

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2016-079**



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**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on March 15, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 21, 2017, 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] serving on active duty, asked the Board to correct his record by removing a derogatory officer evaluation report (OER), a negative counseling form CG-3307 ("Page 7"), and any other documentation surrounding the events that led to his removal from his official duties on April 18, 2013, from his record. He requested that the derogatory OER be replaced with a Duty Under Instruction (DUINS) OER, documenting only his attendance at school during that period. The applicant asked that his non-selection of promotion to CWO4 in 2015 also be struck from his record. Lastly, if he was selected for promotion in 2016, while his BCMR case is pending, he asked that his promotion be back-dated to coincide with the date he would have been promoted, June 1, 2016, had he been selected for promotion in 2015 and that he be awarded associated back pay.

The applicant argued that the investigation that resulted in his derogatory OER and negative Page 7 was not performed according to the controlling manual, COMDTINST 5830.1A. He stated that despite the fact that the investigation had started months earlier, he was not informed that he was under investigation until January 29, 2013. The applicant claimed that because he was not told he was being investigated, he was not afforded the opportunity to attain counsel. The applicant also stated that his derogatory OER does not contain comments to support the low numerical marks assigned to him.

The applicant explained that the investigation concerned accounting discrepancies with the morale funds while the applicant had been serving as the Morale Officer. He stated that after he was relieved of Morale Officer duties, the accounting issues were not resolved for more than a month after working with a financial expert.

In support of his application, the applicant submitted four character reference letters. The first letter is from a Lieutenant who was one of the Morale Officers following the applicant. His letter includes the following:

There was an ongoing investigation in the discrepancies discovered from the previous Morale Officer, [the applicant]. While the supporting documentation to reconcile the funds was missing or incomplete, it was apparent to me that the funds that were unaccounted for were due to accounting errors and not anything malicious, illegal, or negligence. [The unit] had 4 vending machines (3 soda machines, 1 snack machine). Every month the Morale Officer would go to the machine, take out all the money and count it, then put ~\$50 in quarters back in the machine since the machines would not operate without change. The amount of money that was removed from the machines, including the \$50 that was put back in, was counted as "sales" on the MWR Quarterly Financial Statements. When I took over as Morale Officer I realized the accounting could not be reconciled (still), before I signed over for the accounts, conducted a month long audit working closely with CSC to find out what we were missing. Eventually we discovered we were effectively re-counting money (the \$50 we left in the machines) every time we counted it as sales, which lead to previous balance sheets being off by approximately \$200 each fiscal quarter. We promptly established a \$200 cash fund, documented the new process of not counting the \$50 as "sales" in the quarterly report...and didn't have any problems with the Morale accounts after that...While I wasn't involved in the administrative investigation, I do not believe [the applicant] was taking money or negligent in his accounting. Without formal training or documentation anyone could have easily made the mistake in the same situation. The MWR Reports were all signed by the Commanding Officer as well as [the applicant], and from what I observed the accounting discrepancies were only brought to light and investigated after he left and didn't have the opportunity to diagnose or reconcile the errors in lieu of administrative action.

The next letter provided is from a Lieutenant who stated that has known the applicant for seven years on a professional and personal level. His letter includes the following:

I am delighted to provide this Character Reference letter on behalf of his appeal to the Board... Enthusiastic, professional, and organized, [the applicant] is a valuable asset to the Coast Guard. [The applicant] is a professional and dedicated officer who consistently seeks opportunities for personal and professional development for himself and subordinates. He is forthright and fair, discreet, motivational and supremely knowledgeable in how to encourage the best performance from his team. His magnificent interpersonal skills extend to every level of an organization... [The applicant] and I served at [the unit] during the period of September 2009 to July 2012. In my role as Operations Officer I relied heavily on him as the Information Systems Division Officer to ensure that mission critical C4IT systems remained fully mission capable. [The applicant] exhibited exceptional preparedness and formidable technical leadership to develop comprehensive plans supporting the integration of several major Mobile Contingency Communications assets totaling over \$2M...

The applicant provided a letter from a CWO who served with the applicant for two years in an adjacent office at the unit. His letter states:

Professionally, and from my vantage point, [the applicant] was an outstanding officer and an integral part of the Wardroom. His demeanor was professional at all times both in and outside the workplace. His dedication to his shipmates, through his duties as Morale Officer or in an unofficial capacity, demonstrated his compassion for helping others despite any personal inconveniences his help may have caused. I remember several occasions in which he tirelessly worked outside of normal office hours and on the weekends to raise

funds and boost unit morale by leading volunteers to organize road races, serve as security at sporting events, and hold the annual Christmas party for the children of [unit] members... [The applicant] has been an outstanding representative of the Coast Guard, and will hopefully continue to serve diligently for years to come.

The last letter provided by the applicant is from a member who worked with the applicant at his prior unit who highly praised the applicant's mentorship and guidance to the IT Help Desk at that unit.

The applicant also provided copies of quarterly financial statements, the morale fund bank account statements, and itemized receipts. All other documents provided by the applicant are included and summarized below in the Summary of the Record.

### **SUMMARY OF THE RECORD**

On July 8, 2008, the applicant was transferred to a new unit and assigned to serve as the Information Systems Division Officer. His OERs show that the applicant had the collateral duty of serving as the unit's Morale Officer, in charge of the morale funds, during the annual reporting periods for his OERs dated June 1, 2011, and July 9, 2012. On his June 1, 2011, OER, of the eighteen fields in which officers are evaluated on a scale of one to seven, with seven being the best, the applicant received two 5s, thirteen 6s, and three 7s. He was "enthusiastically recommended" for promotion as an exceptional officer.

On March 13, 2012, a morale fund audit for the fourth quarter that ended on January 31, 2012, was completed. The CWO who administered the audit stated that he reviewed all financial records and transactions, and "they were found to be accurate including bank statements, petty cash on hand, and money within the vending machines." He further stated that after an inventory of product, he found that all vending items were correctly reflected. There were no "outstanding loans, no accounts receivable, and no losses." He concluded that the morale fund program was "being run in accordance with the MWR manual, COMDTINST M1710.13C with no items requiring additional attention."

On July 9, 2012, the applicant received his annual OER. He received one 4, nine 5s, and six 6s. He was recommended for promotion as one of the many competent professionals who form the majority of his grade.

On August 20, 2012, the applicant reported to attend a DUINS school program. He was attending an Advanced Computer, Engineering, and Technology program.

On December 2, 2012, the Lieutenant Commander sent a convening order to an investigator. He tasked the investigator with conducting a "standard investigation into all facts and circumstances surrounding [the unit's] morale relief and third quarter report net loss of \$976.05." The order states that the investigator was to prepare an investigation report, which should include facts and recommendations as to administrative action or discipline that should be taken. The order also states that before investigating any member who is suspected of having committed a violation of the Uniform Code of Military Justice (UCMJ), the investigator was to "provide appropriate rights and warnings in accordance with" the Military Justice Manual.

On December 7, 2012, the applicant prepared a statement. He stated that as the unit's Morale Officer he had conducted all inventory and purchasing. He stated that he stapled receipts to the back of the monthly bank statements. He stated that he used plain lined paper to conduct inventories, and figured out the price per item from receipts. The applicant stated that all of the record keeping was conducted quarterly in his office. He stated that when he handed over the role of Morale Officer to his successor, a chief petty officer (Chief H), the "relief process was not the most ideal." Due to their vacation schedules, the applicant conducted the inventory and filled out the paperwork without Chief H. The applicant stated that he asked another chief petty officer, Chief G, to check his paperwork because he needed an auditor, and his response was "I trust you sir." The applicant stated that when Chief H returned from vacation, they met to sign over the morale bank accounts and to hand off the records and paperwork.

The applicant then stated that he received an email from Chief H on November 30, 2012, regarding a potential loss of money and products. He told her he had not been on the unit's property since July 20, 2012, and was not sure what went wrong. He thought that perhaps he did not conduct proper inventory on the Coke and Pepsi products, because at that time the cans were changed over to bottles, so cans needed to be counted as losses since they could not be sold. He also stated that he inadvertently gave the only key for one of the Coke machines to a technician, so it could not be opened for inventory. He stated he used the numbers from the invoice because it was a very recent purchase. Lastly, he stated that the money had to be counted from the vending machines, including the money that is put back in the machine. He stated that if the money that is put back in the machine is not accounted for, it could add up to several hundred dollars in discrepancies between the four vending machines.

A statement was also provided by Chief H on December 10, 2012, regarding the morale relief process in the summer of 2012. She stated that in June she and the applicant began to try to schedule a time for the morale hand-off, but the date was pushed back and they both had vacations during the summer. She stated that before she left for vacation, she was able to "completely account for MWR physical property against the physical property report." She said that the applicant signed the final MWR physical report on July 19, 2012. The applicant then left to transfer to another unit while she was on vacation. On August 22, 2012, they made arrangements to meet for hand-off purposes. She stated that they changed the Costco membership and the bank account to be in her name. Afterwards, the applicant gave her the paperwork, which consisted of "a folder for FY2011 and for FY2012, as well as the completed CG-2985 and CG 2985(a) 'relief' report." On September 6, 2012, she submitted the "relief" report that the applicant completed, as well as the identical 2nd quarter regular report.

Chief H went on to say that around November 10, 2012, she conducted an inventory of the soda and snacks and completed the 3rd quarter report. Once she created the report, she stated that there was approximately \$970 worth of missing inventory on the CG-2985A. She requested a meeting with the XO to go over the numbers, and confirmed that there was around a \$970 discrepancy in the inventory numbers. She stated that they also discovered an error on the 2nd quarter relief report. Lastly, she stated that in her opinion the inventory discrepancy was "the result of a lack of record keeping and an incomplete passdown. [She did] not believe that any type of inventory tracking existed before" she took over the morale account.

On January 9, 2013, the applicant had an email exchange with the investigator. The investigator asked the questions shown below and asked for a response to each one. The final email from the applicant states:

1. Describe your procedures on how you filled out forms CG-2985 & CG-2985A.  
Reply: I counted all of the money in each vending machine first, then I counted up the inventory in the machines including the product in the closet at the RX site. After counting up the inventory of the product, I researched how much each item cost through the use of the pictures I took at Costco or from the receipts. For the soda product, I used the invoice to determine what the individual cost was. For income, I counted up any Morale parking I had received along with any Navy League funds and recycle money... After that was all completed I filled out the forms, printed and signed my block as Morale Officer and submitted them to the XO for his or the CO's signature.
2. Explain the clerical errors on the 2nd and 4th quarter reports of 2011/2012.  
2nd QTR CG-2985 line item 7 reads \$155.50 should read \$87.60 from A-4 on CG-2985A per M1710.13C guidance for CG-2985/2985A.  
4th QTR CG-2985 line item 14 reads \$912.65 should read \$449.67 from A-5 on CG-2985A per M1710.13C guidance for CG-2985/2985A.  
How did you reconcile that both line items 9 & 17 from CG-2985 for both 2nd and 4th QTRS matched based on the above errors?  
Reply: It was my understanding that the loss from the vending sales were to be entered on line 7 on form CG-2985. The figures that are highlighted on form CG-2985A were to be figured into the amount noted on line 3 of CG-2985. That is how the lines matched up.
3. Did you ever have a report that line items 9 & 17 did not match?  
Reply: Yes I did on a couple of occasions. When the reports were sent to [the MWR Manager] she caught my mistakes and let me know about them. I then found my accounting errors and explained them to the CO or XO for a new signature on a newly printed report.
4. Did you physically count both inventory and cash on hand for your reports and these in particular?  
Reply: Yes. I counted everything including cash and product for every report I created. The last report I made out regarding the Coke machine was made out using the invoice since I could not open the machine. I admit I could not count the cash inside of the Coke machine and it was not noted on that report. The amount of money in the Coke machines should have been minimal since the product had recently changed to bottles and only 4 or so selections could be made. The machine was not working properly and the Coke technician had not come out to repair it prior to my departure.

On January 9, 2013, Lieutenant T had an email exchange with the investigator. The investigator asked three questions and asked for a response to each one. The final email from Lieutenant T states:

1. How did you verify the accuracy for the petty cash on hand and money within the vending machines listed in para 2. of MWR AUDIT MEMO dtd 3/13/12?  
I counted the petty cash on hand, including all bills and change in the vending machines. I also compared bank statements with morale documents presented to me.
2. How did you conduct the inventory listed in para 3. Of MWR AUDIT MEMO dtd 3/13/12?  
I remember counting all the products in the vending machines and the morale locker in the front passageway.
3. Who completed forms CG-2985 & CG-2985A for the 4th QTR Morale Fund Financial Statement (Nov-Jan) that you signed as the certified Auditor and did you review/compare against the inventories conducted for the audit?  
Although I don't remember witnessing [the applicant] completing those forms, I assume he did since he presented them to me. I recall that the forms were given to me for review at a later date than the actual audit/count of inventory and funds; but I do not recall how or if I compared the audit data to forms CG-2985 and CG-2985A.

On January 16, 2013, the investigator prepared a summary of an interview he conducted with the applicant on January 15, 2013. In response to being asked how he filled out the Morale Fund Financial Statement forms, the applicant stated that he counted the money from the vending machines, did an inventory of the vending machine items including from the storage closet, filled out the CG-2985A and CG-2985 by flipping between PDFs, and looked at checkbook statements and receipts. The investigator asked the applicant if he followed morale instructions when filling out the forms. The applicant stated that he “referenced manual COMDTINST 1710.13C, but did not use it every time.” The applicant said he received approximately 30 minutes of training from the previous Morale Officer on how to fill out forms, count money, and conduct inventories. He stated that there was no bank account when he began as Morale Officer, as the prior Morale Officer handed him all of the cash and checks. The applicant stated that the account was three quarters behind when he became the Morale Officer. He opened a checking account and deposited all of the money. The applicant said the previous Morale Officer had kept all the cash at his home in a shoebox.

The investigator asked why the applicant did not use the other forms, such as the CG-5017 inventory form and the CG-4517 morale fund transaction sheet. The applicant stated that he used lined paper, and after he input the information into the CG-2985/2985A he shredded the paper. The investigator asked if the applicant was ever questioned by the Commanding Officer (CO) or the Executive Officer (XO) regarding discrepancies between lines 9 and 17 on the forms. The applicant stated that he was because he had made a few mistakes on the forms, and they were sent back to him by the MWR manager to be corrected. The applicant stated that he explained this to the CO and XO at the time. The investigator asked what the applicant did when the reports had errors, such as when lines 9 and 17 did not match, and he asked if there were other errors. The applicant stated he shredded the incorrect forms after he returned the corrected forms to the MWR manager, and that he could not recall any other errors.

The investigator asked if there was any oversight other than the audit performed by Lieutenant T. The applicant stated that there was no additional oversight other than the CO signing off on the audit. The applicant stated that he did perform another audit in 2010. When asked if the MWR manager verified the reports, the applicant stated that he believed that she did because a few reports were returned with errors that he corrected. The applicant was asked to confirm that he prepared the 2012 Fourth Quarter Report, for November through January, and was asked to explain the errors on lines 14 and 17 of the CG-2985. The applicant stated that he did prepare the form, and that he must have made a mistake when he was going between the two PDFs. When asked if there was anything additional he wished to add, the applicant said that during the time period in question he was going to college and having marital issues, and he was only getting around four hours of sleep.

The investigator added that the applicant’s demeanor did not waiver during the interview; he was calm and answered all questions. The investigator stated that he never sensed that the applicant was not being truthful. He also added that he spoke with the MWR Manager to discuss the process when CG-2985/2985A forms are submitted. She stated that she validates the numbers and looks at the bank statement for the last month of the quarter. If an error is found, she notifies the Morale Officer who corrects and resubmits the forms. She stated that she would only issue the next morale check when the forms were correct.

On January 29, 2013, the applicant signed a *Miranda* and *Tempia* rights form. The applicant placed his initials next to all of the “Suspect’s Rights,” and checked the boxes that stated “I do not desire to consult a lawyer” and “I desire to make a statement and/or answer any questions.”

The applicant provided a copy of a Report of Offense and Disposition, dated January 31, 2012,<sup>1</sup> but it is not found in his official military record. Under Details of Offenses, the form states:

Art. 92, UCMJ: failure to obey a regulation (dereliction of duty) in that [the applicant] was designated the Morale Fund Custodian, knew of his assigned duties as Morale Fund Custodian, and that [the applicant] was derelict in completing the duties of the Morale Fund Custodian in accordance with reference

Art. 107, UCMJ: false official statements in that [the applicant] signed multiple Morale Fund Financial Statements (CG-2985) with values he knew to be false, and did so with the intent to deceive

The comments section states “See attached PIO report, dated 02 DEC 2012.” Under ‘Recommendation as to Disposition,’ the ‘Other’ box is marked, and next to it is typed “Letter of Reprimand.” Under ‘Action of Executive Officer’ and ‘Action of Commanding Officer,’ which is usually where the disposition or sentence is included, nothing is marked or written.

On January 31, 2013, the investigator provided a memorandum to the unit in question titled “Investigation into the Circumstances Surrounding [the Unit’s] Morale Relief and Third Quarter Report.” He stated that he completed “a Standard Investigation into the facts and circumstances,” that no one was identified as a party, and there was no recommendation to designate anyone as a party. The investigator stated that the proper morale relief was not conducted, and that “all previous quarterly reports were not completed in accordance with” COMDTINST M1710.13C. The report contains the following findings of fact:

- Chief H relieved [the applicant] of Morale Officer on September 4, 2012;
- Chief H did not validate the financial statements (CG-2985/2985A) dated July 31, 2012, as required by COMDTINST M1710.13C;
- On August 29, 2012, Chief G signed the financial statements dated July 31, 2012, without conducting an audit as required by COMDTINST M1710.13C;
- Chief H calculated a loss of \$976.05 while completing the 3rd Quarter 2012 financial statements, and this was the first statement made by her;
- There were multiple errors in the 2011 second quarter, 2011 fourth quarter, and 2012 second quarter financial statements;
- The applicant was the Morale Custodian who completed the 2011 second quarter, 2011 fourth quarter, and 2012 second quarter financial statements;

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<sup>1</sup> This is presumably a typo, as January 31, 2012, is before the events in question took place. The author likely meant 2013.

- Lieutenant T conducted an audit of the 2012 fourth quarter financial statements and found no errors in the reports;
- The applicant did not use the appropriate morale fund inventory accounting sheet (CG-5017) or the morale fund transaction accounting sheet (CG-4517) when tracking inventory. Instead, he used lined paper and shredded the paper after completing the financial statements despite the requirement to keep such records in accordance with COMDTINST M1710.13C;
- The applicant and the MWR manager stated that to receive the next morale payment, lines 9 and 17 on the financial statement must be equal; and
- The applicant “manipulated multiple morale fund financial statements...to make line items 9 and 17...equal.”

Under a section titled Opinions, the investigator stated that the morale fund was poorly managed during the applicant’s tenure, as was evident from his lack of record keeping, manipulation of the financial statements, and improper audits. Due to poor management, multiple values were inaccurate and were unable to be validated. The investigator stated that the applicant manipulated the statements to “avoid the tedious task of finding the error(s), to conceal his poor record keeping, and to ensure timely receipt of [morale] funding, rather than conceal any actions would result in personal financial gain.” The investigator further stated that the applicant was in violation of Articles 92 and 107 of the Uniform Code of Military Justice (UCMJ), failure to obey a regulation and false official statements, respectively. The investigator recommended that the matter be disposed of through the CO. He recommended that the CO consider a letter of reprimand for the applicant, counseling for Chief G and Chief H, creating a standard operating procedure for the morale program, and morale officer training.

On February 4, 2013, a Report of Offense and Disposition for the applicant was sent to the applicant’s then-current unit. The Report stated that the applicant had been found to have violated Articles 92 and 107 of the UCMJ. The Report briefly summarizes the events in question, and the investigator’s findings. Lastly, the Report recommended that the matter be disposed of at mast (non-judicial punishment (NJP)).

On April 12, 2013, the applicant received a negative Page 7 from his then-current unit. It states in full:

A report of offense dated 4 Feb 2013 was received by this command from your previous commanding officer which presented the following findings of fact:

- a. You violated Art 92, UCMJ; failure to obey an order or regulation; in that you were derelict in the performance of your duties as [the unit’s] Morale Fund Custodian by negligently tracking and accounting for morale vending machine sales and inventories which resulted in accounting errors which you hid by willingly manipulating the values on the quarterly reports (CG-2985, CG-2985A).
- b. You violated Art 107, UCMJ; false official statement; in that you signed and submitted quarterly MWR reports which you knowingly manipulated to hide accounting errors (and therefore knew to be false) with the intent to deceive.

Your previous commanding officer believes that you did not steal unit morale funds. Rather, you decided to take short cuts in performing your duties which resulted in accounting errors. Your actions displayed poor judgment and lack of integrity because you chose not to report morale fund losses to your previous command



and the...MWR Office. Furthermore, the statements you made to the investigating officer in regards to this matter were less than forthright, requiring multiple interviews (email and in person) before you finally disclosed the actions you took to make line 9 and line 17 of CG-2895 equal, despite apparent accounting errors.

Based on your own statement and the Preliminary Investigating Officer's report you were derelict in your duties as the [unit's] Moral[e] Fund Custodian. I am certain this entry will have an adverse affect [sic] on your career and future promotions. As such, you are encouraged to review your rights to rebut this entry and may appeal its inclusion in your permanent personnel record using appropriate channels.

Any repeated offenses of this nature during your time assigned to this command will result in non-judicial punishment or referral of those charges to trial by courts-martial.

On April 18, 2013, the applicant received a letter removing him from the Advanced Computer Engineering, and Technology Advanced Education Program. The notice stated that a "recent investigation of your prior duties revealed that you lack the judgment, integrity, character and professionalism required of Coast Guard advanced education selectees."

On May 10, 2013, the applicant submitted a reconsideration request regarding his removal from the Advanced Computer, Engineering, and Technology Advanced Education Program. In the request, the applicant states that he was being removed from the course due to the February 4, 2013, investigation report. He stated that on April 23, 2013, he was contacted via telephone and informed of this decision. The applicant argued that the decision was disproportionate to the alleged acts of misconduct. He stated that when he became the Morale Officer, the "checking account had been closed due to inactivity, morale reports were three quarters behind, and the balance of the morale funds, \$1,400, had been allegedly kept in the previous Morale Fund Custodian's apartment." He stated that with minimal training, he did the best he could while referencing the appropriate manuals. The applicant stated that he admitted that he manipulated reports in order to receive the morale checks because he always had to "change some numbers around to make the columns match up." He further stated that the "idea of manipulating numbers was not [his], but instead, it was advised and taught" to him by his predecessor. He stated that he takes full responsibility for his actions, but he added that he did not intend to deceive.

The applicant also added that he had a few mitigating factors he wanted to be considered for his request. He stated that in 2011, his marriage was experiencing difficulties. He was also working at night on an online degree so that he could be more competitive in the Coast Guard's selection process. The applicant stated that he did so on approximately four hours of sleep per night. He added that he was diagnosed with severe depression in November 2011. He stated that he "was a broken man during this period" and he was unable to perform his duties to his highest ability. He added that he and his wife had reconciled their marriage, that he completed his degree, and that at that time he continued to see a psychologist routinely. Lastly, he added that he had an "impeccable" record over the previous 20 years with above average evaluations. He therefore requested that the decision to remove him from the advanced education program be overturned.

On May 28, 2013, the applicant received a response to his reconsideration request, denying his request to remain in the program. The response stated that his removal was effective the same day, May 28, 2013.

On June 19, 2013, a special OER was submitted for the applicant to document his removal from his primary duty which was DUINS (duty under instruction). Under Primary Duties, it states “This OER is submitted...due to removal from primary duties and is a Derogatory Report per Article 5.A.4.h.<sup>2</sup> officer removed from his primary duties on 2013/04/18.” The reported on period was from August 1, 2012, to April 18, 2013. Of the eighteen fields in which officers are evaluated, sixteen of the fields were marked N/O, for “not observed.” Judgment and responsibility both contained a mark of 3. In the comments, it states “Based on Admin Remarks dated 12Apr13, which were rcvd by [his new unit] during this period of report, [the applicant] was disenrolled from the Advanced Computer, Engineering, and Technology program due to failure to demonstrate the judgment, integrity, and ethics required of Coast Guard advanced education student.” In the space used to comment on the applicant’s potential for promotion, it states that given the nature of schooling assignments, “observations are typically inadequate to fairly judge an officer’s ability to assume greater leadership roles. Recommend assignment to a unit where member will obtain requisite leadership oversight to assist in personal development. Not recommended for promotion.”

On July 8, 2013, the applicant submitted an addendum for the derogatory OER. His comments contain the following:

As per my investigation report I fully admit my wrongdoings while performing the Collateral Duty as...Morale Officer. Although there was no training involved during my passdown or any example to go by, there is the MWR Manual that one can follow and then ask questions to someone else that...performed the collateral in the past. It is obvious that the system is not 100% easy to follow. To prove that, my CG lawyer stated that while talking to a...CWO onboard a cutter who held the Morale Officer title, that CWO stated to the lawyer that he had to put in, on average, \$75.00 per quarter out of his own pocket just to make the books balance. I don’t believe that I am the first, nor will be the last, to get “caught” manipulating numbers on a Morale report just to receive those quarterly Morale checks. If given the chance to go back in time, I would have spent more time filling out the reports but I’m quite positive they probably wouldn’t balance out to the penny. What I am getting at is that indeed my situation needed to be dealt with but could have been handled very differently. If you think about all of the good things that I did for [the unit’s] morale, did I really deserve to get removed from the Advanced Education Program and receive a derogatory OER that will most likely keep me from being promoted and therefore face retirement before I planned? I am submitting this addendum to my derogatory OER because I completely disagree with the decision to remove me from the Advanced Education program and the bad OER. I admit that I did not run the...Morale fund 100% as per the manual. I should have asked for assistance from someone at my unit but I didn’t feel comfortable doing that. I will not go...into details about that within this document. In hindsight, I should not have even taken over the Morale Fund in the shape that it was in. I appreciate the opportunity for my voice to be heard. I know that even with me writing this, what’s done is done and my career is essentially over. I have never been in a situation like this and quite frankly my reputation and confidence has been shattered. I intend to move on to my next assignment with a positive attitude and try to do the best I can do.

All three of the officers on the applicant’s rating chain who signed the OER endorsed the addendum without adding additional comments.

The applicant’s annual OER for the period of April 19, 2013, to July 31, 2014, covered his time at his unit following disenrollment from advanced training school. He received six 5s and twelve 6s. He was recommended for promotion as one of the many competent professionals who

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<sup>2</sup> COMDTINST M1000.3.

form the majority of his grade. However, he was not selected for promotion in 2015. Nor was he selected for promotion in 2016.

### VIEWS OF THE COAST GUARD

On August 10, 2016, 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 regards to the applicant's claim that the Administrative Investigation was conducted improperly, the JAG stated that the Administrative Investigations Manual, COMDTINST M5830.1A, Article 3.A.1. states that the vast majority of administrative investigations are conducted as standard investigations. This is true even in investigations involving loss of life or loss of vessels and aircraft. The JAG stated that formal investigations are conducted for "significant incidents" when the designation of a party is required, and/or the incidents are of such complexity that a formal investigation is required. The JAG argued that the improper management of a morale fund "is not an incident of such complexity or seriousness as to require a Formal Investigation," and so the unit's convening order dated December 2, 2012, calling for a standard investigation was appropriate.

The JAG then stated that, given that a standard investigation was appropriate, it was necessary to consider the applicant's allegation that the investigation was not performed in accordance with the manual. According to Article 4.C.6., there is no authority to designate parties in a standard investigation. Because there are no parties, no one is entitled to the rights of a party, such as representation by counsel, proceedings, or the opportunity to participate. Additionally, Article 4.C.4.b. states that a standard investigation is not bound by the formal rules of evidence that are applicable to a court-martial. In a standard investigation, evidence may be collected, considered, and included in the record if it is credible or reasonably believable. The JAG therefore argued that the applicant's claim that the investigation was not performed per the manual because he was not informed that he was under investigation and not given a chance to obtain counsel is without merit.

In the advisory opinion, the JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). PSC argued that the applicant did not exhaust all of his administrative remedies prior to coming to the Board because he did not submit a Reported-on Officer Reply<sup>3</sup> and because he did not submit an application to the Personnel Records Review Board (PRRB).<sup>4</sup>

PSC noted that, according to the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, special OERs may be completed in order to document below standard performance when deferring the report of performance until the next regular report would preclude documentation to support personnel management decisions, such as reassignments.<sup>5</sup> When an individual is removed from their primary duties as the result of below standard conduct or performance, the OER must be derogatory and must follow Article 5.A.4.h. of the manual.

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<sup>3</sup> The applicant did submit an addendum, which is contained in his military record.

<sup>4</sup> Applications to the PRRB may only be made within one year of the alleged error.

<sup>5</sup> COMDTINST M1000.3, Article 5.A.3.c.(1)(a).

PSC stated that according to the Administrative Investigations Manual, a person who is designated as a party to an investigation must be advised of their rights. This includes being informed of the right against self-incrimination, and if applicable the rights in Article 31 of UCMJ. However, UCMJ applies to evidence that is used for the purposes of criminal proceedings, as opposed to administrative investigations. Therefore, PSC argued, the applicant was not required to be advised of his rights under Article 31 of UCMJ. PSC further argued that the applicant was advised of his *Miranda* and *Tempia* rights on January 29, 2013, and he chose to admit “to manipulating the morale fund to cover up an accounting discrepancy in order to receive additional funding.”

In response to the applicant’s allegation that the low marks of 3 for judgment and responsibility on his derogatory OER are not sufficiently justified with comments, PSC argued that the basis for the marks is the Page 7 dated April 12, 2013. This is substantiated by the fact that the comments section states “based on Admin Remarks dated 12Apr13...[the applicant] was disenrolled...due to failure to demonstrate the judgment, integrity, and ethics required of Coast Guard advanced education student.” In addition, PSC noted, both the applicant’s supervisor and reporting officer provided a statement and stated that the applicant’s claim that his OER “does not have comments to support the numerical marks is unsubstantiated.” PSC therefore argued that no relief should be granted.

In addition to providing documents which are contained in the Summary of the Record, the Coast Guard provided declarations from the applicant’s supervisor and reporting officer. The statement of the applicant’s supervisor, who is now retired, contained the following:

I was the applicant’s Supervisor...from 30 July 2009 to 12 July 2013. In that role, I supported over 200 military students (annually) who were attending graduate school programs throughout the country...Unfortunately, given the years that have past [sic] and the volume of student issues that were handled...I cannot recall the facts regarding the applicant’s allegations.

The statement of the applicant’s reporting officer, who is also currently retired, included the following:

I was [the applicant’s] Reporting Officer while attending Advanced Computer, Engineering, and Technology program...from September 2010 to 01 October 2013. In reviewing [the applicant’s] request I recall that this process was handled by [the applicant’s new unit] mostly through correspondence with [the applicant’s old unit] and [the applicant’s supervisor]... I am not aware of the circumstances that brought the investigation into the mishandling of USCG Morale Report to light nor do I have any of the correspondence that initially handed the investigation and results to [the new unit]. What I am aware of is that the investigation was handled by [the old unit] iaw [in accordance with] the Coast Guard’s Administrative Investigation Manual... A student enrolled into any of the Advanced Education programs are not normally assigned numerical weights to an OER. They are only used to account time and grades. The fact that [the applicant] was awarded numerical weights and approved by his entire rating chain...lends credence to procedures being properly followed and the actions taken merited. These facts and the paperwork submitted by [the applicant] in the Board for Correction of Military Records disprove his allegations in that he was notified of being investigated in a timely manner, he turned down council and the OER is sufficiently supported.

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

On September 12, 2016, the applicant responded to the views of the Coast Guard and disagreed with the conclusions. He first argued that the Coast Guard was incorrect in stating that the investigation was performed in accordance with the Administrative Investigations Manual. The applicant stated that he did freely answer questions from the investigator starting in December 2012. However, the applicant stated that the investigator's first words to him were "Don't worry... you are not in any trouble. We are just trying to figure out this accounting discrepancy." The applicant stated that he answered all questions freely, including those in the email exchanges. He stated that his last meeting with the investigator, on January 29, 2013, he was asked to sign the *Miranda* and *Tempia* form. He stated that he asked why he needed to sign this form, to which the investigator reportedly replied "don't worry about it...it's just to cover our bases." The applicant stated that he signed the form because he trusted his shipmates, as he had worked closely with them for three years. The applicant stated that he was never told that he was under investigation, and he was never told he was put on report prior to being told in March 2013 that he was being released from the Advanced Education Program.

The applicant further stated that the working climate at the unit in question during the last two years he served there "was horrible." He stated that in his opinion he was singled out because he stood up to certain people on numerous occasions. He stated that he did not mention a name or rank because he believed that it was "forbidden" to make statements about personnel in BCMR applications. The applicant stated that when he told his supervisor about the problem, his supervisor told the person what the applicant had said which only made problems worse. The applicant further stated that when the accounting issues came to light, this person "put every effort into seeing [that he] would be punished."

In closing, the applicant reiterated his requests to the Board. He stated that his military record is "spotless" outside of this one instance. He stated that he took responsibility for a poorly managed morale program, with no bank account and a year late in filing reports, and was able to improve it during his time as Morale Officer. While he took responsibility for his actions, he stated that he would like the negative documentation to be removed from his record.

## APPLICABLE REGULATIONS

The Administrative Investigations Manual, COMDTINST M5830.1A, Article 3.A.2. states that "[s]tandard investigations are appropriate in most circumstances... Formal investigations should be conducted for significant incidents for which a Court of Inquiry is unnecessary, but are nonetheless of such importance that formal hearing procedures with documentation is required; are incidents for which the designation of parties is required, and/or are incidents of which the complexity or seriousness requires a formal investigation."

Article 4.C.2., a standard investigation may not designate parties. It is a "non-Party investigation. Parties must not be designated by a Convening Authority."

Article 4.E.4., regarding advising witnesses of their rights, states the following:

a. All military personnel suspected of criminal misconduct must first be advised of their rights... It may be necessary to provide the rights warnings at the outset of the interview. In some cases, however, an Investigating Officer will become aware of a witness's involvement in criminal activity only after the interview has started and the incriminating evidence is uncovered. In such cases, rights warnings must be provided as soon as the Investigation Officer suspects the witness may have been involved in criminal activity...

b. Note that these rights apply only to information that might be used to incriminate the witness; they cannot be invoked to avoid questioning on matters that do not involve violations of criminal law or do not incriminate that particular witness.

The Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A, Article 5.A.3.e.(b) states that a "special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard...The OER will be defined as derogatory."

### 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.<sup>6</sup>

2. The applicant asked the Board to correct his military record by removing his OER for the period of August 1, 2012, to April 18, 2013, the Page 7 dated April 12, 2013, and any other documentation in his military record pertaining to the underlying incident. He requested that the derogatory OER be replaced with a DUINS OER. The applicant asked that his non-selection of promotion be struck from his record. Lastly, if selected for promotion, he asked that his promotion be back-dated to coincide with the date he would have been promoted, June 1, 2016, if he had been selected for promotion in 2015 and that he be awarded associated back pay. The applicant claimed that the investigation was not conducted pursuant to the Administrative Investigations Manual.

3. The Board begins its analysis in every case by presuming that the disputed information in the 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.<sup>7</sup> 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."<sup>8</sup> When challenging an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed

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<sup>6</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

<sup>7</sup> 33 C.F.R. § 52.24(b).

<sup>8</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>9</sup>

4. The applicant’s basis for requesting that the documentation surrounding the morale fund discrepancies and his removal from his primary duty be removed is his allegation that the Coast Guard did not conduct the administrative investigation in accordance with the Administrative Investigations Manual (AIM). He alleged that the investigation was not conducted properly because he was not timely informed of his rights or told that he was being investigated until January 29, 2013, towards the end of the investigation; and so he made unwarned statements and did not obtain counsel. However, the record shows that the investigation was originally convened to investigate discrepancies in the morale fund, and the applicant was one of the witnesses and not suspected of intentional wrongdoing. In addition, according to the AIM, a “party” is only designated for formal investigations.<sup>10</sup> In a standard investigation, as was used to investigate the discrepancies in the morale fund, parties are not designated.<sup>11</sup> Therefore, the applicant was not entitled to party rights, as he was not a party to a formal investigation. And in conducting a standard investigation, the investigator was not required to advise the applicant of his rights until the investigator suspected that the applicant may have been involved in criminal activity.<sup>12</sup> Moreover, the investigator’s failure to advise the applicant of his *Miranda* and *Tempia* rights under Article 31(b) of the UCMJ when first asking the applicant about the morale fund would only prevent the Coast Guard from using his unwarned statements against him during a court-martial. Nothing in law or policy prohibits unwarned statements made by witnesses for an investigation from being used in administrative matters, such as the applicant’s OER, Page 7, and removal from school, or even in non-judicial punishment.<sup>13</sup> Therefore, the fact that the applicant was not initially warned of his right to silence and to counsel did not prevent his command from taking appropriate administrative actions, such as his removal, the disputed OER, and the Page 7, based at least in part on the statements the applicant made to the investigator.

5. The applicant has therefore submitted insufficient evidence to overcome the presumption of regularity accorded the disputed Page 7, derogatory OER, and his rating chain.<sup>14</sup> The applicant admitted to the acts that led to the Page 7 and the OER. He has not shown that they contain any erroneous information, and he has not shown that his CO abused his discretion in removing the applicant from his primary duty, which was school (DUINS), based on the revelations of how the applicant had mishandled the morale fund. Once the CO determined that the applicant should be removed, preparation of a derogatory OER was required by Article 5.A.3.e.(b) of the Officer Accessions, Evaluations, and Promotions Manual. It appears based on what the applicant provided that a Report of Offense and Disposition was prepared, but the applicant was not taken to mast and so the Report was not entered in his record. The applicant has not shown that the investigation was conducted improperly or that his CO or XO abused their discretion in removing him and documenting the removal on an OER and Page 7.

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<sup>9</sup> *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).

<sup>10</sup> COMDTINST M5830.1A, Article 3.A.2.a.

<sup>11</sup> COMDTINST M5830.1A, Article 4.C.2.

<sup>12</sup> COMDTINST M5830.1A, Article 4.E.4.a.

<sup>13</sup> Article 1.D.1.g., Manual for Courts-Martial United States (2012).

<sup>14</sup> 33 C.F.R. § 52.24(b); *Arens*, 969 F.2d at 1037.

6. Lastly, regarding the applicant's allegation that his OER did not contain sufficient comments to substantiate the low marks of 3 in judgment and responsibility, the OER specifically references the April 12, 2013, Page 7. The Page 7 includes comments that clearly show why the applicant received these low marks. In addition, the comments section of the OER states that the applicant was disenrolled "due to failure to demonstrate the judgment, integrity, and ethics required of a Coast Guard advanced education student." Therefore, the Board finds that the comments in the OER support the two low marks. The Board finds no grounds for removing either the Page 7 or the disputed OER, which the applicant has not shown to be adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>15</sup>

7. Because the applicant has not shown that his record contained a material error or injustice when it was reviewed by the selection boards in 2015 and 2016, the Board finds no grounds for disturbing the results of those boards or for convening a special selection board. Accordingly, the applicant's requests for relief should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>15</sup> *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).



**ORDER**

The application of  for correction of his military record is denied.

April 21, 2017

