

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2005-030**

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**FINAL DECISION**

  
This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed it on December 1, 2004, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated March 16, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to correct his record by amending an officer evaluation report (OER) he received for the period June 1, 2002, to May 31, 2003, when he was serving as an aircraft commander. From June 8, 2000, to September 11, 2002, he was the air station's Communications Officer and Command Security Officer (CSO), and as such was responsible for the security of the unit's classified materials and head of the Communications Division, which consisted of himself and one petty officer. He alleged that because he had insufficient staff to assist him in this collateral duty, the security clearances of air station personnel were not properly tracked. Therefore, some personnel were allowed to continue viewing classified materials after their security clearances had expired. The applicant alleged that he brought the problem of the lack of staff to the attention of his commanding officer (CO), but nothing was done.

The applicant alleged that when he discovered the staff's errors in failing to keep the security clearances up to date, he immediately ordered that the problem be corrected. However, he was made the scapegoat in his OER even though understaffing had clearly caused the problem. The applicant alleged that the Report of the Investigation (ROI) was not completed by the time the disputed OER was prepared and ultimately contained several inaccuracies. He alleged that he was not given party rights in the

investigation even though it was used against him in his OER. He alleged that his rating chain improperly used information from the incomplete ROI when preparing his OER, contrary to the Personnel Manual.

The applicant alleged that the Report of the Investigation is inaccurate in that (a) it states that he had received the Coast Guard's CSO training when he had not; (b) it erroneously states that he admitted that no effort was made to correct the discrepancies identified during the April inspections, when he in fact had personally drafted an Information Security Plan in response to the inspections and had made security clearance tracking TC2 B's top priority, as shown in his email to the Reporting Officer dated June 24, 2002; and (c) it indicates that inspections had identified problems with security clearance tracking numerous times when the April 2002 inspections were the first to mention any problem. Moreover, the April 15, 2002, "biennial" inspection by the District Security Manager was the first to occur since August 1996.

The applicant asked the Board to amend the OER by raising his marks in sections 3, 5, and 9 to what he had received on his prior OER, by including a recommendation for promotion, and by removing the following written comments:

- (a) "As CSO, ident manning shortfalls compounded by rapidly exploding comsec demands, fell behind in mgmt & allowed Comms to be overrun – resulted in sev'l practices dangerous to security & incidents of improper issuance of class mat'l."
- (b) "Struggled w/ direction of Comms staff in admin of secure mat'l, pers clearances, & req'd trng – caused sev'l reportable incidents."

The applicant also asked that all references to the OER be removed from his record, that all references to administrative actions taken against him be removed from his record, that his failures to be selected for promotion to lieutenant commander (LCDR) in 2003 and 2004 be removed from his record, that his LCDR date of rank be backdated if he is selected for promotion by the first LCDR selection board to review his record once corrected, that he be offered an opportunity to return to active duty if separated from the Coast Guard prior to the Board's decision, and that he receive all back pay and allowances that would be due as a result of these corrections.

The applicant alleged that the Coast Guard recently amended Article 10.A.4.f.1. of the Personnel Manual so as to remove a member's constitutional right to due process. He alleged that the regulation now allows any member of a rating chain "to comment on their perception of the rated officer's alleged conduct (even alleged criminal conduct), regardless of whether it is actually proven to be true; as long as the name of the proceeding which is investigating or adjudicating the conduct is 'tactfully' omitted. This alteration is a license to ruin an officer's career on unproven conduct." The applicant argued that the BCMR should reject the new regulation and uphold the prior

regulation, which, he alleged, prohibited the use of disputed information from a pending investigation in an OER.

In support of his allegations, the applicant submitted several statements from colleagues. CDR R, who had previously served as the Administrative Officer at the unit, stated the following:

When I reported to the unit in 1998, I found it inappropriate that this division was staffed with one officer and one enlisted. Having worked in Communications as a junior officer, I knew this was inadequate for the workload involved at a large unit ... . I pointed this out to both the Operations Officer and the Executive Officer to no avail. In 1999, I became the Assistant Operations Officer and again tried to garner support for expanding the division with no luck. It appears the command knew the division was understaffed yet took no action. This, in my opinion is a failure of leadership and [the applicant] unfortunately suffered the brunt of this failure.

LCDR P stated that the unit had previously had two "comms" officers instead of one. He stated that before the applicant's arrival, the CSO was a lieutenant who was leaving the Coast Guard for a civilian flying career and who did not "display much interest in his collaterals at that time." He also stated that the petty officer who worked with the prior CSO was not a strong performer. He stated that "[d]espite his outstanding efforts to correct the problems created by his predecessors, [the applicant] was unjustly selected by the command as the individual that would shoulder the blame."

LT S, who replaced the applicant as CSO in September 2002, stated that he has known the applicant since they graduated from the Academy together and that the applicant "has extremely impressive organizational and project management skills." He also stated the following:

Upon [taking over the duties of CSO], there was improvement required due to several complex reasons. It is my strong opinion that the command lost focus on the fact that [the applicant] was assigned as the [CSO]. The Military Personnel Security Manual, Physical Security Manual, CMS-21, and other directives clearly stated the [CSO] shall not be assigned any other non-security related duties. I remember [the applicant] working feverishly for the command on several global command initiatives that were detailed in a lengthy ... [unit] Business Plan. Many of these initiatives were tedious and extremely time consuming. One huge project I remember taking up a large portion of his time was the CASPER Implementation Project. The command of the [air station] took the lead for the Coast Guard regarding the implementation and [the applicant] was the single project officer for the project. ... It is my strong opinion that given [the applicant's] flight duties and duties as the [CSO], there is no possible way he could have succeeded given the extreme command interest and demands that were placed on him. He had only one petty officer assisting him in the Communications Division during his entire assignment as CSO. The responsibility is huge in order to maintain security clearances for 235+ personnel assigned to the unit. ... [After he replaced the applicant as CSO], it was very clear to the command that a larger staff was required to maintain and properly execute the security related assignments associated with the [CSO] and the handling of classified material at the unit. During my assignment as CSO, there were three officers and two enlisted personnel assigned to the Communications Division. I freely state that even with

a 5-person staff and daily 12-14 hour workdays, it was extremely demanding to successfully carry out the security duties associated with CSO. There is no way I would have been able to successfully complete my assigned duties given a 2-person staff. With additional tasking like [the applicant] received, there is no way I could have successfully performed my duties even with a 5-person staff.

LTJG G, who became CSO at the air station after LT S, stated that the Communications Division was understaffed during the applicant's tenure as CSO and

held together by extreme hard work and overtime by all who work here. We have more than doubled our allotted crypto holdings with no additional billets being made available. ... Following all of the Coast Guard regs for security, destruction, handling, and clearances required by users of our equipment is not possible with two people. Over 250 people require security clearances at this air station. ... The average cutter has five times the number of people staffed in a Comms department and has no portable equipment and only 150 people total with less than half of those requiring a security clearance. Again we are doing it with two people. ... We continue to barely hold together our department now staffed with two officers, both pilots, one full time OS1 and an active reserve OS2. By bolstering the department we are only seeing progress after one full year of repairs from the previous understaffing problems. I know [the applicant] to be an honest person and a very hard worker. It is my opinion that his position could only be described as one ready for failure. He was the unfortunate recipient of a department on the verge of collapse. He did the best he could with what little support he had available. That support within the department and within the command was not enough to stop the inevitable loss that was going to occur through continued understaffing.

LTJG F, who was assigned to the Communications Division for a year beginning in October 2002, stated that the division grew from two people when the applicant was CSO to five people. He himself was the fourth person in the division when he arrived. He stated that this growth was a direct result of the problems the applicant experienced trying to keep up with the tremendous increase in the workload while assisted by only one petty officer. He described the many responsibilities of the division. He stated that "[e]ven with the increase in manpower, we found it extremely challenging to keep up with everything. ... I could not imagine being in [the applicant's] place."

The chief warrant officer (CWO) who served as the District's Electronic Key Management System (EKMS) Manager stated that she worked closely with the applicant and the petty officer who assisted him. She stated that although they were extremely busy, they "were inundated with other projects, the biggest one [of which] was to upgrade over 150 personnel with Top Secret security clearances in addition to keeping the unit operational with communications." She stated that in 1999 the district Security Manager asked her to help the applicant's unit process the security clearances as he "recognized the overwhelming task that was about to be placed on the Air Station's shoulders. It was to be near impossible for one or two people to complete the task." However, the project was delayed and she was not asked to help them when the applicant and his staff member later began processing the clearances. Later, they were ordered to remove all "KYKs" and use "DTDs" instead, which tripled her own work-

load as well as that of the applicant and his staff member. She stated that their workload increased significantly again after September 11, 2001. She stated that she was very surprised that the applicant had maintained the division as well as he had given his flying duties and lack of staff. She stated that the air station's "command personnel would regularly implore me to provide assistance with a billet increase to their communications center and I believe I did send out some e-mails documenting and backing up [the applicant's] request. ... [However] the billet increase documentation was never submitted from the command level." She further stated that the applicant and petty officer were extremely busy with a tremendous workload and worked as hard as they could. She stated that they "could not humanly accomplish everything they were assigned without something slipping, and it's shameful that someone's career is in jeopardy because they were not superhuman."

TC1 H, who served as the applicant's only staff member in the Communications Division until he transferred out in May 2002, stated that upon arriving at the air station, he was stunned to discover that he was the only telecommunications specialist because there were supposed to be two. Within a couple of months, he and the applicant requested another billet through the chain of command but were told that no help was available. Soon thereafter, CASPER was initiated, requiring top secret clearances and vastly increased message traffic. He began doing his unclassified work at home in his off hours. The applicant, who was one of five or six aircraft commanders, often helped him although he had to spend most of his time on his other duties. Many times TC1 H could not route security packages because the applicant was deployed on a mission. TC1 H stated that the applicant asked the command for more staff numerous times and that the command's refusal to support more staffing caused the problems that occurred. TC1 H stated that every other air station, even smaller ones, had more than one TC in their Communications Divisions.

## **SUMMARY OF THE RECORD**

The applicant graduated from the Coast Guard Academy and was appointed an ensign on May 19, 1993. He was first assigned to a cutter as a deck watch officer for two years. His collateral duties included being the Security Training Officer and the alternate custodian of classified materials. He received high marks in his evaluations,<sup>1</sup> including marks of 5 on the Comparison Scale,<sup>2</sup> and advanced to lieutenant junior grade on November 19, 1994. In July 1995, the applicant became an Operations Center Duty

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<sup>1</sup> Coast Guard officers are evaluated in a variety of performance categories on a scale of 1 to 7, with 7 being best.

<sup>2</sup> The Comparison Scale is not actually numbered. However, as with the performance categories, there are seven possible marks. The instructions say that the reporting officer should assign a mark on the scale by comparing the reported-on officer with all other officers of the same rank whom the reporting officer has known throughout his career. On the scale, a mark in the fourth spot means the officer was rated to be an "good performer; give tough, challenging assignments." A mark in the fifth spot means the officer was rated to be an "excellent performer; give toughest, most challenging leadership assignments."

Officer, standing 12-hour watches at a joint service operations center. He received very high marks on his evaluations in this position, including marks of 5 and 6 on the Comparison Scale.

From January 1997 through April 1998, the applicant attended flight training. On November 19, 1997, he was promoted to lieutenant. In July 1998, the applicant reported to the air station to serve as a copilot and operations duty officer. His initial collateral duties were being the Educational Services Officer and the Housing Officer. On his first OER at the air station, covering his service through May 31, 1999, he received one mark of 4, twelve marks of 5, and five marks of 6 in the various performance categories, a mark of 5 on the Comparison Scale, and a strong recommendation for promotion "with his peers."

From June 1, 1999, through May 31, 2000, the applicant continued to serve as a copilot and operations duty officer. His collateral duties were being the Morale Officer, the Civil Rights Officer, and the Assistant Education Services Officer. On his OER for this period, the applicant received one mark of 4, thirteen marks of 5, and four marks of 4 in the various performance categories, a mark of 5 on the Comparison Scale and a strong recommendation for promotion with his peers.

### *Assignment as CSO*

From June 8, 2000, through September 11, 2002, the applicant was designated and performed the collateral duties of the Communications and Readiness Officer, Command Security Officer, and Alternate Classified Material Control Officer. Upon assuming these collateral duties, he sent the CO a memorandum noting the following:

- Defects of deficiencies noted: None.
- Adequacy of personnel assigned: Inadequate at this time, until assignment of billeted Telecommunications Specialist (TC)
- Adequacy of equipment: Adequate
- Condition of files, records, and instruction books: Adequate
- Status of transfer of material and equipment: Complete
- There are no facts in dispute.

TC1 H worked at the air station from July 2000 through May 2002. On September 25, 2000, he was designated as the Classified Material Control Officer.

The applicant's OER for the period, June 1, 2000, to May 31, 2001, shows that in addition to these collateral duties and his primary service as a first pilot and operations duty officer, the applicant was also the CASPER Implementation Officer, the Coast Guard Day 2000 Project Officer, and the Assistant Morale/Club Officer. On his OER for this period, the applicant received one mark of 4, ten marks of 5, and seven marks of 6 in the various performance categories, a mark of 5 on the Comparison Scale, and a very

strong recommendation for promotion. The OER notes that he had been selected to be an aircraft commander.

On October 25, 2001, the District EKMS Manager reported to the applicant, his Reporting Officer, and the CO that her quarterly spot check revealed no practices dangerous to security (PDS) and no COMSEC incidents. She noted that access lists needed updating and that the watch-to-watch inventory and visitors' log were incomplete.

On January 18, 2002, the District EKMS Manager performed another quarterly spot check. She reported no PDS or COMSEC incidents. She noted a few minor discrepancies but concluded that the "account is in good shape and CMS 21A is being adhered to."

On January 18, 2002, the applicant emailed the Reporting Officer and others about needing another TC in light of CASPER implementation; Mode 4, the workload for which would soon double; and dramatically increased classified traffic. He noted that other air stations had between 2 and 5 billeted TCs.

On April 12, 2002, the applicant emailed the Reporting Officer about the upcoming inspections by the District EKMS Manager and the District Security Manager. He noted that the inspections would likely reveal concerns with physical security in the Operations Center and Communications Center due to the large amount of traffic in the secure spaces and with security clearances. The applicant also noted they needed more personnel and that it "seems like things are getting worse too. Keeping the security packages up to date, managing classified message traffic, and COMMSEC could all be full time jobs for individual TC's. This says nothing of the 'regular comms stuff' like radios, access lists, phone systems, secure computer systems, Crypto and Office equipment, etc. The CO's e-mail about the future requirements for COMMS is right on track. It's growing exponentially."

On April 15, 2002, the District Security Manager conducted a biennial security evaluation. He later reported that he had found many minor discrepancies but that the "overall security posture at this unit ... was acceptable." He noted the lack of a roster of personnel who had been granted access to classified information, a large backlog of investigation packages pending, and a lack of annual self-evaluations using checklists.

On April 22, 2002, the District EKMS Manager conducted another quarterly spot check of the EKMS security at the air station. She reported finding a few "minor administrative discrepancies" to the Reporting Officer and CO and stated the following:

Security clearances are not up to date. District is aware that there are approximately 250 Airsta personnel needing clearances and only one person [TC1 H] available to submit them. This same [petty officer] is also responsible for the EKMS, CMCO, and Comtac duties. This is an ongoing problem with no immediate solution in sight. With the upcoming transfer season the security clearance workload will drastically increase caus-

ing an extreme burden for the oncoming TC. ... [TC1 H's] EKMS account is in very good condition considering his workload in EKMS, CMCO, Comtac, and security clearance processing. It is virtually impossible for one individual to perform all of these functions and maintain a perfect account.

The District EKMS Manager later reported to the investigator that the minor administrative discrepancies included out of date and improper lists; PDS, such as loading improper keymat and missing signatures on destruction reports; and incidents, such as use of improper call signs and old keymat and keymat left unattended.

On April 19, 2002, the applicant emailed the Reporting Officer to ask if LT S could take over the Communications Division sooner than planned. He stated that immediate relief would help given the change and gap in the TC billet and the increasing number of OPS duties he was being assigned.

On April 30, 2002, the applicant emailed his Reporting Officer and other officers a list of the Communication Division's CASPER-related duties, which he estimated took 63 to 75 hours per week apart from the division's regular security-related duties. He wrote, "As you may infer from the numbers, the TC1 and myself are not able to 'cover all the bases' properly in addition to our COMMS/security duties; not to mention covering the flight schedule."

On May 10, 2002, the applicant emailed his Reporting Officer and other officers, in response to the question "what rate do we want for our one billet," that "we cannot do everything that we want to do with only one billet. Even if the CASPER program is considered a totally separate entity, we cannot manage all our security, communications, computer systems (DMS/SIPRNET/ADNET), OPSEC, COMSEC, etc., needs with only one body. ..."

On May 14, 2002, the applicant and TC1 H asked the District EKMS Manager if a TC1 from her office could fill in for TC1 H, whose last day at the air station was to be May 23, 2002. TC1 H noted that until that day he would "be in and out for household packing, inspection and car shipment." The District EKMS Manager replied that they could not spare the TC1 and that "you should have arranged for an on site relief."

On May 16, 2002, one week before he transferred, TC1 H emailed to the applicant a long list of members whose security clearances had expired or would soon expire.

On his OER for the period June 1, 2001, through May 31, 2002, the applicant received one mark of 4, seven marks of 5, and ten marks of 6 in the performance categories, a mark of 5 on the Comparison Scale, and a strong recommendation for promotion "with the best of peers." The OER indicates that he was serving as an aircraft commander and senior duty officer and that his collateral duties were being the Communications Officer, the CSO, and the CASPER Implementation Officer.

On June 24, 2002, the applicant emailed the Reporting Officer and District personnel, stating that TC2 B had arrived earlier than expected but was "overwhelmed by the workload." He noted that even before he took over the Communications Division, the command had been trying to increase the TC billet strength, and that they had more than enough work for three TC2s.

Also on June 24, 2002, the applicant sent to his Reporting Officer and Supervisor an email in which he reported steps that he had taken to resolve several problems. He reported that TC2 B "has done a great job getting security clearance tracking started" and that they were "still working on some discrep[ancie]s" identified during the April inspections. He also wrote that, "We need a second TC in COMMS. The OS augment will not occur in time to keep the shop healthy. We are the only unit of our size that has only one TC (billeted for a TC2 no less). This struggle began long before I moved into comms."

On June 27, 2002, the Reporting Officer concurred in the applicant's statement to the District personnel, stating that "CASPER demands alone, using the CG staffing standards algorithm suggests a 4 person deficiency (which we hoped would be resolved by OS augmentation). The series of unit PDS incidents (8) over the last year are indicative of comms related security and training challenges we have and will continue to experience with 1 TC2 assigned. The assumption of new Homeland Security responsibilities and proliferation of OPSEC/COMSEC demands has exacerbated the consequences of staffing shortfalls in our COMMS Division. Adding Siprnet, Mode IV, CASPER hard drives, and other factors to the workload equation makes our current status even more ridiculous. If you compare the numbers of Airsta personnel with security clearances, daily CMS transactions, total number of radios, and volume of classified messages for this unit with any [high endurance cutter], I think you'll appreciate the logic and necessity for rebalancing TC staffing. CGC JARVIS has 9 TCs (including an E-7) and I have one E-5. CGAS SACTO has 4 aircraft/3 TCs and I have 8 aircraft/1 E-5. ... I would appreciate any support or ideas you can offer in leveling the TC workload and reducing the frequency of our comms related mistakes (beadwindows, improper callsigns, missed destructions, deferred training, etc.)."

On July 30, 2002, the District Commander reported to the applicant's CO that the biennial security evaluation on April 15, 2002 had identified "no major discrepancies" but that several minor discrepancies should be corrected by September 5, 2002, including creation of an Information Security Plan and a roster of everyone who had gained access to classified information, as well as annual self-evaluations and semi-annual emergency drills.

On August 15, 2002, the District EKMS Manager reported that her quarterly spot check had revealed no PDS or COMSEC incidents.

On October 16, 2002, the applicant's CO sent the Commandant a memorandum stating that the air station needed another sixteen billets to implement CASPER, including ten aviation billets and four operational specialty<sup>3</sup> billets. The CO noted that "[w]ith only 10 total billets proposed for [the air station] in the FY04 CASPER Resource Proposal, I have been forced to sacrifice two aviation billets in order to get 2 of the 4 OS billets absolutely necessary to properly manage the additional communications security, personnel security, intelligence, training and data management requirements brought about by CASPER, MODE IV, and our more extensive use of secure comms. I do not believe 10 additional billets will be adequate, as evidenced by the CMS/EKMS incidents we've experienced over the past 18 months. ..."

### *Informal Investigation*

Also on October 16, 2002, the applicant's CO appointed CWO K to conduct an informal investigation into the cause of "numerous discrepancies" involving classified information and security clearances. On October 29, 2002, CWO K submitted an initial report, in which he stated that the security clearances were in a "state of disrepair" and that several members with regular access to classified material did not have valid clearances. He stated that the members' security files "ran the gamut: missing or improperly administered SF-312, no source documents, no record of local record checks, no CG-5588, no record of initial access/indoctrination briefings and no record of annual refresher briefings." He reported that the security files and instructions were "spotty and almost non-existent" and that there "was no system for maintaining document receipt cards or a suspense file for security packages, nor was there a record of members' SF-86s on file." CWO K stated that he had interviewed personnel who had access to classified material and discovered that some members had never received a security briefing and that there was no record to show who had received a security briefing.

TC1 H told CWO K that he was the personnel security clerk "by default" and briefed new personnel using a read hand-out. When supervisors informed him that personnel needed access to classified material, he would check their records and the People Soft database to determine whether they could and kept his own roster. TC1 H stated that annual self-evaluations were not done.

TC2 B told CWO K that when he arrived in June 2002, the radio shack was in disarray and that "he was left to pretty much figure things out on his own. Sorting through files, he found some persons did not have valid security clearances. ... [In July] he notified [the applicant] who asked him to pursue rectifying the problem." Therefore, TC2 B began notifying personnel to fill out the appropriate paperwork. LT S discovered more problems when he relieved the applicant. After the "stand down" on September 26, 2002, additional personnel were assigned to help TC2 B process and track the security clearance paperwork.

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<sup>3</sup> In 2002, the TC rating was merged into the OS (operational specialist) rating.

LT S, who relieved the applicant as CSO on September 11, 2002, told CWO K that “[w]hile looking at the check-in and security clearance processes it became apparent that there was a problem. The further [LT S] got into it the worse it became. ... [The division] immediately went into a security ‘stand down’ and limited/restricted access to classified material. The initial report listed 14 persons but by having individuals sign SF-312s and access briefings, the number shrunk to 5 who had no record of clearances or whose clearances had expired and were out of scope.”

CWO K wrote that in discussing the problems with the applicant, the applicant had admitted that “he was unaware of the discrepancies that the Security Manager and EKMS custodian discovered in the course of their evaluations [on April 15, 2002]. He stated that he made the determination they would have to await remedying until the new TC2 reported aboard. They were first discovered on April 15<sup>th</sup>, [TC1 H] departed on May 2<sup>nd</sup> and [TC2 B] reported aboard on the 5<sup>th</sup> of June. Even then no action was taken to correct these flaws.”

### *Applicant’s Statement for the Investigation*

The applicant submitted a written statement to the investigator dated October 28, 2002. He stated that as COMMO and CSO, he “was acutely responsible for safeguarding classified material and ensuring access to such material was properly controlled,” but there were several mitigating circumstances. For example, while he was CSO, CASPER was implemented and many of the members’ clearances had to be upgraded from secret to top secret. Also, because there were only two people in the division, efficiency required a division of labor. Therefore, the applicant handled almost all of the security and COMSEC/OPSEC training, devised a plan for rehabilitating the Operation Center, updated Communications Bills, wrote new equipment user instructions, and “pieced together several existing elements into a single ‘Information Security Plan,’” while the TC handled the access briefings and annual refresher briefings and processed security clearances. The applicant further stated that because the division only had one standard workstation, which was used by the TC, he usually had to work elsewhere rather than with the TC. He had asked for another workstation but was told that the air station was already over its material allowance limit.

Moreover, the applicant noted, by the spring of 2002, there were plans for him to move to the Operations Staff and so the Assistant Operations Officer assigned him an increasing number of non-Communications-related duties, such as being the OPS representative at JRAC meetings, representing the air station during work-ups for a major marine disaster exercise, and being the point of contact for various initiatives. The applicant stated that because of these new demands on his time, he asked to be relieved early from his Communications duties, “which proved to be impossible.”

Regarding the invalid security clearances of personnel using classified material, the applicant stated the following:

[T]he leading cause was a loss of situational awareness regarding administrative records in the COMMS office. I believe this primary causal factor was influenced by a number of elements. First, our shop has been overloaded since I took over. I took over the COMMS office from a period of near collapse, where we lost our permanent TC months before we had a full time replacement, while at the same time the outgoing COMMS officer was leaving the service due to voluntary separation. Due mostly to the efforts of [TC1 H] (then TC2), the ship was quickly brought up to an operating condition.

Not long after this, numerous changes of additions came about in the COMMS world. These ... were most notably the addition of Coast Guard Message System (CGMS), basic SIPRNET & Defense Messaging System (DMS), CASPER systems (including the requirement for Top Secret Clearances), major COMSEC policy changes and increased focus on OPSEC considerations following the 9/11/01 terrorist attacks, the addition of Mode-4 crypto, and the conversion to CYZ-10 Data Transfer Devices. None of these changes came with training or additional personnel. It was all "taken out of hide," both for the Avionics Technicians and the COMMS office.

The 9/11/01 terrorist attacks also brought about a change in the approval authority for Security Clearance Packages. All packages that had been submitted to COMDT (CFI) were returned, and because of specific time requirements had to be completely redone. For significant periods of time we were unable to obtain any information from the Personnel Security and Suitability Section regarding status of any clearance packages. The timing of the change in approval authority with the addition of over 40 SSBI clearance packages required for CASPER operations was especially problematic. This dramatically increased the workload in COMMS and the backlog of Security Packages.

Even though I was never notified of any situations involving unauthorized access to Classified Material, I was keenly aware that we were getting in over our heads in COMMS. I reported our lack of adequate staffing and requested additional support on numerous occasions. (Enclosures 1, 3, 4, 6, 8 & 9) ...

The next causal factor to the loss of situational awareness was a result of there not being an "on site" relief between [TC1 H and TC2 B]. I attempted to have the relief done in person, but [TC2 B's] cutter schedule delayed his reporting from when it was originally scheduled. By the time I knew this, [TC1 H] had already scheduled his pack-out, vehicle shipment, and arrival plans at his new duty station, so I did not ask to have his orders changed.

I feel that a great deal of "the bubble" was lost in the short time where we had a TC gap. In anticipation of this being a problem, I requested TAD help from the District, but was told that no additional personnel were available. ... The only support augment that I was able to obtain was part time reserve support from [TC2 D]. She was very eager to help out, but with limited drilling dates it was difficult for her to make very much progress on the backlog that was developing.

A sidebar to the issue of no onsite relief is the destruction of numerous paper records. When [TC2 B] first arrived, he asked me if he could organize and get rid of out of date records. I enthusiastically told him yes. I am not certain, nor do I suspect any malicious intent, though I believe some of the documents that we have been unable to locate may

have been destroyed in the "house cleaning." Literally hundreds of pages were shredded in the weeks that I was still in the office with [TC2 B].

... [LT S] showed me a document that listed personnel that had received "in-briefings." The sheet listed personnel up to a certain date, stopped for a long period of time and then resumed listing names. I remember finding that document many months ago. [TC1 H] had been listing personnel that had received in-briefings on a separate sheet, which either had no heading or a hand-written heading. I asked him if he would start using the pre-formatted in-briefing document, which he did. When asked about it by [LT S], I was unable to locate the other listing of personnel.

... I cannot provide a whole lot of detail as to how the specific individuals were allowed access with expired (or in at least one case, without) a Security Clearance, because I was not aware of these situations until after the fact. I know that [TC1 H] was conducting access briefings because I watched him give and record them. I also know that TC1 was completing and tracking Security Packages. I have an e-mail from him from 16 May 02 that gave me an update of personnel that included the status of several pending packages, and listed personnel that had either expired or soon-to-be expired clearances. (Enclosure 5)

Unfortunately, the CGHRMS system that was designed in part as a tool to track Security Clearances is completely unreliable. Among its drawbacks is that it is not anywhere close to being up to date, and the system cannot show the status of a pending Security Clearance. ...

My thoughts as to how one of the individuals was given access to classified material on several occasions without any security clearance is simply that Operations Duty Officers (ODO's) and duty pilots were not checking individuals against the access list in the Operations Center before signing them out material. Because of the demands on the COMMS Office, all transactions and daily CMS destructions are the responsibility of the ODO or duty pilots who also manage all active operations at the AIRSTA. I feel that the omission of checking the access list is the result of the extremely high number of COMSEC transactions we have at the AIRSTA. It is not uncommon to have more than twelve CMS-17 (Local Accountability Form) transactions a day. ...

... When I took over the position it was only the TC2 and myself. After that some of my duties were passed on to the Intel Officer billet. I worked with [LCDR S] on the suggestion to create the "Intel Officer" position to reduce the load that was being carried between COMMS and the H-65/C-130 schedulers (SKEDS). In the last couple months, two assistant COMMS billets have been added to reduce the workload in COMMS. Finally, with my departure from COMMS, I have taken most of the CASPER Implementation Officer duties with me. In summary, the COMMO and four other officers are now doing what was once my responsibility in COMMS. These additions have been a definite change for the better, but they also show how desperate we were prior to their creation.

The applicant attached many email attachments, which are summarized above, to his statement to support his claims.

### *Report of the Investigation*

On December 18, 2002, CWO K submitted his final report on his informal investigation of the possible compromise of classified material to the CO. CWO K noted that before gaining access to classified material, a member must have (1) a "certificate of clearance from SECCEN" showing a valid security clearance, (2) a properly executed Classified Information Non-Disclosure Agreement (SF-312), and (3) a Personnel Security Action Request (CG-5588) certifying that a review of the member's local administrative and medical records revealed no derogatory information. CWO K found that none of these three steps had been taken for five members at the air station who were given access to classified information. He opined, however, that the impact on national security had been negligible as four of the five had had security clearances at one time and their records contained no derogatory information that would call into question their continued eligibility. (The fifth needed a top secret clearance but had none.)

CWO K also reported that, contrary to regulations, he found no evidence that (a) security clearance packages had been sent by first class mail to the SECCEN; (b) document receipt cards had been filed; (c) copies of members' security questionnaires (SF-86s) were being retained while their clearances were pending; (d) records of access/arrival, upgrade, or annual refresher briefings were being kept in unit training records, personal data records, or security training files; (e) a roster of all personnel who had been given access to classified material was maintained; or (f) any self-evaluations had been performed or documented by the CSO. CWO K noted that a log of arrival briefings had been maintained through March 8, 2000, and recommenced on June 10, 2002.

CWO K concluded that the Communications Office had an "ineffective, at best, or altogether lack of security clearance tracking/indoctrination system that allowed members improper access and to fall out of scope" and that there "was a lack of sufficient oversight by the CSO [applicant]." CWO K stated that the applicant had received CSO training (but the applicant denied this in his application). CWO K also concluded that the applicant had made no effort to remedy the discrepancies identified by the District EKMS Manager during her April 2002 spot check and that the billet gap between TC1 H's departure and TC2 B's arrival had "exacerbated the problem and was a contributing factor in the compromise of classified material."

CWO K recommended administrative action against the applicant because his duties as the CSO had been clearly spelled out to him and "[f]irst and foremost of these, it was incumbent upon him to ensure the unit met published guidelines regarding the safeguarding of, and access to, classified material. His failure to institute and adequately oversee a security clearance access and tracking system allowed for the compromise of classified material." CWO K also recommended that the command "reapportion extra duties assigned to the CSO that detracted from [the applicant's] ability to correct extensive backlog of discrepancies. They were made aware of the state of the security clearances on numerous occasions via verbal briefings, CMS spot checks, e-mails and official letters. While the CSO and CMCO were busy with a myriad of tasks, only recently has that office been given extra part-time assistance." In addition, he recom-

mended that personnel be added to the Communications Division "to assist with the backlog of security clearances and discrepancies."

### *Disputed OER*

The disputed OER, which covers the applicant's service from June 1, 2002, through May 31, 2003, indicates that as an aircraft commander he flew more than 340 hours, including 23 search and rescue missions. In addition to being a senior duty officer, his collateral duties were being the Communications Officer, the CSO, the CASPER Implementation Officer, and later the Contingency Planning Officer and the OPS Measures Program Manager. His Supervisor, the Assistant Operations Officer of the air station, assigned the applicant two marks of 3 in the categories "Results/ Effectiveness" and "Directing Others" and five marks of four in the categories "Planning and Preparedness," "Using Resources," "Evaluations," "Initiative," and "Responsibility." The applicant received seven marks of 5 and four marks of 6 in the other performance categories. His Reporting Officer assigned him a mark in the fourth spot on the Comparison Scale and did not include a recommendation for promotion. The mark of 3 for "Results/Effectiveness" is supported by written comment (a) (see page 2 above). The mark of 3 for "Directing Others" is supported by written comment (b) (see page 2 above). In addition, the Reporting Officer included the following comments in block 7:

(c) "Concur w/ supervisor. A series of incidents involving inappropriately authorizing access to classified material and workspaces have made this a difficult reporting period for the entire command. Nonetheless, I give [the applicant] credit for attempting to recover and continuing to be productive. [He] is an experienced C130 Aircraft Commander and prosecuted a number of noteworthy missions. In addition, [he] spearheaded 2 major projects in OPS this period. ..."

The applicant did not file a reply to the disputed OER. He was not selected for promotion to LCDR in 2003.

### *CO's Endorsement of the Report of the Investigation*

On June 10, 2003, the applicant's CO forwarded the Report of the Investigation to the District Commander and stated the following:

I concur with the Investigating Officer's overall findings that the five security violations/COMSEC incidents discovered [by the air station] ... were the result of poor security clearance program management by [the applicant], the unit CSO, and ineffective oversight by this command. ...

Unfortunately, the full range and depth of problems with the management of the unit's security clearances were not detected despite the command's completion of six CMS Spot Check Local Elements over the eighteen months prior to September 2002, Quarterly CMS Spot Checks by the CMS Account Manager, and a Biennial Security Evaluation conducted by the District Security Manager in April 2002. These checks only identified

minor discrepancies. The true range and depth of problems with the management of the unit's security clearance processes and five resulting security violations were discovered when the new CSO conducted an in-depth review of the unit's entire security program at the specific direction of this command. ...

[This air station] is still not adequately billeted to manage and operate its communications and security programs, given the rapid expansion of unfunded workload that new systems and initiatives like CASPER, Mode IV, and SIPRNET are generating. This command has strongly articulated this fact on numerous occasions over the last eighteen months. We even completed and informally submitted an unsolicited CASPER Staffing Study to Headquarters in May 2002, and then formally re-submitted it in September 2002 ... in an attempt to help resolve the issue Service-wide. ... In the interim, two additional officers were assigned to the Communications Branch in October 2002 to assist with the complete overhaul of all security processes and to manage the additional workload generated by several new unfunded programs and initiatives that have been deployed Coast Guard-wide. This increase in staffing could only be accomplished because the unit was temporarily over billeted with officers during FY03. Only one of the additional officers will remain in the Communications Branch after July 03, but a Reserve TC was activated in June 03 for extended active duty to offset the unit's return to normal officer billet strength.

[The applicant] was verbally reprimanded and counseled by the Commanding Officer, and then his Supervisor and Reporting Officer were provided the details of this investigation. ...

Regrettably, significant management errors were made that compromised the integrity of the unit's security program and resulted in very painful lessons learned. ...

From June 1, 2003, to May 31, 2004, the applicant served as an aircraft commander and instructor pilot at a joint services flight school. On his final OER, he received ten marks of 5, seven marks of 6, and 1 mark of 7 for "Professional Competence" in the performance categories, a mark of 5 on the Comparison Scale, and his Reporting Officer's "highest recommendation for immediate promotion."

On April 12, 2004, the District Commander concurred in the findings and opinions of the investigator and forwarded the Report of the Investigation to the Commandant. He noted that the "need for additional OS billets to support the unit's physical, material and personnel security programs ... is well documented in the unit staffing study enclosed under the CO's endorsement to this investigation. ... When the Reserve OS who is currently on an active duty contract is released, the unit will be left with one OS to support Communication Security Material (CMS), Classified Material Control (CMC) systems, and personnel security as well as their primary duty as the Communications Petty Officer at a large unit."

On June 15, 2004, the Commandant took final action on the investigation by concurring with the findings and supporting the recommendations. He wrote that "the findings of fact indicate that a poor personnel security clearance program, failure to correct discrepancies from a District Security Manger's inspection, a lack of self evalua-

tions, and an overall lack of oversight on the entire security administration system led to a series of security violations and COMSEC incidents onboard the Air Station.”

The applicant failed of selection a second time in 2004 and was scheduled to separate on June 30, 2005. However, because the Service needs aviators, he received a Reserve commission and is currently serving on a two-year extended active duty contract during which he is eligible for selection for promotion, though “above the zone.”

## VIEWS OF THE COAST GUARD

On April 22, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request for lack of merit.

The JAG argued that "[a]bsent 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 (1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The JAG argued that the amendment of the Personnel Manual was intended to clarify "that although mentioning an investigation in an OER is inappropriate, addressing the underlying conduct is permissible." The JAG further argued that the applicant's due process rights are not determined by the Constitution but by the Personnel Manual, under which the applicant could have filed a reply to the disputed OER and applied to the PRRB for correction before applying to the BCMR. The JAG argued that the applicant has failed to prove that his performance was better than as depicted in the disputed OER. The attached to and adopted as part of his advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command.

CGPC stated that when the applicant assumed the duties of Communications Officer, CSO, and Alternate Classified Materials Control Officer on June 8, 2000, he reviewed the records and reported no problems. However, on October 16, 2002, the applicant's CO appointed a chief warrant officer to conduct an informal investigation into the circumstances leading to reported departures from the classified material management protocol. On October 19, 2002, the CO reported the discovery of security violations in a classified message. On December 18, 2002, the investigator submitted his report to the CO.

CGPC stated that the Officer Evaluation System is not linked in any way to the administrative investigation process. Therefore, CGPC argued, the applicant's claim "that the investigation was conducted in a manner which did not afford him the rights of a party and prohibited him from reviewing its results and formally pointing out errors, discrepancies, or disagreements to the investigator, the Command, his rating chain, and other reviewers of the document is not germane to the construction and submission of the disputed OER." Furthermore, CGPC stated, while the Personnel Manual prohibits a rating chain from mentioning that an officer's conduct is the subject of an investigation, it does not prohibit mentioning the conduct that is the subject of the investigation. CGPC argued that the applicant's rating chain "was authorized to evaluate performance that occurred during the period of the report, regardless of the fact that certain aspects of the Applicant's performance were the subject of a pending administrative investigation."

CGPC stated that there is “no dispute that a series of incidents involving unauthorized access to classified material and workspaces occurred during the reporting period. There is no dispute that the Applicant was the unit Command Security Officer ... responsible for managing security of classified materials.” CGPC stated that the rating chain did not base the disputed marks and comments in the OER on the pending investigation but upon “known reportable security violations that, in their judgment and experience, were due in part to the Applicant’s management of the command security program.” CGPC argued that the rating chain properly supported the marks of 3 in the disputed OER with written comments showing how his performance did not meet the written standard for a mark of 4.

Regarding the applicant’s allegation that the security violations were caused by understaffing, CGPC stated the following:

There is sufficient evidence that indicates that the Communications Division was not staffed at the appropriate level, yet the Applicant’s claim that the command did nothing to address the shortage is not accurate. The command requested three additional Operational Specialists based upon a ... CASPER Staffing Study that was completed and submitted to [the Commandant] in May 2002 and then again in Sep[tember] 2002. There is evidence that the Operations Officer, ..., engaged [a District Branch Chief] to seek assistance with communication security and training duties, resulting in limited support augmentation with a reserve telecommunication specialist (TC). Unfortunately the request and approval process for increasing a unit personnel allowance list (PAL) is a lengthy one, and therefore no additional billets were approved during the period. While the Applicant appropriately conveyed the communication division’s staffing shortages, he exacerbated the situation by allowing his sole experienced TC1 to depart without an on-site relief. In the Applicant’s own statement to the investigating officer regarding the reported comsec incident, he states “The next causal factor to the loss of situational awareness was a result of there not being an ‘on-site’ relief between TC1 ... and TC2 ... .” and “I feel that a great deal of ‘the bubble’ was lost in the short time where we had a TC gap.” As the Communications Officer, the Applicant had the authority and responsibility to ensure an effective relief was executed and that all responsible duties were performed and maintained. The Applicant made an extremely poor leadership and management decision by allowing the 33-day personnel gap to occur.

CGPC also noted that the applicant did not avail himself of the opportunity of submitting a letter to the selection boards that reviewed his record in 2003 and 2004. CGPC submitted an email dated April 12, 2005, from the Reporting Officer for the disputed OER, who stated the following:

[The applicant] was accountable and evaluated for his misgivings and neglect of Communications Officer responsibilities to provide control of classified material and crypto devices (IAW Air Ops Manual). An Administrative Investigation confirmed classified material was purposely issued to at least 7 people that did not have valid security clearances (compromised). ...

[The applicant] was specifically responsible for the classified material, as well as the clearance, access, and need to know processes, on the Commanding Officer’s behalf. In

addition, [he] had a responsibility to notify the Command if proper safeguards were inadequate.

[The applicant] had numerous opportunities to correct unsafe practices, including a security stand-down that I initiated on July 9<sup>th</sup> to reduce the backlog of incomplete user acknowledgments and mandated training. Regrettably, 2 of the compromises mentioned above occurred a few weeks later, as interim clearances expired without notice or response actions (that were well within his control).

[The applicant's] concerns with inadequate staffing are valid, and were the cornerstone of recommendations to overhaul the Communications Division and prevent recurrent incidents. ... But in reality, [LT S] and an inexperienced E-5 that were subsequently assigned to the Division successfully organized the Division within 2 months. During a short notice inspection 2 months later, the Chief of TISCOM personally commended [LT S], characterizing his security documentation, tracking tools, records and files as the best in the Coast Guard.

As Operations Officer, I was responsible for supervising the Communications Division. I recognized a number of security problems including overdue spotchecks (required), outdated access lists, inadequate emergency destruction plans, and the like. ... I assigned [the applicant and TC1] to implement appropriate corrections, but few tasks were completed. Until we began the intrusive investigation, I was unaware of the apparent atrophy in our personnel check-in and clearance application process. In my opinion, neither was [the applicant]. [He] was formally required to conduct in-briefs for new arrivals, and sign their check-in sheets. We found little documentation to validate that this process was completed, and more often than not, any clearance forms that we found were processed by TC1 ... . I believe [the applicant] was also unaware of compliance problems within his office, as he nominated TC1 ... for enlisted person of the quarter, an end of tour award.

As Operations Officer, I fully concurred with assigning [the applicant] a pair of "3"s and the remarks reflecting his failure to manage Communications Officer responsibilities. In doing so, I gave [him] due regard for increasing comsec demands, frequent absences as a deployable Aircraft Commander, as well as perceived staffing shortfalls. The Reviewer [the CO], surely expected lower marks (having mentioned a handful of "1"s), and I may have suffered lower marks for not placing [the applicant] on report for misconduct, and launching a criminal investigation.

I have given [the applicant] the benefit of every possible doubt and believe his OER ... is entirely fair.

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

On April 22, 2005, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. He requested and was granted an extension of the time to respond, and his response was received on May 31, 2005. Because the applicant's response included significant new evidence, his application was deemed to be newly complete pursuant to 33 C.F.R. § 52.26.

The applicant repeated his argument that the staffing of the Communications Division was insufficient and that he "made numerous attempts to notify the Command

of this deficiency and even warned them of the damage that would result from maintaining this condition." He also stated that he "made every effort to keep the division operational" despite the staffing problem but was made a scapegoat when his warnings about problems proved valid.

The applicant stated that he was disappointed to read the Reporting Officer's email because the Reporting Officer had made him believe that he understood that the security violations were due to a "failure of the system" rather than to the applicant's performance. The applicant stated that the Reporting Officer had reviewed his statement before he submitted it to the investigator and noted that he should emphasize the "failure of the system." The applicant submitted a photocopy of his statement with several notes from the Reporting Officer, one of which reads, "Need more emphasis on failure of the system. District: tracking? backup? CGHRMS? SEC Ctr: same [as above]." He alleged that the Reporting Officer told him several times that the "system had failed" due to the staffing shortage and "problems with the administrative check-in process." He stated that the Reporting Officer has attempted to "exonerate himself" as if the applicant had not repeatedly complained about the need for help and notified him of the potential consequences of remaining understaffed. The applicant also pointed out that he was given several "high profile" projects that were very successful and were documented in the disputed OER, which shows that his command had great confidence in his abilities.

The applicant alleged that the Reporting Officer's claim that the office was well organized within two months of his departure by LT S and TC2 B is clearly mistaken in light of the statements he submitted showing that the office was staffed with five personnel after his departure. Moreover, he pointed out, the increased staffing was not merely a temporary fix for the existing problems but a long-term change that continued at least through 2004. He submitted a personnel roster for the air station dated February 2004, which shows that both an LT and an LTJG were assigned to the Communications Division.

The applicant alleged that it is unjust for the Reporting Officer to blame him for allowing a gap between TC1 H's departure and TC2 B's arrival since he "made great efforts to work with the TC detailer to arrange for an overlap." When he found that it was impossible, he asked repeatedly for temporary assistance, which was denied.

The applicant pointed out that in April 2002, the District EKMS Manager and Security Manager listed only "minor" discrepancies. He alleged that his division "made great strides to comply" even though the Reporting Officer never gave him any direction or critique. He stated that the July 9 "stand down" had nothing to do with user acknowledgments or mandated training but was training the applicant initiated to "get users up to speed on the conversion from KYK-13 to a more complex Data Transfer Device." The applicant pointed out that the training was listed as a success in the disputed OER. The applicant included with his response several new statements in sup-

port of his allegations, including several with highly laudatory comments about his performance in prior evaluation periods.

CDR G, who was the applicant's Supervisor for a period in 2001 and 2002 but did not prepare any of his OERs, stated that the applicant was one of only five aircraft commanders and had to "stand eight to ten duties a month." He stated that each of the aircraft commanders "accumulated nearly 600 flight hours during this period," and many more "total dedicated mission hours." CDR G stated that in 2001 and 2002, many new duties were imposed on the air station's Communications Division but no additional personnel were assigned and the division was "already burdened."

CDR P, who was the Operations Officer at the air station in 2000, stated that he chose the applicant to lead the Communications Division because he was one of the best performing junior officers and that, when he left the air station in July 2001, he recommended that the applicant remain in that position because his performance had been outstanding. CDR P stated that the applicant has all the qualities necessary to perform well at a higher rank.

LT R strongly complimented the applicant on his leadership as an aircraft commander. He stated that when the requirements for handling classified material "increased exponentially" after September 11, 2001, the applicant "led the development of a detailed training program, ensuring all required personnel were well versed in the proper procedures for dealing with classified material.... His efforts greatly reduced the 'growing pains' as the air station met new operational requirements." LT R stated that by October 2003, the Communications Division was staffed by one LT, two LTJGs, an OS1, and an OS3.

LTJG C stated that when he arrived at the air station, he was assigned for one month to the Communications Division for a "security paperwork/clearance record scrub of all assigned personnel." After the "scrub," the division was manned with one LT, two LTJGs, and an OS, as well as part-time support from a Reserve OS. By October 2003, the division had one LT, one LTJG, and two full-time members in the OS rating.

CWO K, the investigating officer, responded to an email from the applicant on July 10, 2003, by stating that the "gap with [TC1 H's] transfer was only very small and honestly, insignificant part of the security posture at [the air station]. The relief [TC2B] simply served as the mechanism to highlight the past gaps. ... By all rights you knew that and attempted to get the command to take some action. Sadly they did not. I certainly don't hold that against you."

#### **SUPPLEMENTAL ADVISORY OPINION**

In light of the new evidence submitted by the applicant, the Chair notified the applicant that his application would be considered newly complete, pursuant to 33

C.F.R. § 52.26, and forwarded a copy of his response to the Coast Guard. The Coast Guard responded with a supplemental advisory opinion on September 2, 2005. The JAG stated that he continued to recommend that the Board deny relief based on a memorandum prepared by CGPC.

CGPC stated that it does not dispute the applicant's claim that the Communications Division was not properly staffed during the applicant's tenure as CSO. "However, the mere fact that the unit was not staffed properly does not excuse the Applicant from performing the duties for which assigned. There are many units throughout the Coast Guard that are not staffed at the appropriate level, but continue to execute their duties in a safe and effective manner." CGPC submitted an affidavit by the applicant's CO (summarized below) and noted the many steps the CO took to try to alleviate the staffing shortage. CGPC concluded that "the fact that the Applicant communicated to the command his concerns relating to the personnel shortage does not mitigate his responsibility as the Command Security Officer to properly manage and safeguard classified material."

The CO of the air station, who served as the Reviewer for the disputed OER and is now retired, stated that from "June 2001 through August 2002, the Air Station was never at full officer or enlisted billet strength due to significant Service-wide personnel shortages. Service-wide under billeting raised the per capita workload across the unit." The CO detailed the ways in which he attempted to increase staffing but stated that the air station was not "returned to full officer billet strength [until] the fall of 2002, [when] additional personnel were assigned to the Communications/Security Branch."

The CO stated that the applicant's tasking increased following September 11, 2001, and the implementation of CASPER. In addition, the "Service-wide process that reviewed personnel security clearances was very slow and unresponsive until the new Coast Guard Security Center was fully implemented in mid to late 2002. Historically, this resulted in chronic backlogs and [clearance] packages that were sometimes returned for updating. Both of these factors helped reduce situational awareness on the status of individual security clearances, since a roster of personnel who had been granted access to classified information was not maintained to include a detailed summary of all key data and critical data. As indicated in [the applicant's] e-mail of 24 June 2002, ... [he] initiated the development of a security tracking system to better understand the status of security clearance packages submitted for approval and to meet the mandate of the Military Personnel Security Program, COMDTINST M5520.12B, in response to a discrepancy identified during a Biennial Security Evaluation conducted in April 2002."

The CO stated that in the spring of 2002, he told the Reporting Officer to rotate the applicant out of the Communications Division because he had performed the "high tempo" duties for two years and the inspection had showed that "there was still much to do." The CO asked LT S "to conduct a top-to-bottom review" after he relieved the

applicant of his communications and security duties on September 11, 2002. The review revealed "significant administrative problems ... in the unit's Military Personnel Security Program that resulted in the formal reporting of five security violations/COMSEC incidents on 19 October 2002." Therefore, additional personnel were assigned to the division as they became available that fall.

The CO stated that the five security violations "were the result of poor security clearance program management by [the applicant] and ineffective oversight by the Command." The CO stated that before drawing conclusions, he asked the applicant to read the Report of the Investigation and provide him with comments. In response, the applicant "acknowledged its basic findings regarding his flawed program management." The CO also discussed with the applicant the command's ineffective oversight and the extenuating circumstances of the understaffing and increasing work. The CO stated that during the course of their discussion, he realized that the applicant "lacked the detailed subject matter knowledge required to effectively establish and manage the requirements of the Coast Guard Military Personnel Security System for the unit. In particular, I was disturbed to find he didn't really know which documents had to be maintained for each individual with a security clearance. Instead of being the unit's subject matter expert, [the applicant] indicated that he had tasked his subordinates to manage the program and trusted their knowledge and expertise without question. Unfortunately, this precluded [him] from recognizing the deteriorating condition of the unit's personnel security records, which eventually resulted in security violations."

The CO wrote that "[o]f all the OERs I wrote or reviewed in my thirty years of military service, none involved more thought and soul searching as I tried to fairly balance the member's leadership and management skills, significant extenuating circumstances, and portion of responsibility for results. A fair and accurate evaluation was always my sincere objective. Never was there any thought of finding a scapegoat. ... I clearly recognized there were significant extenuating circumstances that were beyond [the applicant's] control and that made his job far more challenging. ... While these extenuating circumstances certainly increased the chance for mistakes and oversights to occur that could result in security violations, I sincerely believe that [the applicant's] lack of subject matter expertise was a much more critical element in the chain of events that resulted in the five security violations."

The CO stated that the low marks of 3 and supporting comments in the disputed OER accurately reflected the applicant's performance. He stated that they reflect the applicant's "lack of subject matter expertise to identify growing problems with the unit's deteriorating personnel security records and form a proactive action plan to fix them." The CO stated that a recommendation for promotion to LCDR "requires a self-starter who will quickly master the requirements of his job and then effectively marshal all available resources to get the job done correctly." He stated that he lacked confidence that the applicant was ready for promotion.

## APPLICANT'S RESPONSE TO THE SUPPLEMENTAL ADVISORY OPINION

On September 6, 2005, the Chair forwarded a copy of the Coast Guard's supplemental advisory opinion to the applicant. The applicant responded on October 4, 2005.

The applicant stated that the "supplemental opinion did not address any of the fallacies contained in [the Reporting Officer's] statement," but instead presented "a more consistent statement from my Reviewing Officer." The applicant alleged that the staffing at the air station's Communications Division "was well below any similar unit ashore or afloat." He stated that as the Communications Officer on a high-endurance cutter, his department had "two officers, a chief petty officer, a first class petty officer, a second class petty officer, and approximately five third class petty officers." He stated that the air station had more holdings, more clearances to process, and more classified transactions than the cutter, and that other air stations of similar size also had more staff.

The applicant stated that it was unjust for the Coast Guard to hold him accountable for "not being a subject matter expert" in light of the understaffing. He stated that he "was forced to divide my duties with [TC1 H] who was also barely able to keep up with a portion of the ever-increasing demands of the division. It was, in fact, the staffing shortage in our division that not only prevented me from developing such expertise, but also precluded proper oversight of this administrative process." He stated that although he was not a "subject matter expert" in the clearance processing duties TC1 H performed, he was such an expert "in the vast majority of my duties in the Communications Division," as shown in his two prior OERs covering his work as CSO.

The applicant stated that none of his command's attempts to alleviate this division's understaffing helped. When his command failed to provide additional staffing, he "perceived the Command issued a 'green-light' to continue operating without the benefit of redundancy or oversight of critical areas." The applicant stated that the eventual discovery of five violations "was no surprise to me, and it should not have been a surprise to the Command in light of the clear warnings I issued." He pointed out that the command "had no problem taking effective action after problems occurred. Immediately following the discovery of the discrepancies in the division, the billet structure at the Air Station was restructured to properly manage the Communication Division." He repeated his allegation that the disputed OER was intended to shift all blame for the security violations from the command to him.

In support of his allegations, the applicant submitted a letter from the CO dated October 29, 2001, in which the CO recommended the applicant for a special aviator billet exchange with Canada. The CO wrote that the applicant was an "excellent candidate" as he "has successfully managed this unit's communications and security programs in support of the complete range of Coast Guard missions. ... As the [CASPER] system expert, he has demonstrated both the management skills needed to quickly

implement the system in the District ... and [he] in an outstanding new Aircraft Commander." The CO also wrote that the applicant "embodies our Service's core values and has the superior mental and physical qualities that will make him a success in any assignment he is given. ... An outgoing self-starter, [the applicant] is well liked and respected in the Wardroom and on the hangar deck ... ."

The applicant also submitted a statement from his current CO and Reviewer, who described his work as a flight instructor as "exceptional" and his "work ethic, enthusiasm, and professionalism ... among the finest I've seen." He stated that he has "found [the applicant's] integrity and judgment to be beyond reproach."

### APPLICABLE REGULATIONS

Article 10.A. of the Personnel Manual in effect in 2001 and 2002 governed the preparation of OERs. Article 10.A.1.b.1. provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

Article 10.A.4.c.4. of the Personnel Manual provides that a Supervisor should assign the Reported-on Officer marks in the first thirteen performance categories as follows (the same instructions are provided for the Reporting officer in Article 10.A.4.c.7. for completing the remainder of the OER):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards [on the OER form] and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

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d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. ...

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g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.4.f.1. states that rating chain members may not

[m]ention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, PRRB, CGBCMR, or any other investigation (including discrimination investigations) except as provided in Article 10.A.3.c. ... These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

A prior version of the Personnel Manual included the following restriction in Article 10.A.4.g.(1):

Members of the rating chain shall not comment on or make reference to any ... ongoing investigation ... . Reference to a final proceeding is only proper if the officer concerned has been made a party to and accorded full party rights during the course of the proceeding. The finality of a proceeding is governed by regulations applicable to its convening. See ... Administrative Investigations Manual, COMDTINST M5830.1 (series). This restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings.

Article 10.A.2.e.2.a provides that in preparing an OER, the Reporting Officer "[b]ases [his] evaluation on direct observation, the OSF or other information provided by the Supervisor, and other reliable reports and records." Article 10.A.4.c.8.a. states that the Reporting Officer completes the Comparison Scale by "fill[ing] in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known." Article 10.A.4.c.9. provides that in block 10 of an OER, the Reporting Officer "shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard."

Article 10.A.2.f.2. provides that it is the responsibility of the Reviewer to ensure that an OER "reflects a reasonably consistent picture of the Reported-on Officer's performance and potential."

Article 10.A.4.g. allows an officer to file a reply to his OER, within 15 days of receiving a copy of it, to "express a view of performance which may differ from that of a rating official." The reply is forwarded up the rating chain, whose members may attach written responses, before being entered in the officer's record with the OER by CGPC.

## FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that the disputed OER is erroneous and unjust and asked the Board to amend it by raising the marks and deleting negative comments. To establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a "clear and prejudicial violation of a statute or regulation or, alternatively, a misstatement of a significant hard fact."<sup>4</sup> The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.<sup>5</sup>

4. The applicant alleged, and members of his rating chain admitted, that his marks were lowered because of his alleged mismanagement of the Communications Division as revealed in CWO K's report of his informal investigation into the discovery in September 2002 of five members who had access to classified material even though they had no valid security clearances at the time. The applicant alleged that his marks should not have been significantly lower than those he received for the prior evaluation period because the security incidents were due to severe understaffing, a "failure of the system." The record shows that he warned his command about the understaffing many times prior to his relief as CSO on September 11, 2002, and that he warned them that continued understaffing could result in errors.

5. The Coast Guard has admitted that the Communications Division was understaffed while the applicant served as CSO. The division consisted of the applicant and one TC while their workload was increasing greatly in the aftermath of September 11, 2001, and due to the implementation of new programs. Other air stations of similar size had two or three TCs. Following the applicant's relief as CSO on September 11, 2002, the CO ordered his replacement, LT S, to perform a complete review of the division, which revealed significant problems with the unit's processing and tracking of security clearances. The applicant has proved that to fix the identified problems, the staff of the division was quickly increased to five personnel and thereafter staffed with four, including one LT, one LTJG, and two OS petty officers.

6. The record shows, however, that the applicant's rating chain was well aware of the increasing workload and the critical need for more staff in the Communications Division and took these extenuating circumstances into account when preparing

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<sup>4</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); see also *Hary v. United States*, 618 f.2d 704 (Cl. Ct. 1980).

<sup>5</sup> 33 C.F.R. § 52.24(b).

the disputed OER. In fact, the first negative comment in the OER begins as follows: "As CSO, ident manning shortfalls compounded by rapidly exploding comsec demands ... ." The Reporting Officer wrote that the applicant's "concerns with inadequate staffing are valid" and that "I have given [him] the benefit of every possible doubt and believe his OER ... is entirely fair." The CO also acknowledged the understaffing and increased tasking but concluded that "[w]hile these extenuating circumstances certainly increased the chance for mistakes and oversights to occur that could result in security violations, I sincerely believe that [the applicant's] lack of subject matter expertise was a much more critical element in the chain of events that resulted in the five security violations." Therefore, although the applicant has proved the existence of extenuating circumstances, he has not proved that those circumstances were unknown or discounted by his rating chain when the OER was prepared.

7. The applicant alleged that his Reporting Officer acknowledged that a "failure of the system" caused the security incidents when he advised the applicant to emphasize this point in the applicant's statement to the investigator. However, the fact that the Reporting Officer acknowledged that a "system failure" contributed to the incidents and recommended that the applicant emphasize that point does not prove that the Reporting Officer did not deal honestly with the applicant in handling the incidents or in preparing the disputed OER. The fact that the Reporting Officer acknowledged contributing factors (i.e., extenuating circumstances) does not prove that the disputed OER should not reflect the applicant's own failure to oversee the TC's work and to ensure that security clearances were properly processed and tracked.

8. The applicant pointed out that the Reporting Officer claimed in his email dated April 12, 2005, that LT S and TC2 B "successfully organized the Division within 2 months" of the applicant's departure on September 11, 2002, whereas LTJG C stated that he was involved in the "scrub" of the Communications Division in the fall of 2002 and that he was the fourth person assigned to the job, and LT S stated that three officers and two petty officers were assigned to the division that fall. Although the Reporting Officer's statement about the number of members involved in the "scrub" of the air station personnel's security clearances is clearly erroneous, the email is dated approximately two years after the OER was prepared. Therefore, the Board is not persuaded that it proves that the Reporting Officer misunderstood the staffing problem during the evaluation period or when he was preparing the disputed OER. The Board notes that on June 27, 2002, the Reporting Officer strongly supported the applicant's complaints about the increasing workload and insufficient staff.

9. The applicant alleged that the understaffing forced him to delegate and divide the workload in a way that prevented him from becoming a "subject matter expert" in processing and tracking personnel security clearances. Therefore, he argued, his marks should not have been lowered due to the failures in the unit's processing and tracking of security clearances. However, as Communications Officer and CSO, the applicant was responsible for overseeing his staff member's work. His CO clearly

expected him to understand, at a minimum, "which documents had to be maintained for each individual with a security clearance" so that he could determine whether the TC was properly performing his duties. Instead, the applicant apparently admits that he was unaware of the requirements and therefore could not track or recognize the inadequacy of the TC's work and so lost (or apparently never acquired) "situational awareness." Although the applicant clearly had more than enough work, he has not proved that his CO's expectation that he acquire a basic understanding of security clearance procedures during his two years at the division and monitor the TC's work was unreasonable.

10. The applicant alleged that the Report of the Investigation contained factual errors, including claims that he had received formal CSO training, that he had not attempted to correct discrepancies, and that discrepancies had been discovered in the unit's clearance tracking before April 2002. However, the applicant's CO indicated that before the disputed OER was prepared, he had the applicant read the investigator's report and discuss it with him. The applicant did not deny the CO's statement. Therefore, the Board is not persuaded that the command was unaware of the applicant's point of view on the findings and opinions of the investigator when the OER was prepared.

11. The applicant alleged that his rating chain erroneously relied on the Report of the Investigation in preparing the disputed OER contrary to his constitutional rights. He alleged that a recent change in the Personnel Manual deprived him of due process and allowed his rating chain to make unfair comments about conduct that was still under investigation. As the Coast Guard noted, the applicant's rights with respect to the OER are defined in the Personnel Manual, not in the Constitution. Under Article 10.A.4.f.1. of the Personnel Manual, the restriction against mentioning that an officer's conduct is the subject of an investigation "do[es] not preclude comments on the conduct that is the subject of the proceeding. [It] only prohibit[s] reference to the proceeding itself." The disputed OER contains no reference to the investigation, which had not been finalized when the OER was prepared.

12. Moreover, the applicant errs in asserting that the comments in the disputed OER would have been prohibited under the prior provision of the Personnel Manual, Article 10.A.4.g.(1), which stated that the restriction against mentioning an ongoing investigation "does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings." Although the applicant may dispute the allegations in OER comments (a) and (b) (see page 2 above) he has not proved that the underlying facts about his performance that his command considered and relied on were truly "disputed." As the Board found in BCMR Docket No. 1999-101, the "applicant's argument, if valid, would prohibit any OER from ever mentioning facts uncovered by an investigation that was still ongoing or facts uncovered by an investigation to which the officer was not named a party, unless the officer not only agreed about the facts but also agreed that they should be reflected

in an OER. Such an interpretation of the word 'undisputed' would render the last sentence of Article 10-A-4.g.(1) a virtual nullity because no one would voluntarily permit negative facts to be reflected in an OER if he could prevent it just by quibbling or pretending to quibble with the facts." Moreover, the Board notes that the applicant expressly admitted to the investigator that as the Communications Officer and CSO, he "was acutely responsible for safeguarding classified material and ensuring access to such material was properly controlled" and that the "leading cause" of the security clearance processing errors was a "loss of situational awareness."

13. The applicant alleged that the disputed OER was unjust because he did not have party rights during the informal investigation of his behavior. No part of the Personnel Manual requires the Coast Guard to give an officer party rights before preparing an OER. Even a CO who is being relieved "for cause" is entitled only to submit a written statement on his own behalf.<sup>6</sup> Under Chapter 1.E.1. of the Administrative Investigations Manual (AIM), the applicant's command had "broad discretion" to determine whether to convene an informal investigation or a formal investigation, in which case the applicant would have received party rights. Service policy is to convene "the least extensive type of investigation which will meet all service needs."<sup>7</sup> AIM Chapter 1.E.1. states that an informal investigation "will ordinarily be adequate in most cases, including most death cases," whereas examples of situations that could require a formal investigation include incidents with "significant loss of life," "significant international or legal consequences," and "major afloat casualties." AIM Chapter 1.E.2.b. provides that an informal investigation with no designated parties is usually adequate because prior to taking *disciplinary* action based the report, the command "would be required to comply with the procedures provided for that action in the [Military Justice Manual or the Manual for Courts-Martial]." As only administrative and no disciplinary action was taken against the applicant, he was not entitled to the due process provided under those manuals. Therefore, the Board is not persuaded that the Coast Guard erred in convening an informal investigation or in not according the applicant the rights of a party to the investigation.

14. The applicant has proved that the Communications Division was understaffed during his tenure there. He has not proved by a preponderance of the evidence, however, that his management of the Communications Division and oversight of the security clearance processing were not significant contributing factors in the security incidents discovered at the air station in September 2002, as his CO concluded. Nor has he proved that his rating chain was wrong, unreasonable, or unfair in deciding that the division's lack of sufficient staff and increasing workload did not entirely excuse his inadequate oversight of the processing of security clearances. Based on their honest, professional judgments of his performance as CSO, the applicant's rating chain was entitled to lower his marks in the disputed OER (as compared to those he received

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<sup>6</sup> Personnel Manual, Art. 4.F.

<sup>7</sup> AIM, Chap. 1.C.1.

during the prior reporting period). In particular, the applicant has not proved that his rating chain erred in comparing his performance with the written performance standards on the OER form for the categories "Results/Effectiveness," "Directing Others," "Planning and Preparedness," "Using Resources," "Evaluations," "Initiative," and "Responsibility" and assigning the marks of 3 and 4.

15. The applicant asked the Board to remove the negative comments that support the lower marks in the disputed OER, but he has not proved that they are erroneous or unjust. He has not proved that the "reportable incidents" mentioned in the OER did not result in large part because of his failure to learn the requirements of security clearance processing and to ensure that it was being properly performed by the TC or himself, as his CO concluded.

16. The applicant made numerous allegations with respect to the actions and attitudes of various officers who became involved in his case. Those allegations not specifically addressed above are considered to be not dispositive of the case.

17. In light of the above, the Board finds that the applicant has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a "clear and prejudicial violation of a statute or regulation or, alternatively, a misstatement of a significant hard fact."<sup>8</sup> Therefore, he is not entitled to amendment or removal of the OER or to any of the other relief he requested since he has not proved that his record was erroneous or unjust when it was reviewed by the LCDR selection boards.

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

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

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<sup>8</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); see also *Hary v. United States*, 618 F.2d 704 (Cl. Ct. 1980).

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

