

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-080



FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the applicant's completed application on February 3, 2017, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 27, 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] asked the Board to remove from his record a Special Officer Evaluation Report (SOER), which documents his removal from his primary duty as the Executive Officer (XO) of a cutter on April 7, 2015. He also asked the Board to restore his name to a commander (CDR) promotion list so that he will receive the promotion he was selected for by the CDR selection board that convened in August 2014. The applicant alleged that the SOER is erroneous and unjust and that therefore—and because of other errors committed by the Coast Guard—his removal from the promotion list was erroneous and unjust.

The disputed SOER states that the applicant was removed from his primary duty based on "substandard conduct." The assigned marks include two very low marks of 2 for "Judgment" and "Responsibility,"¹ a low mark of 3 for "Professional Presence," and a mark in the third spot (of seven) on the officer comparison scale, which indicates that his commanding officer (CO) rated him as a "fair performer" in comparison to other LCDRs. These low marks are supported by negative comments concerning adultery, which appear in the Summary of the Record below.

¹ Coast Guard officers are rated on a scale of 1 (lowest) to 7 (best) in eighteen performance dimensions and also on a "comparison scale" with seven possible marks. The Supervisor and Reporting Officer assign marks by comparing the officer's performance to the written standards for each performance dimension and then comments supporting the assigned marks. The Reporting Officer (often, as in this case, the commanding officer) marks the comparison scale by comparing the officer's performance during the period with that of all other officers of the same rank that the Reporting Officer has known throughout his career. COMDTINST M1611.1A, Articles 2.E. and 2.F.

Summary of Allegations About the SOER

The applicant stated that he was serving in a district on the [REDACTED] when he was selected for promotion to CDR in August 2014 and was placed near the top of the promotion list. Later that year, he enthusiastically accepted an off-season assignment as the XO of a cutter in [REDACTED] on the [REDACTED]. Before transferring, he was “frocked”² as a CDR on December 19, 2014, based on his anticipated promotion, and transferred to the cutter after the holidays. The applicant stated that he believed that his duties for the cutter would “necessitate much time away from the homeport,” and so his wife and two children remained [REDACTED].

The applicant stated that a few weeks later, he became “involved with a married woman,” who subsequently revealed the affair to her husband, who complained to the applicant’s CO. As a result, he was removed from his assignment as the XO and received the disputed SOER. His CO told him to submit a draft SOER even though Coast Guard policy cautions against allowing officers to write their own OERs. He noted that because he was the XO of a cutter, the CO signed the SOER as both his Supervisor and Reporting Officer and so he had only one evaluator instead of two.³ In addition, the OER Reviewer who reviewed the SOER for errors and inconsistencies was only a CDR, whereas his CO was a captain. Therefore, he argued, the SOER was “effectively based on only one person’s subjective opinion,” rather than a rating chain of three officers, and “did not properly reflect [his] performance over the entire period of the report.”

The applicant alleged that the SOER is erroneous and unjust as it “incorrectly imparts the feelings of the woman’s spouse to the community as a whole. This was a private consensual relationship with a woman [who] has no nexus or connection to the Coast Guard. She was not a crewmember, subordinate, relative, or contractor, nor did she have any other connection to the Service or the Department of Homeland Security.”

The applicant alleged that the draft SOER that he submitted to his CO shows that the SOER is substantially incomplete because the CO omitted significant accomplishments without explanation even though there was space for more comments on the final version. The approved SOER, he argued, fails to reflect the positive work he completed during the reporting period.

² An officer on a promotion list may be “frocked” (allowed to wear the uniform and use the title of the higher rank before actually being promoted) when the officer is transferred to a position normally held by an officer of the higher rank so that the officer will be better able to wield the authority and perform the duties of that position. COMDTINST M1000.3A, Article 3.A.13.

³ OERs are signed by a “rating chain,” which includes the reported-on officer (the evaluatee); a Supervisor, who assigns the first thirteen performance marks on an OER form with supporting comments; a Reporting Officer, assigns the last five performance marks and the comparison scale mark on an OER form with supporting comments; and a Reviewer, who reviews the OER for completeness and ensures that the Supervisor and Reporting Officer have adequately executed their responsibilities and returns the OER if there are errors, omissions, or inconsistencies. The Supervisor is normally the officer who supervises the evaluatee on a day-to-day basis. The Reporting Officer is normally the Supervisor of the Supervisor, but if evaluatee is not a CO, then the Reporting Officer is normally no higher than the evaluatee’s CO, and any CO in the rank of O-3 or above, or any officer in the rank of O-5 or above, may serve as both Supervisor and Reporting Officer. An OER Reviewer is normally the Supervisor of the Reporting Officer may be junior to the Reporting Officer. OER Reviewer is a position designated by competent authority rather than a specific person. COMDTINST M1000.3A, Article 5.A.2.d.

The applicant stated that the SOER should also [REDACTED] because it “serves no further purpose now other than to repeatedly shame [him] whenever it goes before a future Board or Panel. [He has] to endure knowing that [his] peers, colleagues, [REDACTED] [REDACTED] in about [his] personal life that is none of their business.” He alleged that he has “suffered enough” because he lost a job he loved, was unable to serve at sea, and had to move away from the area where his mother and brothers live and where his family was looking forward to living. He stated that the revocation of his promotion and continuing effects on his career are unnecessary and not justifiable.

The applicant stated that he submitted an addendum to the SOER, but the Personnel Service Center (PSC) advised him that it would redact certain information that was deemed restricted. He alleged that the restrictions unjustly prevented [REDACTED] all of the circumstances surrounding his adultery and so limited his [REDACTED] dressing SOER comments that impugned his character. [REDACTED]

The applicant stated that after the SOER was completed, the Officer Personnel Management (OPM) branch of PSC informed him that his frocking had been rescinded and that his promotion would be delayed [REDACTED] proceedings. He returned [REDACTED] and then was reassigned to [REDACTED]

Allegations About the Special Board

The applicant [REDACTED] a personal statement [REDACTED] [REDACTED] [REDACTED] [REDACTED] responsibility for his actions. He had not “handle[d] the compounded stress of the job, family separation, and various [REDACTED] frustrations with [his] prior and current assignments well.” A [REDACTED] and the cutter would not be [REDACTED] as soon as he had hoped. Therefore, he spent “increasing amounts of time at work in an attempt to bury the emotional challenges [he] was dealing with, but in a misguided effort to find solace in distraction, [he] engaged in a very busy [REDACTED] of similar age.”

The applicant stated that he was entitled to submit a statement to the Special Board when it convened in November 2015. Although he asked for a hearing with the Special Board, his request was denied even though he was working at Headquarters, where the board was to convene. In addition, he argued, PSC biased the Special Board by asking it not whether he could perform as a CDR, but whether his name should be removed from the promotion list. The applicant also argued that because none of the members of the Special Board were [REDACTED] they did not have the background to accurately assess his performance in his primary specialty. He argued that they had no objective basis for evaluating his record and performance or whether he was capable of performing as a CDR.

Moreover, the record before the Special Board was incomplete, the applicant alleged, because when his supervisor at his Headquarters office received orders for an off-season transfer

at the end of 2015, PSC determined that he would “fleet up”⁴ to fill her CDR position, where he would be responsible for much of day-to-day management of the office. The applicant alleged that this assignment to a high-visibility role was important because it showed that both OPM and the [REDACTED] had faith and confidence in his ability to perform as a CDR. Therefore, he asked his Division Chief how to provide this information to the Special Board, and the chief forwarded the information to the officer at OPM-1 responsible for Special Boards. The applicant stated that OPM-1 responded cryptically by referencing a manual but indicated a willingness to accept the new information. Therefore, he submitted a memorandum with his supplemental information about fleeting up to take his supervisor’s position to both the officer responsible for Special Boards and the recorder for the Special Board three days before the Special Board convened, but his supplemental information was not submitted to the Special Board. The applicant alleged that as a result of this error, the Special Board decided to remove him from the promotion list based on an erroneous and incomplete record.

The applicant argued that the decision of the Special Board is also not supported by the record. He argued that the Special Board’s finding that his conduct had been unethical is “materially flawed” because there was no evidence that his conduct had been unethical since he had accepted responsibility for his actions instead of lying or refusing to answer questions. He argued that the Special Board should not have attributed the spouse’s feelings and retribution to society at large. He argued that the “retribution and the demands being made by the spouse [were] personal matters outside the Coast Guard and not the province of an ex-parte administrative hearing designed to enhance the efficiency of the Service. There is no nexus between [his] personal actions and the efficient workings of Government.”

The applicant noted that in recent guidance to selection boards, the Commandant has emphasized the importance of selecting officers with the “strength of character to hold themselves accountable for lapses in behavior” and of evaluating “errors against service standards and impacts. Consider subsequent performance and conduct that positively reflect lessons learned and demonstrate the officer’s potential to serve in the next higher grade.” The applicant argued that “applying the totality of this guidance to [his] overall record necessitates a result different than the narrowly focused view of the Special Board.” He stated that his removal from the promotion list denied him the promotion and will result in his retirement as soon as he attains twenty years of service.

The applicant stated that his job performance has been stellar throughout his career and did not decline at any time before, during, or after the affair, as shown by his other OERs. He argued that the affair was “not a performance issue, rather it was a personal challenge that [he] struggled with that has nothing to do with the Coast Guard. [He] stumbled in [his] personal life and instead of finding support and understanding within [his] then chain of command, [he] was publicly shamed, lost [his] dream assignment, was no longer able to support the ship’s crew [that he] cared deeply about, and was diminished in [his] chances to return to sea.” He argued that the “Coast Guard has overstepped its role by taking action for a situation that has nothing to do with the Service ... based solely on a personal matter that is properly between [him] and [his] family.” The applicant asked to be able to continue his career in the Coast Guard.

⁴ When a member’s billet is left vacant, a CO may “fleet up” a subordinate member of the command to fill the billet, in which case OPM-2 may adjust the names on the Personnel Allowance List without issuing transfer orders.

[REDACTED]

The applicant stated that the administrative action taken by the Coast Guard has not only limited his career but hurt his family and their future. He stated [REDACTED]s, celebrations, and school and sports events because of his military career “is not diminished through any of [his] actions.”

In support of his allegations, the applicant submitted many emails and military and personnel records, the most relevant of which are included in the Summary of the Record below.

SUMMARY OF THE RECORD

The applicant was commissioned an ensign in [REDACTED] and served aboard two cutters before the Coast Guard assigned him to [REDACTED]. He was promoted to lieutenant junior grade in [REDACTED] and to lieutenant in [REDACTED], and he received two Achievement Medals and a Commendation Medal.

The applicant [REDACTED] and served as a [REDACTED] for four years, where he received [REDACTED] in [REDACTED]. he served as the XO of a large cutter and received excellent OERs. The applicant received another Commendation Medal and a Navy Achievement Medal during this period.

From [REDACTED] the applicant served as a [REDACTED]
[REDACTED]
[REDACTED] The applicant received excellent OERs and was awarded two more Commendation Medals for this service. In [REDACTED] he was selected for promotion to CDR and placed near the top [REDACTED] December 2014, he was frocked [REDACTED] on his upcoming assignment to a CDR billet.

Removal and SOER

[REDACTED]

On January 5, 2015, the applicant reported for duty as the XO of a large cutter that was not then operational. On April 7, 2015, he was removed from this primary duties based on “sub-standard conduct” in accordance with Article 5.A.3.e.(1)(b) of COMDTINST M1000.3A. A few days later, the applicant submitted five pages of bulleted information about his performance during his three months aboard the cutter and supporting documentation as input for the SOER that would document his removal from his duties. He also submitted a draft SOER with many positive comments about his performance as well as the following: [REDACTED]

Unfortunate personal conduct outside of CG work environment compromised ability for continued fulfillment of primary duties. [His] involvement in extra-marital affair & subsequent investigation necessitated removal; otherwise perception amongst crew would be that disparity existed in handling Good Order & Discipline. Upon realization of gravity of situation, [he] self-reported conduct to CO; work never diminished thru invx. Outside of this conduct, [he is] a self-starter. ...

Unfortunate personal conduct that occurred over less than 3 week period appears far from norm for [the applicant]; fully expect [him] to move forward with career utilizing available support to ensure conduct is never again called into question. Highly recommend future assignment afloat ... Recommend proceed with promotion to O-5 as scheduled.

On the official SOER documenting his removal, the applicant received eight marks (out of eighteen) of “not observed,” indicating that the CO felt that he had not observed sufficient performance to assign a mark in that performance dimension. He also received three high marks of 6 and four marks of 5 with supporting positive comments. The Reporting Officer’s part of the SOER, however, includes a mark of 3 for “Professional Presence,” two marks of 2 for “Judgment” and “Responsibility,” and a mark in the third spot on the comparison scale, denoting a “fair performer.” These low marks are supported by the following negative comments:

[The applicant] was off to a promising start as an XO; however, [he] had an unfortunate lapse in personal conduct that occurred over a period of approximately 3 weeks. This lapse revealed significant defects in his personal and professional qualities.

Personal misconduct⁵ outside of CG work environment compromised ability for cont’d fulfillment of primary duties as XO and exposed character flaw. Involvement in an inappropriate relationship with a married woman demonstrated a lapse in judgement and personal accountability that disparaged CG’s reputation among individuals in local community. ...

[The applicant’s] poor personal conduct may have been out of the norm for an otherwise solid officer. Behavior was reprehensible & in direct contrast to Good Order & Discipline, undermining duties & responsibilities as a senior leader & XO of a major cutter crew. Actions necessitated removal from primary duties. I fully expect [him] to move forward w/career utilizing available support to ensure conduct is never again called into question. Rec[ommend that he] be retained in Service, but not be permitted to promote as scheduled due to substandard conduct. [His] administrative skills and [REDACTED] make him well suited for most staff assignments.

On April 24, 2015, OPM-1 advised the applicant that “based on pending potential adverse information,” his promotion would be temporarily delayed in accordance with Article 3.A.12.f. of COMDTINST M1000.3A and his authorization to frock as a CDR had been revoked. OPM-1 stated that he would be notified “when it has been determined that either you will be promoted or further administrative action is necessary.” The applicant acknowledged this notification on April 30, 2015.

On May 22, 2015, the applicant submitted to OPM-3 an addendum for the SOER with many comments concerning his wife, children, and other family members. On May 26, 2015, OPM-3 returned the addendum with comments and redactions of “information/comments that

⁵ Adultery is a crime under Article 134 of the Uniform Code of Military Justice (UCMJ).

specifically relate to or indicate your family status, such as wife and kids/geo-separation, which is restricted,” as well as specific details about his performance that occurred outside of the reporting period for the OER, which are also restricted.⁶ The applicant replied that the restrictions would limit [REDACTED] context for the SOER. OPM-3 replied that the policy allowed for only broad references to family and prior assignments, such as “cumulative stress built up from being away from family in addition to demanding/high stress jobs.” The applicant revised his OER addendum and submitted it the same day.

In his OER addendum, the applicant stated that he deeply regretted and was embarrassed by his conduct. To put his behavior “into context,” he stated that he had worked in high-stress assignments since 2006 in which he had carried a smart phone to be available 24/7, which often reduced his personal time. He stated that although he had enjoyed more personal time in 2014 and was able to explore the wilderness in his boat, he vigorously pursued the opportunity to be the XO of the new cutter, which would be homeported near his hometown. His excitement quickly diminished when he reported for duty in January 2015, however, because the disruption to his personal life caused stress, sadness, and depression. He stated that he compensated by working longer hours and increasing his exercise routine and did not realize that “the emotional toll that was occurring put [him] in crisis mode.” Looking for anything that would lift his spirits, he stated, he began a romantic relationship with a civilian woman, which gave him something to look forward to. The applicant stated that the relationship “ended badly” and he simultaneously realized that it was not what he wanted. However, the damage had already been done. The applicant stated that he “informed [his] CO and cooperated through the aftermath.” The applicant stated that he had “paid dearly for [his] mistake” because of the personal and professional embarrassment, the loss of his “dream assignment,” and continuing negative effects on his career. He asked for an opportunity to rebuild his career.

The applicant’s CO and the SOER Reviewer forwarded his addendum for entry in his record without comment.

Special Board

On September 15, 2015, the Boards, Promotions, and Separations Branch of OPM (OPM-1) notified the applicant by memorandum that based on the SOER, OPM-1 had initiated action to convene a Special Board to “recommend whether you should be permanently removed” from the promotion list in accordance with Article 3.A.12.f. of COMDTINST M1000.3A. OPM-1 noted that pursuant to COMDTINST 1410.2, the applicant was allowed to submit comments on his own behalf for the Special Board within 21 days of acknowledging the notification. The applicant acknowledged it by signature on September 25, 2015.

On October 9, 2015, the applicant submitted a statement to OPM-1 for the Special Board. He admitted that he had had a sexual encounter with a married woman. He stated that upon learning that she had told her husband, who intended to complain to his command, he self-reported to the CO. The applicant detailed his prior performance and the stresses of his prior assignments and the sacrifices he and his family had made for his Coast Guard career. He noted

⁶ Article 2.B. of COMDTINST M1611.1A prohibits comments referring to an officer’s “performance or conduct which occurred outside the reporting period” or the officer’s “marital or family status.”

[Personnel Allowance List (the Division's organization [redacted] chart)] to reflect [the applicant's] filling the O-5 deputy position. What is the proper mechanism to get this info before the special board?" OPM-1 replied that the applicant could "inc [redacted] article 3.A.12.f. of COMDTINST M1000.3A]." The Division Chief forwarded this email to the applicant and told him that he was "able to get you moved into the deputy position on PAL" and that he could provide the information to the Special Board, which was to convene on November 13, 2015. The applicant submitted an addendum to OPM-1 on November 10, 2015, which stated that he would be fleeting up to backfill the O-5 deputy position when the incumbent was transferred in January 2016.

On November 13, 2015, a Special Board composed of a captain and two commanders convened to review the applicant's records and recom [redacted] name should be removed from the promotion list. The list of attachme [redacted] Special Board's report includes the applicant's statement dated October [redacted] endorsement as "Tab A," but the addendum to t [redacted] statement is not mentio [redacted]. The Special Board concluded that his name should be removed, finding that his conduct

constituted a s [redacted] nd discipline, ref [redacted] upon his judgment [redacted] serving in a position of trust and leadership as Executive Officer of a major unit, [he] mismanaged personal affairs to the detriment of the Service by engaging in a sexual relationship with a married woman. This behavior subverted trust within [redacted] ight discredit to the Servi [redacted]

[redacted] behavior while assigned in a highly visible leadership position. [redacted]

As demonstr [redacted] ve deficiencies, these actions are inconsistent with Coast Guard Core Values. [The applicant] failed to meet the prescribed standards expected of senior officers as outlined in Commandant's Guidance to P [redacted] officer Selection Boards and Panels.

On December 1, 2015, OPM-1 forwarded the Report of Proceedings of the Special Board up through the Commandant, who approved the proceedings and recommendation on January 5, 2016.

On January 22, 2016, the Secretary approved the Special Board's recommendation that his name be removed from the promotion list. [redacted]

On January 28, 2016, OPM-1 informed the applicant of the results of the Special Board and forwarded him the Report of Proceedings. OPM-1 stated that under 14 U.S.C. § 272, the removal would constitute the applicant's first non-selection for promotion and noted that the applicant would be reconsidered for promotion in August 2016. The applicant acknowledged this notification on February 4, 2016.

On his OER dated April 30, 2016, the applicant [REDACTED] lent marks and was strongly recommended for accelerated promotion. However, he was not selected for promotion in August 2016. Based on his two non-selections and more than [REDACTED] [REDACTED] e to retire.

VIEWS OF THE COAST GUARD

On July 27, 2017, a JAG officer submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum by PSC.

PSC reviewed the facts and policies and noted that [REDACTED] applicant's addendum to his original statement to the Special Board had [REDACTED] within the 21 days of notification as required. [REDACTED]

PSC stated that under Article 1.F.2.b. of COMDTINST M1000.8A, the applicant was properly removed from [REDACTED] air with a married [REDACTED] community. PSC stated that [REDACTED] s [REDACTED] could be delayed if there is "any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers."

PSC s [REDACTED] 14 U.S.C. § 254, the Spec [REDACTED] [REDACTED] [REDACTED] that the applicant's conduct had constituted a significant breach of good order and discipline and so recommen [REDACTED] name be removed from the promotion list. This recommendatio [REDACTED]

PSC submitted statements from the applicant's CO and OER Reviewer (summarized below), who have supported the completeness and accuracy of the SOER. In lig [REDACTED] [REDACTED] ed that the marks and comments in the SOER are based on facts to which the applicant admitted. In addition, PSC stated that the SOER's preparation by the CO as both Supervisor and Reporting Officer and review by the designated OER Reviewer, who was a CDR, was in accordance with policy.

PSC argued that the applicant has failed to substantiate that the SOER is incomplete or unjust and has not overcome the presumption of regularity. Therefore, PSC concluded, no relief should be granted. [REDACTED]

Rating Chain's Declarations

The CO of the cutter, who signed the SOER as both Supervisor and Reporting Officer, stated that the applicant was relieved of his duties as XO after a thorough investigation of his adultery was conducted. The CO noted that both the woman and her husband were civilians and not affiliated with the Coast Guard.

Regarding the SOER, the CO stated that it “is [REDACTED] accurate reflection of his performance.” He stated that the applicant had reported aboard in January 2015, more than five months after the core group of the crew had arrived, and so [REDACTED] [REDACTED] y been initiated, “negating some of the credit he claimed in his Officer Evaluation Support information.” The CO stated that he marked many of the performance dimensions on the SOER as “not observed,” instead of assigning marks with comments, because he felt that the three-month evaluation period—during which the applicant was away for 21 days—did not provide sufficient grounds to accurately assess his performance in those dimensions.

The CO stated that he learned of the applicant’s affair with a married woman from the unit chaplain, who had been called by the woman’s husband [REDACTED]. The husband had been calling ... area Coast Guard units attempting to identify [REDACTED] Coast Guard officer who was having an affair with his wife. The husband [REDACTED] Coast Guard officer’s first name and knew that he worked [REDACTED] in the command structure. All of this occurred within approximately 2 months of [the applicant] reporting to [the cutter].”

The CO further [REDACTED] bought this relationship [REDACTED] woman via an internet tool [REDACTED] s [REDACTED] ear that the applicant’s conduct had disparaged the Coast Guard’s reputation in the local community as the husband had “consulted with friends and co-workers on how to proceed with his knowledge of his wife’s affair, which is why he called the Coast Guard units.” The CO noted that when [REDACTED] the cutter crew was about to [REDACTED] [REDACTED] [REDACTED] a declaration that as Chief of the Atlantic Area Cutter Forces Branch in 2015, he was the designated Reviewer [REDACTED] policy required a Reviewer to be senior to the Reporting Officer [REDACTED] applicant in 2011 and 2012, was [REDACTED] of the cutter for which the applicant was the XO. He stated that as the Reviewer, his role was to ensure that the SOER “was valid, that the comments were allowed and supported the marks given.” He stated that he worked with OPM-3, [REDACTED] [REDACTED] of OPM, to ensure that the SOER was prepared in accordance with policy and that he had re-reviewed the SOER and could find nothing that disqualified it.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 15, 2017, the applicant responded to the advisory opinion of the Coast Guard. He stated that he disagreed with it and asked the Board “to take a honest [REDACTED] of [his] record, compare it to the adverse actions taken against [him] and their continuing consequences to [his] professional and personal life, and then determine if [his] case merits relief.” He alleged that each adverse action had been compartmentalized and made without all available information because he had been restricted from including pertinent information in his addendum to the SOER and his addendum to his statement to the Special Board had not been shown to the Board. He asked the Board to allow him to continue his career instead of retiring by granting relief.

The applicant stated that the Coast Guard's adv [REDACTED] correctly stated the policies in COMDTINST M1000.3A but argued that any policy that allows a single person to serve as both Supervisor and Reporting Officer for a derogatory SOER [REDACTED]

The applicant repeated many of his arguments and also argued that under Article 1.F.2.b. of COMDTINST M1000.8A, he should not have been removed from his duties because his conduct "did not significantly hinder mission accomplishment or unit readiness," his actions did not "significantly undermine" his leadership authority, and he did not lack the ability or desire to do the work. He alleged that there is no avenue of appeal when a CO removes an officer from his duties and so he had to accept his CO's decision but did not agree with it. He argued that his removal was unauthorized because there is no evidence, other than the opinion of the CO, that his indiscretion significantly undermined his leadership [REDACTED] he reputation of the crew in the local community. [REDACTED]

The applicant stated that the [REDACTED]'s declaration indicates that the CO must have "negotiated with the husband" to convince him not to bring more negative attention to the affair. He argued that it is clear that the CO's decision was unjustly and heavily influenced by the complaints of a civilian ins [REDACTED] ard. [REDACTED]

[REDACTED] applicant stated that the policy limiting an officer's submission of information to a Special Board to 21 days from acknowledging notification is arbitrary, capricious, and unjust. He noted that the 21-day limitation does not appear in COMDTINST 1410.2 and that Article 3.A.4.f.(1) sta [REDACTED] must arrive before the a [REDACTED]

[REDACTED] ened the Special Board, was going to assign him to an O-5 billet at Headquarters was highly relevant inform [REDACTED] Special Board should have seen. [REDACTED]

The applicant argued that the Special Board erred because his conduct was not a result of an ethical issue or character flaw and neither subverted trust within the local [REDACTED] t on the Coast Guard. Nor did his actions constitute a significant breach of good order and discipline or reflect poorly on his judgment or professionalism. The applicant stated that he made a human mistake and had handled it with candor and integrity and had resolved not to repeat the mistake. He stated that his own actions had not involved any member of the military or compromise his ability to carry out his duties. He argued that the "mistake in [his] personal life has no bearing on [his] judgment or professionalism as an officer."

Regarding the CO's declaration, the applicant stated that the CO neve [REDACTED] n that he disagreed with the applicant's input for the SOER. The applicant pointed out that his "overall record demonstrates the highest performance throughout [his] career and [he has] never felt the need to embellish or take credit for the work of others." The applicant argued that the CO's comments show the injustice caused by having the CO serve as both his Supervisor and Reporting Officer.

The applicant alleged that although the CO said he learned about the affair from the chaplain, the applicant had first approached the CO and told him only that he was suspected of having

an affair and that the chaplain had more information. [REDACTED] the applicant did not want to put the CO in the position of possibly serving as a witness to whatever the applicant told him. The applicant stated that he would have answered any question [REDACTED] the investigation and removed him from his duties a month later.

The applicant stated that there is no evidence that the woman’s husband told others in the community about their affair. He alleged that the chaplain must have improperly encouraged the husband to pursue retribution and that the husband’s desire for retribution should not have influenced the CO. He argued that his removal, the SOER, and the disruption of his life and career are unnecessary and unjust.

[REDACTED]
[REDACTED]
APPLIC [REDACTED] TIONS

The Military Assignments and Authorized Absences Manual, COMDTINST M1000.8A, states the following:

1.F.2.b. Circumstances [REDACTED]

[REDACTED] considered for permanent removal from primary duties under the following circumstances:

(1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or

[REDACTED] he at the unit (normally at least s [REDACTED]

[REDACTED] cantly undermine their leadership authority.

1.F.2.d. Removing an Officer from [REDACTED]

(1) At [REDACTED] discretion, an officer may be temporarily removed from primary duties at any time. Upon determining that an officer meets the requirements of Article 1.F.2.b. of this Manual for permanent removal from primary duties, the command will submit an OER in accordance with Articles 5.A.3.c and 5.A.4 h. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series). The command should inform the officer of the RPD process and way forward.

(2) After the OER is routed to Commander (CG PSC-OPM-3) or (CG PSC-RPM) per Article 5.A.2.i. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), Commander (CG PSC-OPM) or (CG PSC-RPM) will review and make the final decision on removal from primary duties.

Article 5.A.3.e.(1)(b) of the Officer Accessions, Evaluations, and Pr [REDACTED] Manual, COMDTINST M1000.3A, states the following:

A special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority’s final action on a permanent relief for cause request per by Article 1.F. of reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)). The OER will be defined as derogatory and shall follow the procedures for derogatory OER submission in accordance with Article 5.A.7.c. of this Manual. This OER will count for continuity.

Article 5.A.7.c. of COMDTINST M1000.3A, “Derogatory Reports,” states the following:

(1) Definition. Derogatory reports are OERs that indicate the reported-on officer has failed in the accomplishment of assigned duties. Section 2 of the OER shall clearly state “Per Article 5.A.7.c. of Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), this OER is a derogatory report.” Rating chains are strongly encouraged to contact Commander (CG PSC-OPM-3) or (CG PSC-RPM-1) for guidance in derogatory OER preparations. Derogatory OERs should be completed by the rating chain and received by Commander (CG PSC) no later than 45 days after the OER was initiated by the rating chain. Derogatory reports are only those OERs which ... (c) Documents conduct or performance which is adverse or below standard and results in the removal of a member from their primary duty or position.

(2) Responsibilities. Derogatory OERs are processed as follows:

(a) Reporting Officer. The reporting officer shall provide an authenticated copy to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum. The supervisor and the reporting officer shall be afforded the opportunity to address the reported-on officer’s addendum via individual one-page signed endorsements to the reported-on officer’s addendum. The reporting officer will then forward the OER and attachments to the reviewer.

(b) Reported-on Officer. The reported-on officer has the option to prepare an addendum using Coast Guard Memorandum limited to two pages with no enclosures. The addendum must be submitted to the supervisor within 14 days of receipt of the OER unless an extension is specifically requested from Commander (CG PSC- OPM-3) or (CG PSC- RPM-1).

[1] The reported-on officer’s addendum does not constitute an official request for correction of a record but provides the reported-on officer an opportunity to explain the failure or provide their views of the performance in question. Commenting or declining comment does not preclude the reported-on officer from an official request for correction of the record under Article 5.B. of this Manual or submitting an OER Reply under Article 5.A.7.e. of this Manual. ...

(c) Reviewer. The reviewer shall ensure that the evaluation of the reported-on officer is consistent and that the derogatory information is substantiated. If the reviewer finds otherwise, they shall return the report to the reporting officer for additional information and/or clarifying comments. Substantive changes to the OER require its return to the reported-on officer to provide another 14-day opportunity for the reported-on officer to revise the addendum.

Article 3.A.12.f. of COMDTINST M1000.3A states that a CO or OPM must delay a promotion if they know that an appointee has disqualified himself after being placed on the promotion list. “Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers.” OPM-1 must notify the officer about the delay and the Commandant “shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list. The officer concerned will be afforded 10 calendar days’ notice of the proceedings, and may communicate by memorandum to the board via [OPM-1].” Article 3.A.4.f. states that a communication to a selection (promotion) board “must arrive prior to the commencement of the board” and may be accompanied by one endorsement.

Paragraph 7.g. of COMDTINST 1410.2, which concerns the documents that may be seen by various officer boards, states the following:

Special Boards. Special boards consider issues unique to a particular circumstance in making special determinations. These determinations include but are not limited to revocation of commission, determination of highest grade held, removal from a promotion list, or reversion to permanent

grade. Because of this, there are a variety of concerns unique to these boards in relation to the record before each board:

(1) Special boards that are convened to determine if an officer should be removed from a promotion list shall follow the guidelines set forth for ADPL promotion boards. The only exception is that communications to the board are not restricted in their length and content.

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.⁷

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁸

3. The applicant alleged that his removal from primary duties in April 2015, the SOER documenting this removal, and the removal of his name from the CDR promotion list in January 2016 are erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁹ 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."¹⁰ In addition, to be entitled to removal of an SOER, an officer cannot "merely allege or prove that an [SOER] seems inaccurate, incomplete or subjective in some sense," but must prove that a disputed SOER 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.¹¹

4. Removal from primary duties. The applicant has not proven by a preponderance of the evidence that his CO erred by removing him from his primary duties. A CO may remove an officer from his primary duties if the officer's actions "significantly undermine their leadership authority."¹² Although the applicant argued that his affair with a local civilian woman did not *significantly* undermine his leadership authority and had no nexus with his professional performance, the Board strongly disagrees. As the XO of a large cutter, his misconduct, which became known as a result of the woman's husband's response, significantly undermined his trustworthiness and ability to lead the crew of the cutter, particularly those who might commit adultery or similar misconduct. The applicant complained that there is no evidence that his misconduct was known to the community or the crew, but the CO's declaration shows that the affair

⁷ 10 U.S.C. § 1552(b).

⁸ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹¹ *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).

¹² COMDTINST M1000.8A, Article 1.F.2.b.

had become known to members of the local civilian community through (and including) the woman and her husband and that the husband had broadcast the existence of an issue with a high-ranking officer with the applicant's first name to the Coast Guard community by calling Coast Guard offices to try to discover the applicant's last name and command. With his affair known by members of the local community, the applicant was no longer an appropriate representative of the cutter or the Coast Guard at community or media events, as XOs are sometimes required to do when COs are occupied elsewhere. Therefore, the applicant's adultery had essentially disqualified him from performing the leadership role expected of the XO of a large cutter, and his CO did not err by removing him from his duties. Although the applicant argued that his affair and the husband's response to the affair should not have caused his removal or had such a great impact on his career, the Board finds that having the affair become known in the local civilian and military communities, which are not isolated from each other, and being removed from his duties were foreseeable potential consequences of his misconduct.

5. Composition of rating chain. The applicant alleged that the SOER is erroneous and unjust because the CO served as both Supervisor and Reporting Officer and because the Reviewer was junior to his CO. COs who are lieutenants or higher, however, may serve as both Supervisor and Reporting Officer for a subordinate,¹³ and in the Board's experience it is normal for the CO of a cutter to serve as both the Supervisor and Reporting Officer of the XO because there is no officer between them in the chain of command. In addition, Chapter 5.A.2.d. of COMDTINST M1000.3A allows the designated Reviewer to be junior to the Reporting Officer unless the Reviewer is required by policy to submit comments, which was not true in this case.¹⁴ Although the applicant argued that these policies are unjust when applied to derogatory SOERs, the Board is not persuaded that an officer's misconduct or poor performance should require the Coast Guard to change the membership of the officer's rating chain. Moreover, in this case, the CO was both the applicant's immediate supervisor and the officer best placed to assess the applicant's performance in the performance dimensions completed by the Reporting Officer. Nor has the applicant shown that the Reviewer failed to ensure that the SOER comments supported the assigned marks and that OER policies were not violated.

6. SOER marks. The applicant alleged that the SOER marks are erroneous because his adultery had "no bearing on [his] judgment or professionalism as an officer"—two performance dimensions for which he received low marks. The Board strongly disagrees and notes that the written standard for a low mark of 2 for "Judgment" on the SOER form includes poor decision making, making decisions without considering impacts, and not weighing risks, all of which his misconduct reflected. And to earn a mark of 4 for "Professional Presence" and officer must convey a positive image of himself and the Coast Guard and abide by the core values of honor, respect, and devotion to duty, which the applicant did not do. His adultery constituted both a lapse in judgment and a lack of professionalism. He failed to consider the potential impact of his decisions; failed to weigh risks; failed to convey a positive image of himself and the Coast Guard to the woman, her husband, and others who learned of the adultery; failed to show respect for a military family (his own); and disqualified himself from his duties as the XO. Likewise, his questionable ethics in cheating on his wife; toleration of his own indifference to the law concerning adultery; and creation of a major personnel problem for his command (the loss of the XO)

¹³ COMDTINST M1000.3A, Article 5.A.2.d.(3)(a)[4][a].

¹⁴ COMDTINST M1000.3A, Article 5.A.2.d.(4)(a) and (a)[1].

support the mark of 2 for “Responsibility.” The Board finds that the applicant has not proven by a preponderance of the evidence that the marks on the SOER are erroneous or unjust.

7. SOER comments. The applicant alleged that the SOER comments are erroneous and unjust because the affair revealed only a personal mistake and not a professional one; because his ability to perform his professional duties was not compromised; because his CO wrongly attributed the husband’s feelings to the whole community; because the Coast Guard’s reputation in the community was not disparaged; and because his conduct was not in conflict with good order and discipline and did not undermine his duties or responsibilities. For the reasons stated in findings 4 and 6 above, the Board disagrees. The applicant committed misconduct that involved a local civilian, and his misconduct foreseeably became known to “individuals in the community,” as the SOER states, which undermined his ability to lead and discipline the crew and made him an inappropriate public representative of the cutter. The applicant’s and the CO’s statements show that numerous individuals became aware of his misconduct, including, at a minimum, the woman, her husband, the friends and colleagues her husband consulted, the chaplain, the CO, and the investigating officer. And because he is an officer of the Coast Guard, this misconduct was Service-discrediting. The applicant also claimed that the affair did not reveal a “character flaw,” as the SOER states, but the Board finds that the applicant has not shown that his adultery cannot reasonably be considered evidence of a “character flaw.” Committing misconduct and risking one’s career to commit adultery are inconsistent with the good character and discipline required of a senior Coast Guard officer. Therefore, the applicant has not proven by a preponderance of the evidence that the SOER marks or comments are erroneous or unjust.

8. SOER completeness. The Board finds that the applicant has not proven by a preponderance of the evidence that the SOER is incomplete. The applicant argued that the SOER is incomplete because it does not include some of the accomplishments he listed in his input and in his draft. The SOER does have a room for a few more comments, as the applicant noted, but there is no requirement that all of the comment blocks be filled. The purpose of OER comments is not to list an officer’s accomplishments but to support each assigned numerical mark that is higher or lower than the “standard” mark of 4 with an example of the officer’s performance that supports the assigned mark.¹⁵ Because the CO marked eight of the eighteen of the performance dimensions as “not observed” due to the brevity of the evaluation period, fewer comments were required to support the assigned numerical marks.

9. Restrictions on the SOER addendum. The Board finds that the applicant has not proven by a preponderance of the evidence that PSC erroneously or unjustly required editing of his draft SOER addendum, which prevented him from explaining all of the circumstances surrounding his misconduct. The record shows that PSC properly advised the applicant that specific comments referring to his marital or family status or to performance that occurred outside of the evaluation period are prohibited.¹⁶ The first restriction prevents promotion boards from considering officers’ marital or family status in making their selections, and the second restriction properly confines the comments to the officer’s performance during the evaluation period. The record also shows that the parts of the draft SOER addendum that PSC identified as violating the

¹⁵ COMDTINST M1611.1A, Articles 2.E.4. and 2.F.2.

¹⁶ COMDTINST M1611.1A, Articles 2.B.10. and 2.B.11.

restrictions refer specifically to the applicant's wife or family or to his performance during prior evaluation periods. And after PSC informed the applicant which comments were considered restricted, the applicant quickly submitted a different version of his SOER addendum, which included information about his professional stress and the disruption of his personal life without violating the restrictions. Although the restrictions in COMDTINST M1611.1A apparently prevented the applicant from adding all of the details about his family life and prior performance that he wanted to add to the SOER, he was allowed to present such information to the Special Board in his statement to that board.

10. Continuing validity of the SOER. The applicant argued that the SOER should be removed because it no longer serves any purpose except to shame him. Like all of his OERs, however, the SOER documents his performance during a reporting period. The SOER is no less valid or important because it is derogatory. Because the applicant has not proven by a preponderance of the evidence that the disputed SOER is 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, the Board finds no grounds for removing or changing it.¹⁷

11. Lack of hearing and attorney on Special Board. The applicant argued that the Special Board proceedings were erroneous and unjust because he was denied an oral hearing and none of the board members were [REDACTED]. The applicant did not cite any law or policy that authorizes or requires hearings when a Special Board is considering removing an officer's name from a promotion list or that requires a Special Board for [REDACTED] to include [REDACTED] as a board member, and the Board knows of none. Promotion is a privilege, rather than an entitlement, and an officer does not have a constitutional liberty or property interest in his selection for promotion that would mandate any due process except what is granted by statute or regulation.¹⁸ Nor is the Board persuaded that the officers who served on the Special Board were unable to appreciate the quality of his OERs and the breadth of his experience and skills just because they were not [REDACTED].

12. Addendum to the statement to the Special Board. The applicant alleged that he was denied due process because his addendum to his statement was not submitted to the Special Board. He alleged that this error deprived the Special Board of the information that OPM was going to let him "fleet up" to fill his supervisor's O-5 position despite having convened the Special Board. Assuming that the applicant's addendum to his statement to the Special Board was not actually included with the statement at Tab A to the proceedings, which the Coast Guard did not deny, the applicant has not shown that the 21-day limitation on his submission was improper. But assuming that it was improper, the question remains whether the Special Board was actually denied material information in making its decision. The record shows that the Special Board was informed of the applicant's possible "fleet up" and of [REDACTED] confidence that the applicant could do his supervisor's job and perform well in an O-5 [REDACTED] position in the [REDACTED]'s October 13, 2015, endorsement of the applicant's statement to the Special Board:

¹⁷ *Hary*, 618 F.2d at 708.

¹⁸ *Blevins v. Orr*, 721 F.2d 1419, 1421-22 (D.C. Cir. 1983) (holding that "it is clear that military promotion decisions *simpliciter* are not susceptible to due process challenges, inasmuch as there exists no property or liberty interest in a military promotion *per se*").

[The applicant's] work quality is easily what we want from a Commander. In fact, I just allowed the current O-5 office deputy to compete for an offseason assignment because I know [the applicant] can step into that billet and function instantly without any programmatic gap.

The applicant's November 10, 2015, addendum added only the information that because the current office deputy had actually received the offseason assignment, he was going to fleet up as the [REDACTED] had anticipated and that, at the Division Chief's request and because the Division had been over-billeted due to the applicant's assignment, OPM-2 had adjusted the Division's Personnel Allowance List to reflect the fact that the [REDACTED] had decided that the applicant would fleet up to the O-5 position in January, when the incumbent left.

The Board finds that the applicant has not proven by a preponderance of the evidence that the Special Board was denied material information, assuming that the Special Board did not see his November 10, 2015, addendum to his statement to the Special Board. The addendum did not include information that was materially different from the [REDACTED]'s endorsement for the purpose of the Special Board. The [REDACTED]'s endorsement informed the Special Board that the applicant would fleet up to the O-5 position, with the [REDACTED]'s full confidence, if and when the O-5 office deputy left. The applicant emphasized the fact that his addendum shows that OPM-2 had adjusted the PAL, as if the adjustment of the PAL somehow reflected a change in OPM's assessment of his misconduct, his abilities, or the need for a Special Board. But the emails dated November 9, 2015, do not show that the Chief of OPM had changed his mind about the need for the Special Board; the emails show that the [REDACTED] was going to fleet up the applicant—just as the [REDACTED] had anticipated in his endorsement for the Special Board—and that therefore and because the Division had been over-billeted, the Division Chief “had OPM-2 adjust the PAL to reflect [the applicant's] filling the O-5 deputy position.” The Board finds that the fact that the applicant would be fleeting up as anticipated and the fact that OPM-2 had adjusted the PAL to reflect the fleet-up at the Division Chief's prompting do not constitute materially different information about his ability to perform as an O-5—or about his superiors' confidence in his ability to perform as an O-5—from what the [REDACTED] had already told the Special Board in his endorsement.

13. Special Board's recommendation. The Board finds that the applicant has not proven by a preponderance of the evidence that the recommendation of the Special Board to remove the applicant's name from the promotion list was unsupported or based on erroneous conclusions. The applicant's regular OERs show that his performance has been outstanding throughout his career except during his assignment to the cutter in early 2015. But the SOER shows that within weeks of reporting for duty as the XO of the cutter, the applicant used the internet to find a woman and committed adultery, which foreseeably could disqualify him from performing his leadership duties as XO—and did. Therefore, the Board finds that the Special Board's conclusions about the applicant's breach of good order and discipline, poor judgment and professionalism, mismanagement of his personal affairs, reduction of trust within the local community, failure to serve as a role model of ethical behavior, and failure to adhere to the Coast Guard's core values are supported by the SOER.

14. Other allegations and arguments. The applicant made numerous allegations and arguments with respect to the actions and decisions of his CO and others. Those allegations not

specifically addressed above are considered to be not dispositive of the case or not supported by substantial evidence sufficient to overcome the presumption of regularity.¹⁹

15. Conclusion. The Board has found no basis for expunging the SOER, disturbing the recommendation of the Special Board, returning the applicant's name to the promotion list, or removing his non-selections for promotion. Although the applicant asked to Board to take a "holistic view" of this case and conclude that his misconduct did not warrant the loss of his promotion or his retirement upon attaining twenty years of service, the Board finds that his misconduct reflected a fairly severe lapse of judgment, especially given his XO billet, and foreseeably warranted his removal from his primary duties based on its effect on his ability to lead the crew and represent the command. His removal required the CO to prepare the SOER, and the SOER in turn provided ample grounds for OPM-1's decision to delay his promotion and convene a Special Board to determine whether his name should be removed from the promotion list. And the preponderance of the evidence shows that the recommendation of the Special Board to remove the applicant's name from the promotion list was supported by the SOER and not based on erroneous or incomplete information. Accordingly, his requests for relief should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁹ 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

ORDER

The application of [REDACTED], USCG, for correction of his military record is denied.

October 27, 2017

