

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-105

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 the case upon receipt of the applicant's completed application on April 15, 2014¹ and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 27, 2015 is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a [REDACTED], asked the Board to correct a derogatory officer evaluation report (OER) covering his service during a unit pre-commissioning assignment as the XO of a maritime force protection unit (MFPU), to reflect his alleged actual job performance. Specifically, the applicant requested that the OER be modified to show marks of 4 or better in all performance dimensions, including the marks on the comparison scales. Otherwise, he requested that the OER be replaced with a continuity OER. He also requested that the Board consider additional relief, including but not limited to monetary compensation for the years since his resignation from the Coast Guard on [REDACTED]; the awarding of the rank of lieutenant commander (LDCR); and the right to return to the Coast Guard as a commissioned officer to include time in service from the time of his resignation forward.

The disputed OER, attached and also described below, contains two standard marks of 4,² eleven below-standard marks of 3, five poor marks of 2 for the various performance dimensions,

¹ The timing of the applicant's request to the Board is discussed in further detail below.

² Coast Guard officers are evaluated in 18 performance dimensions, such as "Teamwork" and "Judgment," on a scale of 1 (worst) to 7 (best). A "standard" mark of 4 in a performance dimension means that the officer's performance met the expected performance standard for all Coast Guard officers for that category as described on the OER form. Personnel Manual (Changes 1-41), COMDTINST M1000.6A, Art. 10B.6.

a mark in the first spot on the comparison scale,³ and a recommendation against promotion. The applicant stated that the OER wrongfully accuses him of the compromise of classified material, when he was cleared of such a charge. He also stated that the OER makes allegations regarding his performance without factual evidence. The applicant also alleged that the negative OER was retaliation against him for notifying the chain of command of unsafe conditions, negligent practices, and vulnerabilities at the MFPU. The applicant stated that he would not have resigned from the Coast Guard if not for the resultant damage to his reputation from such alleged mistreatment of him by his superiors.

In support of his allegations, the applicant submitted many documents, some of which have been incorporated into the summary below. Among those documents were his narrative statement of the events; a complaint the applicant filed in 2007 pursuant to the Military Whistleblower Protection Act, 10 U.S.C. § 1034; and related FOIA requests and responsive documents. Other documents constituting the record are as follows:

Applicant's Assignment to the MFPU

The applicant enlisted with the Coast Guard Reserve in [REDACTED], and became an officer when he received his commission as an ensign on [REDACTED]. He advanced to lieutenant junior grade in [REDACTED] and was promoted to lieutenant (O-3) on [REDACTED].

From [REDACTED], the applicant served as the office in charge (OIC) of a law enforcement detachment (LEDET) unit. As OIC, he supervised and was responsible the safety, training, and readiness of a nine-person team. From [REDACTED] he also served as the OIC of a different LEDET unit, where he also supervised a nine-member unit and prepared for deployments aboard U.S. and allied foreign ships for counterdrug operations. During his time in service at this duty station, the applicant became a qualified deployable team leader. From [REDACTED], the applicant served as the OIC of a reserve detachment. The applicant was responsible for supervising operations, support, planning, training, and administration of a 13-person reserve component of a maritime safety and security team (MSST) to support homeland security missions. The applicant received positive OERs for his service at these duty stations.

From [REDACTED], the applicant served as an [REDACTED] [REDACTED]. While at this duty station, he completed a [REDACTED] and a year at the [REDACTED]. On his OER for this tour of duty, the applicant received three marks of 4, one mark of 5, and one mark of 6 ("Planning and Preparedness") in the Performance of Duties section; one mark of 4 and one mark of 5 in the Communication Skills section; two marks of 4 and four marks of 5 in the Leadership Skills section; and one mark of 4 and four marks of 5 in the Personal and

³ On an OER comparison scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his or her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of "unsatisfactory" for a mark in the first spot on the scale to a high of "a distinguished officer" for a mark in the seventh spot. A mark in the third, fourth (middle), or fifth spot on the scale denotes the officer as "one of the many competent professionals who form the majority of this grade."

Professional Qualities section. He received a mark in the fourth spot on the comparison scale and was recommended for promotion with his peers by his reporting officer. The applicant received two letters of commendation for his service during this time.

The applicant was granted a top secret clearance on [REDACTED].

The applicant volunteered for one year of active duty at the MFPU to begin on October 1, 2006.⁴ At the time the applicant began this tour of duty, the MFPU had not yet been commissioned. The applicant served as an assistant detachment supervisor, acting as commanding officer (XO) and command intelligence officer (CIO), for the MFPU prior to its commissioning. The applicant submitted emails evidencing that prior to his arrival at the unit, he was in communication with the unit's parent command about being chosen for, accepting, and being approved for the XO position in September 2006. In his narrative statement and in his whistleblower complaint, the applicant alleged that when he first arrived at the MFPU, he was informed by his supervisor, a [REDACTED] that he would not be acting as XO of the MFPU, because another member of the unit, a LT C, had already been serving as the XO for several weeks. After speaking with [REDACTED] regarding his email communications with the unit's parent command about being approved for the XO position, the applicant was made the XO of the MFPU. The applicant alleged that as a result of this incident, his relationship with LT C was "very unpleasant, tense, and full of resentment."

The applicant stated that prior to his arrival at the MFPU, he was not given any training, such as an opportunity to attend the Coast Guard's prospective executive officer school. He also stated that [REDACTED] provided little guidance and direction and spoke infrequently to the applicant. He alleged that he asked [REDACTED] numerous times if there was anything [REDACTED] would like the applicant to do, to which [REDACTED] would answer no. The applicant stated, "I feel I was set up for failure in that no matter what course of action I took, it was always incorrect in [REDACTED] assessment." To learn more about being an XO, the applicant met with an XO at a nearby Coast Guard unit that he knew from a previous duty station. While there, the applicant took notes and obtained a binder of XO reference materials. However, because the MFPU had not yet been commissioned and did not have a budget or an operational facility code, the applicant alleged, "I could not perform many of the financial and administrative tasks of an XO. Most of the financial and administrative tasks were being handled at [the unit's parent Area]. As a result, I focused my XO responsibilities on training, morale, and good order and discipline." The applicant stated, given that his background in the Coast Guard had been primarily law enforcement, physical security, and intelligence, "[I]n the absence of any pending XO matters...I tended to spend my time pursuing my responsibilities as Command Intelligence Officer (CIO). An important responsibility of any CIO is to point out and address operational vulnerabilities. I took this responsibility very seriously. Additionally, an important responsibility of any XO is to point out and address any unsafe conditions or exposures to his unit and its members. I took this responsibility very seriously as well."

⁴ The OER covering the applicant's service for this duty station indicates that it covers the marking period from June 1, 2006 to August 15, 2007. However, emails submitted by the applicant indicate that he was still in communication with the unit's parent Area about accepting the position in September 2006. Additionally, the applicant's Certificate of Release or Discharge from Active Duty, DD 214, indicates that he began his period of active duty at the MFPU on October 1, 2006.

The applicant alleged that although he had top secret clearance, he was never briefed at the top secret level and never reviewed any materials marked top secret relating to the MFPU. Rather, the highest marked classification level of any material he reviewed was secret. As a result, the applicant alleged that he did not know that the materials he [REDACTED] December 5, 2006 (discussed below) could be viewed as classified. The applicant also alleged that he was not authorized to access a classified computer system that was rated to handle material up to the top secret security level, despite multiple requests for access. The applicant stated that he instead only had access to a system that was rated to handle material up to the secret level and as a result never had the option of sending potentially top secret material through the correct computer system.

December 5, 2006 Email Incident and Subsequent Investigation

The applicant stated that after being at the MFPU for several weeks, it became clear to him that, based upon his law enforcement and military experience, “we were exposing our personnel, as well as U.S. Navy personnel and civilian contractors, to unsafe conditions and negligent practices.” The applicant also alleged that he uncovered vulnerabilities that could be potentially exploited by terrorists. He stated that after one attempt to discuss his findings with “appropriate other stakeholders who had the proper security clearance and need-to-know in a secure space,” he was “verbally reprimanded and threatened by [REDACTED] with a ‘Negative Page 7.’”⁵ Among his application materials to this Board, the applicant submitted a handwritten note that he appears to have faxed to his attorney on December 10, 2006, referencing the alleged negative Page 7 threat from [REDACTED]. In his narrative statement and whistleblower complaint, the applicant listed some of the persons that he had spoken with, which included individuals from the Naval Criminal Investigative Service (NCIS), U.S. Marine Corps Security Force operations, Navy⁶ officers, a civilian contractor, and members of other Coast Guard units. The applicant stated, “While I was working at the [MFPU], I never saw or heard of any attempt by anyone to soon resolve any of these unsafe conditions, negligent practices, or vulnerabilities...” [REDACTED]

The applicant stated that he was concerned about the alleged vulnerabilities and the “rather closed relationship” he had with [REDACTED]. As a result, he consulted and was advised by a retired Coast Guard captain to speak to [REDACTED] regarding his concerns. However, the applicant stated that he did not do so, because [REDACTED] had informed the applicant before such a meeting could occur that he was being reassigned to a joint harbor operations center (JHOC) in a different state. The applicant stated that before this point, he had not been notified either verbally or in writing by [REDACTED] that his performance was insufficient, aside from the one instance where [REDACTED] had threatened to give him a negative Page 7. The applicant stated that it is his belief that the reassignment was retaliation for the applicant’s reporting of unsafe conditions, negligent practices, and vulnerabilities to [REDACTED]. When he was informed of the reassignment, the applicant stated that he informed [REDACTED] that he had volunteered only to fill the XO/CIO position at the MFPU and was not interested in being reassigned to a JHOC.

⁵ Under Section 10.A. of the Coast Guard’s Personnel and Pay Procedures Manual, HRSICINST M1000.2A, an Administrative Remarks page (Page 7) provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative Remarks entries are made to document counseling or to record any other information required by current directives, or considered to be of historical value.

⁶ The mission of the MFPU required it to work jointly with the U.S. Navy.

The applicant alleged that because he felt unable to address his concerns with ██████ he sent an unclassified email on December 5, 2006 to several Coast Guard flag officers, and copying his personal email address. The applicant stated that in the email, he pointed out in “non-specific and unclassified terms” that vulnerabilities existed with the MFPU. The applicant submitted, as part of one of the Coast Guard’s responses to his FOIA requests, a redacted copy of the December 5, 2006 email. In the email, the applicant stated, “I am probably ending my USCG career by sending you this email. However, the [redacted] more important than my career.” In this email, the applicant stated that he had been informed by ██████ that he was being reassigned and alleged that “[s]ince it was announced that ██████ recently made the list for a major reserve command he does not want to take the chance of these [redacted] being exposed.” The applicant also stated that he would be sending a classified report regarding his assessment. The applicant wrote, “I would like to continue working here to help correct the [redacted] but this email will make that very unlikely.” In his narrative statement, the applicant stated that he then sent a classified email with the report through the classified email system he had access to, which was rated for communications up to secret level, to members at the unit’s parent Sector’s intelligence division. The applicant stated that he never received a response to his December 5, 2006 email to his flag officers.

The applicant stated that morning of the day he sent the emails, he attended a team coordination training (TCT), which “made it very clear that [he] must exercise [his] TCT mandated right to jump the chain of command to avert a catastrophe when the Commanding Officer did not adequately address it.” The Coast Guard’s training history records for the applicant do not show that the applicant attended any TCT session in 2006.

The applicant then requested leave and that ██████ release him from active duty the following week. According to a December 5, 2006 email chain with ██████ submitted by the applicant, the applicant’s request for leave was denied and he was informed that he needed to come in to discuss his verbal request to be released from active duty.

According to the applicant’s narrative statement, the same night ██████ instructed that his duty station identification credential and access card be returned. The next day, when the applicant returned to his office, ██████ also had someone escort the applicant around the building, which the applicant stated was “extremely humiliating.” The applicant alleged that he received instruction to fly to the MFPU’s parent Area; however, when he was at the airport for a connecting flight, he received a call telling him to return to the ██████ where the MFPU was located. The following day, the applicant was instructed to visit the NCIS office at the base. At the NCIS office, the applicant was read a *Miranda* warning⁷ and interrogated. The applicant submitted, as part of one of the Coast Guard’s responses to his FOIA requests, a redacted copy of a Coast Guard Investigative Service (CGIS) investigation report, which indicated that the CGIS’ investigation of the applicant’s possible violation of “internal security regulation by an unauthorized disclosure of classified and/or highly sensitive information” began on December 7, 2006. According to the investigation report, ██████ submitted to the CGIS various user and briefing acknowledgments from October 2006 (presumably, for the applicant) regarding various information and use of information systems. The report also stated that in his interview with

⁷ A *Miranda* warning is an explanation of rights that must be given before any custodial interrogation, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

CGIS, the applicant admitted sending the emails, but stated that he believed that the information he had sent was not classified or sensitive. He also stated that he had sent a copy of the emails to his personal email account for his records only.

The applicant submitted several documents for the purpose of the investigation, including a military suspect's acknowledgement and waiver of rights, permissive authorizations for the search and seizure of his personal and business computers, and of information and materials from his residence, and business office. The applicant also submitted a statement for the investigation, stating that he understood that the investigation related to possible violations of Title 18 U.S.C. § 793(f) (gathering, transmitting, or losing defense information), and describing the circumstances surrounding the December 5, 2006 emails as noted above.

The U.S. Coast Guard Security Center (SECCEN) sent the applicant a letter dated August 20, 2007, informing him that its determination that he would retain his top secret security clearance, but also cautioning him that deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubts about an individual's trustworthiness, judgment, reliability, or willingness or ability to safeguard such information and is a serious security concern. The letter noted that the decision based on the CGIS investigation's conclusion that there was "no indication the Top Secret material was properly marked therefore my determination is this was an accidental Handling Protected Information incident."

The applicant stated that he was instructed by the CGIS to not return to the MFPU and remain at home until further notice. As a result, the applicant was "involuntarily retained on active duty" and placed on administrative leave/suspension at home for the next eight months.

The applicant was honorably discharged from active duty on August 15, 2007. Upon his release from active duty, the applicant was issued travel orders for his next duty station. The applicant also submitted emails showing that he had discussed the logistics of his arrival with the command of his new duty station. However, when he arrived at the station on September 5, 2007, he was informed that a mistake had been made. The applicant was reassigned to his former duty station. The applicant stated that he believes that the reassignment back to his former duty station was retaliation against him in response to his communications regarding the vulnerabilities at the MFPU.

Subsequently, the applicant "lost all confidence in the U.S. Coast Guard treating [him] fairly." The applicant submitted his resignation on October 12, 2007, which was accepted on [REDACTED] leading to his honorable discharge from the Coast Guard.

The Whistleblower Complaint

On November 9, 2007, the applicant sent the Office of the Inspector General of the U.S. Department of Homeland Security (DHS-OIG) a complaint and related exhibits. The complaint, which closely echoes his narrative statement to this Board, alleged that he was being retaliated against on account of his December 5, 2006 emails, in violation of the Military Whistleblower Protection Act, 10 U.S.C. § 1034, and 33 C.F.R. Part 53. The applicant alleged that he had been

told that the OER covering his service at the MFPU would be derogatory, and although the OER had not yet been issued at the time of his complaint, he believed that the OER “was ultimately in retaliation for my adhering to an official USCG policy which is mandated in the required annual Team Coordination Training (TCT).” The applicant also alleged that his initial reassignment by [REDACTED] as well as the issues surrounding his most recent assignment, was reprisal for the emails.

On June 9, 2008, the applicant amended his whistleblower complaint with a copy of the disputed OER, which is described below.

The Disputed OER

The applicant stated that he submitted OER input on August 14, 2007 and included a copy of his comments. The applicant’s OER comments discussed his achievements during the marking period in question, including directing the creation of an inventory list; the institution of weekly staff meetings and the publication of weekly and monthly plans; seeking outside training experiences for unit personnel; suggesting certain checklists and programs to [REDACTED] directing the creation of an onboarding checklist for new personnel; investigating the need for a certain standard operating procedure; obtaining computer workstations; and examining certain anti-terrorism force protection issues in his capacity as CIO, among others.

The disputed, derogatory OER (attached) covers the applicant’s service from June 1, 2006 to August 15, 2007. The OER was signed by his supervisor, [REDACTED] on August 15, 2007; however, it was not signed by his reporting officer until January 2, 2008 and by his reviewer until February 25, 2008.

Because this OER was derogatory, the applicant was allowed to submit an addendum. The addendum was signed January 18, 2008. [REDACTED] and his reporting officer submitted responsive comments on February 13, 2008 and February 15, 2008, respectively. The OER, with the applicant’s addendum and the related responsive comments, was validated by the Coast Guard’s Personnel Command on May 1, 2008.

In his addendum, the applicant stated his disagreement with the OER. With regard to the December 5, 2006 email incident, he emphasized that he had not known that the material he had transmitted was classified as Top Secret, as he had never seen any material that had been marked Top Secret; he had not been briefed regarding the MFPU’s operations at the Top Secret level; and that the persons to whom he had sent information had the appropriate security clearances and the need-to-know for the information. He also noted that SECCEN had determined that the applicant could retain his Top Secret/SCI security clearance and the favorable NCIS/CGIS investigation result. The applicant submitted that all references to the December 5, 2006 email incident should thus be removed from his OER.

Regarding his job performance, the applicant emphasized that both prior to and after his arrival at the unit, he had not been given any training to prepare him for his duties as XO or CIO. He stated that since he had never been an XO before, he was not initially familiar with XO tasks and responsibilities. The applicant stated that [REDACTED] never communicated his expectations to the applicant and provided little feedback, direction, or guidance, which he believed set him up

for failure. The applicant noted that to learn more about XO responsibilities, he met with an XO at one of the applicant's former duty stations, and did the best he could under the circumstances.

The applicant noted timeliness issues with the OER. The applicant noted that he had submitted his OER input in August 2007, stating that "99% of my OER input was not considered for this OER." He also stated that he had not received the OER with a memorandum requesting an OER addendum until January 7, 2008 — after he had been honorably discharged on August 15, 2007 and five months after the end of the marking period. However, noted the applicant, Article 10.A.4.a. the Personnel Manual requires that an OER be submitted not later than 45 days after the end of the reporting period.

The applicant also noted that the block 1h on the OER, for days not observed, should be 240 days, and that block 1I, for date submitted, should be 2007.

As the applicant's supervisor, ██████ assigned the applicant two low marks of 2 and three low marks of 3 in the Performance of Duties section of the OER for the following performance dimensions and supported the marks with the comments below. The applicant's specific responses⁸ to the comments are also described as follows:

- Planning and Preparedness (mark of 3): "Planning/Preparedness lacking on assigned tasks; unable to determine what documents needed to be developed to stand up unit."

The applicant disagreed with this negative comment and requested specific examples of the documents needed. The applicant emphasized that he had had no prior experience as XO and had not receiving any training or feedback regarding the need to develop such documents.

- Using Resources (mark of 3): "Use of resources had mixed results - able to assist with getting NMCI computer access; mismanaged own time working on personal agenda rather than unit rqnmts."

To address this negative comment, the applicant stated that he had excellent time management skills and routinely spent 10-12 hours a day at the unit working on the unit's agenda. He also requested that specific examples where he had worked on his personal agenda be included in the OER.

- Results/Effectiveness (mark of 2) and Adaptability (mark of 3): "Unable to understand unit mission & working in a joint service operation. Made no progress in unit's prep for operations; redirected crew from developing gunnery doctrine to work on plans for security gaps already addressed. Overlooked & ignored info that [unit] was developed to address shortcomings in a phased development - resulted in working on perceived issues/shortfalls rather than trying to understand the phasing concept already in place to

⁸ In his addendum, the applicant quoted comments from the OER and addressed each in turn. In the discussion below, the comments are discussed in the order that they appear in the OER, and not necessarily in the order discussed in the applicant's addendum.

correct these shortfalls; final result was security spillage into Navy & USCG email system as [applicant] sent miss-classified email to flag officers.”

The applicant disputed [REDACTED]’s comment that he was unable to understand the unit’s mission and how to work in a joint service operation. He emphasized that he had not received a briefing or any formal training when he reported to the unit. He also read the available unit documents and spoke with U.S. Navy personnel to understand the unit’s mission. He argued that his background, training, and work experience at his previous duty stations gave him a full understanding of vessel escorts, maritime security, and working in a joint service operation.

He also disagreed that he made no progress in the unit’s preparation for operations. He stated that he showed initiative in creating the unit’s training program and sought out law enforcement boarding experiences for unit personnel. He also obtained computers and intranet access for personnel use. The applicant also pointed out that he interviewed potential unit members and facilitated the reassignment and processing of selected unit members.

The applicant stated that he had not ignored that the unit had been developed to address shortcomings in a phased development so that he worked on perceived issues and shortfalls. The applicant alleged that he understood the unit’s purpose, and that the vulnerabilities he identified that were at issue in the December 5, 2006 email incident were not those addressed in the unit’s phased development plan. He alleged that [REDACTED] refused to address the vulnerabilities with the applicant when approached. He also alleged that [REDACTED] verbally reprimanded him and had threatened him with a negative Page 7.

The applicant also disagreed with the statements that he had sent misclassified email to flag officers and had failed to obtain facts before sending the email. The applicant stated that he had done “extensive research and was 100% certain in my findings when I sent the emails.” The applicant stated that the TCT training he had attended had taught that team members are obligated to report to their CO conditions that pose great danger to the safety of the team. The applicant also alleged “[t]he official policy goes further and MANDATES that if the unsafe condition is not sufficiently remedied by the Commanding Officer, the member has the obligation to jump the chain of command and report such condition to higher authority. This is exactly what I did...”

- Professional Competence (mark of 2): “Professional competence & credibility questionable after failing to obtain facts before sending email; lack of professional competence further evident in overreaction to unwanted tasking attempting to get immediate RELAD [release from active duty]; believed taking voluntary orders meant ability to cancel orders on own cognizance.”

The applicant disagreed with this statement. The applicant stated that he had specifically been requested and had made arrangements to allow him to serve as the XO of the

MFPU. Once ██████ reassigned him to another duty station, the applicant stated that he was “100% justified in requesting RELAD at that time.”

In the Communications Skills section, the applicant’s supervisor assigned one low mark of 3 as follows, with the applicant’s response to the comment as follows:

- Speaking and Listening (mark of 3): “ROO has difficulty listening and understanding complex issues regarding joint operations; consistently confrontational and argumentative when others did not agree with his ideas. Speaks exceptionally well, however consistently argumentative in nature.”

In the Leadership Skills section, the applicant’s supervisor also assigned several low marks of 2 and 3 for the following performance dimensions with supporting comments. The applicant’s responses also follow:

- Looking Out for Others (mark of 3): “Did not look out for others -took credit for subordinates work on unit budgetary planning without providing any recognition to individual who had created spreadsheets and projections prior to [applicant’s] arrival at unit; used positional power to gain access to documents and information from the Navy later used to generate inaccurate derogatory emails transmitted outside the command.”
- Developing Others (mark of 3): “No noticeable time spent mentoring or developing others - spent inordinate amount of time trying to arrange schools for personal benefit.”
- Directing Others (mark of 3): “Ineffective in directing others, CO intervention required frequently to get tasks done.”
- Teamwork (mark of 3): “Had negative impact on unit teamwork- did not assist crew in prepping for gunnery exercise, following exercise ordered crew to carry ROO's luggage ashore while crew was engaged in offloading weapons/ammo resulting in decreased morale.”
- Workplace Climate (mark of 3): “Negative influence on workplace climate furthered by ROO's imperious, argumentative and subversive behavior - eating granola bars at desk then requiring crew to clean crumbs, frequently arguing w/ CO & crew, refusing to follow CO's direction on working w/ other commands...tried to develop an agreement w/ local USMC to assist in a security plan after direction by CO not to pursue such arrangements.”
- Evaluations (mark of 2): “ROO did not submit OER block 1 information⁹ for evaluation period, as required.”

⁹ Article 10.A.c.2.d. of the Personnel Manual requires an officer to prepare Block 1, Administrative Data, of his or her own OER and forward it to his supervisor 21 or more days before the end of a reporting period.

In response to the negative comments in the Leadership Skills section, the applicant denied taking credit for his subordinates' work and stated that he directed his subordinates to create the unit's first inventory list, which did not exist prior to his arrival at the unit. The applicant also denied being confrontational, argumentative, imperious or subversive, stating that he is open-minded, encouraged healthy debate between his subordinates and himself, is a team-player, and trained, delegated to, and followed up on subordinates for their assignments. The applicant stated that he did not arrange schools for his personal benefit and did not order anyone to carry his luggage or clean up after him. The applicant alleged that his only attempt to develop an arrangement with the Navy was for tactical weapons training. The applicant questioned what tasks required CO intervention and alleged that the statement that his performance was unsatisfactory for any pay grade is unsupported.

The applicant's reporting officer, a chief of operations planning, concurred with the supervisor's portion of the OER. In his comments, the reporting officer stated the applicant had a "significant negative impact on unit and strained relations between unit and other local CG and Navy commands." The reporting officer also referred to the December 5, 2006 email incident and stated that the applicant's actions reflected poorly on himself, unit, and his service. In the Personal and Professional Qualities section of the OER, the reporting officer assigned one standard mark of 4, two low marks of 3, and two poor marks of 2 in the Personal and Professional Qualities section of the evaluation. In his comments for this section, the reporting officer stated that the applicant had demonstrated initiative without judgment in going on an "unauthorized mission to expose vulnerabilities of escort mission known to seniors & already being addressed in phased development of unit." The reporting officer also said that the applicant made untrue statements about using the chain of command regarding these vulnerabilities and demonstrated questionable ethics in failing to speak to chain of command and attempting to take credit for what was already known and documented. He also stated that the applicant needed to be counseled regarding the meanings of basic Coast Guard terms dealing with escort operations.

The reporting officer assigned the applicant a mark of one on the comparison scale. In his associated comments, the reporting officer said that the applicant's performance had been "unsatisfactory for any pay grade," that the results of the applicant's tenure at the MFPU would "continue to have a negative effect for the foreseeable future," and did not recommend the applicant for command, special assignment, or promotion. The OER reviewer also concurred with the applicant's supervisor's and reporting officer's comments. The reviewer, a [REDACTED] stated that the applicant's "performance...has been completely unsatisfactory including actions that embarrassed the service to the Navy." According to [REDACTED]'s comments, the applicant uncovered a perceived gap in the unit's mission and brought it to his supervisor's attention. However, he refused to accept assurances that the gap was known and being addressed in a phased process. Rather, the applicant insisted on pursuing independent solutions with the Navy, Marine Corps, and local authorities. [REDACTED] stated that the December 5, 2006 email incident occurred when the applicant was forced to cease his unauthorized efforts. [REDACTED] noted that the applicant's "inability to take direction from a superior, insistence upon pursuing actions contrary to direction at the expense of accomplishing assigned tasks, and communicating outside the chain of command demonstrate a significant lack of judgment, adherence to duty, leadership

and professionalism. Through these actions [he] has demonstrated little potential for increased responsibility or promotion.” ██████ also assigned the applicant a mark of one on the comparison scale.

In response to the applicant’s January 18, 2008 addendum comments, ██████ submitted comments, dated February 13, 2008. ██████ stated that contrary to the applicant’s addendum statements, the applicant had been briefed in November 2006 at the top secret level regarding the MFPU’s mission in ██████’s presence and noted that in emails, the applicant mentioned that some of the information was classified at the top secret security level. ██████ also disputed that the applicant had been set up for failure, stating that all personnel at the unit had been informed and were expected to be self-starters. However, the applicant “continued to veer off track by concentrating on operational issues that had nothing to do with the MFPU responsibilities...[he] never addressed the fundamentals of starting a unit (as directed) such as organizational charts, organizational manuals, and standard operating procedure development.” ██████ also stated that the vulnerabilities allegedly discovered by the applicant had been outlined in the unit documents the applicant claimed to have read and that the applicant had received an extensive briefing upon his arrival to the unit. ██████ also stated that the applicant’s vulnerability assessment had not been authorized and had been done without ██████’s knowledge. ██████ also stated that it was his personal observation that the applicant discussed the vulnerabilities with anyone, including contractors and NCIS personnel, that a higher level review had never been performed of the applicant’s assessment, and that ██████ had never actually seen the assessment itself. He emphasized that when jumping the chain of command, the applicant had not sent the email to the appropriate entity in the MFPU’s chain of command and had not copied ██████

██████ stated that while the applicant’s background had led him to believe that the applicant was qualified to be the XO for the MFPU, the applicant did not have an understanding of the processes and procedures necessary to start and operate a unit in a joint service environment, as opposed to participating in established joint service missions. ██████ acknowledged that the applicant had obtained computer workstations for unit personnel but emphasized that what had been needed and what the applicant had been tasked with was gunnery training and document development. ██████ stated that the applicant had been reassigned “as an opportunity to excel following unsatisfactory performance as the XO.”

The reporting officer also submitted comments on February 15, 2008. In his comments, the reporting officer concurred with ██████’s comments. Among other things, the reporting officer noted that no pipeline training had been provided for all members assigned to the MFPU. This was because it was a pre-commissioning assignment where members were to develop the materials and training needed to prepare the unit for commissioning. The reporting officer also stated that the applicant’s assertion as to the appropriateness of his jumping of the chain of command was disingenuous, as “[t]he issues raised did not relate to a serious safety risk for team members...” If the applicant had properly followed the chain of command, as opposed to contacting persons outside of his chain of command and escalating to flag officer level, the reporting officer stated that the applicant’s performance issues “could have been resolved without significant material impact.” However, the applicant’s actions strained relations between the local Navy and Coast Guard commands. The reporting officer also stated that the applicant had a poor understanding of service policies and procedures. This was demonstrated

by his belief that because the assignment to the MFPU was voluntary, he could terminate those orders voluntarily without command approval, leading the command to notify the applicant of his duty to return to duty. The reporting officer stated, “[The applicant’s] performance while assigned to MFPU [REDACTED] was unsatisfactory on several levels. The officer pursued issues outside of and to the detriment of assigned duties despite several admonishments by the commanding officer. The officer demonstrated a lack of knowledge in regards to service procedures by failing to follow the chain of command and attempting to ‘voluntarily’ terminate active duty. The member's poor leadership was reflected in the widespread discontent amongst subordinates. The [applicant’s] derogatory evaluation is the result of multiple substandard actions.”

The FOIA Requests

From September 2007 to June 2009, the applicant submitted, through counsel, two requests for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, for information related to the NCIS/CGIS report of investigation regarding his December 5, 2006 email incident and his 2007 whistleblower complaint and its status. The applicant received responsive documents through to 2009, after various appeals and a decision from a federal district court (relating to the NCIS/CGIS report of investigation). The applicant submitted copies of the FOIA requests and the Coast Guard’s responses. He also submitted at least some, if not all, related responsive documents with his application to the Board, which have been described in this summary where pertinent.

IG’s Denial of the Applicant’s Whistleblower Complaint

The applicant received a letter from the DHS-OIG on January 6, 2011, informing him that it had performed a review and preliminary inquiry of his whistleblower complaint. The letter stated the IG’s determination that the applicant had not made a protected communication under the Military Whistleblower Protection Act, because his disclosure did not constitute information that he reasonably believed evidenced a violation of law or regulation; gross mismanagement of or waste of funds; an abuse of authority; or a substantial and specific danger to public health and safety. Rather, the letter noted that the applicant’s disclosure was a disagreement with force protection policies.

The letter also noted that the IG had reviewed the NCIS and CGIS reports of investigation concerning the applicant’s possible compromise of classified material. The IG noted that those investigations had found no evidence of a compromise of classified material and did not make even a determination that an inadvertent spillage of classified material had occurred.

Applicant’s Request to the BCMR

As discussed previously, the applicant’s completed application to this Board was docketed on April 22, 2014. Although the applicant’s DD Form 149 indicates that it was signed by the applicant on July 12, 2012, the Board did not receive his application materials until February 2014, although his counsel has indicated that they were sent at some previous point.

According to a memorandum from the applicant's counsel, dated February 23, 2014, the application was delayed due to the DHS-OIG investigation and his FOIA requests. The applicant's counsel stated that after his whistleblower complaint had been denied, the applicant had been told that the denial was being reevaluated. The applicant was told in June 2012 that the reevaluation had been completed and no further action would be taken, but did not receive any letter confirming the same. The counsel stated that the applicant had submitted his materials to his counsel's office shortly thereafter. However, the applicant's materials were also misplaced by a former staff member of his counsel's office and the counsel was not able to obtain another copy of the materials until that point. The applicant's counsel stated that any delays had not been caused by the applicant and requested that the Board give his application its full consideration.

In his application, the applicant submitted an attachment to his application, where he stated that he had relied upon his counsel to organize and complete the record and statements for his application. However, his counsel experienced family and personal health issues that took his attention away from the applicant's case. The applicant requested that he "not be charged for any delay caused by his counsel..."

VIEWS OF THE COAST GUARD

On August 21, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant the applicant partial relief. In so doing, he adopted the findings and analysis provided in a memorandum, dated July 14, 2014, signed by Commander, Personnel Service Center (PSC).

In its July 14, 2014 memorandum, PSC found that the applicant's application was not timely, noting that the application had been signed on July 12, 2012 — 59 months after the disputed OER was effective and 18 months after the DHS-OIG had ruled that there had been no compromise of classified material.

PSC also found that the applicant had received marks of 3 in eleven different performance dimensions in the OER, and marks of 2 for three performance dimensions. However, of the substandard marks on the OER, only two supporting comments were directly related to the security incident involving the December 2006 emails.

PSC noted that the DHS-OIG's determination had not been available at the effective date of the OER, August 15, 2007. As a result, "[t]he Applicant has a basis for redress in regards to any mentioning of a compromise of classified material in the OER."

PSC recommended granting partial relief by redacting information on the OER, which specifically cites the alleged compromise of classified material. PSC also recommended that the DHS-OIG letter be electronically imaged into the applicant's record.

PSC did not recommend any further relief.

The JAG noted in his concurrence with the PSC memorandum that the DHS-OIG's letter to the applicant had noted that both the CGIS and the NCIS had found no evidence of

compromised material. Additionally, the JAG emphasized that, after the effective date of the disputed OER, the SECCEN had determined that the incident was “an accidental Handling Protected information incident” and not a compromise of classified material. The JAG also noted that SECCEN had allowed the applicant to retain his security clearance “with caution.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 12, 2014, the Chair mailed the applicant, through his attorney, a copy of the advisory opinion and invited him to submit a written response within 30 days. The applicant requested and was given multiple extensions and submitted his response via counsel on December 5, 2014.

The applicant disagreed with the Coast Guard’s recommendation of partial relief and argued that his request for relief should be granted in full. The applicant stated that there is no way to separate out the December 5, 2006 email incident from the disputed OER and stated that the Coast Guard’s advisory opinion “fails to address the actual OER which on its face clearly shows the marks and comments were completely driven and intertwined with the inaccurate fact of an alleged compromise of classified information by me.” He alleged that the OER clearly states that the predicate of its comments and marks were “governed by the false and inaccurate claim of compromise of classified material.” Moreover, he stated that the OER was just one incident in a series of alleged retaliatory acts taken against him.

The applicant stated that of his chain of superiors, he had never met or received any direction or supervision from anyone except [REDACTED]. He claimed that neither his reporting officer nor OER reviewer had firsthand knowledge of his work and their assessments were completely based on hearsay and [REDACTED]’s allegedly inaccurate and biased input. The applicant alleged that their reviews were a violation of the independent evaluation process established in Article 10.A.2.a. of the Personnel Manual.

The applicant also emphasized that he had acted appropriately. He stated that his TCT training taught him that if one’s supervisor is not heeding warnings about unsafe conditions, negligent practices, and vulnerabilities, then the service member had an obligation to go around the supervisor to report unsafe conditions to a higher authority. He stated that he followed this course of action and was improperly given a derogatory OER for doing so.

The applicant also alleged that OER was in violation of Article 10.A.2.g.2. of the Personnel Manual, which states that a rating chain member may be disqualified from rating a subordinate in certain circumstances. The applicant quoted the article and underlined language that a rating chain member who is “an interested party to an investigation” or is in any other situation where he has a “personal interest or conflict” raises a substantial question as to whether the reported-on officer will receive a fair and accurate evaluation. The applicant alleged that [REDACTED] was an interested party in his security investigation and had a personal bias against the applicant.

The applicant also disputed that his application was untimely, pointing out that the DHS-OIG took over three years to complete its investigation of his complaint; his attorney had

suffered a serious illness which delayed his ability to draft and file his application to the Board after the conclusion of the DHS-OIG investigation; he did not receive his OER until June 2008; he did not receive responses to his FOIA requests until February 2009; he believes that his command ignored his OER input; and investigations later determined that there had been no compromise of classified information after the OER had been issued.

The applicant disagreed that a copy of the DHS-OIG letter should be electronically imaged into his record. The applicant stated that the letter did not pertain to his performance as a Coast Guard service member. Additionally, the letter and its reference to an investigation could lead to negative inferences regarding his work performance, which might prevent him from being promoted should he rejoin the Coast Guard and may hinder his ability to be hired with the federal government. The applicant also alleged that doing so would deter future whistleblowers from coming forward with information.

APPLICABLE LAW & REGULATIONS

Officer Evaluation Regulations

In 2007, instructions for evaluating officers were contained in Article 10 of the Personnel Manual (Changes 1–41), COMDTINST M1000.6A. Article 10.A.1.b.1. of the manual states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Article 10.A.1.b.2. states individual officers “are responsible for managing their performance,” including by “determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards.”

Article 10.A.2.A.a. of the manual describes the responsibilities of an officer’s rating chain. The rating chain “provides the assessment of an officer’s performance and value to the Coast Guard through a system of multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure.” The rating chain consists of (1) the reported-on officer; (2) his or her supervisor; (3) the reporting officer; and (4) the reviewer.

Article 10.A.2.c.2. notes that it is the officer’s responsibility to seek performance feedback from his or her supervisor during the marking period as necessary. The officer also “assumes ultimate responsibility for managing own performance...” The officer may submit, not later than 21 days before the end of the reporting period, to the supervisor a listing of significant achievements or aspects of performance which occurred during the period.

Article 10.A.2.g.2. of the manual notes that in instances where an officer’s supervisor, reporting officer, or reviewer is unavailable or disqualified to carry out his or her rating chain responsibilities, the CO or the next senior officer in the chain of command is to designate an appropriate substitute who is capable of evaluating the officer. In the case of disqualification:

- b. “Disqualified” includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other

situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.

c. If not already determined by the commanding officer, it is incumbent on the Reported-on Officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised by the Reported-on Officer during the reporting period or within 30 days after the end of the reporting period.

Article 10.A.4.c.4. provides the following instructions for supervisors completing the first 13 marks on an OER (similar instructions are provided for reporting officers for completing the last 5 marks in Article 10.A.4.c.7.):

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 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.

• • •

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. 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....

• • •

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.c.8.a. of the manual states that on the comparison scale in an OER, a reporting officer "shall fill 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."

Under Article 10.A.4.a., an officer's rating chain is to forward OERs to [REDACTED] at Commander, CG-rpm, or Commander, CGPC-opm-3, not later than 45 days following the end of the reporting period.

Article 10.A.4.f. states that rating chain members shall not "[m]ention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings....Referring to the fact conduct was the subject of a proceeding...is also permissible when necessary to respond to [REDACTED] regarding that proceeding first raised by an officer in a reply..." It also states [REDACTED]'s restriction does "not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself."

Derogatory OERs are discussed in Article 10.A.4.h. of the manual. Under Article 10.A.4.h.1., derogatory OERs "indicate the Reported-on Officer has failed in the accomplishment of assigned duties" and, among other criteria, "[c]ontain an 'unsatisfactory' mark by the reporting officer in section 9 [the Comparison Scale section]." Pursuant to Article 10.A.4.h.2., the reported-on officer/evaluee is entitled to submit an addendum within 14 days of the receipt of the OER "to explain the failure or provide their views of the performance in question," after which the supervisor and reporting officer are "afforded the opportunity to address the ... addendum" in endorsements before forwarding the OER to the reviewer, who must ensure that the derogatory information is substantiated. The reviewer then "ensure[s] that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reviewer finds otherwise, he or she shall return the report to the Reporting Officer for additional information and/or clarifying comments."

FINDINGS AND CONCLUSIONS [REDACTED]

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 concerning this matter pursuant to 10 U.S.C. § 1552. [REDACTED]
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.¹⁰ [REDACTED]
3. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers the alleged error or injustice. The applicant submitted his addendum, responding to the content of the disputed, derogatory OER, on January 18, 2008, including the alleged errors and injustices he claims in his application to the Board. The disputed, derogatory OER was validated by the Coast Guard's Personnel Command on May 1, 2008. According to the applicant's DD Form [REDACTED] the applicant signed his application to the Board on July 12, 2012, which is over four years from the date of his OER addendum and the validation date of the OER. Therefore, his application is untimely.

¹⁰ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board").

4. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if it is in the interest of justice to do so. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that to determine whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further instructed that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.” *Id.* at 164-65; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

5. The applicant explained that his delay was caused by a number of different factors outside of his control. The record shows that the applicant knew of the alleged injustices and errors in his record when he responded to the content of the disputed OER¹¹ on January 18, 2008, well over four years before the date of his July 12, 2012 application to the Board. The applicant received responses to his FOIA requests in February 2009, three years before his application to the Board. He received the DHS-OIG’s response to his whistleblower complaint on January 6, 2011, over a year and half before his application. The applicant justified this long delay between his application and the DHS-OIG response, and the much longer delay between when he knew of the alleged injustices and errors and his application, by referencing his counsel’s inability to review and process his application due to a personal health and family issues. The applicant’s counsel also stated that the delay in the Board’s receipt of the applicant’s materials may be attributed to issues at his office. Because the applicant’s delay in filing his application was due to outside factors and the record shows that he has continually sought to address the alleged injustices and errors in his record in the years since their discovery, the Board finds that it is in the interest of justice to excuse the untimeliness of the application and consider the case on its merits.

6. The applicant asked the Board to correct his record by changing his derogatory OER for the period June 1, 2006, to August 15, 2007. The applicant alleged that the OER is erroneous because it accuses him of a compromise of classified materials, when he was cleared of such allegations in the subsequent NCIS/CGIS investigation. He also alleged that the OER was unjust because the OER was submitted in retaliation against his reporting of alleged unsafe conditions, negligent practices, and vulnerabilities at the MFPU. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in an applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.¹² Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”¹³ When challenging an OER, an applicant cannot “merely allege or

¹¹ In discussing the reasons for his delay, the applicant also notes that the OER was untimely, as he did not receive the OER until 2008, well after the August 15, 2007 end of the reporting period. However, the record shows that the fact the OER was not in his record did not harm the applicant in his Coast Guard career, as it was not validated and a part of the applicant’s record until after he had resigned from the Coast Guard in April 2008. Moreover, given the other factors for the delay of his application noted here, the Board does not find that the delay in his OER has detrimentally affected the timeliness of his application to the Board.

¹² 33 C.F.R. § 52.24(b).

¹³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

prove that an [OER] seems inaccurate, incomplete or subjective in some sense,” but [REDACTED] prove that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a clear and prejudicial violation of a statute or regulation.¹⁴

7. The applicant alleged that the negative, derogatory OER in question wrongfully accuses him of the compromise of classified material, when he was cleared of such a charge. The record reflects that the applicant was cleared of any violations [REDACTED] gathering, transmitting, or losing of defense information related to his Dec [REDACTED] 5, 2006 emails, which were found by the SECCEN to be “an accidental Handling Protected Information incident.” The DHS-OIG also stated in its January 6, 2011 letter to the applicant regarding his whistleblower complaint, that the NCIS and CGIS investigation relating to the emails “found no evidence of compromise of classified material...” The OER, however, makes several specific references to a compromise of classified material by the applicant:

- Block 2, Description of Duties: “240 days ordered home after compromise of classified material...”
- Block 3, Performance of Duties, Comments: “...final result was security spillage into Navy and USCG email system as [applicant] sent miss-classified email to flag officers. Professional competence and credibility questionable after failing to obtain facts before sending email...”¹
- Block 7, Reporting Officer Comments: “Failed to recognize appropriate classification level of information & therefore did not properly safeguard – transmitted over email systems with insufficient security levels.”
- Block 10, Potential: “Based on security [REDACTED] mission, inability to understand mission derivation...”
- Reviewer Comments: “When finally forced to cease [his investigation into alleged gaps with the MFPU’s mission, the applicant] sent an email directly to three flag officers to alert them to the gap as well as an email...to Coast Guard members outside the position of command that contact [REDACTED] information exceeding the classification level of [the email system].”
- The OER Addendum and endorsements thereto also contain comments about the disproved compromise of classified material.

Given that the applicant was cleared of any charges [REDACTED] related to the compromise of classified material, the Board finds that any such characterizations of the December 5, 2006 email incident in the OER are erroneous and unjust. The Board concurs that all such references should be removed from the OER. The Coast Guard also suggested that the DHS-OIG letter be electronically imaged into the applicant’s record. The applicant disagreed with the recommendation, noting the negative implications of the existence of such a letter, with its reference to the NCIS/CGIS investigation. Given that the applicant has not requested this correction, the Board [REDACTED]

¹⁴ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

does not find that the DHS-OIG letter should be electronically imaged into the applicant's record.¹⁵

8. The applicant alleged that the disputed OER constituted unjust reprisal by his rating chain for his reporting of unsafe conditions, vulnerabilities, and negligent practices at the MFPU. In support of his allegation that the OER was retaliatory, the applicant cites that it references the alleged compromise of classified material despite the fact that he was cleared of such a violation. However, while the Board finds that that the OER erroneously and unjustly refers to the applicant's actions as a compromise of classified material as noted above, the OER also includes references to the transmittal of the December 5, 2006 emails without any such references. For example, in the comments to Block 5, Leadership Skills, the OER notes, "Did not look out for others —...used positional power to gain access to documents and information from the Navy later used to generate inaccurate derogatory emails transmitted outside the command." The applicant does not dispute that he sent the December 5, 2006 emails. In fact, the applicant openly acknowledged that when he sent the December 5, 2006 emails regarding his assessment, he was "probably ending [his] USCG career." Regardless, the applicant sent the emails even though he knew that he was acting outside of and contrary to his chain of command and that was not authorized to relay the information in the emails, irrespective of the security level of the information therein. Article 10.A.4.f. of the Personnel Manual states that while rating chain members states may not mention that an officer's conduct is the subject of an investigation or proceeding, that the rating chain is not precluded from comments on the "conduct that is the subject of the proceeding." The applicant's rating chain did not violate any policy in referencing or relying upon the applicant's own actions in the OER to form the basis of the OER comments and marks.

9. In claiming that the OER was unjust because it was retaliatory, the applicant inherently makes the argument that his reporting of the allegedly unsafe conditions, negligent practices, and vulnerabilities at the MFPU in the December 5, 2006 email incident was the correct course of action and that the disputed, derogatory OER was the improper result of his properly emailed report. It is a fundamental tenant of the Coast Guard's policies that "[a]n officer detailed to command by a competent authority has authority over all officers or other persons attached to the command." See United States Coast Guard Regulations, COMDTINST M5000.3B, Ch. 5-1-2. To justify his acknowledged act of "jumping" the chain of command in sending the December 5, 2006 emails to Coast Guard flag officers and persons outside the chain of command, the applicant references a Team Coordination Training (TCT)¹⁶ he allegedly attended the morning he sent the emails. The Coast Guard's training records for the applicant do not show that he attended a TCT on December 5, 2006. Regardless, the applicant alleged, "This training made it very clear to me that I must exercise my TCT mandated right to jump the chain of command to avert a catastrophe when the Commanding Officer did not adequately address it."

█'s and the reporting officer's OER comments and responses to the applicant's OER addendum strongly support that the applicant had been informed that his command had determined

¹⁵ See 10 U.S.C. § 1552(b) (limiting the Board's authority to making corrections that have been requested by the applicant).

¹⁶ As explained in COMDTINST 1541.1, Team Coordination Training, TCT is a training program for increasing team effectiveness and minimizing human error in cutter, boat, and command/control operations and activities.

that the MFPU's issues were being addressed by the MFPU's multi-phase development plan. The record does not contain either a copy of the applicant's assessment or any information regarding whether his assessment was utilized. However, whether or not the applicant's assessment of the MFPU's issues was correct, the preponderance of the evidence in the record does not show that the applicant attempted to consult his chain of command to reach a determination that the issues would not be addressed before sending the December 5, 2006 emails. In his narrative statement, the applicant stated that he was not able to arrange a meeting with [REDACTED] even though he had been counseled to do so by a former Coast Guard officer, because he had learned that he was being reassigned. However, insofar as the applicant argues that his action in jumping (and even going outside of) the chain of command is justified because he did not believe that his commanding officer was adequately addressing the issues at the MFPU, the fact of the applicant's reassignment is irrelevant. He could have reported the problem after his reassignment even though he would no longer have access to the classified material. Moreover, according to [REDACTED] and the applicant's reporting officer, the applicant not only jumped his chain of command without first consulting his supervisor, the applicant went outside of the chain of command by sending his assessment to a unit that was not in the MFPU's direct chain of command. The Board finds that the applicant has not shown that his action in sending December 5, 2006 emails without consulting his chain of command was compelled by a requirement of any Coast Guard policy. Rather, the Board concurs with the DHS-OIG that the applicant's December 5, 2006 emails represented a disagreement with the force protection policies at the MFPU. As a result, the Board finds that the applicant's chain of command did not commit error or injustice by mentioning the applicant's lack of understanding of (or disagreement with) how the phased development of the MFPU addressed the issues facing the MFPU or by citing the applicant's unauthorized investigation and subsequent December 5, 2006 email incident in the OER.

10. The applicant also argued in response to the Coast Guard's recommendation that the Board remove only references to a compromise of classified information from the OER, that the December 5, 2006 email incident cannot be separated out from the rest of the OER, because it informs each of the OER's negative comments and marks so that the OER is unjust. However, as discussed in the preceding paragraphs, the applicant's chain of command did not unjustly reference the December 5, 2006 email incident in the OER, and the comments relating to a compromise of classified information are easily identifiable and may be removed from the OER.

11. In his response to the Coast Guard's advisory opinion, the applicant also alleged that his supervisor, [REDACTED] should have been disqualified from preparing the disputed OER. However, the record shows that the applicant's rating chain members were not interested parties to the preliminary investigation and therefore they were not disqualified from performing their OER responsibilities. Article 10.A.2(g)(1) of the Personnel Manual defines disqualified as "being an interested party to an investigation . . . or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation." Article 1.F.2.G. of the Administrative Investigations Manual, COMDTINST M5830.1A, places responsibility on the commanding officer (CO) of a unit for initiating an investigation into an incident arising within his command. The convening of such investigations does not make the CO an interested party to an investigation. To raise a question as to disqualification the applicant needed to present some evidence that the CO's decision in convening the investigation was of a personal rather than an official nature. The applicant alleges that [REDACTED] had a personal bias against him because the applicant reported unsafe conditions, negligent practices, and vulner-

abilities at the MFPU to a higher authority. However, as opposed to a personal bias, the applicant has merely described the incident leading to the investigation. The applicant has not shown that the CO had a personal interest in the outcome of the investigation. [REDACTED] was not accused of any wrongdoing at the time of the investigation, and to the Board's knowledge he has not been so accused to this date.

12. The applicant also alleged that the disputed OER was improper because his OER reviewer and reporting officer did not have personal, first-hand experience with the applicant in violation of Article 10.A.2.a. of the Personnel Manual. Article 10.A.2.a. states that an officer's performance should be assessed through a system of multiple evaluators and reviewers who present independent views. However, under the Coast Guard's policies, it is not required that an reporting officer and OER reviewer have first-hand experience with a reported-on officer. Article 10.A.2.d. of the manual establishes that an officer's supervisor is "[n]ormally the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements." Under Article 10.A.2.e., a reporting officer "is normally the supervisor of the Supervisor." The reporting officer "[b]ases [an] evaluation on direct observation the [officer support form] or other information provided by the Supervisor, and other reliable reports and records" (emphasis added). Similarly, Article 10.A.2.f. provides that an OER reviewer is "normally the Supervisor of the Reporting Officer." The OER reviewer "ensures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and record."

Additionally, it should be noted that as an event that led to a NCIS/CGIS security investigation, the applicant's December 5, 2006 emails to persons outside and high in the chain of command were referenced in both the reporting officer's and OER reviewer's comments on the OER. Although neither the reporting officer nor OER reviewer may have personally met the applicant, their OER comments and their positions in his chain of command would have allowed them to witness the effects of the applicant's actions on the MFPU and to evaluate his performance in that regard.

13. In addition to alleging that the OER was retaliatory, the applicant also alleged that the initial reassignment away from the MFPU, which prompted him to send the December 5, 2006 emails, and his follow-on reassignment to a previous unit were retaliation for his December 5, 2006 email incident. With regard to the first reassignment, there is nothing to show that the reassignment was retaliatory, an adverse or negative assignment, or that it was an assignment below the level of a LT. In his responsive comments to the applicant's OER addendum, [REDACTED] stated that the reassignment had been meant as "an opportunity to excel following unsatisfactory performance as the XO. The new assignment was based on the officer's INTEL experience and the needs of the program..." For the second reassignment, the applicant has not submitted any information from any source supporting his claim that this reassignment to his home base was an unjust reprisal. As a result, the Board finds that the applicant has not provided sufficient evidence to overcome the presumption of regularity with respect to the referenced reassignments.

14. For the reasons discussed above, the Board finds that the applicant has shown that that disputed OER was erroneous in that it contains references to a compromise of classified material, when the applicant was cleared of such violations by a NCIS/CGIS investigation. The Board also finds that the applicant has failed to prove by a preponderance of the evidence that

the disputed OER was otherwise unjust or erroneous or that it was prepared in reprisal for legitimate whistleblowing, given the recipients of the applicant's December 5, 2006 emails. For the reasons above, the Board directs the Coast Guard to remove specific comments from the disputed OER that reference a compromise of classified material. The Board does not grant any other relief related to the OER.

15. Even if the Board were to change the disputed OER as requested by the applicant or expunge and replace it with a continuity OER, the Board would not grant any of the other relief requested by the applicant because he voluntarily left active duty and was released at his own request. The courts have found that such recovery is only required in the case of an involuntary termination. *See, e.g., Osborn v. United States*, 47 Fed. Cl. 224 (2000) (stating that when a plaintiff has retired by choice, "it follows as a matter of logic that his final separation and retirement were not unlawful and, consequently, he is not entitled to reinstatement to active duty."); *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999) (stating if the plaintiff's discharge was involuntary and improper, his statutory right to pay was not extinguished, but if his discharge was voluntary, his right to pay ended upon discharge and he would not have retained a statutory right to compensation). The record shows that the applicant submitted an unqualified, voluntary resignation from the Coast Guard on [REDACTED]. Although the applicant stated that he would not have resigned except for the alleged improper treatment, the applicant does not allege that that he resigned as a result of some improper treatment associated directly with the resignation itself, such as misinformation, *see, e.g., Tippet*, 185 F.3d 1250.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of [REDACTED] [REDACTED] USCG, for correction of his military record granted, in part, as follows:

- All references to a compromise of classified material shall be removed from his OER for the period June 1, 2006 to August 15, 2007.

All other relief is denied.

February 27, 2015

