Each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor, the reporting officer, and the reviewer. Officers with the rank of lieutenant junior grade receive regular, semi-annual OERs for periods ending each January 31st and July 31st, while lieutenants receive semi-annual OERs for periods ending each May 31st and November 30th. Article 10-A-3.a.(1).

Article 10-A-3.b., dealing with special OERs, states the following:

> 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.
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> • • •
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> (3) 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 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.(1), which covers OER restrictions, states the following:

> Members of the rating chain shall not comment on or make reference to any ... ongoing investigation ... . Reference 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 proceed-

> ing. The finality of a proceeding is governed by regulations applicable to its convening. See ... Administrative Investigations Manual, COMDTINST M5830.1 (series). This restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings.

Article 10-A-4.g.(3)(g) prohibits a rating chain from discussing a "Reported-On Officer's performance or conduct which occurred outside the reporting period."

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The applicant was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant submitted a statement from who deposed him for the MAB, indicating that the applicant was promised that any statement he made to the MAB would be "subject to the safety privilege." The record also contains e-mail messages from the applicant's CO and supervisor, and a page from one of his MAB statements that suggest that he was told his statement would remain confidential. The confidentiality of his MAB statements is also evidenced by the fact that the AIM IO required the applicant to sign releases before taking them from him. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that he was promised by MAB investigators that his statements to the MAB would be confidential and would not be released by the MAB for use outside of the safety program. Therefore, his statements to the MAB were privileged and could not lawfully be released by the MAB to the AIM IO.[9] This does not mean, however, that the MAB could not lawfully provide the applicant with copies of his own confidential statements.[10]

4. On , prior to his interview with the AIM IO, the applicant signed an acknowledgment of having read and understood three documents: the Statement of Witness Rights, the Privacy Act Statement, and Rule 301 of the Military Rules of Evidence. Thus, he was informed of the different purposes and potential uses and effects of the two investigations. The Statement of Witness Rights also informed him that the MAB would not share any information he provided it with the AIM IO but that any information he himself provided the IO could be used against him and affect his

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[9] Safety and Environmental Health Manual, Chapter 2-Y and Enclosure (2), Paragraphs 2.b. and 4.a.

[10] In BCMR Docket No. 1999-029, the applicant argued that the last sentence of paragraph 2.b. of Enclosure (2) to the Safety and Environmental Health Manual prohibited the Coast Guard from releasing copies of an officer's own confidential statements to the officer himself. However, given the purpose of the safety privilege and confidentiality as described in the manual, the Board is not persuaded that the MAB violated paragraph 2.b. by giving the applicant copies of his own confidential statements. *See Brockway v. Department of the Air Force*, 518 F.2d 1184, 1186 (8th Cir. 1975).

professional standing. It also advised him that he could refuse to provide information that might be self-incriminating and that if he had any questions regarding his rights, he should contact the district's legal office. Therefore, the Board finds that the applicant knew or should have known that any information and documents he gave the IO could be used against him, even copies of statements he had made to the MAB. Although Chapter 2-Y of the Safety and Environmental Health Manual states in part that "the content of the mishap report may not be used as the basis of adverse action against individuals," the Board finds that this provision does not take into account situations in which a witness provides the same statement to both MAB and AIM investigators.

5. Nothing in the law of confidentiality and privilege prevented the applicant from providing the AIM IO with the same information that he provided to the MAB, whether by repeating the same words orally or by handing the IO copies of his own statements to the MAB.[11] Of the four statements attributed to the applicant in the AIM Report, two, Enclosures (8) and (9), bear handwritten notes signed by him releasing the documents to the IO. Enclosure (10) is a summary of his voluntary oral statement to the IO. Therefore, the Board finds that the applicant voluntarily and knowingly provided at least these three of his four statements in the AIM Report—Enclosures (8), (9), and (10)—to the IO. Those statements could properly be included in the report and used as the basis for any disciplinary or administrative decisions affecting him.

6. The only negative description of the applicant's performance in the disputed special OER is the following: "During this emergency, he lost situational awareness and did not recognize that " The Board finds that the applicant's voluntary statement to the IO in Enclosure (10) that he was unaware that " pro vided ample basis for this negative com ment. In addition, his statements to the IO about his awareness and conduct at the time of the crash, as summarized in Enclosure (10), are strongly supported by his statements in Enclosures (8) and (9), which he intentionally released to the IO. Therefore, the applicant has not proved by a preponderance of the evidence that his rating chain lacked sufficient lawfully acquired evidence on which to base the negative comment in the special OER. This would be true even if Enclosure (7) were improperly included the AIM Report because Enclosures (8), (9), and (10)—which were voluntarily released by the applicant to the IO and properly included in the report—provided a lawful, substantial basis for the comment that he lost situational awareness while .

7. No written release appears on the front of Enclosure (7) to the AIM Report, a transcript of his statement to the MAB on , the day after the accident. The applicant alleged that the lack of a signed release proves that he did not release the transcript to the IO. Therefore, he alleged, the special OER was improperly based on an AIM Report that unlawfully included confidential information and should therefore be removed from this record. He alleged that the Coast Guard's decision to remove Enclosure (7) from the report proves that its original inclusion was improper.

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[11] The last sentence of paragraph 2.b. of Enclosure (2) to the Safety and Environmental Health Manual states that "[c]onfidential statements will not be released to anyone, including government prosecutors, without the express consent of Commandant .... ." However, in the context of the paragraph, this sentence clearly means that no one in the safety program may release a confidential statement. It does not prohibit a witness from releasing or repeating his own confidential statement.

8. Whether Enclosure (7) could lawfully be included in the AIM Report depends largely upon how the IO acquired it. If the applicant intentionally released it to him, he could lawfully use it in the report even though the release was not documented. The Assistant Commandant's order to remove Enclosure (7) because of the lack of such documentation does not prove that its inclusion in the report was actually unlawful. Moreover, once the applicant had acknowledged reading and understanding the Statement of Witness Rights, the burden was on him not to provide the IO with Enclosure (7) if he did not want him to use it. Therefore, if the applicant physically but unintentionally gave Enclosure (7) to the IO, its inclusion in the AIM Report was lawful. AIM investigators are required to respect the privileged nature of witnesses' statements to a MAB,[12] but they are not obligated to stop witnesses who have been properly warned of their rights from unintentionally providing them with information. Finally, the evidence in the record, including the lack of any written release on Enclosure (7), is insufficient to prove that the IO stole or otherwise underhandedly acquired it from either the applicant or the MAB.[13] It is also insufficient to prove that a member of the MAB violated the safety privilege by releasing Enclosure (7) to the IO. The Board concludes that there are plausible explanations for the lawful presence of Enclosure (7) in the AIM Report that the applicant has not controverted. In fact, in light of all the circumstances, including the applicant's intentional release of Enclosures (8) and (9), the actions and statement of the IO, and the e-mail message of the CO, the Board finds that the preponderance of the evidence indicates that the applicant either intentionally or accidentally gave Enclosure (7) to the IO. He has not proved that the IO unlawfully acquired or used it, and his arguments concerning "fruit of the poisonous tree" are moot.[14]

9. The applicant argued that whether or not he released his MAB statements to the IO, the Coast Guard should not have taken any adverse action against him based on the findings in the AIM Report because it would harm the safety program by discouraging other members involved in mishaps from being honest with MAB investigators. His argument assumes that members throughout the Coast Guard will hear (a) that he received a special OER because of the findings of an administrative investigation of the mishap, and (b) that the AIM Report contained statements he had previously given the MAB, but <u>not</u> (c) that he himself provided the IO with those statements. The Board finds these assumptions farfetched. Members involved in future accidents will presumably receive, pay heed to, and rely on the same MAB promises of confidentiality and AIM Fifth Amendment warnings given the applicant in this case.

10. The applicant alleged that the Coast Guard violated Article 10-A-3.b.(3) of the Personnel Manual by submitting the special OER on , ten months before the final reviewing authority approved the AIM Report on . Article 10-A-3.b.(3) 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

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[12] Safety and Environmental Health Manual, Enclosure (2), paragraph 2.a.; Administrative Investigations Manual, Article 6-A-6.a.b.

[13] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (finding that absent strong evidence to the contrary, government officials are presumed to have acted lawfully, correctly, and in good faith).

[14] The Board notes, moreover, that there is no evidence in the record suggesting that the IO received the information in Enclosure (7) before he received the information in Enclosures (8), (9), and (10).

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) states that "the finality of a proceeding is governed by regulations applicable to its convening."

11. Under Articles 1-K-2 and 1-J-2.c. of the Administrative Investigations Manual, the Commandant is the final reviewing authority for all Class A mishaps and may approve or disapprove findings of fact in an AIM Report. However, Article 1-K-1 expressly authorizes district commanders to "take final action on those aspects of the report which are within their cognizance," and Article 1-J-2.b.(2) requires a district commander, when forwarding a report to the Commandant, to "state clearly (in separate statements or paragraphs) any action taken, or to be taken, ... as a result of matters contained in the record." Moreover, under Article 1-L-2, the Office of General Law, when conducting the final review on behalf of the Commandant, performs primarily a legal review and determines which program offices, such as safety, facilities, and training, need to act upon the report.

12. The AIM Report in this case was not approved by the final reviewing authority before the special OER was completed and validated. Nonetheless, the Board finds that the applicant has not proved by a preponderance of the evidence that the District Commander and his rating chain acted without authority in ordering and preparing the special OER. Under Articles 1-K-1 and 1-J-2.b.(2) of the Administrative Investigations Manual, the District Commander was clearly authorized to take final action upon matters within his cognizance and report such action to the Commandant. The applicant has not proved that the special OER did not fall within the cognizance of the District Commander. As members of the applicant's chain of command, both the District Commander—who convened the investigation and ordered that its findings be reflected in the applicant's "next OER"—and the CO—who prepared the special OER when he realized that the findings could not lawfully be reflected in one of the applicant's regular OERs—were authorized to order preparation of a special OER. Personnel Manual, Article 10-A-3.b.

13. The applicant argued that Article 10-A-3.b.(3) of the Personnel Manual prohibited his rating chain from preparing the special OER until after the final reviewing authority approved the AIM Report. However, Article 1-J-2.b.(2) of the Administrative Investigations Manual clearly contemplates that a district commander may take action on matters within his or her cognizance before forwarding the report for final review. Even if the rules were read to prohibit such action by the District Commander, the applicant has not proved that the action taken by his chain of command prior to the report's finalization caused him any harm because he has not proved that, if the District Commander had waited to act until , he would have decided not to order that the findings of the report be reflected in an OER in the applicant's record.

14. The applicant argued that the special OER was improper under Article 10-A-3.b.(3) of the Personnel Manual because he was exonerated by the investigation. The AIM IO found that the mishap was not caused by any misconduct. However, he also found that the primary cause of the mishap was the applicant's "failure to maintain situational awareness." Likewise, the District Commander concluded that "pilot error ... caused the aircraft to strike the ground." Under Articles 5-C-1 and 5-K of the Administrative Investigations Manual, a determination that a mishap was not caused

by "misconduct" does not mean that it was not caused by ordinary negligence; nor does it preclude disciplinary action or have any bearing on the member's guilt or innocence. Therefore, the Board finds that the applicant was not exonerated by the investigation, and the IO's finding that he did not commit misconduct did not preclude preparation of a special OER under Article 10-A-3.b.(3) of the Personnel Manual. Rather, the investigation concluded, in essence, that the mishap was caused by his negligence ( ).

15. The applicant argued that the special OER should be removed from his record because, under Article 10-A-4.g.(1) of the Personnel Manual, the rating chain was prohibited from making any reference to an ongoing investigation. The Chief Counsel recommended that the Board remove the sentence referring to the investigation from the special OER because of the prohibition in Article 10-A-4.g.(1). In essence, the Chief Counsel argued that, although the investigation was complete in for the purpose of the District Commander's taking action by ordering the preparation of the OER under Articles 1-K-1 and 1-J-2.b.(2) of the Administrative Investigations Manual, it was not complete for the purpose of mentioning the investigation in the OER under Article 10-A-4.g.(1) of the Personnel Manual. While this argument may seem anomalous, it is justified by the last sentence of Article 10-A-4.g.(1), which states that the restrictions contained therein "do[] not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings." Therefore, the regulations clearly permit an OER to contain comments about an officer's poor performance, as discovered by an investigation, even if the report on the investigation has not been finalized, as long as the OER does not make reference to the investigation. However, the sentence referring to the investigation in the special OER is prohibited under Article 10-A-4.g.(1) and should be removed from the OER.

16. As the applicant alleged, CGPC should have returned the OER to his rating chain for revision because of the prohibited reference to the investigation. Nevertheless, CGPC's failure to do so does not render the entire OER invalid. As the Chief Counsel argued, the Board should not expunge an entire OER unless the erroneous comment cannot fairly be excised from it. *See* BCMR Docket No. 151-87. In this case, the Board finds that the prohibited reference to the investigation can easily be removed from the special OER. The applicant has not proved that the entire special OER must be removed from his record because of the reference to an ongoing investigation.

17. The applicant alleged that he should have been named a party to the investigation and accorded full party rights. However, Article 1-G-4.i. of the Administrative Investigations Manual provides that "[m]ost instances requiring investigation can adequately addressed by" an informal investigation. Article 1-E-2.b. prohibits the designation of parties in an informal investigation but provides that, if an informal investigation uncovers "such disputed issues of fact that a substantial risk of injustice to a person or persons would exist if they were not afforded the rights of a party during the investigation," the investigation may be upgraded to a formal investigation or court of inquiry. The Board finds that the applicant has not proved that the informal investigation of his case uncovered such disputed issues of fact that the Coast Guard erred by not according him full party rights. Moreover, the Board notes that in providing him with the Statement of Witness Rights and Rule 301, the Coast Guard strongly warned the applicant against volunteering self-incriminating information and informed him

that legal counsel was available to advise him about what information he should or should not provide to the IO. Therefore, the Board finds that the applicant has not proved that the Coast Guard erred in not according him full party rights or that the Coast Guard denied him any right that he was due as a witness.

18. The applicant alleged that under Article 10-A-4.g.(1) of the Personnel Manual, the rating chain was prohibited from basing an OER on the findings of any investigation to which he not named a party. Article 10-A-4.g.(1), however, only prohibits references to an investigation if the member was not accorded full party rights; it does not prohibit "comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings," as the last sentence of the article expressly states. The applicant argued that since CGPC once returned as deficient an OER that referred to an investigation because the officer in question was not named as a party, the special OER should be removed from his record. However, CGPC's letter in that case did not indicate that the OER as a whole was improper; it merely indicated that the reference to the investigation was improper because the officer was not accorded party rights. Therefore, the fact that the applicant was not accorded party rights in this case does not make the entire special OER improper but only the sentence referring to the investigation, which should be excised from the OER.

19. The last sentence of Article 10-A-4.g.(1) states that the restrictions contained therein "do[] not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings." The applicant alleged that this sentence did not justify the preparation of an OER based on an ongoing investigation to which he was not named a party because he himself disputes the facts. The applicant's argument, if valid, would prohibit any OER from ever mentioning facts uncovered by an investigation that was still ongoing or facts uncovered by an investigation to which the officer was not named a party, unless the officer not only agreed about the facts but also agreed that they should be reflected in an OER. Such an interpretation of the word "undisputed" would render the last sentence of Article 10-A-4.g.(1) a virtual nullity because no one would voluntarily permit negative facts to be reflected in an OER if he could prevent it just by quibbling or pretending to quibble with the facts. Moreover, the Board notes that the applicant expressly admitted to the AIM IO that, ." Thus, the Board finds that the applicant has in fact agreed with the only incriminating comment in the special OER: "During this emergency, he lost situational awareness and did not recognize that ." Therefore, the Board finds that the AIM IO's finding of pilot error, as described in the special OER, was "undisputed" within the meaning of the last sentence of Article 10-A-4.g.(1).

20. The applicant alleged that the OER should be removed from his record because it has been repudiated by his CO, who served as the reviewer on his rating chain. However, the alleged repudiation by the CO is irrelevant. The CO prepared the OER upon a direct order of the District Commander. There is no evidence in the record that the District Commander has repudiated it. Nor is there any evidence that the description of the applicant's performance contained in the OER is false.

21. The applicant alleged that the special OER should be removed from his record because the District Commander intended the mishap to be reflected only in a

regular, OER. He alleged that the CO's decision to prepare a special OER "drew far more attention to the incident than either [the District Commander or the CO] thought proper." The Board finds that the CO reasonably interpreted the District Commander's order that the incident be reflected in the applicant's "next OER" to mean that the incident should be reflected in a special OER. To have commented on the incident in the applicant's next OER would have violated Article 10-A-4.g.(3)(g) of the Personnel Manual, which prohibits comments on events that occur outside of the reporting period. Thus, the only "next OER" the mishap could be reflected in was a special OER. Because the District Commander clearly intended the applicant's performance record to reflect his role in mishap, the Board finds that the CO acted properly in interpreting the District Commander's order as requiring submission of a special OER.

22. The applicant's allegation that his CO wrongfully exerted command influence over his rating chain by directing them to submit the special OER is without merit. Article 10-A-3.b. of the Personnel Manual permits the CO or any higher authority within the chain of command to direct the submission of a special OER. Moreover, the applicant has not proved that the CO or anyone else exerted wrongful influence in determining the wording of the CO. The CO's statement that he would have objected had the applicant's supervisor or reporting officer attempted to change the wording does not prove that the supervisor or reporting officer were actually coerced into accepting the wording of the special OER. As the CO admitted, the reporting officer had participated in drafting the wording of the OER, and the supervisor, a public works officer, did not supervise the applicant in his capacity as an aviator.

23. The applicant has not proved that the information in the special OER pertaining to his role in is inaccurate or that the Coast Guard violated any regulation other than Article 10-A-4.g.(1) of the Personnel Manual, under which only the reference to the investigation is unlawful. Therefore, only the reference to the investigation should be removed from his record. That reference may be removed by deleting the following words: "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,."

24. The applicant asked the Board to remove his failure of selection for promotion, which he alleged was caused by the error in his record. In *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982), the Court of Claims held that the BCMR, after correcting an applicant's record, should decide whether his failures of selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"

25. The Board finds that the first requirement of the *Engels* test is not met: the reference to the administrative investigation did not make the applicant's record appear worse than it would in its absence. The sentence actually refers to a positive finding of the investigator about the applicant's performance. Moreover, the reference to the investigation is not *per se* prejudicial because the officers on the selection board would already know that any would be investigated. Therefore, the Board finds that the

applicant has not proved that his failure of selection for promotion to should be removed from his record.

26. Accordingly, the applicant's request for relief should be granted only in part, by removing from the special OER the sentence referring to the administrative investigation.

ORDER

The military record of , shall be corrected by removing the following comments from block 3.h. of the special OER for the period :

> 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 of the special OER 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.