

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-141

[REDACTED]
[REDACTED]

FINAL DECISION

[REDACTED] Attorney-Advisor:

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 June 27, 2002 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated June 26, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a retired XXXXXXXXXXXX (XXXX; pay grade xxx) asked the Board to correct his military record to show that a "change in rating chain"¹ officer evaluation report (OER) was submitted on his performance for the period May 1, 19xx to December 31, 19xx. He also requested that the Board correct an OER for the period May 1, 19xx to April 30, 19xx (the disputed OER) by:

- (a) removing the comment in section 8 Comments, which states "[m]ade inappropriate public statements about personal disagreement with CO";
- (b) upgrading the numerical scores in sections 8.c. and 8.d. from 3 to 5 as warranted by the narrative correction in section 8 Comments; [and]

¹ Upon the change of Reporting Officer (RO), Article 10.A.3.a.(2)(b) of the Personnel Manual provides that "OERs for officers on an annual submission schedule are required if more than six months (i.e., 182 days) have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later."

- (c) removing the Reviewer comments, entirely or correcting them by removing the erroneous comments consisting of the second and third paragraphs of the comments page.

He further requested that all references to the above erroneous comments in the disputed OER be expunged from his official military record.

The applicant also requested that any and all administrative actions taken against him based on the results of the Special Board be invalidated, including his permanent removal from the 19xx XXXXX Promotion list and his failure of selection by the 19xx XXXXX Selection Board. He further requested that all references to his permanent removal from the 19xx XXXXX Promotion list and his failure of selection by the 19xx XXXXX Selection Board be expunged from his official record.

Furthermore, the applicant asked the Board (a) to reinstate his position on the 19xx XXXXX Promotion list; (b) to promote him retroactively, as of July 1, 19xx, with a date of rank (DOR) of July 1, 19xx; (c) to correct his DD form 214 to show that he retired at the rank of XXXXX (XXXXX); (d) to order the Coast Guard to pay him retroactive active duty pay and allowances for the period July 1, 19xx to July 1, 19xx, as well as the difference in all retired pay and allowances from July 1, 19xx to the present date.

BACKGROUND AND SUMMARY OF THE RECORD

The applicant received his commission as an ensign on May 24, 19xx. He was promoted to xxxxx xxxxx on February 24, 19xx, to XXXXX on August 1, 19xx, and to XXXXXXXXXXXX on July 1, 19xx. From July 24, 19xx, to July 27, 19xx, he served as an XXXXXX at the XXXXXXXXXXX XXXXXX. From July 28, 19xx, to July 14, 19xx, he served as the XXXX XXXX of the XXXXX Branch for XXXXX. Since then, he has served as the xxxxx of the XXXXX XXXXX XXXXX. The applicant retired on July 1, 19xx, after having been removed from the 19xx XXXXX promotion list by a special board of officers and having failed of selection for promotion to XXXXX in 19xx.

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 XXXXXX XXXXX. The OER contained comments about an alleged inappropriate relationship between the applicant and a xxxxx xxxxx. 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 comment 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 XXXXX 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 XXXXX 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 19xx, 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 XXXXX.

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, the applicant was selected for promotion to XXXXX in 19xx and placed on the 19xx promotion list. On January 31, 19xx, the Senate confirmed the 19xx promotion list. The applicant was then frocked (permitted to wear the insignia of a XXXXX) as a XXXXX, 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, 19xx, Coast Guard Investigations issued a Notice of Investigation concerning allegations of sexual harassment by the applicant. The notice states that a XXXXX XXXXX 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 XXXXX 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, 19xx, 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 matter are resolved." On May 21, 19xx, 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, 19xx, 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 concluded that he was a "likely suspect." The investigation also stated that the applicant and the XXXXX "may have provided false statements to [investigators] during in investigation into their inappropriate relationship when she was XXXXX at XXXXX." The report stated that the investigation was closed.

On July 13, 19xx, the applicant's CO received a report of an informal investigation he had initiated after receiving the Report of Investigation on June 23, 19xx. The informal investigation concerned the applicant's alleged misuse of government telephones and email. The report stated that between July 1, 19xx, and January 31, 19xx, the applicant had placed XXX long-distance telephone calls to his XXXXX'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 XXXX XXXX long-distance up to 6 times per day during January 19xx. Both women stated that the applicant's 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 pretenses charge be dropped and that the applicant be taken to captain's mast on the false pretenses charge. However, on August 25, 19xx, the applicant signed an "Acknowledgement and Election," form stating that, after consulting with his private attorney, he chose to refuse NJP proceedings. The Coast Guard did not bring court-martial proceedings against the applicant.

On September 12, 19xx, 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 investigation provided sufficient evidence to prove the allegations "by a preponderance of the available evidence," but not "beyond a reasonable doubt."

On December 18, 19xx, the applicant's command completed a special OER to document his 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, 19xx, 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, 19xx, 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, 19xx, 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, 19xx.

On June 16 and 17, 19xx, 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, 19xx, the Commandant endorsed the Special Board’s recommendation that the applicant be removed from the promotion list. On June 30, 19xx, the Secretary of Transportation signed an order removing the applicant’s name from the promotion list.

On September 17, 19xx, the applicant filed an application (BCMR Docket No. 1998-116) seeking promotion to XXXXX.

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

In BCMR Docket No. 1998-116², 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 19xx by the first XXXXX selection board to meet after his record was corrected. The applicant alleged that the Coast Guard should have placed his name on the 19xx XXXXX 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, 19xx, which is the date of rank he would have had if he had been selected for promotion in 19xx.

The Board denied the applicant’s request for relief. The Board found, in Docket No. 1998-116, 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 19xx promotion list; by planning to promote him in accordance with the order mandated in

² This case was consolidated with BCMR Docket No. 1998-094, another application submitted by the applicant requesting the same relief based on different grounds. It was docketed two months earlier than BCMR Docket No. 1998-116.

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 Case (BCMR Docket No. 1999-108)

In BCMR Docket No. 1999-108, the applicant challenged the special OER (the disputed special OER), which was submitted to CGPC on December 11, 19xx. He alleged that the disputed special OER was not prepared in accordance with Article 10.A.4.g.(1) of the Personnel Manual and was based on unsupported allegations. He alleged that the Coast Guard purposefully and wrongfully delayed submitting the disputed special OER until Change 27 to the Personnel Manual became effective October 3, 19xx. He argued that the 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.

Prior to Change 27, Article 10.A.4.g.(1) read, in pertinent part, as follows:

[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.

With Change 27, the wording of Article 10.A.4.g.(1) was modified and became Article 10.A.4.f.(1) of the Personnel Manual. It reads as follows:

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 also alleged that the disputed special OER was instrumental both in the Board of Officer's recommendation that his name be removed from the PY (promotion year) 19xx XXXXX promotion list and in his failure to be selected for promotion to XXXXX in 19xx; that the reporting officer should have removed himself; and that the rating chain was subjected to improper influence.

The Board denied the applicant's request for relief. The Board found that although the special OER was, in part, the basis for his permanent removal from the 19xx promotion list, the special OER did not violate either provision of the Personnel Manual. Moreover, the Board found that the applicant failed to prove by a preponderance of the evidence that his rating chain unfairly delayed the submission of the disputed special OER; that the reporting officer was "disqualified" from carrying out OER duties; or that his rating chain was subjected to improper influence in preparing the disputed special OER.

Applicant's Fourth Case (BCMR Docket No. 1999-171)

In BCMR Docket No. 1999-171, the applicant challenged the OER (disputed OER) for the period covering July 15, 19xx to April 30, 19xx. The applicant alleged that an earlier draft of the disputed OER had been prepared, but its submission had been delayed by the reporting officer until he could review the CGIS investigation. The reporting period ended April 30, 19xx and the reporting officer signed the OER on July 14, 19xx. The applicant claimed that once the reporting officer reviewed the CGIS investigation he revised the earlier draft of the disputed OER to delete the promotion and command recommendations. He alleged that the reporting officer altered the earlier version of the disputed OER based on the information contained in the investigative report, even though he never used the word "investigation" in the disputed OER.

The applicant also alleged that the reporting officer's use of information contained in a pending CGIS investigation in the disputed OER was prohibited by the Personnel Manual that was in effect at the time the disputed OER was prepared. He further argued that the reporting officer violated Article 10.A.4.g.(1) of the Personnel Manual, by using information from the CGIS investigation as a basis for changing comments from those in the earlier draft of the disputed OER to those in the final version of the disputed OER.

The Board denied the applicant's request for relief. The Board noted that the disputed OER contained no reference to either of the investigations and found that the restriction in Article 10.A.4.g.(1) does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings. The Board also found that the CGIS was not pending, but completed and closed prior to the submission of the disputed OER. The Board was not persuaded that the reporting officer changed the wording of the disputed OER to delete the specific recommendations for promotion and command based on the CGIS investigation, as the Board found the earlier, unsigned version to be a draft. The Board concluded that the Personnel Manual gives the reporting officer the right to base his evaluation of the applicant's performance on "... other reliable reports and records."

The Board found that the reporting officer was acting in his official capacity when he convened the administrative investigation into the applicant's alleged telephone misuse and that the applicant had provided no corroborating evidence that the reporting officer had developed a personal interest in the CGIS investigation that would disqualify him from the rating chain.

APPLICANT'S CURRENT ALLEGATIONS AND SUBMISSIONS

The applicant alleged that his rating chain failed to submit a change of Reporting Officer (RO) OER, as required by Coast Guard regulations. Specifically, he alleged that in December 19xx, his CO changed his position in the applicant's rating chain from Reviewer to RO. The applicant argued that in accordance with Article 10.A.3. of the Personnel Manual,³ his rating chain was required to submit an OER because of this change. He alleged that in refusing to submit a change of RO OER, the CO deprived him of having a " 'positive' OER ... enter[ed in his] record, while [a] 'negative' Special OER was [concurrently] being prepared by his CO," for the period covering July 15, 19xx to February 18, 19xx. He contended that the absence of the change of RO OER prevented his fair evaluation by the 19xx promotion board, and thereby, created an injustice.

The applicant alleged that the disputed OER contained erroneous information and was not a fair and accurate representation of his performance because his CO inappropriately inserted Dr. M, a civilian employee, in his rating chain. He alleged that although he previously requested the CO's removal from his rating chain, the CO, who served as the RO, was not replaced until May 11, 19xx—after the end of the reporting period on April 30, 19xx, and in violation of the Personnel Manual. He further contended that the change violated the Personnel Manual in that the replacement RO was outside the group from which the applicant could expect to be in his rating chain, and "unfairly prevented [him] from knowing the identity of his raters." He alleged that the replacement RO was biased against him and thought that the applicant was the source of an Inspector General complaint, which led to a unit audit. As a result of this misinformation, he argued, the replacement RO included a derogatory comment in the disputed OER and caused the numerical scores in the corresponding section to be unfairly low.

The applicant alleged that, as a result of the presence of two civilians in the applicant's rating chain (supervisor and RO) on the disputed OER, the reviewer was required to make written comments on the applicant's performance. The applicant alleged that the comments submitted by the reviewer were inaccurate in three areas: (a) suggesting that the numerical scores assigned by the supervisor in sections 3.a. and 5.f.

³ Article 10.A.3.a.(2)(b) provides that "OERs for officers on an annual submission schedule are required if more than six months (i.e., 182 days) have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later," when there is a change of Reporting Officer.

be lowered from "6" to "5"; (b) stating that the applicant failed to submit a list of significant accomplishments until well after the end of the rating period; and (c) repeating the RO's comments from Block 8's comment section

The applicant alleged that after he submitted a written reply in response to the reviewer's comments, the supervisor and RO each wrote endorsements in an effort to correct their inaccuracies in the disputed OER. In support of his allegations he submitted a copy of the supervisor's endorsement and argued that it rebuts the reviewer's comments included in the disputed OER. He alleged that, upon being provided with more detailed information, the replacement RO reconsidered his comments and the numerical scores, that he gave the applicant and requested their correction.

The applicant alleged that the disputed OER, containing the above inaccurate information, was his most recent OER and "was likely to have been given significant weight by the [19xx XXXXX Selection Board]." He alleged that the errors were significant and led to his failure of selection before that board in July 19xx. He argued that the inaccurate information requires correction by removing the replacement RO's comment, upgrading the two numerical scores and removing the reviewer's comments.

The applicant alleged that although he had the right under the Personnel Manual to submit a written communication to the 19xx XXXXX selection board, he was denied the fair opportunity to do so. He alleged that after being notified of the decision to permanently remove his name from the 19xx XXXXX promotion list, he submitted a letter to the 19xx XXXXX selection board in "complete explanation of the circumstances." He alleged that by memorandum dated July 24, 19xx, the XXXXX of CGPC "eviscerated his letter and removed virtually all substance from its text" through heavy redaction of his communication to the selection board. Consequently, he argued, the 19xx XXXXX promotion board made its decision based on an incomplete and inaccurate record. He alleged that the Coast Guard's denial of the opportunity to have a complete and accurate record before the board led to his failure of selection before the 19xx XXXXX promotion board.

The applicant alleged that the Special Board, which convened in June 19xx, erroneously recommended the permanent removal of his name from the 19xx promotion list after having considered improper information. He alleged that in addition to documents contained in his official military record, the Special Board also impermissibly considered a Coast Guard Investigation Service (CGIS) investigation, an informal investigation conducted at his command, and BCMR case information. In support of his allegation, the applicant submitted a copy of the Coast Guard's 20xx response to his Freedom of Information Act (FOIA) request, which listed the foregoing and other documents. He alleged that the Special Board should only have reviewed the contents of his official personnel file.

The applicant argued that because he was refused the right to defend himself against the CGIS investigation information, the Special Board was free to draw its own conclusions, despite the determination of CGIS investigators that none of the allegations were substantiated. Moreover, he questioned the validity of the Special Board's recommendation based on "a candid notation [from CGPC which states] that one of the Board's findings was unsubstantiated and should be removed." He alleged that although the Precept for the Special Board directed it to consider "associated correspondence," there is no authority for the use of the investigations by a Special Board, as it is clearly not part of his official record. He argued that the Coast Guard's failure to adhere to the stringent guidelines set forth in the Personnel Manual on the documents that may be considered by the Special Board permits "unrestricted and unproven allegations ... to [be] easily manipulated to obtain [a] desired recommendation from the [Special] Board"

The applicant also alleged that the response to his FOIA request, which did not include the disputed OER, proves that the Special Board never got to review his most recent OER, as it should have. The applicant stated that in 20xx, he received the record of documents considered by the Special Board after submitting a FOIA request in 19xx. Upon reviewing the informal investigation, which was included in the record before the Special Board, he stated that he discovered that it falsely claimed that he was shown all of the evidence against him. He asserted that his request to see any evidence was refused. He stated that the informal investigation report itself states that the evidence is all hearsay, no action was ever taken on the informal investigation and it should never have left the command.

The applicant stated that because the Special Board was provided both the CGIS investigation and the informal investigation, which were not part of his official military record, in fairness to him, the Special Board should have also been provided his Civil Rights complaint, his DOT Inspector General complaint, and the informal complaint he filed on the conduct of the person making the allegations leading to the investigations against him.

Excerpts from Disputed OER (May 1, 19xx to April 30, 19xx)

On the disputed OER, the applicant received thirteen marks of 6 (on a scale of 1 to 7, with 7 being the highest score) in evaluation of his job performance. In block 8.a. (initiative), the applicant received a mark of 7, and in blocks 8.c. (responsibility) and 8.d. (professional presence), he received marks of 3. His block 12 (comparison scale) score was a 5, defined as "excellent performer; give toughest, most challenging leadership assignments."

In Block 8, the replacement RO made many very laudatory statements, but also the following comment: “[m]ade inappropriate public statements about personal disagreement with CO.”

Because the replacement RO was not a Coast Guard officer, on a separate sheet, the reviewer included his comments on the applicant’s potential in the disputed OER. In the category of “leadership and potential,” the reviewer made many very positive comments, but also provided the following pertinent comments and a lower “comparison scale” mark in accordance with Article 10.A.2.f.2.b. of the Personnel Manual:

I concur with written and numerical evaluation of both the Supervisor and the Reporting Officer with the exception of 3.a. and 5.f. These exceptions were discussed with the rating chain after reviewing a draft version of the OER. The OER comments only justify a mark of 5 for item 3.a. The 5f mark should be lowered to 5 since I am aware the that ROO [(Reported-on Officer) or the applicant] failed to submit all the required information before the end of the performance period. The list of significant accomplishment [sic] were not provided to [sic] the OER rating chain officials use until well after the OER period ended.

[The applicant] is an outstanding officer who continues to excel in handling XXXXXX XXXXXX assignments. [The applicant] has generally demonstrated excellent leadership abilities with the exception of occasions when he made inappropriate statements in a common/public areas [sic] regarding his personal disagreements with how the CO was handling his personal personnel issues. These kind of events and statements could undermine command morale and teamwork.

In the comparison scale block, the reviewer scored the applicant with a 4, defined as “good performer give tough, challenging assignments.”

Summary of the OER Reply

By memorandum dated July 7, 19xx, the applicant submitted an OER reply, stating that he disagreed with the comments on “inappropriate public statements” made in the disputed OER by the replacement RO and reviewer because, as he alleged, they were inaccurate.

The applicant stated that the replacement RO knew of certain circumstances under which he was being treated unfairly based on their prior conversations and expressed appreciation of the applicant’s “ability to remain focused ... in spite of the distractions.” He maintained that he made no inappropriate public comments and stated that his supervisor expressed “great surprise” upon discovering that the replacement RO included such a comment in the OER.

The applicant asserted that although his CO assured him that there were “no problems” with his performance and that he was doing an outstanding job, the

replacement RO completed the disputed OER without any discussion with the CO or the applicant's supervisor. He stated that the replacement RO's actions were particularly erroneous because he was inserted after the end of the reporting period ended, and had "no supervision or direct authority over [the applicant]..." He argued that as a result of the replacement RO's comments, the reviewer unfairly included similar misinformation in his comment portion. He stated that contrary to the negative comments of the replacement RO and the reviewer, under his leadership, "morale and sense of teamwork ... has never been higher."

The applicant disagreed with the reviewer's comment that his (the applicant's) mark for "planning and preparedness" should be lowered to a mark of 5. He argued that his performance instead justifies "a mark of 6 or higher." In support of his assertions, he stated that he "anticipated the xxxxx xxxxx and reorganized duties and responsibilities to maintain productivity"... "and xxxxx OES [Officer Evaluation System] training well in advance of the xxxxxxxxxxxx" He also disagreed with the reviewer's suggestion that his "evaluation" marks be lowered due to the untimely submission of the "required" list of significant accomplishments. He stated that the listing was neither required nor late and that it was properly circulated through his entire rating chain.

The applicant asserted that he assumed greater roles of responsibilities when he recognized that those duties were not being carried out. In expanding his duties, he stated, he took the initiative to organize xxxxxxx xxxx and xxxxxxxxxxxxxxxx for xxxxxxxxxxxx. He argued that the improvements he initiated have "significantly enhanced he service provided to the xxxxxxxxxxxx," and establish that his performance for "planning and preparedness" and "evaluations" justify a mark of 6 or higher.

Summary of the Endorsements to the OER reply

On July 15, 19xx, the applicant's supervisor wrote in support of the marks and comments he assigned that applicant. He stated that the applicant "has been the most effective xxxxxx [he had] supervised in [his] 13 years ... at the XXXXX XXXXX XXXXX." He stated that he believed that the applicant's performance in the categories of "preparedness" and "evaluations" warranted a marks of 6 and he "still believe[d] that is correct." He stated that by the applicant's "actively engag[ing] with his subordinates" and "consistently and frequently discuss[ing] individual performance," the applicant "far exceeded any other supervisor ... in routinely recognizing and rewarding superior performance."

On July 16, 19xx, the replacement RO wrote in concurrence with the supervisor's comments for the categories of "preparedness" and "evaluations." He stated that after reconsidering his comments regarding the public statements, he recognized that the applicant had been "impressively productive ... while "embroiled in a serious personnel issue." He stated that although the public comments were made, and the

applicant was counseled on that fact, "the marks of '3' ... in the categories of "responsibility" and "professional presence" were an unfair reflection of his performance. He requested that both be raised to marks of 4.

On July 23, 19xx, the reviewer wrote that after a review of additional materials provided to him by the supervisor and the replacement RO, he found no need to change his original reviewer comments or recommendations of lowering the marks in the categories of "preparedness" and "evaluations" to 5s. He stated that the "written OER comments in these areas do not support a mark of 6." He stated that the list of accomplishments was both required and untimely. He expressed that he concurred with the replacement RO's request to raise the mark in the category of "responsibility" from a 3 to a 4.

Summary of Applicant's Relevant Evidence

The applicant submitted his own affidavit in support of his current application for relief. In addition to claims asserted in the applicant's prior BCMR applications and the current allegations above, the applicant's affidavit, along with its supporting material, is summarized, as follows:

The applicant stated that he objected when his CO wrongfully inserted himself in the applicant's rating chain as the RO. He submitted a memorandum from LTJG L, who wrote that, as part of his duties, he had knowledge of the changes to the rating chain. LTJG L stated that originally, in the Summer of 19xx, he and the applicant had rating chains which consisted of Mr. G, as both the supervisor and RO, and the CO, as the reviewer. After the applicant noted that a civilian could not be both supervisor and RO, their rating chains were informally changed to consist of Mr. G, as the supervisor; the xxxxx xxxxx, as the RO; and the CO, as the reviewer. He stated that the informal chain was "never actually promulgated" and "no copy of the original instruction could be found." He stated that several changes in the rating chain were made but never officially promulgated until December 19xx, when the CO directed a change in the applicant's rating chain. He stated that notwithstanding the fact that this was the first official change in the rating chain since July 19xx, the CO determined that it was not a change in the applicant's rating chain.

LTJG L submitted undated copies of two of the unit's rating chain lists. One list, which LTJG L identified as being effective from July 19xx, is a typed listing with handwritten changes that correspond to his above statement. The other list, which LTJG L identified as being effective December 19xx, is a typed listing that shows the applicant's rating chain to consist of Mr. G, as the supervisor; the CO, as the RO; and the Captain S, as the reviewer.

In continuing with his affidavit, the applicant stated that after the CO was removed from his rating chain, the civilian xxxxx xxxxx, Dr. M, was inserted in his rating chain as the replacement RO even though he was not in the division. Thereafter, he stated, the replacement RO erroneously raised the issue of an alleged “public statement about [a] personal disagreement with [the] CO” in the disputed OER, when the matter had been resolved. He claimed that the replacement RO was biased against him, as he told others that he was upset about a recent xxxxx and blamed the applicant as the source. In support of his contentions, the applicant submitted copies of two brief email communications on the subject. The applicant received one email in July from Mr. R, the xxxxxxxxxxxx xxxxxxxxxxxx, and received the other in June from Mr. G, the applicant’s supervisor, each having the following response:

July 13, 19xx:

I confirm that the [replacement RO] shared with me that you were one of the possible sources of the DOT IG complaint. He also shared a few other possibilities. He and I had these discussions on 2 occasions shortly prior to the IG being here.

...

June 30, 19xx:

I don’t know who else this was discussed with. I know he and I discussed you as a possible source of the DOT IG Hot line complaint.

Applicant’s Submission to the 19xx Promotion Board

On July 23, 19xx, the applicant wrote to the 19xx Promotion Board as follows:

1. As authorized by [the Personnel Manual], I am writing to the Promotion Board. I will address the last two OER’s [sic] contained in my official record. There is not a reply to the Special OER completed in December XX because my right to reply to the OER was unexpectedly rescinded.⁴ There is not yet a reply to the OER for the period ending 30 April XX because I have only recently received this OER. My reply was submitted in a timely manner but is still in routing.
2. I do not understand why the Special OER was submitted and am personally and professionally offended by the adverse allegations contained in the Special OER. The adverse statements are not true. This Special OER does not contain facts. It tries and convicts me of unsubstantiated allegations without proof. The allegations are based on disputed information gleaned from false accusations and hearsay. [CAPT G] and [Mr. G], along with my Executive Officer, [CDR T], have acknowledged on multiple occasions that the allegations which are the basis for the Special OER are disputed and unproven. In addition to the fallacy of the accusations, the stated reason for filing the report is erroneous. The regular OER for this reporting period, per directions from CGPC to [CAPT G], was not completed by [CAPT G] until 14 July 97. At that time, [CAPT G], acting as Reporting Officer, already possessed all the information he used in this special

⁴ Shaded portions of the OER reply were redacted by CGPC prior to submission to the 19xx XXXXX Promotion Board.

report. (There is documentation that attests to this.) This same information is acknowledged to be disputed and unproven. The special OER is not justified by the reason given and this should have been determined in the review supposedly done by CGPC.

3. 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. I have never initiated any FTS phone call which I did not believe was official government business. In every respect, I have complied with government policies and acted in accordance with the specific policies of the XXXXXXXX – policies which were in place since well before I reported to the XXX. There is written documentation that attests to my compliance. The XXXXXX Director is aware of the situation and believes I have not misused the FTS system or any other government resource.

4. I take great exception to the adverse comments made by [Dr. M] and [CAPT S] in my most recent OER. These comments are not accurate and have no basis in fact. They should be removed from the OER. [Dr. M] incorrectly states that I have made inappropriate “public statements”. I have made no public statements. The “personal disagreement” that [Dr. M] refers to is a situation where I have been treated unfairly in a personnel matter. [Dr. M] has discussed this personnel matter with me on several occasions and consistently expressed empathy with the apparent inequity I am facing. [Dr. M] has also consistently commented that he appreciates my ability to remain focused on my duties in spite of the distractions and he has stated that he believes I am performing my duties in an outstanding manner. My supervisor, Mr. G has repeatedly expressed a similar opinion. [Mr. G] expressed great surprise and disagreement when informed that [Dr. M] had made such a comment in the OER.

5. [Dr. M] has told me that he did not discuss his comments with my supervisor and he was not aware of my conversation with [CAPT G]. ([CAPT G] stated directly to me, months ago, that there were no problems and he “... couldn’t ask for a finer xxxxx”.) [Dr. M] completed the OER without knowledge of my actual performance. I am frustrated that his uninformed comments would be made without ascertaining the facts through discussions with either myself or my supervisor. This is particularly critical for this OER as [Dr. M] was designated my Reporting Officer after the Reporting Period had ended. He had no supervision or direct authority over me or anyone else in the xxxxx Division, of which I am a part. As xxxxxx xxxxxx, [Dr. M] is not in the chain of command for the xxxxx Division. Both [Dr. M], himself, and my Supervisor, have also expressed reservations over the unilateral change to my rating chain after the reporting period had ended. [Dr. M] is not in the evaluation chain for anyone else in the xxxxx Division.

7.⁵ [CAPT S’s] comments regarding the alleged public statements are the direct result of the inaccurate comments contained in [Dr. M’s] section. They have been biased and tainted by this misinformation. As I said, I have not made any public comments. I have not taken any action that “could” be even remotely construed as adversely impacting morale or teamwork. Quite the contrary is true, as under my leadership and management, the morale and sense of teamwork within my sections has never been higher. This has led to increased productivity and unprecedented high performance. This esprit de corps is also evident in interactions across the other divisions here at the XXXXX XXXXX XXXXX and other Coast Guard units. The variety of responsibilities I have brings me in contact with everyone at the XXXXX XXXXX XXXXX on an almost

⁵ Apparently, the applicant’s letter to the promotion board was misnumbered, as there is no paragraph 6.

daily basis and I have received only appreciation for the consistently outstanding work that I do.

8. [CAPT S] states that my "Planning and Preparedness" mark should be a 5. **This is an inaccurate statement.** My skills in "planning and preparedness" certainly justify a mark of 6 or higher. Consistently outstanding branch performance while experiencing a 100% turnover in enlisted personnel attests to this. I anticipated the xxxxx xxxxx and reorganized duties and responsibilities to maintain productivity. The results of the recent xxxxxxxxxxxxxxxxxxxx conducted by XX is additional testimony to my abilities. My xxxxx of OES training well in advance of the xxxxxxxx, including xxxxx civilian personnel (first xxxxxxxx xxxxxxxx in recent memory here at the XXXXX XXXXX XXXXX) is further evidence. In all instances, I correctly anticipate what needs to be done and follow through to completion.

9. [CAPT S] further states that my mark in "Evaluations" should be a 5 because I submitted my "required" list of significant accomplishments after the end of the marking period. **This is totally inaccurate.** All required information was submitted to my rating chain in a very timely manner, well before the end of the marking period. The list of accomplishments referred to by [CAPT S] is not a "required" submission as he states. Yet I also provided this list in a timely manner. In addition to the hard copy I submitted to my supervisor, to be routed along with the OER, I also forwarded an electronic copy directly to the rest of my revised rating chain after I received [CAPT S's] letter notification of the unusual change to my rating chain. [CAPT S] signed and forwarded his letter changing my rating chain nearly two weeks after the marking period had ended. (My supervisor had also expressed concern over the apparent unilateral change to my rating chain after the evaluation period had ended.)

10. I am the Xxxxx and the Chief of Military Personnel at the XXXXX XXXXX XXXXX. As clearly documented in my military record, I have consistently demonstrated outstanding anticipation, initiative and judgment in improving the xxxxx xxxxx xxxxx's performance in financial, acquisition, and personnel matters. With limited resources, I have expanded my area of responsibility to include, among others, xxxxx and xxxxx xxxxxxxx. I have initiated improvements that have significantly enhanced the service provided to the xxxxx xxxxx xxxxxxxx. This includes the recent transfer of financial management responsibilities for the entire xxxxx xxxxx to the XXXXX XXXXX XXXXX. It is clear the XXXXX XXXXX XXXXX's level of conformity with financial (supply, logistics, acquisition, property, etc.) and administrative (travel, personnel, OES, etc.) regulations have never been higher. This is all testimony to my high level of skill and expertise and my outstanding leadership and management abilities.

VIEWS OF THE COAST GUARD

On February 24, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request for relief. A copy of the advisory opinion and a memorandum on the case prepared by CGPC are attached to this Final Decision.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 3, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. He was granted an extension and responded on April 8, 2003.

The applicant noted that in the advisory opinion, the Chief Counsel admits that the two investigations used by the Special Board were not part of the applicant's official record; that the applicant's written communication to the 19xx XXXXX selection board was heavily redacted; and that the disputed OER contained errors which should have been corrected. He argued that the Personnel Manual provides that an investigative report may only be used during a Board of Inquiry, where the officer is entitled to a hearing and legal representation. He also argued that the Personnel Manual contains no specific provisions for the redacting of comments in a written communication to a selection board.

The applicant argued that, contrary to the Chief Counsel's allegation, he never accepted Captain G as his RO for the reporting period ending April 30, 19xx. He contended that his attempts to have Captain G disqualified from his rating chain and his petition in BCMR Docket No. 1999-171 requesting his removal demonstrate the fact that he did not acknowledge Captain G as his RO for the disputed OER.

The applicant argued that, although the Chief Counsel "invokes the 'presumption of regularity' for the actions [taken by] the applicant's rating chain" he fails to produce any evidence to xxxxxx the Coast Guard's entitlement to such presumption. He argued that the Coast Guard violated its own regulations by failing to timely disqualify Captain G as RO and by appointing the replacement RO after the end of the reporting period. He contended that these violations show that the OER process was flawed, thereby rebutting the presumption of regularity and, he alleged, shifting the burden of proof to the Coast Guard.

The applicant argued that the documents produced by his FOIA request reveal that the Special Board did not consider the disputed OER, even though the Coast Guard admitted that it was part of his official military record. He argued that the Coast Guard relies on unsupported speculation in (a) alleging that an administrative error kept the disputed OER out of the package in response to his FOIA request, and (b) inferring that the record would have been worse had it contained the OER. In fact, he alleged, had the OER, with the conceded corrections, been presented to the Special Board, "there can be no clear inference that the decision would have been the same." He maintained that the Coast Guard is not entitled to the presumption of regularity concerning the documents released in response to his FOIA because the Coast Guard has failed to produce evidence to support its entitlement.

The applicant argued that because he was denied access to complete information in the CGIS and informal investigations, the Chief Counsel incorrectly claimed that he

reviewed the contents of both investigations and made no objection to its presentation to the Special Board. He argued that, contrary to the Coast Guard's contentions, evidence to which he was given access was heavily redacted and formally objected to on his part, in an action he filed in Federal district court.

In separately disputing the accuracy of the CGPC memorandum prepared on his case, the applicant argued that despite the statutory provision and case law cited by the Coast Guard, his application for correction of his military record is nonetheless timely. He argued that, in paragraph 6, in an effort to support the Coast Guard's action of submitting the CGIS investigation to the Special Board, CGPC instead "succeeds in showing that the speculation engaged in by the investigator is a good reason to deny access [to the investigation reports] to a Special Board[,] which is required by regulation to determine and evaluate the facts contained in Petitioner's record."

The applicant argued that CGPC incorrectly stated the conclusion of the informal investigation in paragraph 7 by leaving out information which showed an equally plausible conclusion that the calls were made by another person. He reasoned that many of the calls were placed during a time when the applicant "was out of the state on official orders and definitely impossible for him to have made." He restated his position of BCMR Docket No. 1999-108 and indicated that in response to the allegations, he vigorously denied making any inappropriate telephone calls. He argued that, in paragraph 8, CGPC unfairly adopts the CO's assessment that the allegations against him were proven "by a preponderance of the evidence." He argued that relying on the standard of proof assigned by the CO "flies in the face of due process" because "unproven allegations can never be proof by a preponderance of the evidence."

The applicant argued that in general, CGPC's conclusions in paragraphs 10 and 11 show that the Coast Guard (a) disregarded its own regulations on the use of Coast Guard BCMR documents by the Special Board and (b) misstated facts based on unproven allegations and "highly suspect" speculations. He restated his position that none of the conclusions of the Special Board could be supported by fact. He further argued that in paragraph 12, CGPC "admits that the Commandant of the Coast Guard recognized the faulty reasoning of the Special Board" upon removing the statement about the appearance of an inappropriate relationship with his executive officer, as not supported by the record.

The applicant argued that CGPC improperly compared the Special Board to a determination board, which recommends whether the officer should be required to "show cause" for retention in the service. Because the show cause process involves much greater due process, such as representation and a hearing, he argued, the Special Board is more comparable to a promotion board, where the officer cannot appear before the Board and there is no right of confrontation. Therefore, he contended that the

Special Board should have followed the guidance for a promotion board, where consideration is limited to the officer's official military record and his letter submission.

The applicant stated that contrary to CGPC's assertions under the "opinions" section of its memorandum, there are no cites to any Coast Guard regulations that support what the Coast Guard considers to be "official records." He argued that it is not reasonable for CGPC to apply the determination board standard, as it is unprecedented in the regulations. He argued that because he was not afforded certain due process protections, his case is not the type of proceeding where the entire record should be reviewed.

According to the applicant, CGPC was fully capable of verifying the unofficial changes to his rating chain, as a memorandum from the unit's custodian was attached to the unit instruction and the CO and the reviewer for the disputed OER, though both retired, have addresses and other contact information on file with the Coast Guard.

The applicant stated that despite CGPC's attempts in paragraph 11 to justify the reviewer's comments concerning the applicant's submission of all required information before the end of the reporting period, they were "admitted to be erroneous by the Chief Counsel," ... "plainly wrong and deserve [to be] remov[ed]." In support of his assertion, he noted that error is admitted by CGPC in paragraph 12. He argued that the Coast Guard caused the "confusion," which led to the replacement RO's admittedly erroneous comments. However, he argued that "based on the disagreement of the Reviewer whose comments have already been shown to be incorrect," CGPC refuses to let the replacement RO fully correct his error by deleting the comments from the OER.

The applicant argued that, in paragraph 14, CGPC relies on speculation in arguing that the Special Board reviewed the disputed OER. He argued that because the Special Board met more than 45 days after the end of the reporting period, the Coast Guard had sufficient time to ensure that the disputed OER was properly placed in his military record. He argued that the Coast Guard has failed to show that the FOIA officer, who responded to his request in producing the documents reviewed by the Special Board, is not entitled to the presumption of regularity. He argued that CGPC contradicts itself by attempting to justify the topics discussed by the rating chain within the narrative sections of the disputed OER while simultaneously attempting to justify the Coast Guard's redactions on those same topics from his OER reply.

The applicant restated the above arguments in disputing CGPC's conclusions. He argued that "[t]he entire [nexus analysis] advanced by ... CGPC is an attempt to testify without any proof or statistics to support the bald contentions made." In closing, he renewed his claim of entitlement to the relief stated in this application.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 5.A.4.e. of the Personnel Manual provides that officers who are “eligible for consideration by a selection board may communicate with the board through the officer’s chain of command by letter arriving by the date the board convenes, inviting attention to any matter in his or her Coast Guard record that will be before the selection board. A letter sent under this paragraph may not criticize any officer or reflect on any officer’s character, conduct, or motive (14 U.S.C. § 253(b)).”

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 (RO), and the reviewer. Article 10.A.3.a.2.(b) provides that an OER must be prepared when an RO has changed in a rating chain “if more than six months have elapsed since the ending date of the last regular OER....”

Article 10.A.4.c.9. governs the reporting officer’s comments about the reported-on officer’s “potential” in section 10 of an OER. The reporting officer is directed to “comment on the Reported-on Officer’s potential for greater leadership roles and responsibilities in the Coast Guard. These comments shall be limited to performance or conduct demonstrated during the reporting period.” In addition, the reporting officer should comment on the reported-on officer’s qualification to assume the duties of the next higher grade and types of assignments for which the officer shows aptitude.

Article 10.a.2.f.2.c. provides that part of a reviewers responsibilities include separately adding comments, if necessary, that further address the performance and/or potential of the Reported-on Officer. The article further provides that “[f]or any officer whose Reporting Officer is not a Coast Guard commissioned officer, the Reviewer shall describe on a separate sheet of paper the officer’s ‘Leadership and Potential’ and include an additional ‘Comparison Scale’ mark.”

Article 10-A-2.j.(2). provides that while the Reporting Officer is normally the supervisor of the Supervisor, “... [a] civilian members of the Senior Executive Service (SES), can be both Supervisor and Reporting Officer for their immediate subordinates....”

The standards on the OER form for a mark of 4 for the performance categories “responsibility” and “professional presence” are as follows:

Responsibility	Held self and subordinates personally and professional accountable. Spoke
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	up when necessary, even when expressing unpopular positions. Supported organizational policies and decisions which may have been counter to own ideas. Committed to the successful achievement of organizational goals.
Professional Presence	Knowledgeable in how [Coast Guard] objectives serve the public; cooperative and fair in all interactions. Composed in difficult situations. Conveyed positive image of self and [Coast Guard]. Well versed in military etiquette; precise in rendering and upholding military courtesies. Great care in uniform appearance and grooming.

Article 10.A.4.g. describes how members should reply to an OER, should they choose to do so. Article 10.A.4.g.1. states that “[t]he Reported-on Officer may reply to any OER regardless of its content and have this reply filed with the OER, “ allowing a member the opportunity to “express a view of performance which may differ from that of a rating official.”

Under Article 10.A.4.j.2., OERs are reviewed by the Commander of CGPC for substantive errors. While ensuring that OERs have been prepared in accordance with the Officer Evaluation System (OES), “[p]articular attention is given to inconsistencies between the numerical evaluations and written comments.”

Article 10.A.1.c.(1) defines an “Officer Support Form (OSF)” as “[t]he optional worksheet which may be used by members to assist in delineating duties, and to enhance organizational communications, performance counseling, and performance reporting.”

APPLICABLE DECISIONS

In Law v. United States, 11 F.3d 1061 (Fed. Cir. 1993), the plaintiff was a Coast Guard officer whose name appeared in the 107th position on a promotion list. The list was nominated by the President and confirmed by the Senate in January 19xx. In May 19xx, before a vacancy had occurred for the plaintiff, the Commandant directed that his promotion be withheld and that a board of officers should meet to consider removing his name from the promotion list because of crude behavior and sexual harassment that had been documented in an OER. A vacancy that the plaintiff would otherwise have filled occurred on June 1, 19xx. On June 11, 19xx, a Special Board met and recommended that his name be removed from the promotion list. The Secretary of Transportation removed the plaintiff’s name from the list in March 19xx. The plaintiff applied to the BCMR for relief, but his application was denied.

In considering the plaintiff’s claim of entitlement to a proceeding in which the same rights and procedures are provided as set forth in 14 U.S.C. § 325, that is the “board of officers” should have acted as a “show cause” board, the court adopted the lower court’s analysis of the arguments concerning Section 325 procedures. That court concluded the following:

There is no statutory guarantee that Section 325 rights and procedures apply to such a board of officers proceeding looking into the possible removal of an officer from a selection list. Section 325 specifies that the rights and procedures therein apply to a board of inquiry proceeding pursuant to Section 322, which involves officers being considered for removal from the Coast Guard. There is no suggestion in Section 325 that these rights and procedures apply for any other type of board of officers proceeding. Here, the board of officers was looking into the removal of the plaintiff's name from the promotion selection list, a far less severe sanction than the removal of plaintiff from the Coast Guard. Since the two sanctions are distinct, the court cannot reasonably imply that Congress intended the same rights that apply to a Section 322 inquiry to apply to the instant board proceeding. There certainly is no statement to this effect in the statute.

11 F.3d at 1065 (quoting Law v. United States, 26 Cl. Ct. 382, 388 (1992)).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submission, BCMR Docket Nos. 193-94, 1998-116, 1999-108, and 1999-171; and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Although approximately four years have passed between the applicant's notification of the disputed OER and his application to the Board, the Soldiers' and Sailors' Civil Relief Act of 1940 (Act), 50 U.S.C. § 501 et seq., as amended, bars any period of active duty military service from being included in computing a statute of limitations against a person in the military service. See Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994). The running of the time granted to file the instant BCMR application was tolled until the applicant was retired from the Coast Guard on July 1, 19xx. The applicant's BCMR application was filed on June 27, 2002, thus rendering his claim timely.

2. The applicant requested an oral hearing before the Board. The Chair, 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 alleged that, after his CO officially changed his rating chain by inserting himself as RO in December 19xx, the CO was required to submit an OER in evaluation of his performance for the period May 1, 19xx to December 31, 19xx. The applicant argued that the CO's failure to submit the change of Reporting Officer OER was a violation of Article 10.A.3.a.2.(b) of the Personnel Manual, which states that when there is a change of RO in a rating chain, "OERs for officers on an annual submission schedule are required if more than six months have elapsed since the ending date of the last regular OER" The applicant argued that the CO's failure to submit the OER also prevented his fair evaluation before the 19xx promotion board.

4. A colleague of the applicant's, LTJG L, submitted copies of two rating chains for their unit, one that was supposedly published in 19xx and a second that was published in December 19xx. Though unsigned and undated, the validity of these rating chains were not disputed by the Coast Guard. The first chain shows that the applicant's supervisor, a GS-14 civilian, was supposed to serve as both his supervisor and his RO for preparing OERs and the CO was to be the reviewer. However, apparently at some point, his command realized that Article 10.A.2.j.2. of the Personnel Manual prohibits a civilian other than a member of the Senior Executive Service from serving as both the supervisor and RO for a XXXXXXXXXX. Therefore, handwritten changes appear on the first published rating chain that purport to make the civilian xxxxx xxxxx, Dr. M, the applicant's RO.

LTJG L stated that other unofficial changes were made as well. The change was never made official by publication in accordance with Article 10.A.2.b.2.b. of the Personnel Manual, however, and when the applicant received his first OER from the command, the CO served as his RO, and the XXXXX served as the reviewer. In BCMR Docket No. 1999-171, the applicant challenged his CO's presence on his rating chain on the basis of his alleged disqualification due to bias, but the applicant never mentioned the unofficial changes to and violation of his published rating chain. The Board concludes that, although the CO appeared as the reviewer on the published rating chain from 19xx to December 19xx, he was known by the applicant to be his RO throughout 19xx even though the change was not published until December 19xx. The publication in December 19xx was essentially a correction of the invalid rating chain published in 19xx to reflect the *de facto* rating chain that had existed for some time.

5. The applicant alleged that with the publication of the rating chain in December 19xx, in order to comply with Article 10.A.3.a.2. of the Personnel Manual, the "unofficial" rating chain, composed of Mr. G, as the supervisor; Dr. M, as the RO; and the CO, as the reviewer, should have prepared a change of RO OER. However, the CO refused to prepare one. The applicant's military record contains an OER for the reporting period July 15, 19xx to April 30, 19xx, which identifies the applicant's rating chain to be Mr. G, as the supervisor; the CO, as the RO; and Captain S, as the reviewer. It is clear from the record that the rating chain initially published in July 19xx was invalid *ab initio* and that the CO had been serving as the applicant's RO for some time. The Board finds that, although the rating chain that had been in existence for some time was not published until December 19xx, that publication did not constitute a true change of RO, and the applicant was not entitled to an OER because of it. Moreover, the purpose of requiring an OER upon the departure of an RO would not have been fulfilled under these circumstances since no member of the 19xx rating chain was actually leaving the office.

6. Even assuming *arguendo*, that in December 19xx, the applicant was

entitled to an OER from the “unofficial” rating chain, as identified in finding 5, because of the publication of the *de facto* rating chain, the applicant has not shown that any significant information about his performance between May and December 19xx is missing from his record. He has not complained that the disputed OER lacks any significant information about his performance during that period. Nor has he shown that a December 19xx OER would not have mentioned the “inappropriate public statements” he made about his disagreement with the CO, discussed *infra*.

7. The applicant argued that his CO violated the Personnel Manual by inserting Dr. M, as the RO, on May 11, 19xx, after the end of the reporting period for the disputed OER. He also argued that Dr. M’s selection as replacement RO was outside the applicant’s expectations of potential members of his rating chain. After the applicant filed a harassment complaint that could not be informally resolved, pursuant to Article 10.A.2.g. of the Personnel Manual, on April 24, 19xx, the CO disqualified himself and assigned Dr. M, the xxxxx xxxxx of the applicant’s unit, to be the replacement RO in the applicant’s rating chain.⁶ Contrary to the applicant’s argument, the Personnel Manual only required the CO “to designate an appropriate substitute” The fact that the reviewer did not approve the change in RO until May 11, 19xx fails to prove that the CO violated the Personnel Manual.

8. In addition, the applicant has not proven that the substitution of Dr. M, shortly before the end of the reporting period, constituted either an error or an injustice. Article 10.A.2.g.2.b. of the Personnel Manual states that “[t]he timing of the substitution may preclude full use of the OSF [Officer Support Form]; however, that fact alone does not invalidate the OER.” Although the applicant contended that his CO once mentioned his decision not to place Dr. M in any xxxxx Division rating chain, the applicant has offered no evidence as to why the xxxxx xxxxx was not a reasonable substitute and no evidence of or explanation for the CO’s alleged statement. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992). Consequently, the Board finds that because the applicant presented no evidence which demonstrates that Dr. M was disqualified in any way, he has not proven that Dr. M’s selection as replacement RO was either an error or an injustice.

⁶ In BCMR Docket No. 1999-108, the CO stated that in April 19xx, a civil rights counselor informed him that the applicant would be filing a formal civil rights complaint alleging gender discrimination. The CO stated that “[b]ased on the fact I believed that I might be considered ‘a interested party’ to this complaint and as the definition of ‘interested party’ within 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.” The Board found that there was no evidence that the CO harbored any prejudice against the applicant.

9. The applicant alleged that Dr. M, the replacement RO, was biased against him. He claimed that Dr. M included a derogatory comment and unfairly low scores in the disputed OER, after blaming the applicant for lodging a complaint with the Inspector General (IG), which subsequently led to a xxxxx xxxxx. Contrary to the applicant's allegations, the evidence he submitted fails to indicate that he was identified by Dr. M as the source of the IG complaint. In fact, according to both emails, the applicant was considered as "one of the possible sources" and "a possible source" of the IG complaint, along with other candidates. Moreover, he did not show that he was retaliated against because of Dr. M's speculation about the cause of the audit.

10. Moreover, the applicant has not persuaded the Board that Dr. M's comment on the applicant's "inappropriate public statements" or the marks of 3 in the categories of "responsibility" and "professional presence" were a product of bias. In Dr. M's endorsement of the applicant's OER reply, he requested "that [both] marks [of 3] be changed to [4] and the comment about inappropriate public statements be removed from the OER." However, Dr. M also stated in his endorsement that "... public comments were made [by the applicant], and counseling was subsequently provided to [the applicant]" Consequently, the Board finds that Dr. M's conduct, in assigning the marks and including the comment and then subsequently reconsidering both, is not sufficient in and of itself to prove bias or prejudice by a preponderance of the evidence.

11. The applicant contended that three parts of the reviewer's comments for the disputed OER were inaccurate and should be removed. First, he alleged that the reviewer erred in suggesting the lowering of numerical scores assigned by the supervisor in sections 3.a. "planning and preparedness" and 5.f. "evaluations" from marks of 6 to 5s. While Article 10.A.2.f.2. states that "the reviewer may not direct in what manner an evaluation mark or comment be changed ...," reviewers are permitted to "add comments as necessary ... that further address the performance and/or potential of the Reported-on Officer." The reviewer's comments were not prohibited by the above-noted provisions of the Personnel Manual. Furthermore, the record fails to indicate that the supervisor was unduly influenced by the reviewer, as the marks for section 3.a. and 5.f. were not changed.

12. Second, the applicant alleged that the reviewer inaccurately stated that he submitted a "required" list of his accomplishments well after the end of the rating period. Contrary to the reviewer's comment, the record shows that the applicant's supervisor indicated in an email that the applicant had submitted all required material in a timely fashion. The Board finds that although Article 10.A.2.c.2.e. of the Personnel Manual provides that the submission of such a list is at the discretion of the Reported-on Officer (ROO), unless directed by the supervisor, in the applicant's case the list of accomplishments appears to have been required. Because the reviewer's comment on the timeliness of the applicant's submission was inaccurate, it should not have been

included in the disputed OER regarding the applicant's performance. Therefore, as requested by the applicant and as agreed to by the Coast Guard, the fourth and fifth sentences⁷ in Block 11 of the reviewer's comments should be removed from the disputed OER.

13. Third, the applicant alleged that it was error for the reviewer to duplicate in his comments, the replacement RO's comments regarding the "inappropriate public statements" from block 8 (reporting officer comments) of the disputed OER. As stated in finding 12, in accordance with applicable regulations, reviewers are permitted to "add comments as necessary ... that further address the performance ... of the Reported-on Officer." The applicant has failed to cite any statute or provision which requires that the reviewer restrict his comments to matters not elsewhere mentioned or discussed in the OER.

14. The applicant argued that in their endorsements, the supervisor and replacement RO sought to correct their inaccuracies in the disputed OER. The record indicates that the supervisor defended his numerical scores and comments, and the replacement RO requested the deletion of his comment on the "inappropriate public statements" and the raising of two marks of 3 to 4s. However, the replacement RO never asserted that the applicant did not make the comments at issue. In fact, in offering his reconsideration of the comments and marks, the replacement RO reiterated that the applicant indeed made the comments, for which he had received counseling.

Moreover, the Personnel Manual directs ROs to include "specific aspects of the Reported-on Officer's performance and behavior..." by "draw[ing] on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period." See Articles 10.A.4.c.7.d. and 10.A.4.c.7.e. of the Personnel Manual. The preponderance of the evidence in the record indicates that sometime during the evaluation period, the applicant made inappropriate public comments about a personal disagreement with the CO. Although the applicant maintained that he made no such comments, he has offered no evidence other than his own statement to support his contentions. Consequently, the Board finds that the applicant has failed to establish by a preponderance of the evidence that the replacement RO's comment in the disputed OER regarding the "inappropriate public statements" was erroneous.

15. The applicant contended that the marks of 3 he received in the performance categories "responsibility" and "professional presence" did not accurately reflect his performance, which warranted a higher mark of 5. The replacement RO who

⁷ To be clear, those sentences read: "The 5f mark should be lowered to 5 since I am aware that the ROO failed to submit all the required information before the end of the performance period. The list of significant accomplishment[s] were not provided to the OER rating chain officials use [sic] until well after the OER period ended."

assigned the marks of 3 apparently supported them with the comment that the applicant made “inappropriate public comments about a personal disagreement with the CO.” While the exact content of the applicant’s inappropriate public statements is not in the record, it is certainly possible that by making such public statements, the applicant did not display “compos[ure] in difficult situations” or convey a “positive image of [him]self and the [Coast Guard],” as required for a mark of 4 in the category “professional presence.” It is also possible that his statements reflected an unwillingness to hold himself “personally and professional accountable” or that they did not support his command’s policies and decisions, both of which are requirements for a mark of 4 in the category “responsibility.”

16. Both the RO and the reviewer opined a couple of months after the evaluation period and after the Special Board had met that the applicant’s mark for “responsibility” should be raised to a 4. The RO also stated that the mark for “professional presence” should be raised to a 4. The delegate of the Secretary has held that such statements by rating chain officials constitute “retrospective reconsideration,” which is normally accorded little evidentiary weight.⁸ However, since both the replacement RO, who assigned the low marks, and the reviewer stated that the applicant’s mark for “responsibility” should be raised to a 4 and the Coast Guard stated that the applicant should have received only one low mark because of his inappropriate public statements, the Board finds that the applicant has proved by a preponderance of the evidence that his mark of 3 in the category “responsibility” is unjust, though not necessarily erroneous, and that it should be raised to a mark of 4, as recommended by the rating chain.

17. The applicant argued that as a result of CGPC’s redacting “virtually all substance” from the text of his letter, he was denied a fair and meaningful opportunity to submit a written communication the 19xx XXXXX promotion board. Article 5.A.4.e. provides that the written communication to a selection board is the member’s opportunity to invite attention to “any matter in his or her Coast Guard record...,” in a manner that does “not criticize any officer or reflect on any officer’s character, conduct,

⁸ In a concurring opinion for BCMR Docket No. 2000-016, the delegate of the Secretary stated that “[r]etrospective reconsideration” cases are those in which an evaluating official, particularly upon finding that a previously reported-on member has been adversely affected by an evaluation, seeks to retroactively change the opinions expressed in that evaluation. See, e.g., Tanaka v. United States, 210 Cl. Ct. 712 (1976), cert. den. 430 U.S. 955 (1977); Savio v. United States, 213 Cl. Ct. 737 (1977); Harris v. United States, 14 Cl. Ct. 84 (1987), *aff’d* 861 F. 2d 729 (Fed. Cir. 1988); Remy v. Air Force Board for Correction of Military Records, 701 F. Supp. 1261 (E.D. Va., 1988); Paskert v. United States, 20 Cl. Ct. 65 (1990); CGBCMR Docket No. 84-96 (Decision of the Deputy General Counsel). Most such after-the-fact statements by raters are given little weight, because a contemporaneous expression of opinion representing a fair and accurate assessment in the context of the specific rating period at issue is to be preferred over a non-contemporaneous one (especially where an ulterior motive — to help the reported-on officer get promoted — may be apparent). Cf. Paskert v. United States, 20 Cl. Ct at 74, citing Tanaka.”

or motive....” In the applicant’s case, CGPC redacted approximately half of the applicant’s communication and informed the applicant that those statements removed were outside the prescribed bounds of Article 5.A.4.e. of the Personnel Manual. In reviewing the applicant’s letter, the Board finds that CGPC was correct in removing such phrases as “false accusations and hearsay” and “fallacy of accusations,” and such sentences as “[t]hese comments are not accurate and have no basis in fact,” as they clearly do not conform with the applicable regulations. However, it is questionable whether the Coast Guard should have removed two sentences in paragraph 9, which state that “[a]ll required information was submitted to my rating chain in a very timely manner, well before the end of the marking period,” and “[i]n addition to the hardcopy I submitted to my supervisor, to be routed along with the OER, I also forwarded on electronic copy directly to the rest of my ... rating chain” The Board finds that both sentences relate to the applicant’s performance and are essentially similar to the non-redacted sentence in paragraph 4, which states “I have made no statements.”

The record also indicates that the applicant was given the opportunity to write a conforming statement prior to the meeting of the 19xx XXXXX promotion board but declined to do so. The fact that the applicant decided not to re-draft his written communication supports a finding that he was not denied a meaningful opportunity to communicate with the 19xx XXXXX promotion board in accordance with the limits set in Article 5.A.4.e. The Board concludes that the applicant has failed to present any persuasive evidence that actions on the part of the Coast Guard illegally prevented him from communicating with the promotion board.

18. The applicant raised several allegations in his response concerning the failure of his command’s informal investigations to substantiate his alleged misappropriation of the FTS. The Board notes that it has already ruled against the applicant on the misuse of the telephone system issue in BCMR Docket No. 1999-108. The Board received no request for reconsideration in that application. Consequently, the Board will not revisit those issues in this application.

19. In June of 19xx, the Personnel Manual addressed actions to be taken by the chain of command when officers have disqualified themselves after being placed on the promotion list. At that time, Article 5.A.13.f.4. stated that “[t]he Commandant shall refer the case to a board of officers [a Special Board] to recommend whether or not removal of the selectee’s name from the promotion list shall be recommended to the President. The report of this board shall include an explanation, in detail, of the reasons for its recommendation.” The applicant alleged that the recommendation of the Special Board, which convened in June 19xx, was erroneous because it failed to follow the guidelines of a promotion board by limiting its consideration of documents to those contained in his official military record. He further argued that the Special Board is unlike a determination board--which reviews all available relevant evidence--because a determination board involves much greater due process rights to a hearing and

representation. Based on its consideration of information “clearly outside of his official military record,” he argued, the invalidity of the Special Board’s recommendation is evident by CGPC’s removal of one of the Special Board’s findings as “unsubstantiated.”

20. As set forth in the findings of BCMR Docket No. 1999-108: (a) on June 17, 19xx, a Board of Officers unanimously recommended removing the applicant’s name from the promotion list; (b) on June 29, 19xx, the Commandant recommended that the Secretary of Transportation approve removing the applicant’s name from the promotion list; and (c) on June 30, 19xx, the Secretary signed an order removing the applicant’s name from the promotion list. In examining the removal of his name from the 19xx promotion list, the BCMR found no errors or injustices in the underlying evidence considered by or the actions of the 19xx Special Board. Additionally, pursuant to Article 1-F-2.g. of the Investigations Manual, the Board found no merit in the applicant’s argument that his rights were violated because he was not made a party to the informal investigation against him. Moreover, in BCMR Docket No. 1999-171, the Board concluded that “[t]he special OER, which spoke to the command investigation, was sufficient in and of itself to cause the applicant’s name to be removed from the 19xx promotion list and his 19xx failure of selection for promotion to XXXXX.” The applicant filed no request for reconsideration regarding the foregoing. As these issues have been ruled on in prior applications, the Board will not revisit them in this application.

21. With respect to the materials considered by the 19xx Special Board, the Board is not persuaded that that board was required to limit its consideration to the applicant’s official military record and written communication, like that prescribed by promotion board guidelines. In 19xx, Article 5.A.13.f.4. of the Personnel Manual outlined the basic procedure that a Special Board must follow; however, the Personnel Manual in effect at that time failed to describe the enclosures or attachments that could be submitted for review. Notwithstanding the absence of a defined standard of submissions, the record indicates that the applicant was afforded the essential requirements of due process.

The applicant received advanced notice of the materials that the Special Board was due to consider, and according to his FOIA response, he submitted a letter to the Special Board on his own behalf. The record bears no indication that the Special Board should have limited its consideration, as argued by the applicant, to only his official military record. Nor does the record indicate that the applicant was entitled to greater due process rights of a hearing and representation, as the proceedings of a Special Board are not the equivalent of a determination or “show cause” board. See Law v. United States, 11 F.3d 1061, 1065 (Fed. Cir. 1993).

Moreover, contrary to the applicant’s assertion, the Board finds that the removal of one of the findings of the Special Board fails to render its entire proceedings invalid. As stated above, the recommendation of the Special Board was approved by the

Commandant and subsequently approved by the Secretary of Transportation. The applicant has previously failed to establish an error or injustice in challenging the removal of his name from the 19xx XXXXX promotion list.

22. The applicant argued that the Special Board's recommendation was erroneous because the documents he received in response to his 19xx FOIA request for the materials considered by that board did not include the disputed OER even though it was part of his official military record. The record indicates that, before the Special Board met, CGPC prepared packets for the board members containing copies of the applicant's military record and other pertinent records. Apparently, the packets, a copy of which the applicant received in a FOIA request, did not contain the disputed OER. However, the record indicates that the disputed OER was expedited because of the pending Special Board and was validated just the day before the board met. The Board finds that, as the Chief Counsel argued, the expedition and timing of the validation of the disputed OER strongly suggest that it was made available to the members of the Special Board even though it was not included in the packets previously prepared for them. Therefore, the applicant has not proved by a preponderance of the evidence that his record was incomplete when it was reviewed by the Special Board. Moreover, even assuming *arguendo* that the disputed OER was not seen by the Special Board, it is very unlikely that the disputed OER, with a mark of 3 for "professional presence" and negative comments in it, could have altered the outcome of the Special Board. Moreover, this Board has already found that the special OER in the applicant's record, in and of itself, was sufficient to cause his name to be removed from the promotion list.

23. Having found that the Coast Guard committed an error by including the comment "[t]he 5f mark should be lowered to 5 since I am aware that the ROO failed to submit all the required information before the end of the performance period. The list of significant accomplishment [sic] were not provided to the OER rating chain officials use [sic] until well after the OER period ended," and an injustice by assigning the applicant a mark of 3 in the category of "responsibility," the Board must determine whether these errors prejudiced the applicant before the 19xx XXXXX promotion board. In determining whether a nexus exists between the errors or injustices and the applicant's failure to be selected, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982) 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?" The Board finds that the inclusion of the two sentences and the mark of 3 make his record appear slightly worse than it would have in their absence. However, the Board further finds that, in light of the negative comments and low marks of the special OER, it is very unlikely that the applicant would have been selected for promotion even if those errors had not been in the disputed OER when it was reviewed by the 19xx XXXXX selection board.

24. The applicant made numerous allegations with respect to the actions and attitudes of his command, his rating chain, and the boards. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

25. Accordingly, partial relief should be granted with respect to the disputed OER by removing the two sentences “[t]he 5f mark should be lowered to 5 since I am aware that the ROO failed to submit all the required information before the end of the performance period. The list of significant accomplishment [sic] were not provided to the OER rating chain officials use [sic] until well after the OER period ended,” and raising the mark of 3 in the category of “responsibility” to a mark of 4.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of [REDACTED] USCG, for the correction of his military record shall be corrected by removing the following comments from block 11 (reviewer's comments) of the OER for the period May 1, 19xx to April 30, 19xx:

The 5f mark should be lowered to 5 since I am aware that the ROO failed to submit all the required information before the end of the performance period. The list of significant accomplishment [sic] were not provided to the OER rating chain officials use [sic] until well after the OER period ended.

The mark of 3 for the category of "responsibility" in block 8.d. of this OER shall be raised to a mark of 4. All other requested relief is denied.

