

**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. 2017-264**

████████████████████  
██████████ CWO2 (retired)

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**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on September 5, 2017, and assigned it to staff attorney ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated April 9, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant, a Chief Warrant Officer (CWO2) who retired on May 1, 2015, asked the Board to correct his record by removing a Special Officer Evaluation Report (SOER) dated March 22, 2013; void and remove his retirement; promote him to CWO3; backdate his promotion with back pay and allowances from June 1, 2013, to April 30, 2015; and change the Narrative Reason for Separation on his DD-214<sup>1</sup> from "Unacceptable Conduct" to "Retirement." The applicant alleged that the SOER and his subsequent loss of promotion were retaliatory actions for filing a complaint about a hostile work environment. His detailed allegations appear below the Summary of the Record.

**SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on July 20, 1987, and advanced to E-8 as an enlisted member. He was appointed to the rank of CWO2 on June 1, 2009.

From June 2011 through June 2012, the applicant served as a Finance & Supply Specialist at a Coast Guard Base. On the three Officer Evaluation Reports (OERs) that the applicant received in 2010, 2011, and 2012, he received no marks lower than a 5 (on a scale of 1 to 7, with 7 being the best). On his June 30, 2012, OER (the OER he received before transferring to the command

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<sup>1</sup> A DD 214 is prepared to document a member's release or discharge from a period of active duty.

at issue), he received three 5s, fourteen 6s, and one 7. He received a mark in the fifth spot on the comparison scale (out of seven spots), denoting “one of the many competent professionals who form the majority of this grade.” Comments included “superb resource mgr”; “incredible effectiveness as Financial Coordinator”; “extremely adaptable”; “strong professional presence”; “composed speaker”; “effective listener placed others at ease, very approachable & professional”; “kept team focused on long term success”; “took lead in fostering mutual respect & positive workplace climate among collective entities”; “performance clearly exceeded expectations”; “level headed & skilled decision maker always focused on the right priorities at the right times”; and “well qualified & highly recommended for promotion to CWO3 at the earliest opportunity with best peers.” The applicant also received a Coast Guard Commendation Medal dated September 28, 2012, for “outstanding achievement from June 2011 to September 2012.”

In June 2012, the applicant began working in the Logistics office at the same Base, even though his transfer orders, making him the Logistics Division Chief, did not officially start until the end of September 2012.

According to copies of emails submitted by the applicant, on June 27, 2012, an email was sent to Financial Managers regarding funding requests. Managers were told that budget cuts were made, so requests needed to be requested and backlog input needed to be submitted. On July 5, 2012, Lieutenant Commander (LCDR) S (the applicant’s military supervisor and the Department Head/Comptroller) forwarded the email to the applicant and stated “Any backlog input? I’d like to combine with ... current requests and submit. Note, deadline is tomorrow.” On the same morning, the applicant replied to LCDR S and copied two other enlisted personnel and requested backlog funds for four items, including \$1,350 for work coveralls. LCDR S replied the same morning and thanked the applicant. Later that afternoon, the applicant requested additional funds to be added to the list. On July 6, 2012, LCDR S responded and stated she would make the addition and asked “why the coveralls?” The applicant replied on July 7, 2012, and stated that SKs used them for working days because they were safe and durable.

The applicant also provided pages one and three of an email chain from September 17 to 19, 2012. The subject of the email chain is Coveralls. Members of the Base were discussing a purchase request (PR) for ordering the coveralls. The emails discussed whether or not the request for coveralls would be approved. Once approved, instructions were disseminated for where the coveralls could be worn (the emails included had no information about who would initiate the PR).

On December 12, 2012, the results for the PY (Promotion Year) 2013 CWO results were released. The applicant was listed for promotion to CWO3.

The applicant submitted an email dated February 25, 2013, and cc’ed to CIV R (the applicant’s first line supervisor and the Budget Officer) in which LCDR S asked the applicant when the transition date for the mailroom was and when he was intending to provide notice to the clients of the official move in date. The applicant replied on the same day and stated that he would be notifying the client on February 27, 2013. On February 27, 2013, at 8:26 a.m., LCDR S emailed an SK1 and copied the applicant and CIV R. LCDR S stated the following:

I continue to filter questions regarding the new mailroom. Focused on customer service, I requested an email to go out announcing the mailroom transition to include changes to services offered (i.e. 24/7 availability,

etc.). Has anything gone out yet? If so, please forward me a copy of what was sent. If not, I expect an email to go out today to all ... tenant commands.

The applicant replied to all at 8:42 a.m. on February 27, 2013, and stated:

I informed you 25FEB13 the official date would be today (after confirming transition with SK1). You previously stated to send out an all hands email of the move, in which was set to go out. Did I miss something [LCDR S]? Please advise.

Later that day, at 11:48, the applicant replied to just CIV R and asked her if she had time to discuss CDR P's (the applicant's reporting officer on his OERs and the Executive Officer (XO) of the Base) email<sup>2</sup> with LCDR S. The applicant stated that he wanted to ensure that CDR P had discussed the issue with LCDR S before the applicant spoke with him. CIV R replied and stated that she had spoken with LCDR S and that she had told LCDR S that part of the conversation "included what [CDR P] is now saying."

The applicant provided an email he sent on Friday, March 1, 2013, to CIV R and LCDR S. The subject line states "NOT FIT FOR DUTY 1 MAR 2013." The body of the email reads, "I am [not fit for duty] 01 MAR13 with a follow-up 1320hrs [Monday] 4MAR13. I will be onboard 4MAR13." He provided an attachment to this email, which was the medical document showing that he was found not fit for duty for one day on Friday, March 1, 2013.

### ***First Negative Page 7***

The applicant received two negative two CG-3307's ("Page 7s")<sup>3</sup> on Monday, March 4, 2013. The first is signed by his commanding officer (CO), CAPT J. CDR P and LCDR S both signed the Page 7 as witnesses to the fact that the applicant had refused to acknowledge receiving the Page 7 with his signature. It states the following:

You are being counseled regarding your inability to follow orders and meet standard performance expectations.

1Aug12: You failed to ensure GVs [government vehicles] were cleaned and washed for the COMDT's visit, as directed.

On 02Aug12, you assumed responsibility for conducting civilian progress reviews and received a detailed sample to follow. Further verbal and email guidance was provided detailing how to conduct progress reviews. After failure to complete the progress reviews timely in Dec 2012, on 8 Jan 2013, LCDR [S] directed the reviews to be completed by 11 Jan as quoted here "I expect to be notified of 100% completion before COB this Friday. If you do not complete 100%, I must be notified with an explanation as to why these remain delinquent." Progress reviews were not completed, and LCDR [S] was not provided an explanation for the tardiness. On 15 Jan a reminder was issued; the reviews were finally completed on 25 Jan, 28 Jan, and 12 Feb.

19Oct12: [CIV R] directed SOP updates, in preparation for the Forcecom Inspection, to be submitted by 31 October. Despite multiple reminders, you have sections that remain outstanding.

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<sup>2</sup> The applicant did not submit a copy of an email from CDR P in regards to this issue.

<sup>3</sup> An Administrative Remarks record entry, form CG-3307, better known as a "Page 7," is used to document a member's notification of important information, achievements, or counseling about positive or negative aspects of a member's performance in the member's military record.

4Dec12: LCDR [S] sent an email requiring all first class petty officer marks to be submitted early allowing for command submission by 17 Dec, to ensure review/markings final before the end of Dec. Marks were not submitted until 26 Dec.

6Dec12: LT [E] asked for a PR [purchase request] to be completed. On 9 January, LT [E] requested the status of the PR. It had not been completed, and you had to be directed 3 times to complete before submission.

18Dec12: Following the Forcecom Inspection, LCDR [S] sent an email stating the staffs need to remain proactive with correcting discrepancies from the inspection and that all discrepancies should be corrected NLT [no later than] 31 January. As of 28 Feb 13, your Division still has discrepancies pending.

20Dec12: LCDR [S] requested input for awards, with specific data requested but no input was submitted.

21Dec12: LCDR [S] directed you to provide the command with updates on the Forcecom discrepancy report every Friday. On 9 Jan 13, after noting no reports had been sent for the previous two weeks as directed, when questioned you stated that no reports were submitted because no input was received. You failed to seek input.

3Jan13: LCDR [S] forwarded award guidance that stated all departure awards needed to be submitted to the front office for review NLT 25 Jan. Prior to ... transfers, LCDR [S] reminded you that awards needed to be submitted well in advance, allowing time for review/approval. After multiple reminders, the awards were received on 28 Jan. Again on 30 Jan, LCDR [S] had to prompt the awards for [the members].

11Jan13: LCDR [S] sent an email reminder for weekly updates by COB 12 January. On 13 January, updates had not been received and LCDR [S] was forced to follow-up.

15Jan13: Due to continued missed deadlines, [CIV R] instructed you via email to complete 6 overdue tasks. [CIV R] also instructed you to provide the monthly vehicle spreadsheet NLT 25 Jan 13. The spreadsheet was originally requested in October and again in November. The format was provided, you simply had to ensure the monthly data was entered. On 16 Jan, you responded that you were "working on at present time." However, as of 28 Feb 13, you have not yet completed this task. [CIV R] also instructed you to update OOVA due to your failure to update it after two previous emails sent to you 9 and 10 January. As of 28 Feb 13, OOVA has not been updated.

17Jan13: Since assuming WEBTA responsibilities, you have consistently failed to certify accounts accurately and approve leave promptly. Despite completing WEBTA training, and receiving a civilian pay period calendar from [CIV R], you have failed to certify time and approve leave. On 17 January, [CIV R] notified you that you have a pending leave request yet you failed to approve before you certified the timecard.

22Jan13: Two separate emails from LCDR [S] directed mandatory attendance of Division personnel to 22 Jan Speed Mentoring event. When no members from [your team] were in attendance, [CIV R] asked you why your staff did not attend, you indicated to her that you didn't know about the event and the direction from LCDR [S].

22Jan13: You were provided marks and told to conduct counseling, ensuring counseling was completed before the end of the month to keep the members off the 60-day overdue report. Counseling was not done until [CIV R] asked about it on 25 January. Subsequently, SKC [B] completed the counseling.

23Jan13: Despite previous notification, you failed to attend a meeting with ..., [CIV R], and LCDR [S] to discuss [a member's visit to local station]. As the first line supervisor, it was critical that you attended.

24Jan13: You received an email from ... CFO Audit team requesting a status update of inquiry sent to you on 6 December 12 regarding an asset that you had failed to respond to.

24Jan13: Following submissions of spend plans in the fall, LCDR [S] informed you [your office] did not have a dedicated project for expenditures and that the ... project under MC was not to be used (it's designated as a reimbursable project). On 24 January, changes to the MC were noted.

15Feb13: LCDR [S] requested further bullets to support [two members'] departure award; no response has been received.

20Feb13: LCDR [S] asked for an update on the mailroom relocation. On 25 February, LCDR [S] again asked for an update on the mailroom transition, asking what date you intend to provide the tenant commands notice of the transition. Notice was not sent until after the transition was completed.

You have demonstrated a continued disregard for direction and established deadlines requiring continuous follow-up by your supervisors to ensure basic Division responsibilities are met. As a Division Officer and Chief Warrant Officer, this behavior is unacceptable. Further performance issues may result in further administrative or disciplinary action.

### *Second Disputed Page 7*

The second Page 7 dated Monday, March 4, 2013, is signed by CAPT J, and CDR P and LCDR S both signed it as witnesses to the fact that the applicant had refused to sign the Page 7 to acknowledge receipt. The Page 7 states the following:

You are being counseled regarding your disruptive and disrespectful attitude displayed towards supervisors and superior commissioned officers. Upon direction from Deputy Comptroller, [CIV R], to complete a purchase request you responded twice that you were not going to complete it. The second time, after being told that this was a direct order from the Comptroller (LCDR [S]), you replied "I don't care who said it, I am not going to do it."

This was not the first instance of inappropriate, disrespectful, and insubordinate behavior displayed towards your supervisor and/or a superior commissioned officer. Prior to your official transfer from ..., when LCDR [S] and [CIV R] met with you on 8 August 2012 to discuss their expectations, you loudly berated LCDR [S] and accused her of "poor leadership." This was following an inappropriate and disrespectful email response you sent to LCDR [S] and [CIV R]. Further, during a civilian progress review, in front of the civilian employee being counseled, you shouted at [CIV R] and told the civilian to "leave" because the things she said were "not right." After the civilian was excused, you continued to loudly berate [CIV R] for her "unfairness" to the civilian.

On 30 January 2013, you once again demonstrated inappropriate, disrespectful and insubordinate behavior during a meeting that I requested to discuss overdue awards for two of your departing members. Your behavior was so insolent that I was forced to clear the room of other attendees.

As a Chief Warrant Officer, I, as well as the CG demand courteous and respectful behavior. Your continuous display of disrespect towards your supervisors, and supervisor commissioned officers is unacceptable. This type of behavior will not be tolerated. Further examples of disrespectful attitude and outbursts may result in further administrative or disciplinary actions.

The applicant included in his BCMR application undated replies he drafted to rebut the allegations in these two Page 7s. His allegations in these documents have been included in the summary of his allegations below.

On March 4, 2013, at 3:26 p.m., which was the day the two Page 7s were issued, the applicant emailed CIV R, with SKC B copied. The subject line states, "NFFD [not fit for duty] 4-8MAR13." The body of the email reads "FYI: Have follow-up apt 12MAR13. Will be in office

11MAR13 unless unable.” The applicant provided an attachment, which was the documentation from medical showing he was marked not fit for duty for five days on Monday, March 4, 2013. On Tuesday, March 5, 2013, CIV R replied to this email, copying LCDR S, and stated:

Thank you for the updated [sic]. However, I am puzzled what this means. My understanding is “not fit for duty” does not mean you cannot come to work. I have seen others classified as “not for duty” but they still come to work.

Are you going to [travel]? Have you informed [your team] if you are not going to?

On the following Tuesday, March 12, 2013, the applicant emailed CIV R and SKC B with “12MAR13 DUTY STATUS UPDATE” in the subject line. The body of the email states “15 day desk work; with 5 weeks of physical therapy 3 times a week; will FYI of appointment itinerary upon confirmation.” He attached the medical documentation noting these orders.

On Thursday, March 14, 2013, LCDR S sent an email to the applicant, copying CIV R, with the subject “Pending Tasks” and wrote the following:

As we approach PCT, anticipation of OFCO release, CoC(s), transfer of ... property, civilian progress reviews, FTO hire, etc, it is imperative that the items that remain outstanding are immediately completed. Most have been pending since last fall and need to be completed asap allowing the staff to remain focused on the future.

On Friday, March 15, 2013, at 4:31 p.m., the applicant emailed Ms. T, CAPT J’s administrative assistant, with the subject “MEETING REQUEST WITH COMMANDING OFFICER.” The body of the email states that the applicant was requesting “a meeting with CO [CAPT J] 18, 19, or 20 March 2013.”

LCDR S emailed the applicant again in the Pending Tasks email chain on Monday, March 18, 2013, copying CIV R, and asked him to stop by and “explain why [he] did not report this morning as directed.” The applicant replied to that email the same morning and said this:

I am presently working with all aspects of my responsibilities at present moment. I want to inform you I will await resolution, or possible investigation findings before meeting with you and [CIV R] again. There has been an issue towards me directly with every meeting I have held with you and [CIV R]. I ask that you continue to communicate with me via email until resolution. As per me informing the CO, I am making every effort to communicate more, starting with e-leadership. As per your instruction, I will have an update to you by COB today, and will continue from here on.

On Tuesday, March 19, 2013, at 10:20 a.m., the applicant followed up on his March 15, 2013, email to Ms. T, and again asked for a meeting with the CO. He stated that CAPT J had informed him that the meeting request had not been received.

Also on March 19, 2013, the applicant emailed LCDR S, CIV R, and SKC B with the subject “19MAR13 at [Training location].” The applicant stated that he would be at a nearby location from March 19 to 21, 2013, for training “with exception to weekly meeting, requested command meeting, and the physical therapy itinerary previously provided.” He stated that he would provide daily updates of pending tasks and asked his supervisors to contact him if they needed him “regardless of nature.” After sending that email, the applicant emailed SKC B and a

civilian regarding SK Shop Transition Plan. He stated that he would be in a training that morning but asked that the plan be emailed to him because he would still be able to discuss while in the training. He stated that he would be back at lunchtime so that they could finalize the plan “at soonest.”

On March 19, 2013, CAPT J emailed a civilian working on the applicant’s EEO claim regarding a resolution for the applicant’s claim and copied CDR P, the Chief at the applicant’s next office, the applicant, and two other civilians. The applicant submitted only one page of this email chain, but it shows that CAPT J stated that he had met with the applicant on March 14, 2013, and they spoke “at length about [the applicant’s] concerns [with] regard to his claim of a hostile work environment.” CAPT J listed the eleven items the applicant wished to see for resolution and the progress of each of them (the page cuts off at number eight). CAPT J replied to this email the same day and corrected himself as follows:

I need to correct a previous statement. I was just informed by Ms. [T] my Administrative Assistant that [the applicant] made an inquiry to Ms. [T] to get on my schedule late Friday afternoon. Ms. [T] was not at work yesterday due to illness and did not see the email until this morning.

### *Applicant’s Formal EEO Complaint*

The applicant filed an Equal Employment Opportunity (EEO) complaint on March 19, 2013, against CIV R and Commander (CDR) P, the XO, in which he complained of harassment (non-sexual). The applicant alleged that he had been subjected a hostile work environment and to reprisal for a protected communication to CIV R on February 27, 2013, when he informed her that he would contact the Civil Rights office. The applicant alleged that the two Page 7s and his relief from duties were reprisal because he had previously told CIV R that he would file a complaint.

### *Applicant’s Removal and SOER*

The applicant was removed from his duties on March 22, 2013, and reassigned to another office. Because he was removed from his duties, he received a derogatory SOER covering the period July 1, 2012, to March 22, 2013. The SOER is signed by LCDR S, as Supervisor; CDR P, as Reporting Officer;<sup>4</sup> and a captain who was Chief of the Coast Guard Office of Base Operations, as Reviewer. On the SOER, the applicant received very low marks of 2 for the performance categories Adaptability, Speaking and Listening, and Responsibility. He also received ten low marks of 3, two standard marks of 4, and three above-standard marks of 5. LCDR S’s comments for the performance of duties section of the OER state the following:

Conducted exceptional ... property management & turnover; accurately managed ... budget from July-September, worth approximately \$200K, & handed over to supervisor to finish closeout. Spearheaded \$822K transfer of excess property from local cmds. Following FORCECOM inspection, corrected discrepancies in property & motor pool however, required constant prompting & oversight. Shared procurement knowledge resulting in quick turnaround of supply orders. Inventoried migrant supplies to increase warehouse capacity; coordinated additional storage to support 3 Fast Response Cutters. Severely struggled in adapting to high-tempo demands; constantly missed deadlines despite reminders & counseling, required arduous prompting. FORCECOM updates/corrections, civilian & enlisted evals, awards & required reports were submitted/completed late. Even after the supervisor drafted the desired template & provided repetitive reminders

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<sup>4</sup> When the SOER was signed on April 17, 2013, CDR P was serving as the Base CO.

over a 6-month period, the monthly Motor Pool vehicle report, which was critical due to a previous CGIS investigation, was never provided. Failed to comply w/ cmd's customer service vision; transitioned mailroom w/out customer notification. Displayed complete disregard for orders & established deadlines stating "deadlines are minute." Failed to recognize the co-relation between timeliness & performance.

LCDR S's comments for the communication skills section state the following:

Demonstrated inability to express ideas in a professional & respectful manner; when confronted w/failure to meet duties & established deadlines, [the applicant] displayed defensive, argumentative, abrasive & hostile attitudes towards supervisors, outright yelling at times. Despite counseling, behavior continued w/insubordinate & hostile behavior exhibited towards XO & CO. Correspondence received, required minimal edits; documents submitted properly crafted, thorough & concise.

LCDR S's comments for the leadership skills section state the following:

Displayed chronic inability to lead & foster cohesion. Unable to coordinate timely completion of assigned tasking despite high performing staff. Failed to provide structure, planned priorities & divisional functions to subordinates, thus missing deadlines. Fostered dysfunctional relationship w/cmd; exhibited hostile, abrupt, & disrespectful behavior towards GS-13, O-4 Dept Head, XO, & CO when questioned about failure to meet assigned tasking; failed to take responsibility for actions & implement corrective measures. Poor leadership & communication skills led to loss of significant travel funding; failed to timely notify of change in availability to travel, which incapacitated supervisor's ability to reschedule Accountable Property Officer (APO) relief ... Rest of assigned team travelled, but could not complete tasking due to [the applicant's] absence (incoming APO). Evident inability to prioritize duties; scheduled/attended Microsoft Office training vs. completing overdue tasking. Effective evaluator, EERs accurate & fair. Failed to document civilian mbrs' performance issues; copied first progress review into mid-period progress review; cmd unable to place mbr on performance plan due to poor documentation & copied eval. Failed to review mbrs' mid-period progress review input & address hostile work environment complaint against Sector EO.

The Reporting Officer, CDR P, concurred in LCDR S's part of evaluation, assigned the applicant a mark in the first (lowest) spot on the comparison scale, indicating an "unsatisfactory performer," and commented as follows:

Failed to meet cmd expectations, could not be entrusted w/critical tasking due to poor timeliness. Unable to incorporate cmd's vision "Tip of the Spear in Mission Support" into ... logistics division daily operations. Required arduous supervision & follow up to ensure completion of assigned tasking. Unable to handle full responsibilities of Logistics Division Officer; Supervisor completed bulk of civilian administrative burden including hiring, counseling, & correspondence w/supported cmds. Evident inability to delegate & foster teamwork w/in division & department.

CDR P's comments for the personal and professional qualities section of the SOER state that the applicant—

Assumed ... supervisory role to ensure successful program closure; assumed Physical Inventory Control Officer collateral for ... inventories totaling approximately 3,000 parts valued at \$1M, enabling on time decommissioning of ... program in Oct 2012. Deployed w/ ... Contingency Repair Team after passage of Hurricane Isaac; provided critical Contracting Officer support, facilitating mission completion. As ... Logistics Division Chief, [the applicant] was unable to manage responsibilities, constantly missing requirements & deadlines. Supervisor had to lead division to ensure completion of required division duties. Demonstrated significant lapses in judgment, displayed poor military bearing during counseling/mtgs w/Senior Officers; yelled at CO when questioned about pending tasking, entered XO's office texting & had to be ordered twice to cease. Directed to complete a simple task by supervisor, stated "I'm not doing it." As APO, failed to cancel scheduled trip to ... w/2 other mbrs to initiate property transfer, & failed to notify supervisor



resulting in significant travel funding wasted, critical w/travel ceiling measures in place. Rigorous fitness regime; worked out 4 days a week & counseled mbrs on importance of diet & exercise.

CDR P's comments regarding the applicant's potential state the following:

Not recommended for promotion to W3. Despite frequent opportunities to improve performance & interpersonal skills, mbr failed to recognize own flaws & accept feedback demonstrating lack of professional competence & leadership. Many violent verbal outbursts, disrespectful behavior incidents, & insubordination towards chain of cmd clearly demonstrate mbr's inability to succeed in a military organization. Strongly believe mbr does not have capacity to lead division w/multiple duties, &/or lead very junior personnel. ... performance prior to ... assignment indicate mbr's capacity to handle single financial assignments, w/very limited supervisor duties & simple requirements.

### ***Applicant's Addendum to the SOER***

The applicant submitted an addendum for the SOER dated April 29, 2013, to respond to its contents. For each section of the SOER, he noted tasks or projects he had completed during the covered period. He denied that he had taken a cell phone into any meeting and stated that he took a journal in order to take notes so he was looking at the journal instead of looking up. He asserted that he adapted well and performed his duties as assigned.<sup>5</sup>

As Supervisor, LCDR S, endorsed the addendum and replied that the SOER is a fair and accurate representation of the applicant's performance. She stated that the applicant received frequent counseling to reiterate his requirements and expectations. She stated that the applicant failed to follow the provided templates and/or guidance. The Reporting Officer, CDR P, endorsed it and wrote that he concurred with the Supervisor's comments and that the SOER was a fair and accurate representation of the applicant's performance. CDR P stated that the supporting input provided by the applicant was properly reflected throughout the SOER. The Reviewer endorsed the addendum and stated that he concurred with the Supervisor's and Reporting Officer's comments (LCDR S and CDR P, respectively).

### ***Delay of Promotion and Notification of Special Board***

On May 8, 2013, the applicant received notice that his promotion to CWO3, which had been scheduled for June 1, 2013, was temporarily delayed "based on pending potential adverse information."<sup>6</sup> He was informed that he would be contacted when a decision was made that he would be promoted or that further administrative action was necessary. The applicant signed an acknowledgement on May 9, 2013.

On October 24, 2013, the applicant received notice of "Proposed Special Board Action." The board was initiated in order to determine his suitability for promotion to CWO3.<sup>7</sup> If the board found the applicant not suitable for promotion, it would recommend to the Secretary that his name be removed from the PY13 CWO3 selection list. The applicant was informed that he could submit

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<sup>5</sup> The addendum included additional arguments and complaints that the applicant included in his EEO complaint and application to the Board.

<sup>6</sup> U.S. Coast Guard, OFFICER ACCESSIONS, EVALUATIONS, AND PROMOTIONS MANUAL, COMDTINST M1000.3, Article 3.B.6.b.

<sup>7</sup> *Id.* at 3.B.5.a. and Military Separations Manual, COMDTINST M1000.4, Article 1.A.20.b.

comments on his behalf to the board. He was also informed that he could request retirement in lieu of involuntary board action within ten calendar days. The applicant signed an acknowledgment of this notice on October 25, 2013.

On October 31, 2013, the applicant provided comments to the Personnel Service Center (PSC) for consideration by the Special Board. He stated that his withheld promotion stemmed from a falsified SOER and two falsified Page 7s that were given for retaliatory purposes. He summarized some of the awards and commendations he had received at other commands where he had served as a CWO. He stated that he had performed his duties of CWO2 while assigned to the Base and had volunteered to start working in June 2012, months before he was scheduled to officially transfer. The applicant stated that when he began taking on more responsibility, he “was perceived as abrasive by [his] supervisors while asking the questions needed to improve productivity.” He stated that he was then seen as an opponent instead of a team player. He stated that he tried to build a relationship with CIV R and LCDR S before going to CAPT J with his issues in January 2013. His biggest concern was that he was being accused by CIV R of disobeying orders. The applicant stated that in a meeting with CAPT J, CAPT J acknowledged his concerns “but nothing more.” The applicant stated that after the meeting CIV R and LCDR S degraded his responsibilities and continued to build on their negative perception of him. The applicant stated that this became clear to him when CAPT J yelled at him during a meeting yet LCDR S and CIV R had documented information to disprove what CAPT J was yelling at the applicant about. When the applicant asked LCDR S about this, she stated that the applicant “had not done anything since reporting.” The applicant stated that it was then that he realized he had exhausted every attempt to demonstrate his worth, so he informed CIV R that he would consider contacting the Civil Rights Directorate because he felt he was being treated unfairly. The applicant stated that he was then relieved of his duties during the informal EEO phase. He stated that he continued to perform at “a high level” while at his new duty station.

On November 1, 2013, the applicant’s comments were endorsed by a member of his new command. The Captain stated that the applicant was performing at a “level commensurate with other CWO3s.” The applicant was a valuable addition to the staff and had taken on several projects and responsibilities. The applicant had shown he was “an extremely motivated officer who [was] willing to work overtime in order to do whatever it takes to complete a task.” The applicant had never missed a deadline and consistently updated his chain of command on his progress. The Captain stated that the applicant had his recommendation for promotion to CWO3.

### ***EEO Investigation***

The Coast Guard Civil Rights Office conducted an investigation of the applicant’s claims. Several witnesses were interviewed by the investigating officer pursuant to this complaint. The first was CIV H, the Area Vehicle Manager who had held that position for fifteen years and had worked for the Coast Guard as a civilian for twenty-one years. CIV H stated that the applicant was his first level supervisor beginning around October 2012 but he had met the applicant much earlier, when the applicant arrived at the Base in 2011. When CIV H was asked to describe what he saw with regard to a meeting with CIV R and the applicant in August 2012, he said this:

I do not recall the specific date, but it was during the mid-term performance marking period. I was called into [CIV R’s] office to go over my performance report. I have always received excellent performance

reports, but when I met with her she advised me that even though I may be performing extra duties that are not included in my position description, I was not doing excellent work. As background, my position description was probably written in the 1980s and does not portray an accurate description of what I do. Additionally, [CIV R] wanted to hold me accountable for all of the finance duties for the 22 local vehicles which is a duty the storekeepers perform.

[The applicant] was present during the meeting. As background, when [the applicant] first reported to duty he sat down with me for a couple of days in order to determine what I did so he was aware of my duties. During the meeting [CIV R] was reviewing my work evaluation for the period and told me I was not performing well because I did not provide her information for the pool of vehicles. I advised her that was not my job and I was not responsible for financial responsibilities. [The applicant] attempted to defend me and she told him he could leave the meeting because he was not officially on duty yet. As he was leaving [CIV R] told me "and you, I am going to fire you." I told her she wasn't going to fire me because I had not done anything wrong. [The applicant] summoned the Union representative, Mr. [N] who came into the office and told me I could get back to work.

During the meeting [CIV R] was yelling, but [the applicant] never raised his voice and was not unprofessional.

The next day [CIV R] did apologize to me and [LCDR S] also apologized for [CIV R] saying she was going to fire me.

Since the first day I met [CIV R] she and I have had problems. Even though she knows nothing about vehicles she constantly tries to tell me what to do, even though the only thing she knows about is the budget. [CIV R] has had difficulties with most employees, but the command refuses to address her inappropriate actions towards me and others. However, the previous command kept [CIV R] corralled, but when [CAPT J] arrived he turned her loose.

CIV H was also asked to respond to the applicant's allegation that the command's actions against the applicant had constituted harassment and discrimination on the basis of reprisal. CIV H stated that he believed that CIV R "would do anything possible to maintain her 'power' and you cannot convince her of anything other than what she believes." He added that since the applicant filed the EEO complaint, CIV R had been taken out of her supervisory role and operations were running much better. When asked if he would like to add anything else, CIV H stated the following:

[The applicant] saw and realized what I was going through and dealing with second level supervisor that produced and caused a hostile environment in the work place. This work situation was not what I expected from the Coast Guard that I have worked for over 20 years. ... I have ... work[ed] above my grade description for my whole career, I have absolute proof of this. I am soon ending my career and I did not realize my expectations, I am still a GS9 that has been doing GS-11 work for the past 15 years, position description still uncorrected showing duties of the 1980's. I have absolute proof of this but apparently it doesn't matter, but it did matter to [the applicant], [a] stand up guy who saw wrong and wanted to correct it now he is paying. We can't always have yes folks if this happens things are likely to stray away from what is moral and correct in any organization. We need in the organization folks like [the applicant] not a blind follower who witnessed abuse of power and refused to accept the situation. [Sic].

The next person interviewed was Mr. N, the union representative. He also worked as the Engine Shop Work Leader and had held that position for five years but had worked for the Coast Guard for twenty-eight years. Mr. N had no supervisory relationship with the applicant; he only knew him because they worked together. Mr. N was asked to discuss what he observed at the August 2012 meeting and said this:

I do not recall the specific date, but it was during the mid-term performance marking period when [the applicant] came to my office and said he needed me to be a representative for [CIV H]. I went to [CIV R's] office and she was going over [CIV H's] performance marks, and was trying to tell him what his job was even though he had been performing the job for many years. The [applicant] was attempting to defend [CIV H] and [CIV R] did not want him to speak for [CIV H]. She kept telling him to be quiet and kept pointing [her] finger him in a disrespectful manner.

During the meeting [CIV H] was trying to explain why he could not do something related [to] fuel credit cards and was telling her the amount of work he had, but [CIV R] would not listen to him.

When the conversation became heated I said "this meeting is over, done with" and at that time [LCDR S] came in and wanted to know what was going on. I told her it was over and she responded by stating if [Mr. N] says it is over, it is over and we all left. ...

[CIV R] was being disrespectful towards [CIV H] and [the applicant] by not letting people speak and every time [the applicant] would try to speak she would tell him to be quiet and this occurred about half a dozen times. Additionally, every time [CIV H] would try to speak [CIV R] would interrupt him. [CIV R's] voice was also loud when speaking to [the applicant] and stern with [CIV H]. I would note that [the applicant] was not loud and was professional the entire time I was there.

The applicant was interviewed for the EEO investigation as well. He stated that he had informed his supervisor, CIV R, on March 1, 2013, that he intended to file an EEO complaint. The applicant stated that he was relieved of his duties on March 22, 2013. He was told he was relieved of his duties "for being a poor performer and being disrespectful towards [his] supervisor and superiors." He added that the previous CWO in his position "was relieved from duty" because he had fraternized with junior enlisted personnel and because he was incompetent. The applicant discussed an encounter with LCDR S on August 8, 2012, when she emailed him and copied two different commands on an email regarding a government vehicle which she believed needed to be cleaned. The applicant emailed her back requesting that she give him a call because he "was still in the office." The next day they met and LCDR S "said the tone of [his] email was inappropriate and she was an O-4 and [he] was a W-2." The applicant stated that his email "only said that [he was] in the office and please give [him] a call and later [he] emailed her to ask that in the future she give [him] a call when problems arise since [he] had no idea what she was talking about." He stated that during the meeting LCDR S was raising her voice at him and he acknowledged that he raised his "voice back to her."<sup>8</sup>

The applicant stated that he believed he was removed from his duties because he informed CIV R on March 1, 2013, that he was going initiate the EEO process and then on March 4, 2013, he was given two negative Page 7s describing over twenty alleged performance discrepancies. The applicant stated that all of the discrepancies, with the exception of instances on December 20, 2012, January 12, 2013, and January 20, 2013, when he and CAPT J agreed that they had raised their voices towards each other, were false. He added that from the beginning of the EEO process, he was willing to use the mediation process but on March 22, 2013, CAPT J rejected mediation and relieved him of his duties. The applicant stated that he did not think that CIV R liked the fact that he had tried to address procedural issues, would request clarification, and would try to meet with supervisory personnel. The applicant stated that he had been scheduled to arrive in October 2012, but he reported around June 6, 2012, "to assist the Division." He claimed that LCDR S had told him that he "was only needed for 'adult supervision' meaning all [he] had to do was stay in

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<sup>8</sup> The applicant did not submit a copy of this email chain.

[his] office and look around.” The applicant told LCDR S that he was there to work even though he had reported early. He stated that he was also advised not to interact with SKC B, but he needed to interact with her because she was an E-7 and the “backbone” of the shop.

The applicant discussed other issues he had with LCDR S and CIV R during his time at the command. He stated that in June 2012 a member was in her third trimester of pregnancy and was getting sick from the fumes of a roof repair. The applicant told her that she could relocate to another office in order to get away from the fumes. He stated that thirty minutes later CIV R overturned his decision because he was told he could not make personnel decisions. Another instance happened around August or September 2012, when another CWO came into the applicant’s office to ask him about the temporary mailroom billet and the CWO informed the applicant that he was taking that person away because that person was needed elsewhere. The applicant stated that he said “no problem.” The next day LCDR S told the applicant that he was “not allowed to make deals with personnel by letting them come and go.” The applicant stated that he told her that the member, who belonged to a different division, had been on a temporary loan and that they wanted her back.

The applicant then discussed the August 2012 evaluation meeting with CIV H. He stated the following:

In August 2012, [CIV R] wanted me to sit in on a meeting while she gave a civilian appraisal to [CIV H] and she told me what she was going to give him. She was going to give him all “fails to meet” and since I had worked with [CIV H] for a month I asked her if she had ever sat down with him and she said she did not need to because she knew his job. I advised her I disagreed with her and she needed to let him have performance input. She stated all I needed to do was to observe and I would have input during the next period. During the meeting with [CIV H] they had a heated discussion and I became a mediator and [CIV R] told me to stay out of it, pointed at me and told me to be quiet, then told me to leave the office. I also advised [CIV H] he should also leave and [CIV R] told him that if he left he would be fired so I called [Mr. N], Union Representative. [CIV R] also accused me of being a liar when I advised the Union Representative that she stated she would fire [CIV H] if he left.

Since this period of time I was perceived as being disrespectful and on March 1, 2013, right before I advised her I was pursuing an EEO complaint she told me I had not done anything since I had reported for duty.

The applicant was asked about the disputed SOER. The applicant stated that he believed that the SOER constituted harassment. He stated that he had given CAPT J a list of eleven remedies during mediation, including to be promoted to CWO3 but CAPT J had had “no clue” that the applicant was due a promotion. The applicant asserted that the only way he could have been removed from the selection list is if CAPT J had removed him. He stated that he believed that he received the SOER and was removed from the selection list so that his command could justify their discriminatory actions towards him so that they would have a documented basis upon which to base their retaliatory practices.

The applicant also discussed an issue he had had with CIV R regarding his medical status. He stated that on March 1, 2013, a Medical Officer had determined that he was not fit for duty and found him unfit until April 17, 2013. The applicant stated that on March 5, 2013, CIV R called him and told him to disregard an email she had sent asking why he was not at work because she knew “many people who were not fit for work and still reported for duty.” He stated that CIV R asked what was wrong with him and he told her that he had sent the medical information on March

1, and March 4, 2013. The applicant stated that CIV R called the Medical Officer on March 5, 2013, to verify the applicant's medical status and then called the applicant back to say that she spoke to the Medical Officer and everything the applicant had said was accurate. The applicant stated that he believed this was connected to his EEO claim because he believed that CIV R wanted to discredit him and that it constituted harassment.

CIV R was also interviewed by the investigating officer. She stated that she was the Administrative Officer and had been for four years. She had been working for the Coast Guard for four years but had been working for the Federal Government for about twenty years. She stated that the applicant was her subordinate and that she was his direct supervisor. CIV R had met the applicant when he "unofficially came onboard in June of 2012." She stated that around late February or early March 2013, the applicant told her that "he was not being allowed to talk to the higher ups in his chain of command and he 'might have to consider' filing an EEO complaint." CIV R was asked why the applicant was relieved of duty. She replied as follows:

For insubordinate behavior and work performance issues. Specifically, in August 2012, there was an issue with a vehicle not being ready for a VIP. The [applicant] was told to report in-person to [LCDR S]. Instead of following that directive, he responded through an email that she should instead call him which was an inappropriate request for a subordinate. The [applicant's] email precipitated a meeting with the [applicant], [LCDR S] and me where she outlined her expectations for the [applicant], to include chain of command and general respect to his superiors. During this meeting, the [applicant] loudly berated LCDR [S] and accused her of "poor leadership." His shouting was so loud, that even though he was behind a closed door, he was still overheard by the entire Finance & Accounting Staff. There were other egregious incidents where he displayed disrespectful and insubordinate behavior. Upon officially assuming his duties as the head of logistics, he was to take on the supervision of several civilians. In August 2012, as part of the hand-over, and because he was not yet "officially" onboard, I asked the [applicant] to *merely observe* a performance progress review. Unfortunately, instead of being a silent observer, the [applicant] took it upon himself to tell the civilian to "leave" because the things I said were "not right." The [applicant] then departed to get the union representative, which was an antagonistic and uncalled for action since this was only an unrated progress review. The [applicant] continued to loudly berate me for my "unfairness" to the civilian. He was yelling and screaming at me in front of the entire Finance and Accounting staff, where they all could hear and see. In another incident on January 30, 2013, [CAPT J] met with the [applicant], [CDR P], [LCDR S] and me. [CAPT J] called the meeting to discuss overdue award submissions for two departing members. [CAPT J] asked the [applicant] when he submitted the award forms. [The applicant] stated he submitted them in draft format. [CAPT J] told him that he still had not submitted them on time. [CAPT J] threw up his hands in frustration then the [applicant] threw up his hands and said "What do you want me to tell you captain?" [CAPT J] responded "Don't you throw up your hands at me!" [CAPT J] and the [applicant] were shouting and [CAPT J] told the [applicant] to not shout at him and the [applicant] responded by stating "Well you are shouting at me," and [CAPT J] replied, "I am the Captain and you are not!" [CAPT J] then told all of us to leave the room. These are the incidents I witnessed. (Emphasis in original).

CIV R denied that she ever told CIV H that she would fire him if he left the meeting. CIV R also stated that the SOER and the Page 7s were not created in retaliation for the applicant's EEO complaint; nor was he removed from his duties for the EEO complaint. CIV R stated that "one or both of the documents had already been prepared prior to March 4, 2013."<sup>9</sup> She stated later in the interview that the Page 7s concerning the applicant's behavior were "supposed to be issued around January 14, 2013," but that she did not know when they actually were issued. She stated that both of the Page 7s accurately reflected his behavior and performance. CIV R stated that the SOER

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<sup>9</sup> It is not clear which documents she is referring to. She may have been referring to the Page 7s as one document and the SOER as one document, but it is unclear.

also contained “facts of [the applicant’s] performance and behavior, and truthfully portrayed what had occurred,” although she admitted she had not seen the SOER. Regarding SKC B, CIV R stated that the applicant was never told that he could not interact with her, only that she was not in his chain of command. Regarding the applicant’s not fit for duty status, CIV R stated that she had emailed the applicant and told him to disregard a previous email, but it was because she had not realized that the applicant had sent documentation of his medical status. She stated that she never asked the applicant “what was wrong with him and [she] never called the Medical Officer.” CIV R denied that the applicant was discriminated against, harassed, or that any actions were taken in reprisal for his EEO actions.

### *Decision on EEO Complaint*

On December 27, 2013, the Coast Guard Civil Rights Officer made its final decision on the applicant’s EEO claim and found that the applicant had “failed to prove by a preponderance of the evidence that he was subjected to harassment and reprisal.” The decision stated that CDR P, CAPT J, and the Chief of the Coast Guard Office of Base Operations were also interviewed but “only those witness statements determined to be dispositive as to the ultimate determination of whether [the applicant] was subjected to unlawful discrimination were considered in this decision.”

The Civil Rights Officer found that the applicant’s management had “articulated legitimate, nondiscriminatory reasons for taking the actions at issue” and had denied that reprisal was a factor. The Coast Guard provided a summary of events that had occurred from CIV R’s testimony. CIV R, LCDR S, and CAPT J stated that the applicant had never informed them that he felt he was being discriminated against or harassed. LCDR S had also stated that on March 4, 2013—the day the Page 7s were signed—the applicant had been supposed to go on a temporary assignment but he “failed to notify his command that he was unable to go” despite the fact that he was “aware the prior week before he was to leave that he would most likely not be able to make the trip.” LCDR S stated that because the applicant did not go on the trip, they were unable to complete the mission of the trip and they had to call other members back who had travelled, wasting time and money. CAPT J stated that the applicant had reported that he felt that he was working in a hostile work environment. CAPT J stated that the applicant had a meeting scheduled for a Tuesday (no date was given) and instead of “attending as required, [the applicant] elected to attend elective training in downtown ... without telling his supervisors.” CAPT J asserted that protocol required that the applicant request training from his supervisors but he had not done so. CAPT J stated that LCDR S had wanted to give the applicant a Page 7 in fall 2012, but CAPT J had not given some of the issues much credibility. CAPT J said the situation never improved, though, regarding the applicant’s disrespectful attitude towards supervisors.

On January 30, 2014, the applicant appealed the December 27, 2013, EEO decision. He asserted that he had upheld the responsibilities of a CWO while performing his duties while he was assigned to the Base. He stated that he arrived in June 2012, although he was not scheduled to arrive until October 2012, and he was still meeting his responsibilities of his previous position during that transition period. He stated that he was not welcomed by his two supervisors (CIV R and LCDR S) and was “perceived as abrasive ... while asking the questions needed to improve productivity.” He stated that he was never abrasive, hostile, defensive, insolent, or berated anyone. The applicant stated that he had attempted to build relationships with CIV R and LCDR S before

taking the “communication problems” to CAPT J in January 2013. The applicant claimed that during the EEO process, CAPT J had stated that four of the eleven resolution requests had been resolved when they were not. The applicant brought this to CAPT J’s attention and the applicant was relieved from his duties two days later. The applicant stated that CAPT J later claimed that this was for “loss of confidence in [the applicant’s] performance.”

### *Misuse of GTCC, NJP, and Second SOER*

On February 19, 2014, the applicant was charged with violating Article 92 of the Uniform Code of Military Justice (UCMJ), Failure to Obey a Lawful General Order. The details of the offense state that the applicant had used his GTCC on multiple occasions from August 2011 to December 2013 “for other than official government business while on approved official travel, a violation of COMDTINST 4600.14.” An audit found ninety separate instances of misuse totaling \$18,270.41 and fifteen separate instances of a past due charge for a total of \$17,505.24. Each instance of misuse was stated to be a violation of Article 92 of the UCMJ. The applicant was interviewed and he “admitted to misusing his GTCC and using it as an easy source of money whenever he felt like he was in a small crisis and needed money.” The record of previous offenses noted that his only previous NJP was in 1990 for missing movement and his two Page 7s from March 4, 2013, were noted as well. The case was recommended to be disposed of at Mast.

On February 24, 2014, the applicant was tried at Mast for violating Article 92 of the UCMJ for misusing his GTCC. The applicant pled guilty to the charge. He was awarded a punitive letter of reprimand and no other punishment.

The punitive letter of reprimand is also dated February 24, 2014. A copy of the letter was placed in the applicant’s official record. It states that he was found to have violated Article 92 of the UCMJ for his conduct from August 2011 to December 2013. It continues follows:

You engaged in misuse of your Government Travel Charge Card, in violation of Article 92, UCMJ. You used your Government Travel Charge Card on multiple occasions for other than official government business while on approved official travel and, on a number occasions, did not pay the balance by the date it was due. You violated COMDTINST 4600.14, Government Travel Charge Card Policies. Additionally, your financial impropriety was a violation of Coast Guard policy and, based on your position of special trust, a security breach.

The applicant received a second SOER, dated February 24, 2014, to document the NJP. All of the eighteen performance dimensions are marked as Not Observed except that he received a mark of 2 in Judgment and a 3 in Responsibility. He received a mark in the third spot on the comparison scale, denoting a “one of the many competent professionals who form the majority of this grade”. The comments state the following:

[The applicant] violated Article 92 of the UCMJ when he knowingly disobeyed a lawful general order by using his government travel charge card while not on official duty. [The applicant] misused the government travel charge card on 90 separate occasions from August 2011 to December [2013] for a total of \$18,270.41 and was past due on 15 separate occasions for a total of \$17,505.24. [The applicant] did pay off the debt and payments that were past due never reached the threshold requirement for late fee charges nor to be considered delinquent. A Flag mast was held and [the applicant] was awarded Non Judicial Punishment.



[The applicant] admitted to own misjudgments and promptly made substantial corrections to prevent further incidence. Recent conduct does not accurately describe member's enthusiasm nor accurately reflect member's leadership ability to get things done. [The applicant] made a few mistakes, however, he consistently meets expectations and continues to successfully manage a significant workload. I firmly believe [the applicant] will move beyond this incident and will earn a recommendation for promotion and future assignment with increased responsibilities by the end of the next marking period.

### ***EEO Appeal Denied***

On March 28, 2014, the Deputy Officer for the Office for Civil Rights and Civil Liberties made a decision on the applicant's appeal of the December 27, 2013, EEO decision. The Deputy Officer found that the applicant's formal complaint had been correctly dismissed. The Deputy Officer found that there was substantial evidence to support the finding that the applicant had failed to prove that he was discriminated or retaliated against as he had alleged. The record showed "that management articulated a legitimate, nondiscriminatory reason for its actions, and [the applicant] provided no evidence to show that [the Coast Guard's] reasons for its actions were a pretext for discrimination."

### ***Delay of Promotion and Special Board***

On April 22, 2014, the applicant received a second delay of promotion notification. He was informed that "based on receipt of adverse information" contained in the second SOER (regarding the GTCC misuse) and the letter of reprimand, his promotion would continue to be "temporarily delayed." He would be contacted when it was determined whether he would be promoted or whether further administrative action was necessary. The applicant acknowledged this notification with his signature on April 25, 2014.

On May 22, 2014, the applicant was informed that a Special Board had been initiated to "recommend to the Commandant whether [he] should be involuntarily separated."<sup>10</sup> The applicant was informed of his opportunity to submit comments to the board or to request retirement in lieu of involuntary board action within thirty calendar days. The applicant acknowledged this notification with his signature on May 29, 2014.

On June 26, 2014, the applicant's Captain at his new duty station provided comments to the Special Board regarding the applicant. The Captain stated that despite the applicant's lack of judgment regarding his misuse of his GTCC, the applicant had "otherwise been a productive member" of the staff and had assisted with many projects and trainings. The applicant's efforts had increased efficiency and accountability. The Captain called the applicant "an enthusiastic officer who continue[d] to motivate others towards reaching District goals."

The Special Board convened on August 28, 2014, and reviewed the applicant's record and "all relevant documents." After reviewing the record, it was the opinion "of at least a majority of the members of the Board that [the applicant's] performance [was] unsatisfactory and the case should be referred to an evaluation board to consider separating the member."<sup>11</sup> The Special Board came to this conclusion notwithstanding the negative Page 7s and the disputed SOER, and instead

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<sup>10</sup> U.S. Coast Guard, MILITARY SEPARATIONS MANUAL, COMDTINST M1000.4, Article 1.A.20.

<sup>11</sup> *Id.* at Article 1.A.20.c.

based its decision on the applicant's "mismanaging personal affairs to the discredit of the Service, ... acts of personal misconduct prohibited by military or civilian authorities, ... [and] conduct unbecoming an officer"<sup>12</sup> related to the applicant's misuse of his GTCC from August 2011 to December 2013.

On October 16, 2014, the applicant was informed of the results of the special board. The board determined that the applicant should be referred to an "Evaluation Board." The Commander of PSC had initiated an evaluation board to "recommend to the Commandant whether the applicant should be involuntarily separated." The applicant was informed that he had the opportunity to submit comments. He was advised that he could receive a general discharge if he was separated by action of the evaluation board. The applicant was advised that he could request retirement in lieu of involuntary board action.

### ***Retirement***

On November 12, 2014, the applicant requested retirement in lieu of involuntary board action. He requested an honorable character of service. He stated the following regarding promotion eligibility:

I understand if this request is approved, I will be ineligible for promotion if already selected for the next higher grade. I further understand that a copy of my retirement orders will be included in my permanent record and will be visible to any future selection board.

On November 18, 2014, the applicant's request for retirement was approved for May 1, 2015.

The applicant retired on May 1, 2015. His character of service was Honorable and his separation code is RNC, denoting a voluntary retirement authorized when the member performed acts of unacceptable conduct. The narrative reason for separation on his DD 214 is "Unacceptable Conduct."

## **APPLICANT'S ALLEGATIONS**

The applicant, through counsel, stated that before the events at issue here, his evaluations throughout his career were consistently outstanding. He noted that the Officer Evaluation Report (OER) dated June 30, 2012, which the applicant received right before transitioning to the command where he received the first SOER, described him as "an enthusiastic, highly skilled officer who effectively used expert financial and contracting experience to improve [the] program by placing right emphasis on planning and proper execution." Around July 1, 2012, the applicant began working as Logistics Division Chief at the same Base but in a new office/command. His first level supervisor, CIV R, and his uniformed Supervisor, who signed the SOER, was LCDR S.

The applicant explained that on December 4, 2012, he was notified that he had been selected for promotion to CWO3, and the promotion scheduled to take place on June 1, 2013. But

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<sup>12</sup> *Id.* at Article 1.A.14.c.(2)(c), (2)(e), and (2)(g).

on March 4, 2013, the applicant received two Page 7 signed by his CO, CAPT J, which together listed over twenty alleged problems with his performance since August 1, 2012.

### *Allegations about the First Disputed Page 7*

The applicant alleged that both Page 7s dated March 4, 2013, were entered in his record in retaliation because he had previously told CIV R on February 27, 2013, that he would contact the Civil Rights office. Regarding the first disputed Page 7, the applicant asserted that it is highly unusual for Page 7s to have so many specifications on them. More importantly, the applicant stated, he was not counseled on any of the alleged conduct during that period. He stated that if the conduct had happened or if it was truly an issue, he would have been at least counseled verbally contemporaneous with the actions and not months later after he submitted an EEO complaint. The applicant also submitted allegations addressing each item on the Page 7 as follows:

- **August 1, 2012:** Regarding this item, the applicant stated that he had received an email from LCDR S, in which she had copied several commands, stating that he had received direct orders “involving cleaning of a GV” but he asserted that she had never mentioned anything to him. He stated that he replied to the email and asked her to give him a call because he was in the office. He stated that she never called, and the next day he emailed and said in the future to please contact him with any issues. The applicant stated that he was told that the tone of the emails was inappropriate. He replied that it looked bad to send him that email with others copied when the issue “could have been handled with a simple phone call.” The applicant stated that LCDR S replied that she was an O-4 and he was a W-2 and that he was being childish. The applicant told her that when she sent emails like that with commands copies, it showed “poor leadership to either incompetence or frustration” and he asked her to never call him childish. He stated that he later found out that the issue had been resolved before LCDR S had sent the email.
- **August 2, 2012:** Regarding this item, the applicant stated that the progress reviews were a work in progress. He stated that he was obtaining information from Tech Reps and was keeping CIV R informed while doing so. He stated that there would be gaps due to time off, holidays, or emergency leave, but he would keep CIV R informed of these issues. He stated that this was complete when a civilian returned from emergency leave and all necessary parties were able to have a progress review.
- **October 19, 2012:** The applicant stated that he never discussed Standard Operating Procedures (SOP) updates with CIV R until she returned to work in December 2012. He stated that his SOP updates were in process between December 7, 2012, and February 3, 2013. He stated that he turned in a final rough draft to CIV R and she mentioned it was still pending on March 1, 2013, to which he responded he had turned in a final rough draft. She did not reply.
- **December 4, 2012:** The applicant stated that the marks were completed and routed to LCDR S on or before December 17, 2013. He stated that CIV R met with him a few days later to discuss his style of evaluating. He stated that CIV R would inform LCDR S that

the evaluations were complete and she “proceeded with routing to command on or around 26DEC13.”

- **December 6, 2012:** The applicant stated that he never worked with LT E on PRs. However there was an issue once where he had to inform CIV R that his shop did not initiate PRs, but researched and reviewed them. An SK1 had said to the applicant that the previous CWO had initiated PRs because this shop had the subject matter expertise. The applicant replied that it is against Coast Guard policy to both initiate and approve PRs, but that he would be “more than glad to help should they run into problems initiating.”
- **December 18, 2012:** The applicant asserted that one of the discrepancies was a work in progress and should have been considered corrected because his shop was (then) currently working on reviewing personnel records for training, etc. The applicant asserted the same with a property; he stated that it was a work in progress that should have been considered corrected. He stated that the trailers had been identified and were being processed for new tags and proper documents.
- **December 20, 2012:** The applicant stated that he was only asked for one member’s award input, which he provided upon return from leave on February 17, 2013.
- **December 21, 2012:** The applicant stated that he kept LCDR S updated and he acknowledged the lesson learned to seek input in the future.
- **January 3, 2013:** The applicant stated that he had submitted award documentation to LCDR S and received no reply from her. He received an email from CAPT J requesting a meeting to discuss why the applicant had not yet submitted awards. The applicant stated that he contacted LCDR S to ask if she had informed CAPT J that he had routed the awards and she stated that CAPT J still wanted the meeting. He stated that the meeting “turned bad” and “should have never happened” because all that was needed was a discussion with LCDR S.
- **January 11, 2013:** The applicant stated that he provided the information to LCDR S “on several occasion[s],” and since the meeting with CAPT J, he had been more observant of LCDR S’ tasking emails.
- **January 15, 2013:** The applicant stated that the vehicle spreadsheet was assigned to his shop before his arrival. He told CIV R he would work with the other office, but that this was “not an easy task due to the disputes between [CIV R] and [the other office].” He stated that he obtained adequate information in January 2013 but was told this project was not a priority. He asserted that CIV R received all information needed via monthly reports from the other office.
- **January 17, 2013:** The applicant stated that CIV R was voluntarily involved in WEBTA duties since he had taken over those duties. But she continued to make entries and constantly stayed “on [him].”

- **January 22, 2013:** Regarding the first item with this date, the applicant stated that he had been told this event was a voluntary attendance event. He stated that he informed his staff that it was voluntary. The applicant stated that CIV R asked him why his office was not attending the event and he stated that it was voluntary. She replied that it was mandatory, so he informed his staff that it was mandatory. He stated that he has reviewed emails about the event, and nowhere did it say that the event was mandatory.
- **January 22, 2013:** Regarding the second item with this date, the applicant stated that he was involved with preparing evaluations for the E-4, E-6, and E-7 in his office. He stated that he reviewed marks for the E-6 in a two- or three-day turnaround period.
- **January 23, 2013:** The applicant stated that he was attending training during that time. He stated that he later spoke with the civilian “in detail” about the referenced matters.
- **January 24, 2013:** Regarding the first item with this date, the applicant stated that this was a pending issue. He stated that he was still working on this issue “as their audit needs arise.”
- **January 24, 2013:** Regarding the second item with this date, the applicant stated that he had misunderstood LCDR S’ “direction to supply not having a shared budget; informed of issue by LCDR; acknowledged and informed LCDR [he would] contact her with every request until supply [was] given its own budget.”
- **February 15, 2013:** The applicant stated that the “bullets were routed upon [his] return” from leave on February 17, 2013.
- **February 20, 2013:** The applicant stated that on February 25, 2013, he was asked about the timeline for the notification email and he replied that the move was then in transition and his office would send a notification email on February 27, 2013, which was the day the new mailroom would be opened. On February 27, 2013, he received an email requesting the notification email. He emailed CIV R and asked if he was missing something, given his previous email. He stated that CIV R came to his office and told him that she would tell the client what was going on.

### *Allegations about the Second Disputed Page 7*

Regarding the purchase matter request addressed on the second disputed Page 7, the applicant stated that he had informed the client via an email and a phone conversation that he had to initiate his own PRs. After CIV R told the client that the applicant’s shop would initiate PRs, the applicant requested a meeting where he “requested to know the specifics of [his] job/role in ... Division; also requested to know LCDR [S’s] direction as to philosophy, goals, protocols, and procedures.” He stated that LCDR S claimed that they had gone “through this already.” The applicant stated that he replied that he was “only trying to follow [her] direction, but cannot keep having these issues as if [he was] not doing [his] job when [he was] only following guidelines as per policy.” The applicant stated that LCDR S accused him of having disobeyed a direct order from CIV R, but CIV R had never told him what he had to do. He stated that she had inquired so

he informed her of the issue with the PRs. He stated that LCDR S told him to initiate PRs for “special” clients only and he replied that he would do so.

Regarding the cleaning of the government vehicle, the applicant repeated the allegations he made in response to the first Page 7. Regarding the civilian review with CIV R, he stated this:

Met with [CIV R] to discuss preparations for civilian ... progress reviews. All ... reviews would be electronically sent to me for third party verification. I would have to be present to observe ... civilian progress review. In discussions with [CIV R] before meeting with evaluatee, we had conflict as to factors that determine grade status. [CIV R] was stating the evaluatee barely meets expectations on the average block, regardless of the range of responsibility. I stated the region the evaluatee covers is one of the large stand high-op tempo for the Coast Guard. I was then told that I was only observing this period, and will have input next period upon officially reporting aboard. At the progress review meeting, [CIV R] asked the ... civilian his self-evaluation of the first block. While describing his reason for exceeding [CIV R] interrupted him, stating she has had complaints from people all over on his performance, and as their discussion heated I intervened requesting to reconvene due to my observance that evaluatee wasn't prepared for this type of performance counseling / evaluation. [CIV R] pointed to me and stated to stay out of this. As they continued [CIV R] informed the ... civilian his grade for the block in discussion, and is moving to next block. Same situation as prior where [CIV R] asked the evaluatee then cut him off as he gave his answer, and a heated discussion erupted. I again requested that the meeting be rescheduled; [CIV R] pointed at me and told me to be quiet. I then stood up and stated I don't need this, [CIV R] stated to get out of her office, I advised the evaluatee to leave as well, and [CIV R] stated to the civilian that if he left he would be fired. I then proceeded to find the civilian union representative to inform of [the] situation and requested he intervene. The civilian representative halted the progress review to reconvene at [a] later date, and advised me I had the right to file a complaint of my observance of [CIV R's] conduct towards myself and the civilian employee. I refused due to the possibility of this turning for the better upon becoming my responsibility.

Last, the applicant stated that CAPT J had requested a meeting with him to discuss awards. The applicant stated that CAPT J informed him that the award drafts were late and unsatisfactory. The applicant replied that he had been unaware of the command's award board process but was now aware so he would be sure it did not happen again. The applicant stated that CAPT J then yelled at him “is that all [he had] to say?” The applicant acknowledged that he yelled back “that is what happened, would never happen again, and there's nothing else [he] could say.” CAPT J instructed everyone except the applicant to leave. The applicant stated that CAPT J told him he had an “abrasive attitude.” The applicant stated that they talked for forty-five minutes to an hour about both of their tones, paying attention to procedures, and working with LCDR S. The applicant stated that at the end of the conversation they thanked each other and the applicant stated that he would work on his tone.

### ***Allegations about Removal and Disputed SOER***

The applicant stated that on March 22, 2013, just three days after he filed his EEO complaint, he was relieved of his position by CAPT J in retaliation and so received the retaliatory disputed SOER. He stated that the March 22, 2013, SOER is “factually inaccurate, erroneous, and unjust.” He stated that the BCMR is presented with “two diametrically opposed accounts” of what happened – the first is from the command during the EEO investigation and the second is from the applicant, his performance history through his evaluations, and statements of witnesses who served with him. The applicant asserted that the personality characteristics such as those alleged in the SOER “tend to persist over time,” yet no insubordinate or disrespectful behavior had been noted

in any of his previous evaluations throughout his career. He had never been counseled or disciplined for such or similar conduct issues.

The applicant argued that the context in which these actions were taken “strongly points to reprisal” and fully supports his assertion that his command never gave him a chance to succeed. The applicant also asserted that the Page 7s and the SOER stood “in stark contrast to [his] past duty performance.” He stated that the claims made about him were “simply not accurate reflections of [the applicant’s] conduct and duct performance.”

### ***Allegations about Promotion Delay***

Regarding the delay of his promotion on May 8, 2013, the applicant asserted that it was caused by the disputed SOER which was “factually inaccurate and unjust,” which made the delay improper. He claimed that had it not been for the unfounded SOER, he would have been promoted to CWO3 on June 1, 2013, as intended, and so retired as a CWO3 in 2014.

The applicant argued that had he been promoted on June 1, 2013, his misuse of his GTCC would have had “no bearing on his promotion or his retirement grade.” He emphasized that the Coast Guard had no intention of impeding the remainder of his career as evidenced by the punishment he received at Mast, which was only a punitive letter of reprimand. He asserted that if not for the March 22, 2013, SOER, he would have served for thirty years in the Coast Guard and would have retired as a CWO3 and not a CWO2.

### ***Allegations about EEO Investigation***

The applicant noted that the “responsible management officials, unsurprisingly, denied unlawful reprisal.” However, he alleged, only two of the seven witnesses he had identified were interviewed and both stated that they believed the applicant was retaliated against and provided statements that were very favorable for the applicant. (The applicant stated that he had originally named ten witnesses but reduced the list to seven at the behest of the investigator.) The applicant also asserted that CIV R was not a credible witness and that she had lied to the investigating officer.

### ***Allegations about GTCC Misuse***

The applicant noted that as NJP for his GTCC misuse, he was awarded only a punitive letter of reprimand, even though he could also have received correctional custody for up to thirty days, restriction, diminished rations, reduction of pay for up to sixty days, rank reduction, and extra duties for up to forty-five days.<sup>13</sup> He also pointed out the comments in the SOER, particularly that his Reporting Officer believed the applicant would “move beyond this incident and [would] earn a recommendation for promotion and future assignment with increased responsibilities by the end of the next marking period.” The applicant argued that this shows that his command had no intention for the GTCC incident to end his career. However, a Special Board was convened on August 28, 2014, and found that the applicant met the criteria for separation due to the misuse of his GTCC. The applicant noted that the board specifically found that neither the March 22, 2013, SOER nor the negative Page 7s provided sufficient grounds for involuntary separation.

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<sup>13</sup> See UNIFORM CODE OF MILITARY JUSTICE, Article 15, at 10 U.S.C. § 815.

### *Allegations about the Special Board*

The applicant argued that his misuse of his GTCC alone would not have resulted in a Special Board being convened to consider his suitability for retention. He emphasized that the SOER documenting his GTCC punishment actually noted that the applicant would still be of continued value to the Coast Guard and that he would “move beyond this incident.” The applicant’s command did not recommend him for separation but instead believed that he would earn a recommendation for promotion by the end of the following marking period.

The applicant stated that the record shows that the Special Board was initiated on May 22, 2014, based on both the disputed March 22, 2013, SOER and the February 24, 2014, SOER documenting the GTCC punishment. He also pointed out that the Special Board was originally initiated to determine his suitability for promotion to CWO3. He argued that the SOER documenting his NJP does not call into doubt his suitability to continue to serve and actually endorses his suitability. Therefore, the applicant concluded that the Special Board would not have been initiated without the March 22, 2013, SOER. Had there been no Special Board, the applicant would have had no need to request retirement in lieu of separation and he would have been able to serve to thirty years as supported by the GTCC SOER. Therefore, he asserted that his misuse of the GTCC alone would not have resulted in an involuntary separation process.

### *Supporting Documents*

In support of his application, the applicant provided many documents which are discussed above in the Summary of the Record. He also provided several supporting statements.

The first statement is from SKC B. She stated that she served with the applicant during the time in question and that she reviewed the disputed SOER. She stated that CIV R was “the most unprofessional civilian Coast Guard employee [she had] ever known.” SKC B stated that after CIV R arrived at the Base, the “work atmosphere went from pleasant and professional to exceptionally hostile.” SKC B stated that CIV R created a “climate of disrespect and abuse.” SKC B stated that the applicant arrived after CIV R and he brought energy and enthusiasm and worked to bring the unit together again. SKC B asserted that CIV R took an immediate disliking towards the applicant, “especially after he consulted directly with [SKC B] about his office arrangement and other issues involving enlisted personnel.” SKC B stated that CIV R “demonstrated complete ignorance about military rank and structure”; instructed my junior enlisted personnel not to come to me with questions or concerns, but to go directly to her”; “held meetings with our enlisted personnel without our presence”; and “confused the enlisted personnel and threw the organization into a state of chaos.” SKC B noted that CIV R “seemed to have particular problems with male authority figures such as [the applicant].”

SKC B stated that she had good reason to believe that LCDR S and CDR P knew that CIV R was “a very disruptive figure in the unit and would have preferred to terminate her employment.” SKC B stated that CIV R was loud, aggressive, and intimidated everyone including the officers. SKC B stated that the applicant “gave his best effort but was undermined by [CIV R] and the command’s lack of courage in dealing with her.” She stated that the SOER does not accurately



reflect the applicant's performance or attitude in her opinion. She admitted there was friction between the applicant and the command, "but it was not because he was insubordinate, disrespectful, or negligent in his duty performance. Rather, it was because he saw a terribly dysfunctional organization and command climate and tried to repair it." SKC B stated that she was aware the applicant also had filed an EEO claim and identified her as a witness, but she was "inexplicably" never contacted or interviewed. She stated that she was eager to share her side of the story. She suggested that the "Coast Guard be very cautious about ending [the applicant's] career based on the results of [the EEO] investigation." SKC B clarified that she did not write this statement because she was the applicant's personal friend; rather, she wrote this statement because she was "shocked and appalled that the Coast Guard, and the Civil Rights investigation especially, failed to see that [the applicant] was a victim of command incompetence and the vindictiveness of [CIV R]." She stated that she personally would not trust CIV R and that she felt sorry for anyone who had to work with her.

The second statement was from Mr. B. He stated that he served with the applicant during the time in question and he reviewed the disputed SOER. He stated that he did not believe the SOER "in any way accurately portrays [the applicant] or his duty performance." Mr. B stated that he personally warned the applicant "that he was walking into a disaster area" because he had heard "a lot of horror stories from [his] shipmates working" in that office. He stated that CIV R was "known for belittling people, which made for a hostile work environment." He stated that the leadership was "highly dysfunctional, morale was extremely low, and operations were a mess due to the unit not having a Warrant Officer for a few months." Mr. B asserted that the applicant was "set up to fail." Mr. B stated that the applicant was always walking around with a notepad making note of things to do. Mr. B stated that he once saw the notes and "it was so much to do for one person, due to [Base] not having a Warrant for a couple months and the new command did not try to ease him in, they just kept piling it on him. He was working so many extra hours and still did it with a smile on his face."

Mr. B stated that people were afraid of the leadership. He stated that CAPT J would give out "minion dolls" during meetings to whoever did a good job. Mr. B stated that everyone he spoke with was upset and offended by this practice because a minion is like a slave, but due to fear of retaliation, he did not say anything. He stated that LCDR S was also very short and unapproachable. She "walked around as if she was mad at the world." He stated that LCDR S would come into his office and would only speak to the E-3 and would not speak to him (an E-5) which he found "strange and uncomfortable." Mr. B stated that his experience with the applicant for over two years "was that he was an exceptional leader with a positive, can-do attitude, who tried very hard to foster a team atmosphere. He is a very quiet, soft-spoken man who [Mr. B had] never seen become angry or aggressive." Mr. B stated he particularly did not believe the SOER was correct in stating that the applicant had "many violent outbursts, disrespectful behavior incidents, & insubordination." He stated that the applicant was a "role model for how to handle pressure and job stress." He stated that the applicant was "very organized and spoke clearly on what he wanted accomplished" at weekly meetings and never had an ego. Mr. B added that he did not believe the officers who rated the applicant's SOER gave him a chance to succeed. Mr. B stated that he believed the applicant was "very successful in cleaning up the terrible mess he inherited when he began his assignment" despite the fact that when he started he was juggling two jobs and "was assigned more duties and tasks than any one person ever could accomplish." Mr. B stated that he

was listed as a witness for the applicant's EEO claim as well, but he was never contacted for an interview. He stated that it was his opinion that the applicant "was the victim of serious injustice" and he hoped that the Coast Guard would not prematurely end his career.

The next statement is from a civilian Coast Guard employee who worked as a Contracting Officer in the applicant's office in 2012 and 2013. She stated that CIV R was "a very difficult person to work with, and [she] alienated many good people through her micromanagement and abrasive personality." The civilian stated that CIV R was "loud, aggressive, and, frankly, disrespectful to anyone who was not her superior. She was an exceptionally disruptive figure and the morale in [the] organization plummeted after her arrival." The civilian stated that CIV R did not understand or respect military rank. She stated that she personally observed CIV R being disrespectful towards the applicant and other uniformed personnel. She stated that leadership, in particular LCDR S and CDR P, "were unable to 'control' [CIV R] and, [she] believe[d], came to fear her." The civilian stated that this reinforced CIV R's style of communication and leadership, which were dictatorial, impulsive, and aggressive. The civilian stated that she believed that the applicant did his "very best in what became an impossible situation." She stated that leadership sided with CIV R because it was the easiest path for them. She stated that the applicant was very respected by uniformed and civilians and she had never seen him being disrespectful to anyone. The civilian stated that she believed the applicant became "the proverbial scapegoat for leadership's inability to effectively address [CIV R's] behavior and attitude." She stated that she reviewed the disputed SOER and it is not a fair portrayal of the applicant's performance and conduct. She stated that she strongly endorsed the applicant's request to remove the SOER because there was no doubt in her mind that it was reprisal for the applicant's defense of CIV H and for the applicant saying he was going to make an EEO claim.

The next statement is from a Master Chief Petty Officer (MCPO) W. He stated that in his experience the applicant was an "exemplary" CWO. MCPO W stated that he served with the applicant at the Base. MCPO W stated that his experience with CIV R was "not that great because she seemed pushy and very forthcoming with her statements and opinions." He stated that he worked extensively with LCDR S and his experience with her started off well. Over time, though, she began to question his judgment and he found "her quick to judge others and generally disrespectful towards subordinates." MCPO W stated that he was aware of the two negative Page 7s that spanned eight months of time and were issued days after the applicant informed CIV R that he was going to file an EEO complaint. MCPO W stated that in his experience that "strongly appears to be reprisal. The purpose of issuing a [Page 7] is to promptly document and correct deficient conduct and performance. Corrections should be timely, so that the member has notice of the deficiencies and a fair opportunity to address them. A [Page 7] should not be used as punishment." MCPO W added that the applicant was a mild mannered person and was respectful of others.

The next statement was from CWO R. He stated that he worked with the applicant while they were both stationed on a cutter from 2009 to 2011. CWO R stated that the applicant was "an incredible supervisor to work for and at all times displayed an even temper regardless of the stressors associated with life aboard ship." He stated that they had dealt with a member who had repetitive performance issues in their department and during that time "it was plain to see that [the applicant] was careful how he handled personnel issues, even when faced with maddening poor

performance out of a member who had the experience to know better.” CWO R stated that the applicant was humble and open to suggestions. He stated that the applicant was “an asset to the service” and was worthy of promotion to CWO3.

The next statement was from MCPO L. He stated that he knew the applicant since 2004 when they were stationed together and they were also stationed together at the Base. MCPO L stated that his overall impression of the Base was good except for the office where the applicant worked. He stated that he could “attest to [CIV R] consistently disrespecting [the applicant], insisting he did not know how to perform his job.” He stated that the applicant frequently confided in him regarding CIV R’s “complete lack of respect for military rank and experience.” MCPO L stated that CIV R was very aggressive with the applicant and “had a reputation for not knowing her job [and] talking to senior enlisted and CWO’s in a disrespectful manner.” MCPO L stated that based on his thirty years of experience, it is not normal practice to issue a Page 7 eight months after the fact. He stated that a member “would normally be given a verbal warning/counseling for first offense ... and after the second counseling he or she would be issued” a Page 7. He also stated that he had never seen a Page 7 that contained over twenty specifications. MCPO L stated that he was aware the applicant had also admitted to misusing his GTCC totaling almost \$19,000. MCPO L stated that based on his experience, the applicant “would not have been involuntarily separated based on the GTCC misuse alone but asked to retire.”

### **VIEWS OF THE COAST GUARD**

On February 8, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In doing so, he adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC).

PSC stated that the application is timely and should be considered by the Board. PSC noted that the applicant did not submit an application to the Personnel Records Review Board (PRRB) as authorized by policy for the Page 7s or the SOER. PSC argued that the applicant did not present “clear and convincing evidence that overcomes the presumption of regularity” with respect to the disputed Page 7s and SOER. PSC asserted that the record “illustrates a pattern of poor professional and moral actions unbecoming a member of the United States Coast Guard.” His promotion was correctly temporarily delayed and the applicant’s retirement was a result of his own request. PSC recommended that the applicant’s requests be denied.

#### ***Declaration of the Applicant’s Supervisor, LCDR S***

PSC provided a declaration from LCDR S.<sup>14</sup> She stated that the SOER is “fair, accurate, and complete, and should not be modified in any way.” She stated that the SOER contains feedback from the applicant’s supervisor from his previous position because he continued to serve in both roles from July to September 2012. LCDR S stated that the previous supervisor endorsed the comments “conducted exceptional ... property management & turnover; accurately managed ... budget from July-September, worth approximately \$200K, & handed over to supervisor to finish closeout.” LCDR S stated that she contacted the previous supervisor in order to obtain additional

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<sup>14</sup> She is now CDR S, but for continuity the Board will refer to her as LCDR S.

feedback, and he stated that the applicant's performance "was not great." LCDR S stated that the previous supervisor stated that he had tried to isolate the applicant during closeout due to a lack of confidence.

LCDR S stated that although the applicant pointed to his "glowing accolades" in his 2012 OER, his supervisor at his next duty station "minimized [the applicant] due to a lack of confidence in his performance and professional abilities."<sup>15</sup> LCDR S stated that it was her "humble opinion that, as leaders, it [was her] responsibility to provide timely feedback and mentoring to correct performance and conduct deficiencies." She stated that the applicant was given "ample opportunity to heed the command's counseling and modify his behavior and performance." She then stated that the Page 7s were originally drafted on January 9 (presumably 2013), after the applicant was asked to complete a PR and replied that the division requesting the PR should create the request. LCDR S stated that the applicant met with CAPT J on January 14, 2013, to discuss command expectations and again on January 30, 2013, to discuss late award submissions. LCDR S asserted that the applicant "engaged ... in a shouting match" with CAPT J, who still refrained from issuing the Page 7s. She stated that on February 27, the Executive Officer (XO), CDR P, contacted the applicant regarding the mailroom renovation "and lack of project management on [the applicant's] part." She stated that the applicant replied to his email stating "XO, Request that in the future should you 'see' anything of concern in my area of responsibility, please contact me before assuming communication (or scheduled notifications) has lacked." LCDR S stated that it was this email exchange (which she added included more than the quoted language, but she did not provide any attachments with her declaration) that prompted CDR P to have a meeting with the applicant on March 4, 2013, at which the Page 7s were issued. LCDR S stated that during that meeting the applicant stated "you've got this all wrong"; "I gave this a six month window"; "deadlines are very minute"; "there's a process and I'm going to follow that process"; "this is blackball"; and "if this is the route you want to take, go ahead."

LCDR S stated that shortly after the Page 7s were issued, the applicant filed an EEO complaint. During this time, property inventories were underway. The applicant was scheduled to travel for this purpose. LCDR S stated that he "failed to report and failed to cancel his trips." LCDR S stated that adjustments had to be made in order to complete the inventory. She asserted that it "came to light afterwards that [the applicant] was aware he would not be traveling, but provided both his supervisors along with his own staff conflicting stories." She stated that he was aware the Friday before the travel that he was not fit for full duty. LCDR S claimed that the applicant "failed to notify his chain of command and failed to ensure the property inventories were rescheduled or covered by other personnel acting in his capacity."

LCDR S stated that during the informal complaint process of the applicant's EEO claim, he had been informed that he had to communicate with his chain of command and continue his duties. LCDR S stated that the applicant failed to meet with her on March 18 "for a routine weekly meeting, meetings he himself stated were not held, but in reality, just not attended by him." She

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<sup>15</sup> LCDR S may have conflated the applicant's previous supervisor and his next supervisor. She names the previous supervisor when talking about the comments that were endorsed by the previous supervisor. She does not provide a name and makes a similar claim when talking about the 2013 supervisor, so it is possible she conflated the two people. However, the supervisor named by LCDR S does not appear on any of the applicant's OERs as being on his rating chain, though he could nevertheless have been in the applicant's chain of command.

quoted the following, which she alleged the applicant said in an email (although she did not provide a date or a copy of the email) “I want to inform you that I will await resolution, or possible investigation findings before meeting with you and [CIV R] again. There has been an issue towards me directly with every meeting that I have held with you and [CIV R]. I ask that you continue to communicate with me via email until resolution.” LCDR S stated that on March 19, 2013, she received an out of office reply from the applicant stating that he was at an offsite training from March 19 to 21. She stated that this training had “not been routed for approval” and on March 20 he missed a scheduled informal complaint meeting with CAPT J. LCDR S stated that after “failing to heed the direction provided by CAPT [J], [the applicant] was relieved of his duties on 22 March 2013.”

LCDR S stated that the applicant’s allegations regarding CIV R’s integrity were “blatantly inaccurate” and that CIV R “was a reliable Deputy Comptroller during this time frame, maintaining a high level of performance and integrity.” LCDR S added that several of the applicant’s witnesses were themselves “counseled for performance and conduct deficiencies” while assigned to the Base. She asserted that the command “took equal and fair action to ensure all members maintained performance and conduct standards.” LCDR S stated that CIV R’s “performance started to slide in mid-2014” and she “was held to the same standard with monthly and then weekly counseling sessions” before she elected to retire. LCDR S stated that it was her opinion that the applicant was “unsuited to serve as an officer in today’s Coast Guard” because he “displayed routine hostile behavior towards all levels of his command, military and civilians, without remorse.” She stated that she wished the best for him and his family, but as one of the “supervisors to which his hostility was directed, one of the individuals whose workload increased due to his nonperformance,” she attested to the lengthy attempts to peacefully resolve the relationship with the applicant before administrative action was taken. She recommended that no changes be made.

#### ***Declaration of the Applicant’s Reporting Officer, CDR P***

PSC also provided a declaration from CDR P.<sup>16</sup> He stated that he served as the applicant’s Reporting Officer for the SOER and the direct supervisor of LCDR S. CDR P stated that the SOER is well justified because while stationed to the Base, the applicant “consistently failed to follow directions despite numerous counseling sessions reiterating performance expectations, ... ignored orders, showed inability to recognize own flaws, and displayed poor military bearing.” CDR P stated that the applicant once entered his office for a counseling session texting on his phone and had to be ordered twice to cease. CDR P stated that after reviewing the applicant’s request he stood by the SOER on file. He stated that it is fair and accurate as written.

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

On February 13, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. After several extensions, the applicant replied on May 14, 2018, through counsel. The applicant disagreed with the Coast Guard’s advisory opinion.

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<sup>16</sup> CDR P is now Captain P, but for continuity the Board will refer to him as CDR P.

The applicant first noted that one of his main arguments is that LCDR S, CDR P, and CAPT J “unlawfully reprised against him by issuing him false counseling statements and a Special OER.” The Coast Guard then “rather incredibly” garnered declarations from LCDR S and CDR P. The applicant argued that this was an “ill-advised course of action” because it constituted unauthorized investigative activity and turned those officers into witnesses in this proceeding. The applicant argued that obtaining declarations from the officers has exposed him to further reprisal. He alleged that the Coast Guard has created a dispute as to witness credibility because the BCMR rarely holds in-person hearings. The applicant argued that the Coast Guard “has invited potential violations of the privacy of the individuals who provided supporting statements for his application,” particularly given the fact that LCDR S attacked the credibility of some of the individuals. He asserted that in fairness he should have access to LCDR S’s record “to see if she has been counseled for performance and conduct deficiencies herself that are relevant to this application.” The applicant stated that the Coast Guard converted “what Congress intended as a non-adversarial process into a highly adversarial one.” The applicant emphasized his request for an in-person hearing before the Board so that he and the Coast Guard could cross-examine witnesses.<sup>17</sup> In the alternative, he stated that the Board could strike the declarations and request an advisory opinion that did not include these statements.

The applicant stated that the advisory opinion did not employ the correct standard of proof. PSC wrote that the applicant did not “present clear and convincing evidence,” but according to 33 C.F.R. § 52.24 the applicant must prove the existence of an error or injustice by a “preponderance of the evidence.” The applicant argued that the advisory opinion “is of limited use to the Board” because it used the incorrect legal standard and it is unclear if the Coast Guard may have perhaps recommended relief using the correct standard.

The applicant stated that PSC’s summary of the facts implied that the applicant’s admitting to misusing his GTCC was a factor in his referral to a special board for involuntary separation consideration. The applicant argued that the special board was recommended or initiated before he was punished under Article 15. The February 24, 2014, SOER documenting the NJP specifically noted that the applicant would likely “move beyond this incident and ... earn a recommendation for promotion and future assignment with increased responsibilities by the end of the next marking period.” The applicant argued that it is clear that the applicant’s command “did not intend for the credit card matter to end [his] career.”

The applicant stated that the Coast Guard took as fact LCDR S’s assertion that the applicant attended an “unapproved training” from March 19 to 21, 2013, when he had been scheduled to meet with CAPT J on March 20, 2013, for an informal complaint follow up. The applicant stated that this assertion is false. He first stated that CAPT J “refused to meet with Civil Rights in the second phase of [the] EEO complaint.” The applicant stated that he then made three attempts by email to contact CAPT J’s supervisor, but he never responded. He stated that he attended monthly meetings and he “was advised that all managers should attend if possible.” He stated that he had attended more than six since he had reported and he had never been required to request approval, as the training was ten minutes away. He stated that he had had an EEO resolution meeting with

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<sup>17</sup> The BCMR’s hearing regulations do not authorize cross-examination unless a report of the Inspector General substantiating reprisal for a protected communication has been submitted to the Board. 33 C.F.R. § 52.51 *et seq* and § 53.9.

CAPT J on March 14, 2013, and this was the first meeting in which the applicant presented his list of resolutions. In addition, the applicant provided an email showing that on March 19, 2013, he emailed Ms. T (CAPT J's administrative assistant) to follow up on his March 15, 2013, email to request another meeting with CAPT J. By March 19, 2013, CAPT J had still not responded. The same email shows that the applicant notified LCDR S on March 19, 2013, that he would be attending the training. He stated that she never informed him that the training was unauthorized or that he needed approval, which she could have done when he informed her that he would be attending.

The applicant also noted that on March 19, 2013, CAPT J himself sent an email stating that he needed "to correct a previous statement. I was just informed by Ms. [T] my Administrative Assistant that [the applicant] made an inquiry to Ms. [T] to get on my schedule late Friday afternoon [20 March]. Ms. [T] was not at work yesterday due to illness and did not see the email until this morning." The applicant argued that this is proof there was no meeting on March 20, 2013, for him to miss. The applicant argued that the assertion that he was relieved of his duties due to missing a meeting on March 20, 2013, is false. He argued that there was no meeting to miss and he stated that there is no record that he was relieved for missing a meeting. He asked the Board members to note that there is no Page 7 documenting his relief from his duties, which he requested and, he alleged, was required. The applicant argued that this shows that CAPT J, CDR P, and LCDR S "were unwilling to say in writing why they relieved [him]." The applicant also noted that CAPT J had claimed that the applicant filed the EEO complaint three days after he was relieved, but the EEO complaint had been filed seventeen days before.

Regarding the purchase request, the applicant stated that he never said "I don't care, I'm not doing it" as asserted. He stated that when he was asked if he could initiate a PR and approve it, he stated that he could not because it was against Coast Guard policy to both prepare and approve a PR, but that his staff would help the division prepare the PR if they needed help. The applicant stated that CIV R ended up tasking one of his subordinates with initiating the PR without his knowledge. He stated that CIV R admitted that she tasked one of his subordinates because "she thought [he] would take a stance."

Regarding late award drafts, which had been due on January 25, 2013, the applicant stated that this was "probably the most disturbing accusation" LCDR S made in her declaration because it was the "clearest example of [her] dishonesty." The applicant stated that LCDR S told CAPT J that the applicant did not submit the award drafts on January 30, 2013, when in fact the applicant had given the drafts to her two days before. CAPT J then asked to meet with the applicant, so the applicant called LCDR S to ask if she had told CAPT J the drafts were with her. The applicant stated that LCDR S stated that CAPT J still wanted to see him. When the applicant met with CAPT J, CAPT J yelled at him. The applicant said that he told CAPT J that it would not happen again in order to protect LCDR S, while also expecting her to say that he had in fact submitted the drafts. He stated that he "truly felt betrayed by LCDR [S] at that moment." CAPT J then cleared the room so that he could talk to the applicant alone. This was the meeting when they cleared the air and the applicant stated that he did tell CAPT J that he had submitted the award drafts two days earlier to LCDR S. The applicant stated that they spoke for over forty-five minutes about "problems [the applicant] was having with LCDR [S] and [CIV R]." The applicant stated that CAPT J admitted that CIV R was his biggest problem as well. The applicant stated that CAPT J acknowledged his concerns, but neglected to take any action.

Regarding the “mailroom situation,” the applicant stated that this is another example caused by LCDR S’s “incompetence and neglect.” He stated that LCDR S provided false information again, this time to CDR P. He stated that he submitted an email chain to prove that he had informed LCDR S on February 25, 2013, that he would send a base-wide notification email on February 27, 2013 (see page 2 above). The applicant stated that on the morning of February 27, 2013, LCDR S emailed his subordinate asking why the email had not been sent out yet. The applicant replied and reminded her of their conversation from February 25, 2013. LCDR S and CIV R then arrived at the applicant’s office and LCDR S stated that she thought the applicant would send the email out sooner than he had stated in the email. The applicant stated that “within minutes” CDR P had sent him an email informing him how disappointed CDR P was in the division’s customer service and that the email was overdue. He asked his supervisors if CDR P had been told of their conversations and he was told that CDR P had been informed. The applicant asserted that all of this could have been avoided “had LCDR [S] told CDR [P] the truth. Not only did she lie or neglect to inform, [CIV R] clearly states it on [the] email that she was well-informed of when [he] was sending a base-wide email, yet she neglected to tell the truth or re-align communications to CDR [P].”

The applicant stated that LCDR S and CIV R were aware of his back problems due to his temporary assignments to several locations in Florida for inventory inspections “the week prior.”<sup>18</sup> He stated that he had tried his best to remedy his back pain and he came back to work and scheduled a medical appointment for March 1, 2013. He had planned to travel as scheduled despite the pain because of the high-tempo nature of the project. The applicant asserted that he informed CIV R and LCDR S of his scheduled March 1, 2013, medical appointment and then sent them the not fit for full duty documentation after his appointment. He informed them that he had a follow up on March 4, 2013. The applicant noted that this was the same day he was issued the two “falsified” Page 7s. He stated that he had been diagnosed with a bulging disc and nerve complications, was given a spinal shot, and was placed on not fit for full duty status until March 12, 2013,<sup>19</sup> and then placed on light duty thereafter. The applicant stated that one of his “lowest moments as a member of the Coast Guard” was when CIV R called him at home and questioned him about his medical status and told him that his condition was not cause for him to miss his travel because she had seen people work through his condition. He stated that she called him back after calling medical to verify his status, and she said that he “was telling her the truth” and asked him to disregard the email she had sent. He stated that he “never felt so low and irrelevant in [his] life.” The applicant stated that he clearly did keep LCDR S and CIV R updated on his medical status, as the emails he provided show. He stated that he also informed his crew that he would not be able to travel, so it was a lie that his crew was unaware that he could not travel because he had told them more than a week in advance.

Regarding LCDR S’s declaration, the applicant first noted the “hearsay references to communications” with his previous supervisor. The applicant stated that the supervisor LCDR S spoke of was his supervisor at his previous duty station that he was phasing out of as he was transitioning into the Logistics office. He argued that LCDR S’s assertions amount to claiming that the applicant’s 2012 OER and his Coast Guard Commendation Medal “are false and that his rating officers

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<sup>18</sup> From context, this week is presumably the one before the travel he missed due to his not fit for duty status.

<sup>19</sup> The email he provided states he would return to the office on Monday, March 11, 2013.



misrepresented his performance and conduct as outstanding when in fact it was not.” He stated that his 2012 OER contains mostly marks of 6s and 7s with two marks of 5 and laudatory remarks. The applicant recommended that the Board “harbor deep skepticism about [LCDR S’s] honesty and integrity” because either she was misrepresenting the truth or all three officers on the 2012 OER were. He stated that LCDR S had misrepresented his argument by limiting it to just the 2012 OER, because the applicant asserted that he had received “outstanding evaluations throughout his USCG career.” The applicant added that his previous supervisor never once told him that he was doing a poor job and always commended him for his work, as reflected in his OERs and Commendation Medal.

Regarding LCDR S’s assertion that the applicant had been given “ample opportunity to heed the command’s counseling and modify his behavior and performance,” he stated that he was “never counseled for the incidents listed in the [Page 7s], and was unaware of many of them until presented” with the Page 7s. He stated that LCDR S “never counseled [him] on any of the falsified statements listed” in the Page 7s. He noted that neither LCDR S nor CDR P offered a “plausible defense” as to why the Page 7s contained over twenty discrepancies and spanned eight months. The applicant argued that what “does reasonably account for [their] actions ... is reprisal.” He stated that the Page 7s were issued days after he informed CIV R that he intended to file an EEO complaint.

The applicant also asserted that the disputed documents, including “hostile outbursts, verbally abusive, conduct deficiencies, belligerent, inability to maintain self-control, poor performer, poor military bearing,”<sup>20</sup> defamed his character because he never acted in these ways. In regards to the few times he admitted to raising his voice back to his superiors, he stated that Coast Guard Regulations, COMDTINST M5000.3B, Article 8-1-3, explains that examples are to be set by Commanding Officers and other officers in authority. The applicant stated that CAPT J admitted in his declaration<sup>21</sup> that he had used a “stern voice” with the applicant. The applicant asserted that LCDR S yelled at him on three or four occasions and he raised his voice in return once, and CIV R yelled at him once with witnesses as discussed.

Regarding the EEO complaint, the applicant added that the investigating officer refused to consider his rebuttal affidavit because it was “excessive information.” The investigating officer also only interviewed two of the seven witnesses that the applicant had named (which he had reduced from ten). The applicant stated that all of the witnesses he listed had first-hand information, so the investigating officer was wrong to not interview them.

The applicant noted that LCDR S “offered a defense” of CIV R “who by many accounts tormented [the applicant] and others at Base ... and was the primary source of friction there.” He stated that LCDR S “would have the Board members accept her version of [CIV R] over the scathing critiques offered by witnesses, both in the EEO complaint process and in support of [the applicant’s] application. This is clear evidence of the extent to which [LCDR S] will distort reality to suit her goals.” The applicant stated that CIV R once told him that she was loyal to LCDR S and LCDR S was “the only reason” she worked at the Base.

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<sup>20</sup> This quote is taken directly from the applicant’s response to the advisory opinion. It appears that he took various quotations and strung them together here.

<sup>21</sup> No declaration from CAPT J was provided to the Board.

Regarding the statement from CDR P, the applicant stated that his declaration was noteworthy “for its lack of specificity and for its boilerplate assertions.” The applicant stated that he did not carry his cell phone into meetings in general or specifically into meetings with CDR P. He stated that he carried a black journal on which he took notes. The applicant stated that for one meeting, he walked into CDR P’s office and he told CDR P that he wished to take notes of the meeting. The applicant stated that CDR P placed him “at attention, yelled at him, and did not allow him to speak.” The applicant stated that he had never felt so humiliated. He added that CDR P’s assertions about counseling the applicant were false, because the only time he had ever counseled the applicant was when he presented the applicant with the two disputed Page 7s.

The applicant argued that he has presented a “clear-cut case of reprisal and hostile work environment.” He asserted that the justifications offered by the Coast Guard for the “grossly untimely” issuance of the Page 7s were not credible. The applicant concluded by reiterating his request for an in-person hearing before the Board.

With his response to the advisory opinion, the applicant provided copies of several emails which are included in the Summary of the Record above. Because the emails constituted significant new evidence, the Chair invoked 33 C.F.R. § 52.26 and forwarded the applicant’s response to the Coast Guard for a supplemental advisory opinion.

#### COAST GUARD’S SUPPLEMENTAL OPINION

On October 30, 2018, the JAG provided a supplementary opinion and still recommended that the Board deny relief in this case. The JAG stated that the applicant was correct in noting that he has the burden to prove the existence of an error or injustice by a “preponderance of the evidence” and not “clear and convincing evidence.” However, the Coast Guard’s recommendation to the Board remained the same.

The JAG stated that the applicant’s request is predicated upon an allegation that the disputed Page 7s and SOER are factually inaccurate, erroneous, and unjust and that these actions were taken in reprisal for his filing and EEO complaint. The JAG argued that the issue of reprisal has already been the subject of an external, independent EEO investigation, a final agency decision, and an appeal. Every level of the EEO process found that the “record reflected a legitimate, non-discriminatory reason” for the disputed documents. The JAG further argued that the applicant’s historical duty performance is not proof that the March 2013 OER is not accurate. The disputed SOER “reviewed his conduct during a specific period of time.” The JAG stated that the applicant’s failure to address the substance of the Page 7s or the SOER further negates his claims.

Regarding the declarations from LCDR S and CDR P, the JAG stated that it is unclear what law or policy the applicant was referring to when he argued that it was “unauthorized investigative activity” for the Coast Guard to include these declarations. The JAG pointed out that the “function of the board is to consider all applications properly before it, together with all pertinent military records and *any submission received from the Coast Guard* or other government office.” (Emphasis added).<sup>22</sup> The JAG stated that the declarations were provided in order to rebut statements made

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<sup>22</sup> 33 C.F.R. § 52.12.

by the applicant in his application to the Board and to “provide additional context regarding the events in question.” The JAG argued that including the sworn testimony of commissioned officers with firsthand knowledge of the events at issue is proper and appropriate. However, the JAG agreed that it is within the Board’s discretion to grant a hearing should it be deemed necessary to ascertain the veracity or credibility of any witnesses. The JAG asserted that the applicant was “separated because he mismanaged his personal affairs to the discredit of the Service, participated in acts of personal misconduct that were prohibited by military authorities, and engaged in conduct unbecoming an officer” and not as a result of the disputed documents. The JAG recommended that the Board deny relief in this case.

### **APPLICANT’S REPLY TO COAST GUARD’S SUPPLEMENTAL OPINION**

The applicant replied to the Coast Guard’s supplemental opinion on January 9, 2019, through counsel, and disagreed with the opinion. The applicant stated that the opinion lacked “any pretense of impartiality” and validated the applicant’s earlier assertion that the Coast Guard has converted this proceeding into a “highly adversarial” process.

Regarding the EEO investigation, the applicant stated that the analysis of the EEO decision “neglected, among other thing, to interview witnesses [he had] identified.” He asked the Board to carefully “scrutinize what the [advisory opinion] intimates was an impartial, careful inquiry.” The applicant argued it was neither of those things. The applicant asserted that the Coast Guard may have been attempting to sway the Board based on emotion by implying that he had attacked LCDR S and CDR P. The applicant stated that all of his statements were not personal attacks but challenges to the validity of their actions and assertions.

The applicant noted that the supplemental opinion did not refute his argument that LCDR S attempted to impugn the integrity of the applicant’s 2012 OER raters. He stated that the “fact that she would offer as evidence hearsay statements allegedly made by a non-rater to attack an excellent OER is ample evidence of her poor judgment, if not lack of integrity.” The applicant stated that the supplemental opinion also did not contest his argument that providing LCDR S and CDR P with a copy of his application package was a violation of privacy to the individuals who provided statements on behalf of the applicant.

The applicant refuted the JAG’s assertion that he had failed to address the substance of the contested SOER and Page 7s. He stated that he addressed the contents of these documents in his initial submission and he continues to argue that they are factually inaccurate, unlawful acts of reprisal. The applicant argued that the Department of Defense and the military BCMRs have “uniformly interpret[ed] 10 U.S.C. Section 1552 to not authorize investigative activity.” He asserted that apart from a case involving the Board for Correction of Naval Records, which was about to undergo review before the U.S. District Court, he was “unaware of activity by the military BCMRs comparable to that of” the Coast Guard in this case. He stated that if the Board believes that there is legal authority to conduct investigations, then it should contact the applicant’s previous supervisor and interview him in the presence of the applicant (the applicant stated he had been unable to locate the previous supervisor himself). He requested that the Board grant his requests as stated in his original submission.

### APPLICABLE LAW AND POLICY

Title 10 U.S.C. § 571(b) states that the CWO grades, including CWO3, “shall be made by commission by the President.”

#### *Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3*

Article 3.B.5.a. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3, states the following:

When information of an adverse nature is received concerning a warrant officer subsequent to having been recommended for promotion by a selection board, but before an appointment letter has been tendered ... the name of the warrant officer shall be referred to a board per Article 1.A.20.b. of ... Military Separations, COMDTINST M1000.4(series). If the officer is found unfit or unsatisfactory, the warrant officer’s name will also be referred to an evaluation board per Article 1.A.20.c. of ... Military Separations.

Article 3.B.6.b. of the manual states that each officer in a chain of command has the responsibility of withholding a promotion of a CWO “if there is knowledge that they have disqualified themselves after being placed on a promotion list.” Disqualification means “any circumstance which casts doubt on the moral or professional qualifications of the warrant officer concerned.”

Article 5.A.1.b.(1) states that a Commanding Officer must ensure accurate, fair, and objective evaluations are provided to all officers in their command. Article 5.A.1.b.(2) states that individual officers are responsible for managing their own performance. This responsibility entails managing their job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards. Article 5.A.2.d.(2)(a) states that the Supervisor evaluates the performance of the Reported-on Officer in his execution of duties. Article 5.A.2.d.(2)(e) states that the Supervisor must provide timely performance feedback to the Reported-on Officer at the officer’s request during a reporting period, at the end of each period, and at such other times as the Supervisor finds appropriate.

Article 5.A.2.e.(2)(a) states that the Reporting Officer shall base his evaluation on direct observations, the Officer Support Form, information provided by the Supervisor, and other reliable reports and records. Article 5.A.2.e.(2)(b) states that the Reporting Officer will describe the demonstrated leadership ability and potential of the Reported-on Officer for promotion and special assignment.

Article 5.A.2.f.(2)(a) states that the Reviewer must ensure that an OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.

#### *Military Separations Manual, COMDTINST M1000.4*

Article 1.A.20.a. of the Military Separations Manual, COMDTINST M1000.4, states that the responsibility on CWOs requires them to accomplish their assigned duties effectively and adhere to proper standards of conduct at all times. Retaining CWOs who are substandard in performance of duty or conduct, deficient in character, or otherwise unsuited for military service

“cannot be justified.” Article 1.A.20.b. states that Commander, PSC may submit to a board of at least three officers (whose grade is Commander or above) the names, records, and reports of CWOs who have been commissioned for at least three years. From this list, the board will determine any officer whose reports and records establish unfitness or unsatisfactory performance of duty or the officer’s unsuitability for promotion. Article 1.A.20.c. states that if a board is convened under Article 1.A.20.b. and the CWO is found unfit or unsatisfactory, the officer must be referred to an evaluation board convened by the Commander of PSC. The purpose of the board is to recommend separation or retention.

### ***Page 7 Policy***

Article 8.j. in the instruction on Administrative Remarks, Form CG-3307, COMDTINST 1000.14B, states that a command may issue a Page 7 “for incidents within two years of the date of the incident, or within two years of the date that the command knew, or should have known, about the incident.”

## **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>23</sup>
2. The applicant requested an oral hearing before the Board because he wants to be able to cross-examine the members of his rating chain. However, he did not file a complaint of retaliation with the Inspector General as provided by the Military Whistleblower Protection Act and so the Board has no authority to subpoena witnesses or provide for cross-examination. 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.<sup>24</sup>
3. The applicant alleged that his SOER dated March 22, 2013, the delay of his promotion, and his subsequent retirement should be expunged from his record because they are erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed documents in an applicant’s military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that they are is erroneous or unjust.<sup>25</sup> Absent specific evidence to the contrary, the Board presumes that Coast Guard officials, including the members of an applicant’s rating chain, have acted “correctly, lawfully, and in good faith” in preparing their evaluations.<sup>26</sup> In addition, to be entitled

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<sup>23</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>24</sup> *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).

<sup>25</sup> 33 C.F.R. § 52.24(b).

<sup>26</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).

to removal of the SOER, the applicant cannot “merely allege or prove that an [SOER] seems inaccurate, incomplete or subjective in some sense,” but must prove that the 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.<sup>27</sup>

4. As the Coast Guard noted, the applicant did not file an application with the PRRB to have the contested documents removed from his record. His failure to avail himself of this administrative remedy, which is no longer available, does not remove the Board’s jurisdiction, however.<sup>28</sup> The PRRB’s jurisdiction is just one year from the date of entry of the disputed documents, which were dated March 4, 2013, and May 22, 2013. The applicant’s appeal of the decision on his EEO complaint was not complete until March 28, 2014, by which time he had been charged with misuse of his GTCC, which could explain his failure to avail himself of this avenue of relief.

5. The applicant complained that the Coast Guard provided declarations from LCDR S and CDR P, who prepared the SOER, because doing so constituted “unauthorized investigative activity.” He argued that the Coast Guard turned this proceeding into a “highly-adversarial” process when Congress had intended the Board to be non-adversarial. However, the applicant did not cite any law or case law and the Board is unaware of any that prohibit the Coast Guard from providing such declarations. On the contrary, the Board is required pursuant to 33 C.F.R. § 52.12 to consider “all pertinent records and any submission received from the Coast Guard” with the application. In addition, the Coast Guard is permitted to submit an advisory opinion with “other information and material” pursuant to 33 C.F.R. § 52.42 for the Board to consider. The Board is not persuaded that the Coast Guard acted outside of its authority by gathering and providing statements from two members of the applicant’s chain of command.

6. The Board finds that the applicant has not proven by a preponderance of the evidence that the Page 7s and the SOER constituted retaliation for his EEO complaint. The applicant alleged that he told CIV R that he might file a complaint on Wednesday, February 27, 2013, and the Page 7s were issued the next Monday, March 4, 2013. CIV R acknowledged that he had told her sometime in late February or early March that he might file a complaint, which could have been before or *after* the applicant was issued the Page 7s. CIV R, moreover, did not issue the Page 7s. The applicant’s military chain of command issued the Page 7s, and there is no evidence that CIV R told any of the three officers that the applicant had said he was going to file an EEO complaint before the Page 7s were presented to him. In addition, the record shows that the three officers had already expressed significant dissatisfaction with the applicant’s performance before issuing the Page 7s. For example, the applicant did not deny that he had previously been accused of missing deadlines or that, after missing the deadline for submitting award input for two departing members in January 2013, he was required to meet with the CO and they shouted at each other. And when the Page 7s were issued, the applicant had very recently been criticized by CDR P about the timing of his notification regarding the mailroom and about the nature of the applicant’s response to that criticism, which LCDR S identified as reason the Page 7s were issued. Therefore, the Board is not persuaded that the Page 7s were retaliatory. And although the applicant was removed from his position and received the SOER documenting his removal *after* he filed his EEO

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<sup>27</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>28</sup> 33 C.F.R. § 52.13(b).

complaint, the record shows that his removal was warranted by his ongoing poor performance, as documented on the Page 7s dated March 4, 2013, and by his failure to prioritize overdue work in mid-March 2013. Therefore, the Board is not persuaded that either the Page 7s or the applicant's removal and SOER constituted retaliation for his EEO complaint.

7. The applicant alleged that the two negative Page 7s dated March 4, 2013, and the disputed March 22, 2013, SOER contain erroneous information. With respect to the comments that the applicant specifically challenged or submitted specific evidence about, the Board finds as follows:

- a) **Mailroom notification comments** (from the SOER and first disputed Page 7, respectively): *“Failed to comply w/ cmd’s customer service vision; transitioned mailroom w/out customer notification”; “20 Feb 13, LCDR [S] asked for an update on the mailroom location. On 25 February, LCDR [S] again asked for an update on the mailroom transition, asking what date you intend to provide the tenant commands notice of the transition. Notice was not sent until after the transition was complete.”*

The applicant's command alleged that he had failed to follow orders and customer service policy because the client had not been notified by February 27, 2013, the date of the mailroom transition. The applicant provided evidence in his response to the advisory opinion showing that he emailed LCDR S on February 25, 2013, and stated that he would be emailing the client on February 27, 2013, when the transition had taken place and was in effect. The email chain does not show that LCDR S replied to that email and asked the applicant to send an email sooner than the 27<sup>th</sup>. On the morning of February 27, 2013, LCDR S asked why an email had not been sent out. The applicant reminded her that he had told her two days earlier that he would be sending an email out that morning. Apparently a conversation took place regarding this issue as well. The evidence shows that the applicant had stated his intentions, giving his supervisors the opportunity to instruct him to change the timing of the email if they did not like his approach. Although the applicant apparently failed to send the notification about the change in the location of the mailroom at the start of the workday on February 27<sup>th</sup>, when the mail room changed locations, the Board finds that he has proven by a preponderance of the evidence that these comments are misleading and unjust.

- b) **Travel cancelation comments** (from the SOER): *“Poor leadership & communication skills led to loss of significant travel funding; failed to timely notify of change in availability to travel, which incapacitated supervisor’s ability to reschedule Accountable Property Officer (APO) relief in [location redacted]. Rest of assigned team travelled, but could not complete tasking due to [the applicant’s] absence (incoming APO).” “As APO, failed to cancel scheduled trip to [location redacted] w/2 other mbrs to initiate property transfer, & failed to notify supervisor resulting in significant travel funding wasted, critical w/travel ceiling measures in place.”*

The applicant's command stated that he knew he would be unable to travel a week before his scheduled trip but failed to inform his supervisors, causing government waste due to the team's inability to complete the task. The applicant did not provide his travel orders and none of the statements make clear when the exact travel dates were. But the

applicant submitted an email showing that on Friday, March 1, 2013, he told his supervisors that he was not fit for duty but would be in the office on Monday, March 4, 2013, and had a follow-up appointment that day. Another email shows that on Monday, March 4, 2013, the applicant told his supervisors that he was NFFD that week but would be in the office on Monday, March 11, 2013, if able, and had a follow-up appointment on Tuesday, March 12<sup>th</sup>. CIV R replied on March 5, 2013, and asked him, “Are you going to [travel]? Have you informed [your team] if you are not going to?” There is no emailed reply to this inquiry in the record. Then on March 12, 2013, the applicant advised his supervisors that he was fit for limited duty (desk work) for fifteen days. The applicant stated that these emails show that he had informed his supervisors of his not fit for duty status. Although the dates of the scheduled travel are unknown, the Board is persuaded that the applicant did in fact notify his chain of command that he was not fit for duty and thereafter fit for only limited duty as soon as he received the medical orders from his doctor. Thus, he technically, though not expressly, notified CIV R that he could not travel by notifying her of his medical status, which made him ineligible to travel. But although she inquired, he apparently never expressly told her or his subordinates on the travel team that he would not be traveling. The Board therefore finds that the parts of these SOER comments that state that he did not notify CIV R are erroneous and should be redacted. But he has not shown that the comments about his leadership and communication skills, his failure to cancel the trip, or the waste of travel funds are erroneous or unjust.

- c) **Prioritization of duties comment** (from the SOER): “*Evident inability to prioritize duties; scheduled/attended Microsoft Office training vs. completing overdue tasking.*”

The applicant provided emails dated March 19, 2013, to try to refute this comment. On March 19, 2013, at 7:05 a.m., he emailed LCDR S, CIV R, and SKC B with the subject “19MAR13 at [Training location]” and stated that he would be at a nearby location from March 19 to 21, 2013, for training “with exception to weekly meeting, requested command meeting, and the physical therapy itinerary previously provided.” He stated that he would provide daily updates of pending tasks and asked his supervisors to contact him if they needed him “regardless of nature.” After sending that email, the applicant emailed SKC B and a civilian regarding the SK Shop Transition Plan. He stated that he would be in a training that morning but asked that the plan be emailed to him because he would still be able to discuss it while in the training. He stated that he would be back at lunchtime so that they could finalize the plan “at soonest.” These emails show that the applicant informed his chain of command of his whereabouts, but they do not show that he properly prioritized overdue work. They support his rating chain’s claim that he attended a Microsoft Office training instead of staying in the office to complete overdue work, and the fact that he kept in touch with his subordinates who were working in the office does not prove that he properly prioritized overdue work. Therefore, the applicant has not proven by a preponderance of the evidence that this comment about his failure to prioritize overdue tasking is erroneous or unjust.

- d) **EEO process comments** (from the SOER): “*Failed to review mbrs’ mid-period progress review input & address hostile work environment complaint against Sector EO.*”



The applicant alleged that the last half of this comment concerns his own handling of his own EEO complaint against CIV R and CDR P, and he submitted emails showing that he timely requested a meeting with CAPT J to follow up on his own EEO complaint. Neither CIV R nor CDR P was a Sector EO, however. A Base is not a Sector, and CIV R was the Comptroller and Chief of the Base Operations Department, and CDR P was the Base Executive Officer (XO) and then the Base Commanding Officer (CO). Neither was an EO and neither was assigned to a Sector. Therefore, the disputed comment apparently concerns how the applicant handled (failed to address) a subordinate's complaint against the Sector EO, not how the applicant pursued his own complaint. While the applicant's emails show that he diligently tried to schedule a meeting with CAPT J, this evidence does not appear to rebut the contested comment about his handling of a subordinate's complaint against the Sector EO. Therefore, the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that this disputed comment is erroneous or unjust.

- e) **PR completion comments** (from the first disputed Page 7): *“LT [E] asked for a PR to be completed. On 9 January, LT [E] requested the status of the PR. It had not been completed, and you had to be directed 3 times to complete before submission.”*

The applicant stated that he never worked with LT E on a PR, except once when CIV R ultimately circumvented the applicant and asked one of his subordinates to complete the PR, despite the applicant having stated that his shop could not both initiate and approve a PR. He provided an email chain from June and July of 2012, showing that when he was involved in a PR request, he was responsive and assisted with questions and concerns. The Board can draw no conclusion from the applicant's evidence regarding the validity of this disputed comment. He has not overcome the presumption of regularity accorded this comment.

- f) **Awards input comment** (from the first disputed Page 7): *“LCDR [S] requested input for awards, with specific data requested but no input was submitted.”*

The applicant did not provide any specific evidence but vehemently claimed that he had provided the award input two days before the meeting with CAPT J about his having missed the deadline. He apparently missed the January 25, 2013, award submission deadline, however, and submitted his input to LCDR S on January 28, 2013. He stated that before his meeting with CAPT J on January 30, 2013, he asked LCDR S if she had passed the award input onto CAPT J and she replied that CAPT J still wanted to see him. The applicant stated that in the meeting, LCDR S did not stand up for him or admit that she already had the award materials. The applicant's claims indicate that the Page 7 comment *might* have been more accurate if it had stated that no input was *timely* submitted, but sometimes “a miss is as good as a mile.” Award recommendations must be reviewed,<sup>29</sup> must often be approved by an Awards Board,<sup>30</sup> and if approved, must

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<sup>29</sup> U.S. Coast Guard, MEDALS AND AWARDS MANUAL, COMDTINST M1650.25D, Chapter 1.F.

<sup>30</sup> *Id.* at Chap. 1.G.3.

then be procured<sup>31</sup> to be timely awarded to retiring and transferring members. Submitting the input three days after the deadline but two days before the meeting with CAPT J may not have been considered mitigative under the circumstances. The Medals and Awards Manual notes that “[t]o be meaningful, award recommendations must be timely. The expectation is that an individual’s award will be presented prior to departure from the awarding unit.”<sup>32</sup> The Board finds that the applicant has not overcome the presumption of regularity or proven by a preponderance of the evidence that this disputed comment is erroneous or unjust.

- g) **Meeting with CIV R and CIV H** (from the second disputed Page 7): *“Further, during a civilian progress review, in front of the civilian employee being counseled, you shouted at [CIV R] and told the civilian to ‘leave’ because the things she said were ‘not right.’ After the civilian was excused, you continued to loudly berate CIV R for her ‘unfairness’ to the civilian.”*

The applicant provided declarations obtained during the EEO investigation from those who were present at some point during this meeting, including the applicant, CIV R, CIV H, and Mr. N, the union representative. They show that CIV R invited the applicant to attend the meeting with CIV H as an observer and got upset when he intervened and disagreed with her assessment of CIV H’s performance. CIV R told him not to intervene again, and when he did so, she told him to leave. As he was leaving, he invited CIV H to leave with him. According to the applicant and CIV H, CIV R was shouting and threatened to fire CIV H if he left with the applicant, and CIV H did not leave with the applicant. The applicant then asked Mr. N to return to CIV R’s office with him. Mr. N did so and ended the meeting. CIV H and the applicant claim that the applicant did not shout during the meeting, and Mr. N, who witnessed only the end of the meeting, claimed that CIV R berated both CIV H and the applicant and that the applicant did not shout at CIV R. The applicant’s chain of command asserted that CIV R’s version of events is correct, however, and whether someone is “shouting” is a subjective assessment of volume and tone. Given that the applicant inappropriately intervened twice during the meeting, when he was supposed to be an observer, and then advised CIV H to leave, and given his inappropriate, disrespectful, insubordinate, and insolent behavior during a meeting with the Base CO on January 30, 2013, and his admission that he shouted at the CO during the meeting, the Board does not doubt that the applicant’s behavior toward CIV R during and after the meeting can reasonably be described as shouting and berating, as stated in this disputed comment. The Board is not persuaded by the claims of the applicant, CIV H, and Mr. N that this comment is erroneous or unjust.

8. Therefore, the Board finds that applicant has proven by a preponderance of the evidence that the following three comments in the SOER are misstatements of fact that should be removed from the SOER.<sup>33</sup>

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<sup>31</sup> *Id.* at Chap. 1.H.2.

<sup>32</sup> *Id.* at Chap. 1.E.2.

<sup>33</sup> The applicant did not request removal of the Page 7s and has not shown that they should be removed.

- From block 3: “Failed to comply w/ cmd’s customer service vision; transitioned mailroom w/out customer notification;”
- From block 5: “failed to timely notify of change in availability to travel, which incapacitated supervisor’s ability to reschedule Accountable Property Officer (APO) relief in [location redacted].”
- From block 8: “& failed to notify supervisor”.

The low numerical marks supported by these three comments are supported by other negative comments in the SOER and do not require correction. Negative comments in the SOER that are not addressed above, the applicant either disputed with only his own unpersuasive claims or did not directly dispute. Those allegations about the SOER and Page 7s that are not addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity.<sup>34</sup>

9. As stated in findings 7 and 8, the applicant has proven by a preponderance of the evidence that his record contained some erroneous information about his performance when his promotion to CWO3 was delayed on May 8, 2013. However, the Board cannot conclude that the applicant would have been promoted on June 1, 2013, if these erroneous comments had not been in his record. Even without those comments, the Page 7s and the SOER are still highly derogatory, and so the applicant’s promotion would have been delayed even if the comments had been 100% accurate.

10. Although the applicant has not shown that his promotion was erroneously delayed on May 8, 2013, even if he had, the doctrine of “unclean hands” would preclude his promotion. The applicant had “unclean hands” during the entire period in question and so is not entitled to relief.<sup>35</sup> Courts considering BCMR cases have held that the “governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands.”<sup>36</sup> The applicant was misusing his GTCC from August 2011 through December 2013, and during this period he received an excellent 2012 OER, was selected for promotion, and was scheduled to be promoted on June 1, 2013. Given the applicant’s egregious misuse of his GTCC throughout this period, the Board finds that the doctrine of “unclean hands” must bar his promotion to CWO3.<sup>37</sup> Therefore, the Board will not grant the applicant’s request to promote him to CWO3 or to make the associated changes to his DD-214.

11. The applicant asked that the Narrative Reason for Separation on his DD 214 be changed from “Unacceptable Conduct” to “Retirement.” The Board finds, however, that the assignment of the narrative reason “Unacceptable Conduct” was appropriate and fully justified by

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<sup>34</sup> 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”).

<sup>35</sup> *See United States v. Hout*, 41 C.M.R. 299 (March 13, 1970); *United States v. Bowser*, 73 M.J. 889 (Oct. 3, 2014); and *United States v. Chumovic*, 22 M.J. 401 (Sept. 22, 1986).

<sup>36</sup> *Hout*, 41 C.M.R. at 305, quoting *Olmstead v. United States*, 277 U.S. 438, 484 (1928).

<sup>37</sup> The Board notes that in requesting retirement, the applicant acknowledged that he would not be promoted even if his name was on a promotion list.

the applicant's egregious misuse of his GTCC. And under Article 1.A.21. of the Military Separations Manual, if an officer requests retirement in lieu of board action, the officer receives the same separation code and Narrative Reason for Separation that he would have received had he been separated pursuant to board action. The Board finds that the applicant's separation code and Narrative Reason for Separation on his DD 214 are neither erroneous nor unjust.

12. Accordingly, partial relief should be granted by redacting the three erroneous SOER comments identified in finding 8 above. No other relief should be granted.

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

**ORDER**

The application of retired CWO2 [REDACTED], USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall remove from his SOER dated March 22, 2013, the following three comments:

- From block 3: “Failed to comply w/ cmd’s customer service vision; transitioned mailroom w/out customer notification;”
- From block 5: “failed to timely notify of change in availability to travel, which incapacitated supervisor’s ability to reschedule Accountable Property Officer (APO) relief in [location redacted].”
- From block 8: “& failed to notify supervisor”.

No other relief is granted.

April 5, 2019

