

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-108

FINAL DECISION

[REDACTED]

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on May 4, 1999, upon the Board's receipt of the applicant's complete application for correction of his military record.

This final decision, dated April 27, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a [REDACTED] on active duty at the time he filed his application, asked the Board to correct his military record by removing a special officer evaluation report (special OER), with all attachments and references, for the period July 15, 1996, to February 18, 1997. He also requested that any and all administrative actions taken against him based on this special OER be invalidated, including his permanent removal from the 1997 Commander Promotion list and his failure of selection by the 1998 Commander Selection Board. He further requested that his name be placed on the 1994 Commander Promotion List with a date of rank of July 1, 1994, in accordance with the BCMR's decision in Docket No. 193-94.

Alternatively, the applicant requested, if the Board orders the removal of the disputed special OER but does not order his promotion to CDR, that his corrected record be placed before the next regularly scheduled Commander Selection Board, after he has had the opportunity to earn one additional regularly scheduled OER. The applicant further requested that if he is selected by the next regularly scheduled commander selection board that his name be placed on the 1994 commander selection list in accordance with the Board's order in Docket No. 193-94, and that he receive a July 1, 1994 date of rank. He further requested that, if the Board grants the requested relief after he has left active duty, that he be returned to active duty. The applicant requested adjustment to his leave account and back pay and allowances if he is returned to active duty.

In this case, the applicant challenges the disputed special OER on the grounds that it was prepared in violation of the Personnel Manual and it was based on unsupported allegations. The disputed special OER was, in part, the basis for the applicant's removal from the 1997 CDR promotion list. Before getting to the merits of this case, a background summary is necessary.

BACKGROUND AND HISTORY

The applicant received his commission as an ensign on [REDACTED]. He was promoted to lieutenant junior grade on [REDACTED] to lieutenant on [REDACTED] and to lieutenant commander on [REDACTED]. From July 24, 1989, to July 27, 1993, he served as an [REDACTED]. From July 28, 1993, to July 14, 1996, he served as the [REDACTED]. Since then, he has served as the [REDACTED]. The applicant retired on July 1, 1999, after having twice failed of selection for promotion to CDR.

Applicant's First Case (Docket No. 193-94)

In BCMR Docket No. 193-94, the applicant challenged an OER that he received while serving at the Coast Guard Academy. He asked the Board to remove certain comments attached to that OER, as well as his reply to those comments. He also asked the Board to remove his failures of selection for promotion and to backdate his promotion should the next selection board choose him.

The Board recommended granting the requested relief. It found that Coast Guard regulations prohibited OER comments concerning disputed facts that were the subject of an ongoing investigation. The Deputy General Counsel approved the Board's recommended decision. The following order was issued in Docket No. 193-94 on November 8, 1995:

The application to correct the military record of [the applicant] is granted. The comments of the Reviewer and the applicant's reply to those comments shall be deleted from the disputed OER. The applicant's failures of selection for promotion to CDR shall be removed. The block on the OER that indicates that comments from the Reviewer are attached shall be changed to one that indicates that no such comments are attached.

The applicant shall be given the opportunity to be considered by the next two CDR Selection Boards. If selected by the first such Board, he shall be given the date of rank he would have received had he been selected in 1993, and he shall be given applicable back pay and allowances. If he wishes, he shall be given the opportunity to compete to be on the Command Afloat List.

Chronology of Events Subsequent to the Final Decision in Docket No. 193-94

After his record was corrected in accordance with BCMR Docket No. 193-94, he was selected for promotion to commander in 1996 and placed on the 1997 promotion list. On January 31, 1997, the Senate confirmed the 1997 promotion

list. The applicant was then frocked (permitted to wear the insignia of a CDR) as a commander, but he was never promoted from that list. The applicant's name was eventually removed from the promotion list after several investigations and after a board of officers recommended that his name be removed from the promotion list. The Secretary of Transportation approved that recommendation and the applicant's name was removed from the promotion list.

The following is a chronology of events that preceded the applicant's name being removed from the promotion list.

On February 14, 1997, Coast Guard Investigations issued a Notice of Investigation concerning allegations of sexual harassment by the applicant. The notice states that a former student of the applicant alleged that he had been telephonically harassing her since she attempted to end all contact between them. The allegations arose when the student was questioned concerning two anonymous letters that were received by her command. The letters described her in disparaging terms. She stated that she believed the applicant wrote them.

On May 13, 1997, the applicant's CO sent a letter to CGPC requesting that the applicant's promotion be delayed, because of accusations of sexual harassment and obstruction of justice, "until these matters are resolved." On May 21, 1997, CGPC informed the applicant that, based on the information in the CO's letter, his promotion was being withheld in accordance with Article 5.A.13. of the Personnel Manual. The letter stated, "You will be advised of our intent to initiate administrative action if deemed necessary."

On June 23, 1997, Coast Guard Investigations issued a report of investigation concerning the allegations of sexual harassment. The report stated that the investigation had failed to prove that the applicant had sent the letters, but it concluded that he was a "likely suspect." The investigation also stated that the applicant and the student "may have provided false statements to [investigators] during an investigation into their inappropriate relationship when she was a cadet at the academy." The report stated that the investigation was closed.

On July 31, 1997, the applicant's CO received a report of an informal investigation he had initiated after receiving the Report of Investigation on June 23, 1997. The informal investigation concerned the applicant's alleged misuse of government telephones and email. The report stated that between July 1, 1996, and January 31, 1997, the applicant had placed 408 long-distance phone calls to his former student's personal phone number. The frequency varied from just one call per day to as many as 18 calls per day. The applicant was also found to have called another female junior officer long-distance up to 6 times per day during January 1997. Both recipients of the applicant's calls confirmed that the calls did not concern official business.

The report concluded that the applicant was guilty of failing to obey orders, larceny, wrongful appropriation, and false pretenses. It also concluded that there were aggravating circumstances that weighed against the applicant. The investigator recommended that all but the false pretense charge be dropped

and that the applicant be taken to captain's mast on the false pretenses charge. However, on August 25, 1997, the applicant signed an "Acknowledgment and Election" form stating that, after consulting with his private attorney, he chose to refuse NJP proceedings.

On September 12, 1997, the applicant's CO wrote to CGPC requesting that the applicant's record be reviewed to determine his fitness for promotion and to consider whether he should be separated from the Service. The CO stated that both the formal and informal investigations into the applicant's conduct were complete. He concluded that the investigations provided sufficient evidence to prove the allegations "by a preponderance of the available evidence," but not "beyond a reasonable doubt."

On December 18, 1997, the applicant's rating chain completed a special OER to document the applicant's misuse of government telephones. All of the marks in the OER are "not observed" except for a mark of 4 (out of 7) for Using Resources and marks of 3 for Judgment and Responsibility. The comments state that, although the applicant's "overall performance in 'using resources' has been far beyond that of a typically effective CG officer," the mark of 4 was assigned because of "misuse of the FTS telephone system."

On May 1, 1998, the applicant sent a letter to CGPC protesting his failure to be promoted in accordance with the BCMR's order in Docket No. 193-94. On May 12, 1998, CGPC responded, stating that 14 U.S.C. § 271(b) and the subsequent delay had prohibited the applicant's promotion and that the matter was still under review. On May 12, 1998, CGPC also informed the applicant that a Special Board of Officers would meet to consider his removal from the promotion list based on the special OER, the results of the formal investigation, and his CO's letter dated September 12, 1997.

On June 16 and 17, 1998, a Special Board of three Coast Guard captains met to consider the applicant's removal from the promotion list. After reviewing the record and the applicant's submissions, the board voted unanimously to recommend removing the applicant from the promotion list based on the "appearance" of two inappropriate relationships, adultery, and improper use of government telephones. On June 29, 1998, the Commandant endorsed the Special Board's recommendation that the applicant be removed from the promotion list. On June 30, 1998, the Secretary of Transportation signed an order removing the applicant's name from the promotion list.

On September 17, 1998, the applicant filed an application (BCMR Docket No. 1999-116) seeking promotion to commander.

Applicant's Second Case (BCMR Docket No. 1998-116)

The applicant alleged that the Coast Guard refused to comply with the Board's order in Docket No. 193-94 by promoting him after he was selected for promotion in July 1996 by the first commander selection board to meet after his record was corrected. The applicant alleged that the Coast Guard should have

placed his name on the 1994 commander promotion list and promoted him at the first opportunity after his promotion was confirmed by the President and the Senate. Then, he alleged, his promotion should have been backdated to July 1, 1994, which is the date of rank he would have had if he had been selected for promotion in 1993.

The Board denied the applicant's request for relief. The Board found, in Docket No. 1999-116, that the applicant had not proved by a preponderance of the evidence that the Coast Guard committed error or injustice by placing him on the 1997 promotion list; by planning to promote him in accordance with the order mandated in 14 U.S.C. § 271(b); by delaying his promotion while investigating the allegations of misconduct and taking appropriate administrative action in light of the findings of the investigations; or by removing his name from the promotion list.

Applicant's Third and Current Case (BCMR Docket No. 1999-108)

The applicant's current application attacks the special disputed OER. He alleged it was instrumental in the Board of Officer's recommendation that his name be removed from the PY (promotion year) 1997 Commander promotion list. He also asserted that the special OER was instrumental in his failure to be selected for promotion to Commander in 1998.

On the special OER, the applicant received a 4 in using resources and a 3 in both judgment and responsibility. The comment block (3.h.) contained the following relevant information: "This report is being submitted as a result of information I have received which documents misuse of the FTS telephone system. The mark in the element [using resources] is reduced because this information indicates that the ROO [reported-on officer] in over 400 instances used FTS to call the personal residences of two fellow Coast Guard officers who stated that the calls were personal in nature.

The reporting officer wrote the following in block 11 of the special OER:

[The applicant's] performance as comptroller and as a supervisor of military personnel has been exemplary. His mis-use of the FTS is out of character with this performance and not expected for an officer of his grade and position. This OER documents performance on this one area that should be considered along with his overall record. Performance in all other areas and comparison marks were documented in the regular OER.

The applicant alleged that the special OER was not prepared in accordance with the Personnel Manual. The applicant specifically argued that the special OER was prepared in violation of Article 10-A-4.g.(1) of the Personnel Manual, which was in effect until October 3, 1997. This provision states that

[m]embers of the rating chain shall not comment on or make reference to any pending criminal proceeding . . . disciplinary

action (non-judicial punishment), PRRB, CGBCMR, or any other ongoing investigation (including discrimination investigations). 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 proceeding. The finality of a proceeding is governed by regulations applicable to its convening . . . This restriction does not preclude comments on appropriate, undisputed, supportable, and relevant facts, so long as no reference is made to the pending proceedings.

In this case, the applicant alleged that the rating chain ignored the above provision which

Restrict[ed] the content of the permissible narrative comments by members of the rating chain. Comments regarding any pending investigation are prohibited. Comments regarding any investigation where the rated officer was not made a party are prohibited. In clear violation of Coast Guard regulations, [the applicant's] rating chain chose to ignore those restrictions. The Supervisor and Reporting Officer used disputed information from pending investigations; investigations which did not afford [the applicant] the rights of a party.

The applicant claimed that at the time the rating chain drafted the disputed special OER, they knew that the applicant's conduct was under investigation pursuant to an informal investigation ordered by the reporting officer. The applicant claimed that the CO ordered the informal investigation after CGIS found sexual harassment and obstruction of justice allegations against the applicant to be unsubstantiated. The applicant claimed that the reporting officer had information from the investigations in June 1997, and therefore, the information should have been included in the regular OER for that period.

The applicant asserted that it was the Coast Guard's position, in a previous BCMR application, that the investigations were pending until final action was taken to remove the applicant from the commander promotion list on June 30, 1998. If true, the investigations were pending at the time the disputed special OER was drafted, signed, and submitted.

The applicant alleged that the Coast Guard purposefully and wrongfully delayed submitting the special OER until Change 27 to the Personnel Manual became effective on October 3, 1997. With this Change, the wording of Article 10-A-4.g.(1) was modified and became Article 10.A.4.f.(1) of the Personnel Manual. This provision reads:

Members of the rating chain shall not . . . [m]ention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishments proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, . . . or any other investigation . . . Referring

to the fact conduct was the subject of a proceeding of a type described above is also permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply [to an OER]. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

The applicant stated that the purpose of the restrictions contained in the regulations prior to Change 27 was to protect the reported-on officer's due process rights. He argued that the modification to Article 10-A-4.g.(1) is constitutionally impermissible and contradicts the purposes of the Coast Guard Administrative Investigations Manual, which governs the conduct of the investigations in this case.

The applicant stated that the disputed special OER was created to cover a period of time, prior to the effective date of Change 27 to the Personnel Manual, and therefore, the previous regulation should apply to the disputed OER.

The applicant alleged that his rating chain was subjected to improper influence in preparing the disputed OER. He asserted that officers in his rating chain, particularly the supervisor, did not want to submit the special OER, but were ordered to do so by CGPC. The applicant stated that the supervisor told him and the reporting officer that the supervisor never observed the applicant misusing government resources or the unit's FTS system.

The applicant alleged that the reporting officer was disqualified from serving in the rating chain for the disputed special OER because the applicant had filed a civil rights complaint against the reporting officer in September 1997.¹ The applicant stated that the reporting officer removed himself from the rating chain on the next OER for the period ending April 30, 1998, because the applicant had filed a discrimination complaint against him in September 1997. The special OER was submitted on December 4, 1997.

In summary, the applicant stated the following:

The information [the special OER] contained was known during the period of time when [the applicant's] regular OER was being finalized by his rating chain. The content was impermissible under the due process protections in the Personnel Manual, prior to Change 27. The Reporting Officer should have been removed from the rating chain. The Special OER was submitted as an attempt at

¹ The Board obtained the civil rights counselor's report without exhibits. The applicant made contact with the civil rights counselor on September 19, 1997. The counselor recounted the applicant's allegations as follows: "a. Complainant alleges that he was treated differently based on gender during the investigation of a sexual harassment complaint. b. Promotion was delayed based on the sexual harassment complaint." The relief requested by the applicant was that his promotion be restored retroactively. The attempt at an informal resolution of the complaint was unsuccessful. On April 22, 1998, the counselor informed the applicant's CO that the applicant would be filing a formal civil rights complaint.

punishment, where the Coast Guard did not have evidence to charge [the applicant] under the UCMJ. It was a foregone conclusion that the presence of the Special OER would add support to [the reporting officer's] September 1997 request for the permanent removal of [the applicant's] name from the Commander Promotion list.

Applicant's Reply and attachments to the Disputed Special OER

The applicant submitted a reply to the disputed special OER. He stated that the "unproven accusations and disputed information were provided by a junior officer whose stated intent was to ruin his career because he refused to leave his wife and two sons to be with her." The applicant claimed that the junior officer was harassing him because he refused to stay with her.

The applicant denied that he had misappropriated use of the telephone. He stated that if there were any FTS misuse, it must have been the direct result of the harassing and criminal activities conducted by the junior officer. He stated that the command refused to take any action to determine who was responsible for the FTS misuse, if any occurred. The applicant stated that the command told him that they were relying solely on the unsubstantiated accusations and disputed information provided by the junior officer.

The applicant alleged in his reply that the Coast Guard had not taken any action against the junior officer, even though they were aware that she had made a false official statement (to CGIS investigator), and had committed other criminal violations. He stated that the information he has provided about the junior officer was verifiable and cast a significant doubt on her credibility.

The applicant also alleged, in his reply, that the disputed special OER was not prepared in accordance with the Personnel Manual. (These allegations are similar to the ones now pending before this Board.)

The applicant submitted the supervisor's endorsement to the OER reply to the disputed OER. The supervisor stated the following:

1. Prior to the submission of the Special OER, it was my understanding that the Personnel Manual prohibited the use of information that was under investigation and in dispute. This was my understanding of [the applicant's] position.
2. When the latest change to the Personnel Manual removed that prohibition, I still did not want to submit a Special OER because, although no longer prohibited, I thought it was unfair to apply it to an issue that had been investigated, and that the [reported-on officer] had declined to accept a Captain's Mast. Since no further UCMJ action was pending, I felt the issue was either completed without further action or was still in dispute. So, when I was told I had to submit a special OER, I did so with reluctance and tried to

be as fair as possible. I cited an apparent misuse of the FTS system based on phone logs (400 attempts to [call] one phone number) and information I was told, i.e. that the person whose phone was called had complained that the calls were personal in nature. I do not know who made these calls because the phone log reflects only RDC use and does not detail from which extension the phone calls were made.

3. Now I have a statement by [the applicant] . . . who swears that he has not misappropriated FTS calls. He further states that the person who had complained that the calls were personal in nature had, in fact, been harassing him and his family. [The applicant] has told me he is not using this alleged harassment as the basis of his statement that he had not misappropriated FTS phone calls; rather, he informed me that he had taken steps with the Unit Supply Officer to pay for any personal FTS call that might occur. I believe [the applicant].

4. . . . I now believe [the applicant] did not misappropriate FTS phone calls. It may be argued that he has not addressed the regulatory prohibition against using the FTS for personal use. Here I believe his sworn statement that "I have not misused government resources and have always upheld and enforced government policies and procedures. If there was any misuse it must have been as a direct result of the harassing and criminal activities conducted by the junior officer . . ." I specifically confirmed that [the applicant] is not saying he misused the system in response to this harassing/criminal activity. He said his statement stands on its own merits that he had not misused government resources.

5. . . . I know many telephone calls have been made. Since there are two diametrically opposed statements (from the [reported-on officer] and the complaining officer), the matter is in dispute and I will base my conclusion on the totality of [the applicant's] performance, in the rating dimension, which has otherwise been clearly exceptional Therefore, for the purpose of this special OER I want to change my mark to not observed.

6. . . . I do not know for certain whether the telephone system was misused or not. I know the matter is in dispute, and until the change to the Personnel Manual, could not have been used to prepare the special OER. I do think in a matter this serious, that there must be a presumption of innocence. I think that if I am to submit an OER that raises issues of this gravity, that said OER should be prepared only after this dedicated career officer has been afforded the due process rights we all deserve.

The reporting officer wrote the following in his endorsement to the applicant's reply to the disputed OER.

[T]he statements in the Special OER were not based on telephone extensions, but on other information available at the time of submission. This included: sworn statements from two junior officers not at this command stating that nonofficial business calls were made to them by [the applicant], RDC telephone records obtained from TISHCOM that document over 400 phone calls made from RDC to the personal residences of the two junior officers, and that the calls began to occur when [the applicant] reported to RDC (15 July 96) and stopped in early February 97 when he was ordered to no longer contact one of the junior officers. [The applicant] was informed of these allegations on 23 July 97; the documentation was provided to him at his request on 9 October 97.

[The applicant] makes allegations that he is the victim of several years of extortion and threats by an unnamed junior officer. This may provide a different reason for the phone use; . . . [The applicant's] sworn allegations warrant further investigation so I have referred this to CGIS. However, even if the allegations are true, I believe that the calls would not be considered as official business and that [the applicant] was not justified in using the Government telephone system. Based on the information available to me, I continue to believe that [the applicant] did . . . misuse the Government telephone system.

I carefully followed the submission process [for a special OER] and consulted with CGPC-opm on numerous occasions beginning in June 97. The discussions between CGPC-opm and this Command did not involve whether a special OER was directed or required. The discussion pertained to which section of the Personnel Manual could be referenced, as well as when the Special OER could be submitted and what the OER could contain; this was a topic of discussion as the Personnel Manual was being revised. The direction CGPC-opm provided was consistent with the change to the Personnel Manual that was promulgated on 3 Oct 97, but only received by this Command . . . on 4 Dec 97. . . [T]he Special OER has been administratively reviewed by CGPC-opm to ensure that it complied with the Coast Guard's OER submission requirements.

The applicant's reply to the special OER with the attachments was returned to him by GCPC for the following reasons:

Article 10.A.4.f.10 of [the Personnel Manual] prohibits rating chains from mentioning the Reported-on Officer's marital or family status and is likewise prohibited in the OER Reply by Article 10.A.4.g.2. The statement in paragraph 3 of the OER Reply, ". . . I refused to leave my wife and two sons to be with her" is prohibited and must be removed.

Article 10.A.4.g.2 . . . states: "Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance." Paragraph 4 of your OER Reply addresses issues other than the performance, which is the subject of this OER and consequently must be removed.

[Certain paragraphs] of this OER Reply deal with matters that pertain to administrative irregularities in the preparation process of the OER, not with the performance as documented in the OER, and must be removed. Article 10.A.7 of [the Personnel Manual] specifically addresses the area of administrative or substantive error and is the appropriate article to reference for relief of these types of issues.

The applicant resubmitted the reply, virtually unchanged. It was again returned to him for the reasons stated above. The applicant refused to make any further modifications and told CGPC to make the redactions as necessary. The applicant alleged that CGPC's refusal to accept his reply or to make the necessary redactions was a denial of his right to reply to the special OER.

Views of the Coast Guard

On February 29, 2000, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

The Chief Counsel stated that this is the fifth of six applications filed by the applicant that challenge various actions taken against the applicant as a result of his involvement with a junior officer. The Chief Counsel stated that having failed to prove, in Docket No. 119-116, that the Coast Guard's action to remove him from the commander promotion list was illegal or unjust, the applicant now challenges the disputed special OER, which served as justification, in part, for his removal from the commander promotion list.

The Chief Counsel stated that to establish that an OER is erroneous or unjust, an applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446 (1992). 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 (1992). The Chief Counsel stated that absent a showing that error or injustice affected the challenged record, it is inappropriate for the Board to second-guess the evaluations of those responsible for evaluating the reported-on officer under Coast Guard Regulations.

The Chief Counsel stated that the information contained in the special OER is factually accurate. Specifically, the statement in block 9.f. — "[d]isplayed both a lack of judgement and disregard for government policy by his use of the FTS to make personal calls"—is an accurate, fair and objective evaluation. The

Chief Counsel stated that the conclusion that the applicant used the telephone system to make over 400 personal calls is reasonably based on the following evidence:

First, the evidence contained in the CGIS Report of Investigation . . . along with the command informal investigation found Applicant had made over 400 calls during the period of the disputed OER from [his unit to the junior officer]. . . . The applicant has offered no evidence to rebut that investigative finding. Second, the applicant does not rebut that factual finding. Although he very carefully worded his denial of wrong doing in his OER replies, Applicant never once states "I never placed a phone call using FTS from my unit to [the junior officer]," the target of his harassment. Instead, Applicant offers a statement that says more by what it fails to state than what it does: "[I] emphatically deny any *misappropriation* of FTS phone usage. I have not misused government resources and have always *upheld and enforced* government policies and procedures. If there was any FTS misuse, it must be the direct result of the harassing and criminal activities conducted by the junior officer. . . ." This statement, standing alone does not overcome the strong presumption of regularity afforded his military superior in appraising his performance in the disputed Special OER.

The Chief Counsel agreed with the reporting officer's statement, in his endorsement to the applicant's reply, that "[e]ven if the allegations are true that [referring to Applicant's claim of wrongdoing on the part of the junior officer], I believe the calls would not be considered as official business and that [the applicant] was not justified in using the government telephone system." The Chief Counsel stated that the reporting officer made the conclusion that the applicant made the unauthorized phone calls based on (1) the completed CGIS and command investigations; (2) statements by the junior female officer that applicant had placed phone calls to her from his unit; and (3) documentation that over 400 long distance phone calls were made from the applicant's command to the junior officer's home phone over an eight month period, commencing on his arrival at the unit and stopping when the applicant was given an order to cease contact with the junior officer.

With respect to the allegation that the special OER was not prepared in accordance with the Personnel Manual, the Chief Counsel stated that Article 10.A.3.c.1.d. (of the current Manual) states that special OERs can be submitted "[t]o document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted." The rating chain submitted the special OER under this authority after discovering evidence of significant behavior after the end of the applicant's regular reporting period.

The Chief Counsel stated that the restriction in Article 10-A-4.g.(1) (prior to change 27) did not preclude comments in an OER that were appropriate,

undisputed, supportable, and relevant, so long as no reference was made to the pending investigation. The language authorizing the submission of comments in an OER based on "undisputed" facts was never intended to preclude comments in an OER because the reported-on officer disputed the facts.

The Chief Counsel stated that both the CGIS and command investigation were completed before the special OER was submitted. The Chief Counsel stated that even if the investigations were not completed at the time of submission, the information from them could still be used so long as there was no mention of the pending investigations.

The Chief Counsel stated that the applicant was not entitled to the rights of a party with respect to the informal investigation. Pursuant to Article 2.B.2.c. of the Administrative Investigations Manual, party rights do not attach to an informal investigation. However, information may still be used from the investigation in an OER as long as no reference is made to the final proceeding. Article 10.A.3.c.1.d., Personnel Manual.

The Chief Counsel stated that the applicant's allegation that the supervisor was improperly ordered to submit a Special OER by the reporting officer and CGPC is without merit. The Chief Counsel stated that Article 10.A.3.b. of the Personnel Manual permits higher authority within the reported-on officer's chain of command to direct the submission of a special OER. The Chief Counsel argued that therefore, the applicant's reporting officer was authorized to order the applicant's supervisor to document the applicant's improper use of the FTS in the disputed special OER.

The Chief Counsel stated that the applicant's allegation that his due process rights were abridged by CGPC when he was barred from replying to the contents of the special OER is without merit. The Chief Counsel stated that the applicant was provided three opportunities to submit an OER reply in conformity with the regulations. The Chief Counsel stated that the applicant chose not to follow the regulations for submitting the special OER after being informed of such regulations by CGPC.

The Chief Counsel disagreed with the applicant's assertion that the reporting officer should have been disqualified from serving in the rating chain for the disputed OER. The Chief Counsel stated that the reporting officer had sufficient information to prepare the OER prior to September 12, 1997, the date the applicant claimed that he filed a civil rights complaint against the reporting officer. Additionally, the Chief Counsel stated that the discrimination complaint was filed after September 12, 1997. The Chief Counsel stated that in the absence of a finding by the civil rights investigator that an administrative or criminal investigation was warranted, the reporting officer should not be considered an interested party to the civil rights investigation.

On the issue of a nexus between the disputed special OER and the applicant's failure of selection in 1998, CGPC offered the following analysis:

The special OER documents the results of the investigation conducted into allegations of misconduct on the applicant's part. It would therefore be damaging in front of a competitive Commander promotion board. However, it is not the only aspect of the applicant's record that indicates less than satisfactory performance. The OER for the period May 1, 1997 to April 30, 1998 includes two marks of "3" along with comments supporting those lower-than-average marks. This OER was submitted AFTER the contested OER and would remain in the Applicant's record even if the contested OER were removed.

Statements Submitted by the Coast Guard

1. The Coast Guard submitted a statement from the reporting officer. He stated that in preparing the special OER he consulted with CGPC and his legal advisor to ensure that service regulations and procedures were followed. He stated neither entity directed him to submit a special OER. The reporting officer stated that the disputed OER was based on information that became available to him after the regular reporting period ended.

The reporting officer stated that the applicant's improper use of the FTS was first noted in sworn statements that were taken as part of a Coast Guard Investigative Service investigation into a harassment complaint made by a junior officer. The reporting officer stated that he did not initiate the CGIS investigation. The reporting officer stated that based on the improper use of the FTS described in the completed CGIS investigation, he ordered a further investigation during the summer of 1997. The information obtained in the informal investigation was forwarded to CGPC in September 1997. The contents of the informal investigation were provided to the applicant in October 1997 and the special OER was submitted in December 1997.

The reporting officer stated that in October 1997, the applicant asked to file a complaint of discrimination and requested a military civil rights counselor/facilitator. He stated that in April 1998, a civil rights counselor stated that the applicant would be filing a formal civil rights complaint alleging gender discrimination. The reporting officer stated that "[b]ased on the fact I believed that I might be considered 'an interested party' to this complaint and as the definition of 'interested party' within the [the Personnel Manual] was unclear and I didn't know the specifics of the complaint, I took the pro-active step of requesting that I be removed from the applicant's OER reporting chain. This request was granted. That decision or the underlying complaint had, to the best of my knowledge, no bearing or relevance to the execution of my duties as the Reporting Officer for the special OER."

2. The Coast Guard also submitted a statement from the former [REDACTED] Coast Guard Personnel Command. He stated that he did not, nor did any member of his staff, order a special OER to be submitted on the applicant.

This officer stated that work on Change 27 to the Personnel Manual began in 1995. One purpose of the change was to clarify the provision dealing with when to and how to comment on conduct that is subject to an investigation.

Applicant's Reply to the Views of the Coast Guard

On March 31, 2000, the Board received the applicant's reply to the advisory opinion. He disagreed with the Coast Guard views and restated his request for relief.

The applicant restated his position that the disputed special OER was not prepared in accordance with the Personnel Manual. He argued that the information that formed the basis for the special OER was known to the command prior to the submission of the applicant's regular OER for the period July 7, 1996 to April 30, 1997. (This regular report was signed by the supervisor on June 5, 1997, by the reporting officer on July 14, 1997, and by the reviewer on July 15, 1997.) Therefore the information contained in the special OER should have been included in the regular OER. He cited Article 10-A-3.b.(5) of the Personnel Manual, which states a special OER may be submitted "[t]o document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted."

Further, the applicant stated that the applicant's CO and headquarters' personnel discussed and decided that the special OER would be delayed until Change 27 of the Personnel Manual became effective on October 3, 1997. He stated that the Coast Guard offered no explanation for the nearly six (6) month time period between the date that the CO received the report of the CGIS investigation in June 1997 (and began discussing the special OER with CGPC) and the submission of the special OER. The applicant restated his argument that the special OER should have been submitted under the provisions of the Personnel Manual that existed prior to Change 27.

The applicant alleged that the informal investigation, which formed part of the basis for the special OER, was based on inaccurate and unsubstantiated information. The applicant described it this way:

[T]he investigation . . . consisted of . . . uncorroborated allegations, consisting of an impermissible use of two statements from the CGIS investigation and a list of telephone calls which were placed to Florida numbers from petitioner's duty station. . . . Despite the inability of the system to assign the calls to any extension, the investigation officer (IO) opined that [the applicant] had made the calls.

The applicant stated that "there were a significant number of instances, when suspect calls were made on dates and times when [he] could not have made them, since he was physically absent from the command on official orders." He submitted a list of his absences from the command and a partial listing showing telephone calls that were made during these absences. He

alleged that this information was available to the CO and IO in June 1997, but that they refused to analyze it or to question anyone else at the command about making the questioned telephone calls.

The applicant alleged that there were other flaws in the investigation. He stated, for example, that the IO made a false official statement in the investigation when he "certifi[ed] that [the applicant] was shown all the evidence against him." The applicant stated that he was not shown the statements from the previous CGIS investigation or the evidence gathered in the investigation of the alleged telephone misuse, despite his repeated requests to see this information.

According to the applicant, another inaccuracy in the informal investigation was the statement that the applicant declined to make any statement related to the charge being investigated. The applicant stated that the correct statement should have been "[the applicant] declined to make any preemptive statement related to the charge without being shown the alleged evidence against him." In this regard, the applicant stated that when some of the redacted copies of the statements from the CGIS investigation were finally shown to him in May 1998, he submitted rebuttal and exculpatory evidence.

The applicant stated that contrary to the Coast Guard's assertion, the evidence refutes the accuracy and fairness of the disputed special OER. The special OER does not represent the honest and professional judgment of the rating chain. At least one rater, the supervisor, disagreed with the disputed special OER, but was ordered by the command to complete the supervisor's portion of the special OER.

The applicant further stated that contrary to the Coast Guard's assertion, the evidence contained in the investigations was disputed, inconclusive and termed "hearsay" by the CGIS investigator. The applicant alleged that the CO ignored this statement by the investigator as well as information brought forth by the applicant, the applicant's counsel, the applicant's supervisor, and the supply officer. The applicant stated that "[a]ll of the evidence and all of the statements together easily rebut any presumption of regularity."

The applicant stated that contrary to the Coast Guard's assertion, he believed that he did follow the regulations in submitting his reply to the disputed special OER. He stated that the Coast Guard, in refusing to accept and file his reply, did not specify which references in his reply were prohibited nor did it identify a specific violation of the Personnel Manual. The applicant stated that the Coast Guard allowed such references in his reply to a subsequent regular OER.

The applicant renewed his argument that the CO should have been disqualified from the rating chain because at the time he signed (December 8, 1997) and submitted the disputed special OER, the applicant had filed a discrimination complaint against the CO.

Finally, the applicant challenges the statements from the CO and the [REDACTED] and characterizes them as being inaccurate.

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, BCMR Docket Nos. 193-94 and 1998-116, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application 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. A Coast Guard captain, not the applicant's CO, ordered a CGIS investigation into alleged obstruction of justice and sexual harassment by the applicant of a female junior officer. The basis for the investigation was the receipt of anonymous letters by the junior officer's command, which described her in disparaging terms. The female junior officer indicated to her command that she believed the applicant had sent the letters. CGIS investigated the matter and closed its investigation on June 23, 1997. The CGIS investigator stated that "the investigation failed to substantiate the allegations that the applicant was responsible for sending the letters; however, investigation revealed [the applicant] was a likely suspect." Subsequently, the applicant's CO ordered an informal command investigation into the applicant's alleged wrongful use of the federal telephone system (FTS) by placing personal calls to the junior officer. The CO stated that information in the CGIS investigation led him to believe that the applicant, who was stationed in Connecticut, might have used the FTS to place personal calls to the female junior officer, who was stationed in Florida.

The informal command investigation was completed on July 31, 1997. The investigating officer recommended that the applicant be taken to non-judicial punishment for his misuse of the FTS. The applicant refused NJP. On September 12, 1997, the applicant's CO requested that the applicant's record be reviewed to determine his fitness for promotion and to consider whether he should be separated from the Service.

On December 18, 1997, the rating chain completed the disputed special OER, which documented the command's determination that the applicant had misused the FTS. On June 17, 1998, a Board of Officers unanimously recommended removing the applicant name from the promotion list. On June 29, 1998, the Commandant recommended that the Secretary approve removing the applicant's name from the promotion list. On June 30, 1998, the Secretary of Transportation signed an order removing the applicant's name from the promotion list. After the removal of the applicant's name from the 1997 promotion list, the 1998 commander selection board considered his record, but he

was not selected for promotion to CDR. This was considered the applicant's second failure of selection for promotion to CDR, and he was involuntarily retired on July 1, 1999.

4. The applicant now challenges the disputed special OER, claiming that it was not submitted in accordance with the Personnel Manual and that it was based on uncorroborated allegations. The special OER was, in part, the basis for the Board of Officers' recommendation that the applicant's name be removed from the 1997 promotion list.

5. The first question before the Board is which provision of the Personnel Manual applies to the submission of the special OER. The applicant argued that it was the provision that was in effect prior to October 3, 1997, the date Change 27 to the Personnel Manual became effective. The earlier provision prohibited commenting on or making references to pending investigations in OERs. However, the provision did not restrict comments on appropriate, undisputed, supportable, and relevant facts, so long as no reference was made to the pending proceeding. It also prohibited making reference to final proceedings unless the reported-on officer had been made a party to the investigation.

6. Article 10-A-4.f.(1) of Change 27 to the Personnel Manual became effective on October 3, 1997. It modified the earlier provision (Article 10-A-4.g.(1)) to read that the rating chain shall not mention that an officer's conduct is the subject of an investigation. It further stated that the restriction does not preclude comments on the conduct that is the subject of the proceeding, but only prohibits reference to the proceeding itself. This current provision prohibits mentioning an investigation whether it is pending or final. It also does not mention party rights under any circumstance.

7. The Board finds that the disputed OER as submitted does not violate either provision of the Personnel Manual. In this regard the Board notes that the prior and current provisions are consistent with each other in prohibiting the mentioning of an investigation, itself, but permit comments on the conduct that is the subject of an investigation in an OER.

Moreover, since the disputed special OER was submitted after Change 27 to the Personnel Manual became effective on October 3, 1997, it was appropriate to reference that version of the Personnel Manual in the disputed OER. The reporting officer completed the disputed special OER on December 8, 1997, and the reviewer signed it on December 11, 1997. The applicant has not submitted any regulation or case law that supports his argument that the earlier provision of the Personnel Manual should have been referenced in the disputed OER.

8. The applicant argued that his CO unfairly manipulated the submission process by deliberately delaying the issuance of the disputed OER until Change 27 to the Personnel Manual became effective on October 3, 1997. The informal command investigation into the alleged misuse of the government telephone system was not completed until July 31, 1997. The Board finds that the approximately 4 1/2 months it took for the rating chain to complete and submit

the disputed OER did not constitute an unreasonable amount of time. Special OERs are submitted infrequently and as the reporting officer stated he wanted to obtain guidance from CGPC. Additionally, the applicant has not established that a special OER has to be submitted by a date certain. The reporting officer indicated that he was carefully following the special OER submission process, as provided to him by CGPC. The Board finds nothing unfair in the manner in which the reporting officer handled this situation, particularly in light of the fact that the two provisions are consistent with each other.

9. However, even if, as the applicant argued, the disputed special OER should have been submitted pursuant to the provision of the regulation that was in effect prior to October 3, 1997, the Board finds that the disputed special OER did not violate that provision. The applicant alleged that the reporting officer used information from the investigation in the OER, even though the applicant was not made a party to the investigation and even though the applicant disputed the information in the investigation. The applicant claimed this to be a violation of the earlier provision of Article 10-A-4g.(1) of the Personnel Manual, which stated that "[m]embers of the rating chain shall not comment on or make reference to any pending . . . ongoing investigation (including discrimination investigations) This restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the *pending proceedings*." (Emphasis added.)

The fact that the applicant was not a party to the informal investigation is irrelevant to the disputed OER, because Article 10-A-4g.(1) stated in pertinent part: "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 proceeding." As previously stated, no reference is made at all to the investigation in the disputed special OER.

The applicant would argue that the reporting officer violated the earlier provision of the Personnel Manual by including in the disputed special OER facts that were in dispute. However, the applicant has misread the pertinent portion of Article 10-A-4g.(1)), which stated that "[t]his restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, *so long as no reference is made to the pending proceedings*." (Emphasis added.) The Board interprets this to mean that once the investigation was final, the rating chain, in its evaluation of an officer's performance, could use the information contained therein. In this regard, the Board relies on BCMR Docket No. 193-94, wherein the Deputy General Counsel approved the Board's findings, which stated in part: "Article 10-A-4g.(1) prohibits written discussion, in an OER, of an ongoing investigation, unless they refer to 'appropriate . . . facts,' and make no reference to the investigation itself." Contrary to the applicant's argument, the informal investigation was complete, not pending, at the time the special OER was submitted. Pursuant to Article 1-D-4. of the Administrative Investigations Manual, the informal investigation was final when the investigating officer delivered his findings, opinions, and recommendations to the CO.

10. If the applicant's interpretation of that portion of Article 10-A-4.g.(1) were accepted, it would mean that a CO could never have reported on the inappropriate behavior of a reported-on officer in an OER, if that officer disputed the facts of an investigation or disputed his participation in any inappropriate conduct. Thus, the Board is persuaded that the restriction was limited to the reporting of facts that were appropriate, undisputed, and relevant while an investigation was pending.

11. The applicant claimed that the CO violated Article 10-A-3.b.(5) of the Personnel Manual (cite to the provision in the earlier version of the Personnel Manual), which stated that a special OER may be submitted "[t]o document significant historical performance or behavior of substance and consequence which was unknown when the regular was prepared." (The Board notes that while this provision was renumbered in the current version of the Personnel Manual, the contents remained unchanged.) The applicant argues that the CO had the information in June 1997 and at the time the CGIS investigation was complete. However, the CGIS investigation was ordered by another authority to investigate allegations of sexual harassment and obstruction of justice by the applicant; it did not investigate whether the applicant had placed personal calls using the FTS. From that CGIS investigation came information that the applicant might have misappropriated the use of the FTS at his unit. The CO then ordered an informal command investigation to determine whether such misuse had occurred. The applicant ignores the fact that the disputed special OER was based substantially on information contained in the informal command investigation.

12. The informal investigation, which dealt only with the allegations of telephone misuse, was not completed until July 31, 1997. The reviewer signed the pertinent regular OER on July 15, 1997. Thus, the CO did not have the information from the informal investigation until after the OER for the regular reporting period had been signed and submitted to Headquarters. Headquarters validated the regular OER on July 30, 1997. The information that formed the basis for the special OER, could not have been included in the regular OER covering the period July 7, 1996, to April 30, 1997.

13. The applicant also questioned whether the reporting officer should have removed himself from the rating chain for the disputed OER because the applicant had filed a discrimination complaint against the reporting officer in September 1997. Article 10-A-2.g. of the Personnel Manual states that if a member of a rating chain is disqualified from carrying out OER duties, an appropriate substitute shall be named. Section 10-A.2.g.2.b. defines disqualified as including "relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the [s]upervisor, [r]eporting [o]fficer, or [r]eviewer raises a substantial question as to whether the reported-on officer will receive a fair, accurate, evaluation."

The reporting officer was not a designated party to the civil rights investigation. Nor was he under any investigation during the period in question. The mere filing of a complaint that involves a reporting officer does not establish

that he must be removed from the rating chain. There needs to be some evidence, in this case, that the reporting officer's actions in requesting the delay of the applicant's promotion to CDR or in submitting the special OER were for reasons other than fulfilling his official function. The Board notes there is no evidence that the reporting officer harbored any prejudice against the applicant. Nor was it the reporting officer who initiated the CGIS investigation, which led to the informal investigation. Rather, it was the Coast Guard captain at another command who requested the CGIS investigation. After the completion of that investigation it fell to the applicant's reporting officer, who was also the CO, to determine what official actions, if any, were necessary.

Additionally, the reporting officer stated that to the best of his knowledge, the applicant's civil rights complaint had no bearing on or relevance to the execution of his duties as reporting officer for the disputed special OER. The Board notes that the CO could not grant the relief requested by the applicant in the civil rights complaint. It was up to the Military Personnel Command to determine if the delay of the applicant's promotion was justified. The applicant has not shown that the reporting officer had a personal interest or conflict in requesting a delay of the applicant's promotion or in the submission of the disputed special OER.

14. The applicant claims that the rating chain was subjected to improper influence in preparing the disputed special OER. Particularly, the applicant claimed that the supervisor did not want to submit a special OER. The decision to submit a special OER did not belong to the supervisor but to the reporting officer. See Article 10.A.3.c., Personnel Manual. Additionally, the reporting officer denied that he was forced by any one to submit a special OER on the applicant. The applicant has not provided sufficient evidence to prove that the reporting officer was forced to submit a special OER.

16. In an effort to prove that the investigations were flawed and not credible, the applicant makes much of the fact that the CGIS investigation could not substantiate the charges that he was the individual who sent unfavorable letters about the junior officer to her command. However, these were two separate investigations. Telephone misuse was not the subject of the CGIS investigation but of the command investigation. The failure of the CGIS to substantiate the charges of its investigation does not prove that the same is true of the informal command investigation.

17. Specifically, with respect to the informal investigation, the applicant points out that on certain dates, when he was away from the command, calls were still made to the Florida numbers. However, the applicant did not present any evidence of officially endorsed orders showing departure from the unit or his return to the unit. His mere allegation that he was away on orders is insufficient proof that he did not make certain telephone calls. The applicant points out that the informal investigation did not show which unit extension the calls were made from, much less that he made the calls. However, the Board finds that there was ample evidence for the Coast Guard to conclude that the applicant made the calls. First, he knew the female junior officer in question. Second, she

stated that he had placed non-business calls to her home. Third, another junior officer who stated that the applicant had also placed non-business calls to her home corroborated the female junior officer's statement. She stated that during these phone calls, the applicant was enlisting her help in getting the female junior officer to continue communicating with him. Fourth, the CO stated that the calls to the numbers in question began with the applicant's arrival to the command and ended when he was ordered not to place any further calls. Accordingly the Board finds that there was sufficient evidence to conclude that the applicant made over 400 non-business calls to the female junior officer and the other officer.

18. The Board notes that the applicant alleged that certain comments on his regular OER for the period July 7, 1996, to April 30, 1997, were changed after the CO received the CGIS investigation. The Board will defer on this issue and will consider it when it acts on the applicant's other application, Docket No. 1999-171, which deals specifically with that OER.

19. All of the applicant's contentions have been considered. Those not specifically mentioned in the findings and conclusions are considered to be without merit.

20. The applicant has failed to establish an error or injustice in this case. Accordingly, his request for relief should be denied.

ORDER

The application of
(Ret.), for the correction of his military record is denied.

USCG

