

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-165

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 July 11, 2014, 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 April 9, 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 his record by removing a special officer evaluation report (SOER) he received after an audit completed in November 2011 concluded that the applicant received \$11,844.00 in travel claim overpayments between October 2009 and October 2010, when he was serving on active duty.

In his application to the BCMR on July 1, 2014, the applicant made six claims regarding his SOER and alleged actions that occurred in relation to the SOER.

First, he alleged that the SOER was "unfair and inaccurate because the housing costs he incurred complied with regulation, were reasonable under the circumstances, [he] took reasonable steps to ensure [he] was in compliance with all regulations, and costs were fully approved by [his] authorizing officials prior to processing."

Second, he alleged that the SOER was based on "an unfair and incomplete administrative investigation replete with unfounded opinions devoid of sufficient supporting facts, which adversely affected the findings of the final action memo promulgating the SOER."

Third, he alleged that the administrative investigation did not identify the numerous failings of the authorizing officials (AOs) for his travel claims, which he claimed rose "beyond mere negligence into willful misconduct." He stated that the investigation failed to make

recommendations against the authorizing official, and that it failed to recognize the necessary reliance that the applicant placed on the authorizing official.

Fourth, he alleged that his command had prior knowledge of travel claim related issues at the time of his [REDACTED] departure Officer Evaluation Report (OER), dated June 30, 2010, and his subsequent Port Security Unit (PSU) 301 OER, dated April 30, 2011. He alleged that this because his commands knew about these issues when his regular OERs were prepared, the commands should not have waited to document this performance in an SOER,¹ and so it should be removed.

Fifth, he alleged that there was [REDACTED] potential undue influence over Coast Guard selection panels, given that there was [REDACTED] membership on each Assignment Year (AY) 2013 panel, which he claims ultimately led to him being placed in the Individual Ready Reserve (IRR).

Sixth, he alleged that based on the SOER, he was unduly prejudiced and wrongfully denied the [REDACTED] position for which he had previously been selected.

In his initial application to the Board and subsequent emails to the BCMR Chair, the applicant asked that the Board take specific actions in relation to the allegations listed above. First, the applicant asked that his SOER be expunged, along with his submitted OER reply and any other documents related to the underlying investigation or SOER. Second, the applicant asked to compete for the AY 2015 Reserve Command Screening Panel and Commander Assignment Panel based on a modified record. Third, the applicant asked to be credited for time in grade and retirement points for service, as well as pay and allowances that would have been provided had he served in the [REDACTED] position; or in the alternative, all appropriate time in grade, retirement points and pay allowances for O-5 Selected Reserves (SELRES) IDT & ADT drills from October 2013 through the date of final action on this decision. Last, the applicant asked that he be reinstated into SELRES status, assigned a paying SELRES billet, have his non-selection for retention be removed from his record, and have the corrected record reviewed by a "special/additional retention board".

SUMMARY OF THE RECORD

The applicant is a CDR in the United States Coast Guard Reserve and a civilian attorney, who is expected to reach twenty years of qualifying service towards a Reserve retirement in June 2016.

In April 2009, the applicant, who had been drilling regularly in a Selected Reserve billet, was selected to fill a long-term temporary active duty billet as [REDACTED]. The applicant was informed that he would need to obtain berthing on his own when he transferred to [REDACTED].

¹ He specifically claims a violation of Article 5.A.3.c. of COMDINST M1000.3.

The applicant, a “geo-bachelor” travelling without family members, was not able to secure contract housing and long-term berthing was not available to him since he was only on temporary orders. On his own, in June 2009, the applicant secured a condo in [REDACTED], with a six month lease that was extendable on a month to month basis. Per the lease submitted by the applicant, the rent for the condo was \$2,100.00 per month, including utilities. The applicant also signed a furniture rental contract to furnish the two-bedroom condo for \$651.50 per month. The applicant filed regular travel claims for these expenses and others (e.g., dry cleaning, parking, mileage), approximately every 10 to 14 days during this time.

On July 9, 2009, the applicant received a First amendment to his orders.

[REDACTED] In May 2010, the applicant was informed [REDACTED] to vacate the [REDACTED] condo by the end of July 2010. The applicant’s orders were set to end on September 30, 2010, so he began to look for housing with a short lease option. The applicant located a unit in [REDACTED]. The \$2,800.00 per month lease also required that the applicant [REDACTED] and furniture rental separately and pay approximately \$300.00 per month for pool maintenance.² The applicant signed a lease on July 7, 2010. After signing the lease, he also negotiated a low [REDACTED].00 per month for the months of August 2010 and September 2010. During this time, the applicant submitted travel claims, for these expenses and others (e.g., dry cleaning, parking, cleaning services), approximately every 10 to 14 days.

On September 9, 2010, the applicant received First and Second amendments to his orders. On September 30, 2010, the applicant received a Third amendment to his orders.

Notably, the applicant also took work trips between October 2009 and October 2010, and submitted travel claims for travel and lodging expenses in [REDACTED], and for expenses related to “Reserve Lodging Continuity” in locations such as [REDACTED].

In large part, the applicant filed his travel claims with Yeoman 1st Class (YN1) X and YN1 [REDACTED] Y. In March 2010, YN1 Z succeeded YN1 X as processor (i.e., Approving Official (AO)) of the applicant’s travel claims.

Audit of Travel Claims

In April 2010, an audit of travel claims for the applicant’s attendance at a course at the U.S. Coast Guard Academy identified several issues concerning the calculations of reimbursable expenses and entitlement allotment. This led to an audit of all travel claims dating back to June 2009. In November 2010, the applicant was informed that the final audit of all travel claims identified overpayments [REDACTED]ing \$11,844.00 dating from October 2009 to October 2010.

² The record is unclear how many months the applicant was obligated to and/or did pay for pool maintenance. A pool and spa notice in the record shows that the pool would be open from April to October; at a minimum, the Board will suppose that the applicant paid for pool maintenance from July 2010 to October 2010.

Per the travel audit reports provided by the applicant, the overpayments occurred approximately 20 times³ (out of a total of 64 travel claims), and ranged from approximately \$80.00 to \$2,600.00. Some examples of the amounts of overpayments made to the applicant are listed below. Each row listed corresponds to one submission of a travel claim/voucher.⁴

Dates of Incurred Expenses (as listed on the travel voucher)	Amount of Overpayment
12/11/09-12/22/09	\$552.56
12/01/09-12/12/09	\$454.02
1/12/-10-1/18/10	\$244.00
2/10/10-2/23/10	\$222.80
3/11/10-3/18/10	\$485.88
3/XX/10-3/19/10	\$653.08
3/19/10-3/31/10	\$244.00
4/07/10-5/01/10	\$197.11
5/4/10-5/31/10	\$128.70
5/5/10-5/17/10	\$1,417.15
5/19/10-5/31/10	\$2,672.56
06/01/10-06/30/10	\$1,046.90
06/01/10-6/30/10	\$127.50

The applicant filed request for a Waiver of Debt in December 2010. In his waiver request, he stated that “lack of sufficient oversight and review, as well as lack of clear direction or procedures being established by the [REDACTED] regarding the administrative responsibility for [his] position, directly contributed to [his] current indebtedness.”

Investigation Report

In April 2011, a commander informed the applicant that the commanding officer, Captain (CAPT) X, had appointed him as Preliminary Investigating Officer (PIO) to investigate the overpayment of the applicant’s travel claims. The investigation conducted was a single officer Standard Investigation. In the course of the investigation, the applicant provided the PIO with a variety of documents related to his travel claims, such as leases, rental agreements, and email correspondence regarding travel with DOG administrative staff and Pay & Personnel Center (PPC). The applicant also provided an oral statement via telephone in August 2011. Some relevant portions of the applicant’s statement include:

Question: “Are you familiar with the JFTR?”

Answer: “I am now, but not then. I had basic knowledge, not comprehensive knowledge. I knew it existed, but had no briefings or training on it.”

...

³ The audit notices provided by the applicant show that there may have been as many as 27 overpayments, but the record is not clear if 7 of those overpayments were confirmed debts. For purposes of this hearing, the Board will assume that there were 20 overpayments (as noted by the applicant in his BCMR application).

⁴ The record is not clear on exactly what expenses each amount of overpayment is related to. The source of the overpayments will be discussed later in this opinion.

Question: "Do you think you were overpaid?"

Answer: "Yes, I admit I was overpaid from the first move in. I miscalculated my amounts in the initial claim which compounded over time. Additionally, I requested review of my travel claim, and YNI [X] and PPC did not catch my errors which compounded my miscalculations over time. It wasn't until March 2010 PPC audit that finally discovered that a systemic issue occurred going back to my initial claim. I admit that I provided miscalculations on all my claims up through the March 2010 audit. I take responsibility. I have established a debt payment schedule with ██████████ company and I don't disagree with the overpayment. Once again I accept responsibility. I understand that I am the one responsible for requesting fun ██████████ I did voice my concern with ██████████ and PPC, and talked to everyone involved about my travel claims. I didn't hide ██████████

Question: "Do you wish to make a final statement?"

Answer: "Yes. I fully accept responsibility, but request ██████████ initiate procedures to prevent any further occurrence from happening to anyone else. My orders were changed several times, retroactively changed and issued late. I don't feel I received the support from ██████████ for travel orders. I don't think the procedures were there to support a member who had long-term, complex orders and I never received any visibility on any of my entitlements. Additionally, because of this situation I have suffered financial problems, divorced my wife, and professionally disadvantaged myself by turning down jobs because of the orders I executed. ██████████ Again, if this issue was caught earlier by either ██████████ or PPC, I don't think we would be here today. And this is after 3 audits being approved. Neither ██████████ or PPC identified any abnormalities or issues with any of my travel claims until March 2010."

In his investigation report, although the PIO agreed that the AOs had failed to detect ██████████ "claim abnormalities" and that there was a compelling argument for stronger AO review of travel claims, he also stated that the applicant was not alleviated from his obligation to be prudent in his travel and accurate in his travel claims. In fact, the PIO found that the overpayment to the applicant occurred due to the applicant's successive travel claims with per diem rate errors, successive travel claims with overlapping beginning/ending travel periods, successive travel claims with entitlement errors, and simultaneous travel claim submission to multiple AOs.

The PIO noted that the applicant failed to provide a lease agreement at the time of his claim submissions. He also stated that the applicant "failed to follow his obligation to exercise prudence in his travel because his "temporary residence did not conform to reasonable standards." He recognized that expenses such as "expensive utilities, pool cleaning services, rental furniture and other services" were authorized expenses, but stated that these choices "incurred further debt exacerbating [the applicant's] financial situation, distracted from ██████████'s mission, and diminished ██████████ strategic intent."

Further, the PIO took issue with the frequency of the applicant's travel claim submissions, which he submitted about every 10 days. Specifically, the PIO cited Enclosure (1) to COMDTINST 4600.14B to support his opinion that the applicant should have submitted his travel claims only every 21 days. COMDTINST 4600.14B, which addresses Government Travel Charge Card (GTCC) Usage Exemptions states:

1. *TDY travel duration that exceeds 21 days. Card use is not mandatory if the travel duration will exceed 21 days. If the cardholder chooses to use the card for trips exceeding 21 days, interim travel claims must be submitted. The cardholder should [REDACTED] when the payment will be due and the usual claim processing time to determine when a claim may need to be submitted. The first interim [REDACTED] be submitted no later than 21 [REDACTED] after commencement of travel and every 21 days thereafter. Arrangements [REDACTED] made by the cardholder to receive the necessary billing information and to pay the monthly GTCC bill on time.*

The PIO felt that the applicant "deviated from [this] policy [REDACTED] der to receive funds more frequently to make debt payment more manageable..."

Notably, despite the numerous [REDACTED] travel claim errors cited, the PIO concluded that there was no willful attempt by the applicant to defraud the government. His report stated that there was "clear evidence that the member sought assistance with his claims, guidance on policy, and cooperated fully with authorities and did not engage in a defrauding attempt." On the contrary, he also noted that "the applicant required a staggering amount of customer service support from [REDACTED] admin staff and PPC, many times more than what is [REDACTED] nably expected from a Lieutenant Commander." He specifically stated that between June 2009 and September 201 [REDACTED] e applicant "received or sent 167 individual pieces of email correspondence in association with his travel orders. The vast majority of these 167 pieces of email correspondence requested guidance, information, clarification and or assistance solely with his travel claim processing, debt collection, and special pay action. In every instance he received assistance from either [REDACTED] and/or PPC, with nearly all responses occurring the same business day..."

The final recommendation in the investigation report was that the applicant should receive adverse remarks in the next appropriate officer evaluation report due [REDACTED] the applicant's "inability to correctly manage resources, and display [of] questionable professional competence."

Final Action Report [REDACTED]

On November 6, 2012, CAPT X completed a final action report on the investigation. He confirmed that from October 2009 to October 2010, the applicant executed two separate sets of orders, both of which were amended at least once during that period. He also noted that the applicant was a GTCC card holder and had previously conducted government travel and filed claims for his travels. [REDACTED]

CAPT X's report indicated that during the period in question, the applicant sought and obtained multiple travel advances. In addition, he reported that the audit process revealed

irregularities in the applicant's travel submissions, such as overlapping claims, incorrect per diem rates, and unauthorized entitlements in multiple claims, which ultimately resulted in an overpayment of \$11,844.00. He stated that the applicant's lodging arrangements were "not in keeping with principles of good stewardship," and also noted that the applicant incurred expenses to maintain a swimming pool.

CAPT X opined that the applicant's faulty claims were negligent, but not willful. He specifically stated that that "[he] did not believe that [the applicant] intended to commit fraud or larceny upon the Coast Guard or the government of the United States. However, [he did] have serious concerns about the judgment and responsibility of this officer."

Similar to the PIO, CAPT X opined that the applicant's travel submissions every 10 days were in violation of Coast Guard policy.

CAPT X's final recommendation was the applicant should receive an SOER due to "poor use of resources, lack of professional competence with respect to travel claim policies, inferior judgement and questionable ethics, which demonstrated lack of responsibility with respect to travel claims from October 1, 2009 to October 25, 2010."

SOER

Following the final action report, an SOER was prepared by the applicant's rating chain, including his Supervisor, another captain; his Reporting Officer, a third captain; and his OER Reviewer, a rear admiral. This SOER is reproduced on pages 27 and 28 below. Most of the performance categories are marked "NO," meaning "not observed," but the SOER contains the following numerical marks and comments:

- A mark of 2 for Using Resources
- A mark of 3 for Professional Competence
- Supervisor's corresponding comments in Block 3: "Mismanaged Resources; negligently submitted travel claims that were in excess of the frequency allowed by policy. Travel claims routinely contained gross per diem and entitlement errors that directly led to an unentitled overpayment of \$11,844. Displayed questionable competence and credibility; knew travel claim submission frequency policy of every 21 days, but ignore and submitted travel claims every 10 days in order to receive funds more frequently. Credibility degraded by not upholding professional standards expected of Coast Guard officers."
- A mark of 2 for Judgment
- A mark of 3 for Responsibility
- Reporting Officer's comments:
 - Block 7: "[The applicant] negligently submitted travel claims for monies not due to him for his exorbitantly priced temporary lodging arrangements. His actions were not in keeping with principles of good stewardship of public funds."
 - Block 8: "Displayed poor judgment and decision making; failed to take appropriate corrective action on PPC audited travel claims. Submitted travel claims more frequently than allowed by policy in order to stem personal indebtedness. Actions failed to follow

Coast Guard core values of honor, respect, and devotion to duty. Routinely displayed questionable ethics; on own accord obtained rental property with luxurious amenities that clearly exceeded reasonable standards expected of temporary lodging. Made multiple claims for amenities that failed to provide good stewardship of public funds.”

- Block 10: “Not recommended for promotion, or any positions of authority or independent duty requiring integrity and ethics beyond reproach.”

The SOER was signed by the applicant’s rating chain in December 2012. In February 2013, the applicant submitted an OER Reply, which provided an opportunity to address performance not contained in [REDACTED]. The arguments contained in his OER Reply are incorporated later in this opinion (page 9).

In response to the applicant’s OER Reply, in March 2013, the rating chain provided the following comments:

Supervisor: “[The applicant]’s OER reply has been thoroughly reviewed. All Officer Evaluation System policies and procedures were followed. The OER is accurate and fair, and stands as written.”

Reporting Officer: “I fully concur with [the Supervisor]’s endorsement of 7 March 2013. All Officer Evaluation System policies and procedures were followed and the OER is accurate, fair, and should stand as written.”

Reviewer: “I reviewed the OER in question. Based on my review, all Officer Evaluation System policies and procedures were followed and the OER is and should stand as written.”

Personnel Records Review Board

On August 6, 2013, the applicant applied to the Personnel Records Review Board (PRRB) to 1) have the disputed SOER and related documents pertaining to the travel overpayment investigation expunged from his record and 2) be permitted to compete for the upcoming AY 2014 Reserve Senior Command Screening Panel (RSCSP) and AY 2014 Commander Assignment Panel. He submitted a large amount of supporting material for his request, including copies of his housing and furniture leases, emails with [REDACTED] regarding his travel claims, approved travel claims from October 2009 to September 2010, and copies of prior OERs. In his application to the PRRB, the applicant stated his basis for relief as follows:

1. Conclusions in the investigation, final action memo, and SOER were wholly conclusory and unsupported by facts.
2. Conclusions were contrary to Coast Guard policy interpretation and unsupported by facts.
3. The investigation underlying SOER was materially deficient and did not reflect full and impartial appraisal of facts.

4. Timing of submission of the final action memo was done to negatively affect applicant by submitting it right during the time the screening panel was meeting, thereby thwarting the right to reply.
5. The presence of members of [REDACTED] command (who were involved in the SOER) on an assignment panel deserves scrutiny.
6. The SOER was procedurally and substantively unjust.

On October 31, 2013, the PRRB partially approved the applicant’s request. The PRRB found that the applicant provided clear and convincing evidence that he did not act in contravention of policy by filing travel claims less than 21 days apart, and thus removed the following language from the SOER:

Block 3: “...negligently submitted travel claims that were in excess of the frequency allowed by policy.”

Block 3: “Displayed questionable competence and credibility; knew travel claim submission frequency policy of every 21 days, but chose to ignore and submitted travel claims every 10 days in order to receive funds more frequently.”

Block 8: “Submitted travel claims more frequently than allowed by policy in order to stem personal indebtedness.”

The PRRB also found that the Reporting Officer’s description of the applicant’s lodging as “exorbitantly priced” in the final action report was not “per se accurate in the context of his narrative in Block 7.” Therefore, the PRRB also granted partial relief to remove the term “exorbitantly priced” from the following statement in Block 7 of the SOER: “[The applicant] negligently submitted travel claims for monies not due to him for his exorbitantly priced temporary lodging arrangements.”

The SOER reflecting redactions made by the PRRB is shown below. A more fulsome discussion of the PRRB’s specific responses to the applicant’s claims and OER Reply follow.

MARKS AND COMMENTS IN DISPUTED SOER

(The gray highlighted language below indicates that the language was struck by PRRB.)

#	CATEGORY	MARK	WRITTEN COMMENTS
2	Description of Duties	N/A	[REDACTED]

3a	Planning and Preparedness	N/O	Mismanaged Resources; negligently submitted travel claims that were in excess of the frequency allowed by policy. Travel claims routinely contained gross per diem and entitlement errors that directly led to an unentitled overpayment of \$11,844. Displayed questionable competence and credibility; knew travel claim submission frequency policy of every 21 days, but chose to ignore and submitted travel claims every 10 days in order to receive funds more frequently. Credibility degraded by not upholding professional standards expected of Coast Guard officers.
3b	Using Resources	2	
3c	Results/ Effectiveness	N/O	
3d	Adaptability	N/O	
3e	Professional Competence	3	
4a	Speaking and Listening	N/O	
4b	Writing	N/O	
5a	Looking Out for Others	N/O	
5b	Developing Others	N/O	
5c	Directing Others	N/O	
5d	Teamwork	N/O	
5e	Workplace Climate	N/O	
5f	Evaluations	N/O	
6	Supervisor Authentication - Signed by [the Supervisor] [REDACTED] on November 29, 2012		
7	Reporting Officer's Comments	Concur	[The applicant] negligently submitted travel claims for monies not due to him for his exorbitantly priced temporary lodging arrangements. His actions were not in keeping with principles of good stewardship of public funds.
8a	Initiative	N/O	Displayed poor judgment and decision making; failed to take appropriate corrective action on PPC audited travel claims. Submitted travel claims more frequently than allowed by policy in order to stem personal indebtedness. Actions failed to follow Coast Guard core values of honor, respect, and devotion to duty. Routinely displayed questionable ethics; on own accord obtained rental property with luxurious amenities that clearly exceeded reasonable standards expected of temporary lodging. Made multiple claims for amenities that failed to provide good stewardship of public funds.
8b	Judgment	2	
8c	Responsibility	3	
8d	Professional Presence	N/O	

8e	Health & Well-Being	N/O	
9	Comparison Scale	Below Majority of Commanders	[Steady performer; limited potential for increased responsibility.]
10	Potential	N/A	Not recommended for promotion, or any positions of authority or independent duty requiring integrity and ethics beyond reproach
11	Reporting Officer Authentication - Signed by [Reporting Officer] ██████████ on December 4, 2012		
12	Reviewer Authentication - Signed by [OER Reviewer] ██████████ on December 14, 2012		

Summaries of Evidence and Arguments Related to Applicant's PRRB claims and OER Reply

The following summaries group (a) the applicant's arguments contained in his OER Reply, (b) the applicant's claims and evidence to the PRRB concerning the disputed SOER, and (c) the findings of the PRRB concerning each claim.

1. The conclusions in Investigation, Final Action Memo, and SOER were wholly conclusory and unsupported by facts.

Applicant's Claim

The applicant stated that the SOER was factually unsupported with respect to his scores of 2 for Judgment and 3 for Responsibility, as well as the narrative, "[The applicant] negligently submitted travel claims for monies not due to him for his exorbitantly priced temporary lodging arrangements. His actions were not in keeping with principles of good stewardship of public funds." Similarly, the applicant also disputed CAPT X's conclusion in the final action report that his temporary lodging was not "in keeping with principles of good stewardship."

The applicant argued that the only restriction imposed on him during his housing search was that he was to maintain lodging and expenses within the per diem limits. To this end, he argued that his leases were well within the per diem allotted to him. He submitted documentation to show that he was authorized for up to \$250 per day for lodging from June to September 2010. Per this allowance, he argued to PRRB that he saved the government over \$5,000.00 with his housing arrangements.

He also noted that in the administrative investigation, there are no sworn witness statements, cost/rent comparisons, or other documents to support any conclusions or opinions related to obtaining lodging or the price of lodging. He stated that the record shows that he verified the acceptable parameters of his berthing arrangements, and conducted an extensive and exhaustive search for housing within acceptable per diem standards. As evidence of his search for "berthing in order to find the best arrangement at acceptable cost," the applicant submitted

affidavits from two individuals (one a gym owner and the other a civilian contractor at [REDACTED]) who stated that the applicant made an exhaustive search for housing. The applicant also submitted affidavits from four Coast Guard members to support his position that his living conditions were basic and not in “excess of reasonable standards expected of temporary lodging.” He also provided the Board with an itemized list of his rental furniture, which included a king size bed, a queen size bed, a sofa, chair, cocktail table, dining room table, four dining room chairs, and various other items.

The applicant also claimed that he encountered several problems involving his pay and overall support from [REDACTED] and [REDACTED] personnel. To this end, he submitted emails showing his communication with several [REDACTED], in which he asked about his pay status, whether they received his claim submissions, if they needed anything else, if they could assist him in submitting his requests, if they could help him enter orders into the system, etc.⁵ In support of his claim, the applicant also submitted two affidavits from Coast Guard members that both speak to the challenges they faced with the travel system and support staff.

The applicant stated that the miscalculations in his travel claims “were not the result of intentional malfeasance” and were not identified in separate audits conducted by PPC or [REDACTED] personnel on claims between Jun 2009 and Feb 2010.⁶ Therefore, the applicant argued that the SOER scores of 2 for Using Resources and 3 for Professional Competence were unsupported.

PRRB’s Response

The PRRB did not find the fact that the applicant’s lease was within the allotted per diem to disturb the regularity of the SOER. The Board also stated that the applicant did not show that CAPT X was unaware that the lodging expenses were within per diem. Moreover, the PRRB was not convinced that spending within allotted per diem alone served to overturn or negate CAPT X’s assessment of the applicant as expressed in the SOER. The PRRB stated that the comments in Blocks 7 and 8 of the SOER reflected an overall judgment that was made after review of the Investigation and Final Action Memo, and based off of Joint Federal Travel Regulations, which demand that members exercise the same care and regard for incurring expenses to be paid for the government as would a prudent person travelling at personal expense.

Overall, the PRRB did not find that the applicant’s exhibits cast any doubt on the presumption of regularity afforded to CAPT X. Rather, the PRRB felt that exhibits such as itemized furniture rental lists and a rental agreement that required the applicant to maintain a pool further supported CAPT X’s position.

The PRRB also noted that affidavits from other Coast Guard members did not “meet the clear and convincing evidence standard necessary to disturb the presumption of regularity”

⁵ The record is unclear as to whether the emails submitted by the applicant are exactly the same emails reviewed by the PIO in his investigation.

⁶ Although the PRRB did not address this claim, upon further review of the record, the Board notes that these prior audits were in fact accurate and never disputed in the final audit. In other words, the Coast Guard never identified any travel claim overpayments for the time periods covered by these audits, and there is no merit in this evidence presented by the applicant.

afforded to CAPT X's comments. Further, the PRRB did not find the affidavits from "two wholly uninvolved" persons regarding the applicant's search for housing to be clear and convincing evidence that would persuade it to disturb the presumption of regularity attached to the preparation of the SOER.

Specifically, the PRRB stated that they had no reason to doubt that CAPT X could have reasonably concluded that the unit at [REDACTED] which required pool maintenance, "exceeded reasonable standards of temporary lodging," and called the applicant's judgment and responsibility into question.

The PRRB did find that the description of the applicant's lodging as "exorbitantly priced" in the final action report was not "per se accurate in the context of his narrative in Block 7." Therefore, the PRRB granted partial relief to remove the term "exorbitantly priced" from the following statement in Block 7 of the SOER: "[The applicant] negligently submitted travel claims for monies not due to him for his exorbitantly priced temporary lodging arrangements."

2. The conclusions set forth in the Investigation and Final Action Memo and reflected in the SOER were contrary to USCG policy interpretation and unsupported by facts.

Applicant's Claim

The applicant argued that there is no official policy that travel claims must be submitted no more than every 21 days. He claimed that CAPT X's conclusion in the final action memo regarding exceeding the limits set in policy were incorrect, and therefore, his scores in Block 3 of the SOER (2 for Using Resources, 3 for Professional Competence), as well as all related comments in Block 3 are unsupported. He argued that his scores of 2 for Judgment and 3 for Responsibility are unsupported for this reason as well.

The applicant claimed that "he repeatedly sought direction from the [REDACTED] [specifically the assigned YN1/AO], regularly requested review of [his] travel claims to ensure they were in accordance with appropriate [Joint Federal Travel Regulations] (JFTR), GTCC restrictions, and specifically discussed travel claim filing frequency with the assigned YN1/AO." In support of his claim, the applicant provided the PRRB with email correspondence between himself and the GTCC Program Manager on January 22 and 23, 2013. In the email correspondence, the applicant specifically asks "if the GTCC training class on the CG Portal covers how frequent a travel claim must be filed when a person is on extended orders (over 21 days)." The Program Manager responds that "... GTCC use is not mandatory if the travel duration will exceed 21 days...The first interim claim must be submitted no later than 21 days after commencement and every 21 days thereafter." The applicant then questions the policy further and asks, "The critical issue in question is the 21 day requirement. Bottom line is if the 21 day requirement is a hard and fast requirement (in other words no earlier or later than 21 days, but 21 days exactly). The main issue has arisen where members on long term ADOS orders (exceeding 21 days) where the member has used their GTCC, then submitted periodic travel claims earlier than 21 days (in some cases every two weeks) in order to stay on top of their GTCC bill. Is this acceptable, or does it have to be EVERY 21 days?" The Program Manager responded, "No later than 21 days...so more frequent is ok"

PRRB's Response

The PRRB agreed with the applicant that the Program Manager's view of the policy is that the first travel claim is submitted no later than 21 days after commencement of travel and then within 21 days after, even if official policy states "every 21 days thereafter." The PRRB concluded that with the submission of emails between himself and the Program Manager, the applicant provided clear and convincing evidence that he did not act in contravention of policy by filing travel claims more frequently than every 21 days after he filed his first interim travel claim.

Notably, the Board found that CAPT X did not misread the policy on this matter at COMDTINST 4600.14B, but neither did the applicant act in violation of policy. Based on this finding, the PRRB removed the following language from the SOER:

Block 3: "...negligently submitted travel claims that were in excess of the frequency allowed by policy."

Block 3: "Displayed questionable competence and credibility; knew travel claim submission frequency policy of every 21 days, but chose to ignore and submitted travel claims every 10 days in order to receive funds more frequently."

Block 8: "Submitted travel claims more frequently than allowed by policy in order to stem personal indebtedness."

3. The investigation underlying the SOER was materially deficient and did not reflect a full and impartial appraisal of the facts.

Applicant's Claim

The applicant alleged that the underlying investigation was so inadequate that it could not form the basis for the final action memo and SOER. In support of his claim, the applicant noted that the PIO and CAPT X did not interview any other witnesses in relation to his housing arrangements and there was no request for submission of additional documentation from the applicant beyond what he initially provided to the PIO. The applicant also noted that there were no cost/rent comparisons, documents, or any other evidence to support any conclusions or opinions related to obtaining lodging or the price of lodging. In support of his claim, the applicant also argued that the JFTR require an AO to review claims, verify accuracy, and ensure that they are in the best interest of the government.

PRRB's Response

The PRRB noted that the Investigation was "not what it would consider exhaustive," but concluded that the applicant did not provide clear and convincing evidence that it was so inadequate that it could not support the SOER. Further, the PRRB stated that the applicant did not provide clear and convincing evidence that the PIO's account of the applicant's interview

was inaccurate, or that the applicant's reference to the JFTR provided clear and convincing evidence that the SOER was materially deficient. The PRRB was not convinced that the SOER would have been any different, even if the investigation incorporated the actions suggested by the applicant. In summary, the PRRB was satisfied that the investigation provided a satisfactory foundation for the final action memo and SOER (short of the frequency of filing claims issue noted above).

4. Timing of submission of final action memo was done to negatively affect applicant and thwarted the right to reply.

Applicant's Claim

The applicant argued that the submission of the final action memo and SOER occurred "at the very moment the screening panel was sitting," thereby "thwarting" the right to reply.

PRRB's Response

The PRRB responded that the final action memo and SOER had to be submitted to Personnel Service Center-Reserve Personnel Management Division (PSC-RPM). The PRRB stated that OERs are not available for panel viewing until validated by PSC-RPM, and that the SOER in question was validated on December 26, 2013. This date was well after the AY13 Reserve Senior Command Screening Panel meeting, which occurred on November 6, 2012. The Board concluded that the applicant failed to substantiate any error or injustice in the screening panel itself, and that he did not provide clear and convincing evidence that would overcome the presumption of regularity associated with such boards and panels.

5. The presence of members of applicant's command involved in the OER on an assignment panel deserves scrutiny.

Applicant's Claim

The applicant stated that members of his Command (who were involved in the preparation of the SOER) also participated on assignment panels that determined his assignments and promotions. He specifically mentioned that CAPT X [REDACTED] Commanding Officer and Supervisor on his SOER) released a best qualified list for assignments to Senior Reserve Command for Assignment Year 2013. The applicant was not on that list. In addition, his Reporting Officer [REDACTED] Deputy Commanding Officer) was a member of the panel that did not select the applicant for an O-5 billet assignment. The applicant alleged that the presence of these members on these panels constituted undue influence.

PRRB's Response

The PRRB responded that in order to find undue influence, there would need to be a showing that CAPTs X and the Reporting Officer were not impartial when they performed their duties. The PRRB noted that "it is Coast Guard policy that Board members swear or affirm that they will, without prejudice or partiality, perform the duties imposed on them. The PRRB cited

to the Commandant's Guidance to Promotion Year (PY) 12 Officer Selection Board and Panels to demonstrate that in yearly guidance to members of boards and panels, the Commandant charges members to be mindful of the sacred trust they bear to individual officers under consideration. The PRRB was not willing to infer that the CAPTs acted out of accordance with their duties and stated that the applicant did not provide any evidence of prejudice.

6. The SOER was procedurally and substantively unjust.

Applicant's Claim

The applicant argued that the "SOER primarily focused on fees assessed for the maintenance and upkeep of the property and pool located at his unit in [REDACTED] between July 16 and September 30, 2010." The applicant argued that a different officer was his Supervisor effective July 1, 2010, and so any matters occurring on or after that date should have been addressed to him, not his next Supervisor, who signed the SOER. Because the Special OER was not reviewed and signed by his prior Supervisor, the applicant claimed that the SOER violated Coast Guard policy⁷ and should be removed.

Block 2 of the SOER reads, "This OER is submitted under Art 5.A.3.c.(1)(d), COMDTINST M1000.3, due to discovery of previously unknown behavior from Oct 2009 to Oct 2010." The applicant argued that this was an improper basis for the SOER submission. He stated that the [REDACTED] Command had previous knowledge of his travel matters when they completed his departing OER, dated June 30, 2010. He claimed that he received a score of 3 in Judgment on his departing OER for his travel issues; therefore, the additional SOER was not permitted under the Personnel Manual. To support his claim, the applicant submitted an Officer Evaluation Report Comparison Chart, and multiple OERs ranging in periods of performance from 2006 to 2012,⁸ as well as statement from his prior Supervisor. In part, the prior Supervisor stated that he "could only infer, based upon my earlier conversation with [the new Supervisor], that [the applicant] was given a 4 in judgment based upon the issues surrounding the travel claims, but no supporting verbiage was included as a justification for this mark..."

PRRB's Response

The PRRB stated that they do not agree with the applicant that the SOER focused primarily on fees assessed for the maintenance and upkeep of the property and pool located at his unit in [REDACTED]. The PRRB stated that they did not find the mark of 3 for Judgment on his Detachment of Officer OER with a report period of May 4, 2009, to June 30, 2010. They did find that the applicant received a 4 in Judgment for his Detachment of Officer OER with a period of report of May 4, 2009, to June 30, 2010, from the [REDACTED].

Additionally, although the PRRB agreed that the applicant got a new Supervisor on July 1, 2010, it did not find that the event violated COMDTINST M1000.3; nor did it warrant removal of the SOER.

⁷ He specifically cited Articles 5.A.2d. & g. of COMDTINST M1000.3.

⁸ The applicant scored high in 5 OERs dated before the disputed SOER and 1 OER dated after the disputed SOER. In those reports, he scored mostly 5s, 6s, and 7s, with an occasional 4 for Writing and Evaluations.

Applicant's Response to the PRRB Decision and Additional Evidence Submitted

In his application to the BCMR, the applicant submitted all of the evidence [REDACTED] to the PRRB, as well as copies of the OER Reply and the PRRB's decision. The applicant's specific claims and request for relief to the BCMR are listed on page 1 and 2 of this opinion.

The applicant also submitted two independent assessments for the Board's review – one regarding the applicant's rental properties and the other regarding his accounting methods and travel overpayments. He also submitted emails regarding approved audits between May 2009 and February 2010,⁹ a lease addendum of his reduced monthly rent and pool maintenance bill for the [REDACTED] unit, emails regarding the AY14 O-5 Assignment Panel and PY 15 Retention Board, as well as correspondence regarding a [REDACTED] position for [REDACTED].

[REDACTED] provided was from a licensed real estate agent in the [REDACTED] area. Although this agent did not work with the applicant to obtain housing during the period in question, she opined that the applicant's lease agreements and living arrangements in [REDACTED] were "reasonable, consistent with prevailing market prices in the area, and in accordance with (if not better than" arrangements made by other military clients" she has worked with in her career.

The second assessment, dated June 30, 2014, was from an independent Certified Public Accountant (CPA). The report from concluded that the applicant used acceptable accounting procedures, expenses claimed were authorized expenses, expenses were reasonable given market conditions, and that the [REDACTED] administration and AOs failed to [REDACTED] to the applicant or exercise due diligence in their role.

Shortly after submission of his application, the applicant amended his application with a signed [REDACTED] notarized statement from the Supervisor, dated September 30, 2014. Relevant portions of the Supervisor's statement are summarized below:

- The applicant was given a score of 4 for Judgment on his Departing OER covering the dates of May 2009 to July 2010. Per the Supervisor, this score was given based on the command's knowledge that the applicant had recurring errors in his travel claims resulting in the substantial overpayment of travel reimbursement.
- At the time the Departing OER was prepared and signed, the Supervisor and other members of the [REDACTED] command (including the Reviewing Officer and Reporting Officer) were fully aware of [the applicant]'s travel claim overpayments...which were taken into consideration when preparing and submitting his Departing OER on June 30, 2010.

In addition, the Supervisor made the following statement regarding his involvement in the applicant's SOER:

⁹ As noted on page 10 of this opinion, the prior audits referenced in these emails were in fact accurate and never disputed in the final audit. In other words, the Coast Guard never identified any travel claim overpayments for the time periods covered by these audits, and there is no merit in this evidence presented by the applicant.

“Throughout all my involvement with the Special OER covering the date of 06 NOV 2012, all actions I undertook were specifically directed by the [REDACTED] Command, specifically on how to prepare and what to say in the Special OER and subsequent [REDACTED] Officer Reply. I did not agree with filing the Special OER against [the applicant] or the Command Response to the Reported On Officer Reply, especially given the fact that the investigation found that there was no intentional acts committed by [the applicant] and that other issues regarding overpayment of other officers during this period of time had been identified by PPC and [REDACTED] Admin. As previously stated, the [REDACTED] Command was aware of all the issues surrounding [the applicant]’s status prior to 25 JUL 2011, and [REDACTED] subsequent Special OER was motivated more out of personal animus by some peers and junior members at the [REDACTED] staff that had personal issues with [the applicant], rather than based on actual facts. Also, it was during the time I was deployed PCS to [REDACTED] that this Administrative Investigation was adjudicated. At no time did I ever believe nor do I believe CAPT X held any animus against [the applicant]. Rather it was that CAPT X inherited this situation when he assumed command of the [REDACTED]. When I returned from my one-year PCS, I was summoned to sign the Special OER since I was already on terminal leave and in the midst of selling my house in [REDACTED] moving my family, and buying another house in [REDACTED]. I was told I had to sign it because I was the only person still on active duty from his original rating chain. When I asked what would happen if I refused to sign the Special OER I was told I could be brought back on Active Duty from Retirement to face UCMJ charges. None of these comments came from CAPT X and he was not present [REDACTED].”

VIEWS OF THE COAST GUARD

On December 16, 2014, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in the memorandum, dated October 20, 2014, signed by Commander, Personnel Service Center (PSC). PSC submitted the following statements to support its recommendation for not granting relief:

PSC noted that according to Coast Guard policy,¹⁰ a Special OER can be directed by the Commandant, commanding officers, and higher authorities within the chain of command and reporting officers. Therefore, PSC stated that the final action order to produce a Special OER for the applicant, subsequent to the administrative investigation of travel overpayment, fully corresponded to policy and met all OER validation standards.

PSC also stated that the applicant’s “investigating off [REDACTED] their investigation, review, and [REDACTED].”

¹⁰ Article 5.A.3.c. of COMDTINST M1000.3.

adjudication of this matter...” PSC found that the applicant did not provide compelling evidence that the PIO and commanding officer did not act in this capacity in this case.

PSC cited the applicant’s statement and noted that the applicant admitted to overpayment on claims “from the first move in” and accepted responsibility for errors and miscalculations leading to the overpayments.

PSC noted that all record reviews by any board or panel after October 31, 2013 would have reflected the redactions of certain comments in the SOER, as directed by the PRRB. PSC also noted that the position at [REDACTED] was not a SELRES billet assignment but rather a temporary ADOS (Active Duty for Operational Support) position. Moreover, PCS stated that although the applicant was notified by [REDACTED] of selection for the position, the [REDACTED] qualification was not final; no relief was recommended to accredit the time in grade and retirement points for the [REDACTED] position.

PSC noted that all boards and panels membership are held to and in accordance with the precepts that each personnel board member shall impartially and [REDACTED] evaluate the qualifications of each officer whose name is submitted to the board to determine whether they meet the overall criteria required. PSC stated that the applicant did not provide clear and convincing evidence in support of his allegation of irregular [REDACTED] for the AY2013 panel.

In regards to the AY2015 Reserve Senior Command Screening Panel, PSC recommended that established guidance should apply to the applicant’s eligibility. PSC also contended that the applicant did not provide compelling evidence that the Inactive Duty Promotion List (IDPL) [REDACTED] Retention Board did not act in accordance with [REDACTED] the precepts of Coast Guard policy, therefore no relief was recommended to provide the application the ability [REDACTED] compete for retention in the PY15 panel.

Notably, PSC did not make any specific references to the Supervisor’s September 30, 2014, statement regarding the applicant’s SOER. [REDACTED]

Applicant’s Response to the Coast Guard

The applicant objected to the Coast Guard’s opinion and stated that [REDACTED] was “legally mistaken and fails to refute” the submitted evidence. He argued that the evidence he submitted showed “a clear violation of USCG regulations,” a “gross material error of fact,” and “actions taken in bad faith by members of the [REDACTED] command in preparation of the Administrative Investigation and [SOER].”

The applicant stated that the Coast Guard failed to rebut the evidence presented by the Supervisor’s statement, specifically in regards to his statements about the Command’s knowledge of his travel claim issues during the preparation of other OERs. The applicant also cited the Supervisor’s statements regarding being “specifically directed by [REDACTED] Command on how to prepare [REDACTED] and what to say in the SOER...” The applicant used this statement and others in his assertion that he presented enough evidence to show that the Investigation and SOER were arbitrary and capricious and not conducted in good faith.

██████████

The applicant also argued that the Coast Guard failed to produce contrary evidence sufficient to support the investigation findings or rebut the evidence he submitted in his BCMR application. He specifically noted that the Coast Guard failed to rebut the reports he provided from the real estate agent and CPA.

Finally, the applicant argued that the PIO's summary of his statement at the time of the investigation was inaccurate, "with many statements presented out of context." He stated, "I agreed I was overpaid, but indicated it was in relation to miscalculations originally calculated and approved by my ██████████ Appro ██████████ Official. I was not afforded an opportunity to review or correct his incorrect summary ██████████"

APPLICABLE LAW & POLICY

Officer Evaluation Regulations

In December 2011, instructions for evaluating officers were contained in Article 5.A of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.2 ██████████ ("Manual").

Article 5.A.1.b.1. of the Manual states that Commanding Officers "must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers."

Article 5.A.2.b. states Commanding Officers are responsible to ensure members of the rating chain carry out their Officer Evaluation System (OES) responsibilities.

Article 5.A.3.c., addresses when an officer's rating may or must prepare a special OER. The SOER may be prepared "to document significant historical performance":

(d) Special OERs may be submitted to document significant historical performance or behavior of substance and consequence which were unknown when the regular OER was prepared and submitted. This report should not normally reflect performance reportable under Article 5.A.3.c.(1)(b)¹¹ of this Manual. The OER should address only the performance dimensions relevant to the special OER since all other performance dimensions will have been addressed in the regular OER. The special OER should be initiated by the original rating chain unless they are unavailable or disqualified...This OER does not count for continuity.

¹¹ Article 5.A.3.c.1.b. of the Manual refers to SOERs that are required either 1) after an officer is found guilty of a criminal offense and the conduct relates to the Reported-on Officer's performance or any other matter on which an officer may be evaluated, 2) when an officer receives non-judicial punishment which is not subject to appeal or 3) when the final reviewing authority's action on an investigation includes direction that a Special OER shall be prepared because the evidence established that the officer was criminally culpable.

Article 5.A.3.c.1. provides that “the Commandant, commanding officers, higher authority within the chain of command and Reporting Officers may direct these reports.”

Article 5.A.2.d.2.a. states that the Supervisor evaluates the performance of the Reported On Officer in the execution of duties.

Article 5.A.2.e.2. describes the responsibilities of a Reporting Officer in relation to an Officer Evaluation Report. The Article (in relevant part) states that the Reporting Officer:

(a) Bases evaluation on direct observation, the OSF or other information provided by the Supervisor, and other reports and records.

(b) ... Prepares Reporting Officer [REDACTED] the OER. [REDACTED]

[REDACTED] s the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor's [REDACTED] bmission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer shall not direct that an evaluation mark or comment be changed. [REDACTED]

Article 5.A.2.f.2. of the Manual describes the responsibilities of a Reviewer in relation to an Officer Evaluation Report. The Article (in relevant part) specifically states that the Reviewer:

[REDACTED] (a) Ensures the OER reflects a reasonably consistent [REDACTED] picture of the Reported-on Officer's performance and potential. [REDACTED]

(c) Ensures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES and meet all submission schedules. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed. [REDACTED]

Article 5.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 5.A.4.c.7.): [REDACTED]

(b) For each evaluation area, the Supervisor shall review the ROO's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Supervisor shall carefully read the standards and compare the ROO's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance to the [REDACTED] of performance and qualities against the standards...After determining which block best describes the ROO's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form to ink.

(d) In the “comments” block following each evaluation area, the Supervisor shall include comments citing specific aspects of the ROO’s performance and behavior for each mark that deviates from a four. Supervisors shall draw on his or her observations, those of any secondary Supervisors, and other information during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations. They should amplify 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.

Article 6.A.4.a. of the Manual provides that all boards and panels members shall impartially and fairly evaluate the qualifications of each officer whose name is submitted to the board to determine whether he or she meets the overall criteria the board established considering the parameters outlined in Article 6.A.3. of the Manual, which details selection criteria for officers.

Joint Federal Travel Regulations

Volume 1, Chapter 2, Part A, Paragraph U2010 of the Joint Federal Travel Regulations applicable during the period when the applicant incurred costs and submitted travel claims¹² state that an individual “must exercise the same care and regard for incurring expenses to be paid by the [government] as would a prudent person traveling at personal expense. The regulations also provide that the traveler “must maintain records to validate individual expenses of \$75 or more and for all lodging costs,” and that any “excess costs, circuitous routes, delays or luxury accommodations that are unnecessary or unjustified are the member’s financial responsibility.”

Volume 1, Chapter 4, Part B, Paragraph U4131 of the Joint Federal Travel Regulations applicable during the period when the applicant incurred costs and submitted travel claims¹³ states that allowable lodging expenses are:

1. Apartment, house, or recreational vehicle rent;
2. Parking space for the recreational vehicle rent;
3. Appropriate and necessary furniture rental, such as a stove, refrigerators, chairs, tables, beds, sofas, television, and a vacuum cleaner;
4. Connection, use, and disconnection costs of utilities including electricity, natural gas, water, fuel oil and sewer charges;
5. Dumping fees;
6. Shower fees;

¹² The Joint Federal Travel regulations were amended many times between 2009 and 2010; however, the referenced paragraph was not revised during the period applicable to this case.

¹³ *Id.*

7. Maid fees and cleaning charges;
8. Monthly telephone use fees
9. The costs of special user fees such as cable TV charges and plug-in charges for automobile head bolt heaters, if ordinarily included in the price of a hotel/motel room in the area concerned; and
10. Exchange fee (but not the annual maintenance fee)

Volume 1, Chapter 1, Part A, Paragraph U1039 of the Joint Federal Travel Regulations applicable during the period when the applicant incurred costs and submitted travel claims¹⁴ states that an AO must, among other things, review the amounts claimed on the expense report as soon as possible after receiving it. The AO certifies that “ the travel was taken, the charges are reasonable, the phone calls authorized for reimbursement are in the GOV’T’s best interest, and approves the reimbursement of the authorized expenses.”

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 concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the date the disputed SOER was entered in the applicant’s military record.¹⁵

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.52, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹⁶

3. The applicant asked the Board to expunge the disputed SOER, along with his submitted reply and any other documents related to the underlying investigation or SOER. 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 evidence that the disputed information is erroneous or unjust.¹⁷ 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.”¹⁸ When challenging an OER, an applicant cannot “merely allege or provide that an [OER] seems inaccurate, incomplete or subjective in some

¹⁴ The Joint Federal Travel regulations were amended many times between 2009 and 2010; however, the referenced paragraph was not revised during the period applicable to this case.

¹⁵ 10 U.S.C. § 1552(b).

¹⁶ See *Steen v. United States*, No. 436-74, 1977 U.C. 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”).

¹⁷ 33 C.F.R. § 52.24(b).

¹⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

sense,” but must prove that the disputed OER was adversely affected by a “misstatement of significant hard facts,” facts “which had no business being in the rating process,” or a clear and prejudicial violation of statute or regulation.¹⁹

4. The applicant asked that the Board remove the SOER because, he alleged, his Command knew of his travel claim issues when preparing his June 30, 2010, departing OER, which addressed a reporting period of May 4, 2009, to June 30, 2010. The applicant also claimed that his Command knew of his travel issues at the time of his April 30, 2011, OER, which addressed a reporting period of July 1, 2010, to April 30, 2011. The applicant claimed this knowledge violates Article 5.A.3.c.1.d. of the Manual, which reads “Special OERs may be submitted to document significant historical performance or behavior of substance and consequence which were unknown when the regular OER was prepared and submitted.” He also offered the Supervisor’s statement to support his position that at the time of the departing OER, the command decided he “would be given a score of 4 for Judgment, due to recurring errors in his travel claims...”

5. Upon review of the record, the Board notes that 1) the score of 4 for Judgment in the departing OER was given by the Reporting Officer, and not by the Supervisor, 2) the departing OER does not contain any narrative comments specifically addressing or alluding to the applicant’s travel claim issue, 3) the OER does not contain any scores or comments in relation to the applicant’s travel claim issues 3) the departing OER contains two other marks of 4 for Workplace Climate and Evaluations, 4) the final audit for the applicant’s travel claims was not completed until November 2011, which was after the reporting periods of both OERS, and 5) the identified travel claim errors occurred between October 2009 and October 2010, again placing the applicant’s actions after the reporting period of the OERs.

6. Rating chain officials must base their marks and comments in an OER only on a reported-on performance during the reporting period, and they may not comment on “performance or conduct which occurred outside the reporting period.”²⁰ Poor performance discovered after the end of a reporting period is properly reported in an exception or special OER under Article 5.A.3.c. of the Manual, not a regular OER. While the rating chain apparently knew about some of the travel claim problems while the investigation was pending, the Board is not convinced that it had sufficient knowledge of the extent of his travel issues until the audit was complete in November 2011. Therefore, the preparation of the SOER does not violate the “unknown” provision in Article 5.A.3.c.1.d. of the Manual.

7. The applicant argued that he was not criminally culpable of any actions, and therefore the reference to Article 5.A.3.c.1.d. of the Manual in Block 2 of the SOER is incorrect and grounds for removal of the entire SOER. The Board agrees that the applicant was not found criminally culpable of any actions related to his travel claims, but does find that the SOER was correctly written on the basis of “significant historical performance or behavior of substance and consequence,” which is an authorized purpose for an SOER under Article 5.A.3.c.1.d.

¹⁹ *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).

²⁰ Article 5.A.4.f.11. of COMDTINST M1000.3.

8. In regards to the investigation report and final action memo, the Board finds that the applicant has not proven by a preponderance of the evidence that the reports should be expunged. The Board appreciates the applicant's complaint that the investigation report did not include written statements from the AOs in this case, but that fact does not convince the Board that there were any misstatements of fact or prejudicial violations in the course of the investigation and final report. Nor does it suggest, as the applicant alleged, that the PIO or CAPT X "drew conclusions that were unsupported by any facts or evidence other than [their] own personal opinions."

9. The applicant alleged that the underlying investigation "failed to recognize the necessary reliance that the applicant placed on the authorizing official." However, the PIO's report specifically acknowledges that the applicant failed to recognize "claim abnormalities" of incorrectly submitted charges, but properly pointed out that the applicant is not devoid of his obligation to conduct prudent travel and submit accurate claim submissions. The Board also notes that the applicant did not deny that he made many travel claim errors; Nor did he fully explain or justify each error identified by the audit. He nevertheless asked the Board to grant relief based on the AOs' failures. The Board finds that although the AOs failed to identify the overpayments earlier, the applicant was properly and fairly held responsible for his "successive travel claims with per diem rate errors, successive travel claims with overlapping beginning/ending travel periods, successive travel claims with entitlement errors, and simultaneous travel claim submission to multiple AOs."

10. The applicant alleged that a prior Supervisor should have signed the SOER as Supervisor. In his recent statement, however, the Supervisor did not deny being the applicant's designated Supervisor when the SOER was prepared. The applicant's unsupported claim does not prove by a preponderance of the evidence that the Supervisor for the SOER was erroneously designated.

11. The applicant alleged that the Supervisor was coerced into signing the SOER. The record shows that after a higher authority directed preparation of an SOER, the Supervisor signed it and also signed an endorsement to the OER reply stating that "[a]ll Officer Evaluation System policies and procedures were followed. The OER is accurate and fair, and stands as written." However, more recently, the Supervisor claimed that he was threatened with UCMJ charges if he refused to sign the SOER and that he was "directed by the Command, specifically on how to prepare and what to say in the Special OER and subsequent Command Response to the Reported on Officer Reply." The fact that the Supervisor was threatened with UCMJ charges if he refused to sign an SOER was not a violation of OER policy because he was the applicant's Supervisor and the preparation of an SOER had been ordered by higher authority in accordance with Article 5.A.3.c.(1) of the Manual. However, after directing the preparation of an SOER, the higher authority could not also direct what marks or comments the Supervisor entered on the SOER, and the Supervisor claimed that this happened, which is a violation of Articles 5.A.2.e.2.c. and 5.A.4.c.(4)(b) of the Manual. Accordingly, the Board finds that the marks and comments in the Supervisor's section and the Supervisor's comments in his endorsement of the SOER reply should be removed.

12. In BCMR Docket No. 151-87, the Board found that an OER should "not be ordered expunged unless the Board finds that the entire report is infected with the errors or

injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” In this case, the Supervisor’s statement casts doubt only on the marks and comments in his section of the SOER and on his endorsement of the applicant’s reply to the OER. His statement does not persuade the Board that the parts of the OER prepared by the Reporting Officer and Reviewer are erroneous or unjust. In fact, the Supervisor specifically states that he did not believe that CAPT X (who completed the final action memo) had any personal animus towards the applicant. In sum, the Board does not find that the Supervisor’s statement provides evidence that the scores and comments provided by the Reporting Officer or Reviewer were dictated by another party, contain a misstatement of facts, or affected by prejudice or animus. Nor is it impractical to delete the Supervisor’s portion of the SOER while leaving the rest of it intact. Therefore, the Board finds that but for the Supervisor’s marks and comments in Block 3 and comments in the endorsement of the reply, the rest of the SOER, as corrected by the PRRB, should remain unchanged.

13. The applicant argued that his housing costs were reasonable “given the circumstances and local real estate market conditions.”²¹ The applicant further argued that he was in fact a good steward of public funds, contrary to the findings of CAPT X, and the subsequent SOER. The applicant based a significant part of his argument on the fact that his travel costs were within the per diem allotted to him and that his costs were approved by AOs. The PIO, however, found per diem rate errors, and even if the applicant’s travel costs were within the allotted per diem, this fact would not contradict any comment in the SOER. The Board finds that the pool maintenance fees incurred by the applicant were not allowable lodging expenses per the Joint Federal Travel Regulations.²² Further, the Board notes that the Joint Federal Travel Regulations demand that members exercise the same care and regard for incurring expenses to be paid by the government as would a prudent person travelling at personal expense. Based on this standard, the Board agrees with the PRRB that CAPT X could have reasonably concluded that the unit at [REDACTED] “exceeded reasonable standards of temporary lodging,” and called the applicant’s judgment and responsibility into question. Furthermore, in response to the applicant’s position that he was a good steward of public funds, the Board notes that good stewardship of government funds requires careful and responsible management of federal dollars. This would not only entail spending within per diem allotments and for allowable expenses, but should also include the accurate and non-duplicative submission of travel claims for reimbursement and/or cash advances.

14. The applicant argued that the redactions by PRRB of comments related to the “21 day” travel submission policy and the removal of the term “exorbitantly priced” from the SOER result in an SOER that has no contextual reference and is wholly unsupported by facts. The Board does not find that these redactions by PRRB in any way negate the remaining comments in the SOER. The Board notes that the remaining statements in the SOER assess the applicant on matters such as his travel claim submission errors, the reasonableness of his travel costs (as discussed above), the mismanagement of funds, his credibility and judgement, etc. Although

²¹ The Board notes that the only two comments in the disputed SOER that refer to the reasonableness of costs or luxurious amenities are found in Block 8.

²² Volume 1, Chapter 4, Part B, Paragraph U4131 of the Joint Federal Travel Regulations.

tangentially and generally related to the travel claim overpayment issue, the remaining assessments are independent and stand on their own.

15. The applicant alleged that the harm he suffered due to the disputed SOER includes: 1) Removal from the Approved for Command list by the AY13 Reserve Senior Command Screening Panel; and subsequent denials by AY14 and AY15 panels, 2) Denial of the [REDACTED] assignment, 3) Denial of SELRES billet upon completion of his prior duty, as well as subsequent denial of over 30 e-resume submissions for SELRES assignments, and 4) Placement in the IRR by the PY15 Inactive Duty List (IDPL) Commander Retention Board, with forced retirement from the Coast Guard effective July 1, 2016. The Board must therefore determine whether the Supervisor's marks and comments in the SOER and his comments in the endorsement prejudiced the applicant's record before any of these panels and boards. In determining whether a nexus exists between the errors or injustices and an applicant's failure to be retained or promoted, the Board applies the standards set forth in *Engels v. United States*.²³ The standards are as follows: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been [selected] in any event?"²⁴

16. With respect to the first prong of the *Engels* test, the Board finds that applicant's record would appear essentially the same even without the Supervisor's marks and comments. Even without those marks and comments, which the Supervisor has belatedly repudiated, the SOER still contains significant and very negative comments about the applicant's travel claim submission failures, as well as very low marks of 2 for Judgment and 3 for Responsibility. In other words, the SOER still reads as a very negative assessment of the applicant's performance even without the marks and comments in Block 3 and the Supervisor's endorsement to the reply. The removal of the Supervisor's marks and comments does not improve the overall impact of the SOER.

17. Even assuming *arguendo* that the Supervisor's marks and comments made the SOER and his military record as a whole appear slightly worse than it does without them, the Board finds that it is unlikely that the applicant would have been selected for retention or promotion in any event. Regardless of the removal of the Supervisor's marks and comments, the SOER would still contain the Reporting Officer's extremely negative assessment of the applicant's Judgment and Responsibility, his assessment on the comparison scale that the applicant was a below-average commander, and his comment "Not recommended for promotion, or any positions of authority or independent duty requiring integrity and ethics beyond reproach." Therefore, the Board finds that it is not likely that the applicant would have been selected for retention, promotion, or particular positions of responsibility and authority even if the Supervisor's marks and comments in Block 3 had not been in the SOER.

18. The Board notes that the applicant asked the Board to order the Coast Guard to convene a special selection board for to have his non-selection for retention removed from his record, and have the corrected record reviewed. Because the Board finds that the Supervisor's

²³ 230 Ct. Cl. 465 (1982).

²⁴ *Id.* at 470.

marks and comments did not worsen the appearance of the applicant's record before the selection board, it will not order the Coast Guard to do so.²⁵

19. The applicant made several other allegations that are not discussed in the findings and conclusions of this decision because the Board finds that they are unsupported, without merit, and/or not dispositive of this case.

20. Accordingly, the Supervisor's comments in Block 3 of the SOER and in his endorsement of the applicant's reply to the SOER should be removed, and all of the performance dimensions in Block 3 of the SOER should be "not observed," but no other relief is warranted in this

[REDACTED]

[REDACTED] (ORDER AND SIGNATURES ON NEXT PAGE) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁵ 10 U.S.C. § 628 authorizes only the Secretaries of "military departments" to convene special selection boards, and, for the purposes of Title 10 U.S.C., neither the Coast Guard nor the Department of Homeland Security is a "military department."

ORDER

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

The Coast Guard shall correct Block 3 of the SOER by removing the comments from Block 3 and changing the numerical marks in Block 3 to marks of “not observed.” In addition, the Coast Guard shall remove the comments—“[His] OER reply has been thoroughly reviewed. All Officer Evaluation System policies and procedures were followed. The OER is accurate and fair, and stands as written.”—from the Supervisor’s endorsement of the reply to the SOER. No other relief is granted.

April 9, 2015

