DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-137

[redacted] CDR/O-5

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 May 1, 2018, and assigned it to staff attorney [redacted] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated February 15, 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 AND ALLEGATIONS

The applicant, who retired from the Coast Guard on November 1, 2017, asked the Board to remove a September 26, 2017, Officer Evaluation Report (OER) from his record, promote him to O-6 for purposes of retired pay, grant him all back pay due to him as a result of this correction, anbriad grant any "other relief that is equitable and just."

The applicant stated, through counsel, that he had been selected for promotion to Captain (O-6) and was to assume command of a Coast Guard sector in 2017. The applicant stated that not long before he was to begin this new position, Coast Guard Investigative Services (CGIS) agents arrived at his home and advised him that he was under investigation. He was interviewed on May 30, 2017, and provided a statement to the agents. He stated that two days after the visit, he was informed that his assignment orders had been cancelled and that he would be reassigned. In June 2017, the applicant received notice that his pending promotion had been delayed. On July 26, 2017, the applicant received orders to report for duty in Washington, D.C. These orders contained an option to request retirement in lieu of accepting the orders within five days. The applicant submitted a request for voluntary retirement within the five days.

Officer Evaluation Report

Rear Admiral (RDML) S ordered that a non-regular OER be prepared to document an alleged assault after it was "determined, by a preponderance of the evidence, that [the applicant]

committed a violation of the Uniform Code of Military Justice (UCMJ), specifically Article 134 (indecent assault)."[1] The applicant argued that the OER was unjust because the facts did not support the conclusion that he had committed a crime under the UCMJ and the "overall way in which this case was investigated and adjudicated was entirely improper, unfair, unjust, and inequitable." The OER states that the applicant had "committed serious sexual misconduct." The applicant stated that this crime no longer exists under the UCMJ. In addition, when RDML S had decided that the applicant had committed this crime "the statute of limitations for crimes charged under this Article had run," given that the alleged crime took place in 1996.[2]

The applicant added that he "vehemently and categorically" denied that he ever assaulted the alleged victim ("VX"). The applicant provided a statement explaining what happened during two visits when he and VX engaged in consensual sexual activities to both CGIS and the Board. The applicant argued that given "the nature of this allegation and the fact that the alleged victim's version of events differs so dramatically from that of [the applicant's], there is absolutely no way to determine the veracity of these claims based on the CGIS investigation alone." The applicant argued that the VX's credibility and memory are both questionable, but the best way to determine the credibility of a witness is to subject her to examination in the adversarial process. The applicant stated that RDML S did not allow the applicant the benefit of an adversarial process to examine relevant witnesses.

The applicant argued that there were "obvious reasons" to doubt the VX's version of events. One reason is that she never reported having been a victim of a crime while she was attending the Coast Guard Academy (CGA). Instead, twenty years later, a third party made a report to CGIS agents regarding the alleged assault, prompting an investigation. The applicant argued this third-party was not trust-worthy because she said she kept an eye on the applicant so she could be sure she did not request to be transferred to wherever he was assigned. The applicant asserted that this claim was not true because she had requested to be transferred to what would have been his Sector had he been promoted to Captain.[3] He stated that this proves that the third party "had a motive to fabricate her claims," which "completely eviscerates her credibility.

The applicant argued that the fact that VX initially did not wish to participate in the investigation also casts doubt on her story. She had to be contacted by CGIS multiple times before she eventually decided to participate and give an interview. The applicant argued that the fact that she did not ever report a crime and the fact that she was reluctant to participate make her "story" suspect. The applicant also asserted that the CGIS report contradicts RDML S's finding that the applicant had digitally penetrated the applicant's vagina despite the fact that VX repeatedly stated "no" or "stop." The applicant noted that the CGIS report states that the alleged victim stated that she "could not recall what she said to him; she did not know if she said 'no' or 'stop' or some combination of both," "she didn't know what he put in her because it felt cut or abraded," she was unable to recall "when he stopped or why he stopped," and she admitted that she had "hooked up" with the applicant in a subsequent consensual sexual encounter.

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[1] At the time of the applicant's alleged actions, the UCMJ violation was referred to as indecent assault (Article 134). Today, this crime falls under Article 120, rape and sexual assault.

[2] The statute of limitations is five years. Manual for Courts-Martial, R.C.M. 907(b)(2)(B).

[3] It was not the third-party who stated she kept an eye on where the applicant was so she could be sure she did not request to be transferred to where he was, it was VX. No other person interviewed made such a claim.

The applicant went on to argue that VX's statements to CGIS directly contradict RDML S's finding and demonstrate "that she has virtually no memory of the details of the alleged assault." He also asserted that the CGIS investigation "contains no evidence that corroborates the alleged victim's story." He argued that none of the third-party statements are corroborating because no one else was present during the private encounters between the applicant and the alleged victim. The applicant stated that there is also no medical evidence to corroborate her claim. Given all of these assertions, the applicant stated that VX's "statement is so unreliable that no reasonable person could find that it supports the finding that [the applicant] committed an act of indecent assault by a preponderance of the evidence."

The applicant asserted that other witness statements cast additional doubt on the credibility of VX's claims. One witness stated that he "was under the impression there was penile vaginal penetration." The applicant stated that this contradicts the alleged victim's own claims about her interactions with the applicant. He also argued that RDML S did not prove the elements of the crime of "indecent assault."[4] The applicant stated that RDML S did not show how the applicant's actions were to the prejudice of good order and discipline in the armed forces or present any evidence proving that the applicant had the specific intent required for this crime. He argued that defenses, such as consent, were also not considered by RDML S.

The applicant stated that the burden of proof to find a member guilty of an offense under the UCMJ is beyond a reasonable doubt. However, RDML S stated that had he determined "by a preponderance of the evidence" that the applicant had committed a violation of the UCMJ. The applicant stated that he understood that various administrative contexts use lower thresholds of proof, but argued that RDML S "went out of his way to reference a specific crime … in his memorandum" and yet did not charge the applicant with a crime. RDML S recognized that the statute of limitations had run and he "nevertheless made the extraordinary decision to adjudicate [the applicant's] criminal liability himself using the 'preponderance of the evidence' standard." The applicant argued that it was entirely improper for RDML S to adjudicate a criminal allegation himself by using this lowered standard because it deprived the applicant of "various constitutional rights, including, but not limited to, his right to a jury by his peers, his right to confront his accuser, and the presumption of innocence until proven guilty beyond a reasonable doubt." The applicant asserted that to adjudicate this matter via an OER was a "complete bastardization of the Coast Guard evaluation system and makes a mockery of concepts of fundamental fairness, due process, and justice itself." He stated that this was merely a way to convert a criminal allegation into an administrative matter in which the applicant "was afforded exactly zero due process." The applicant argued that the OER should therefore be removed in its entirety.

[4] The elements of UCMJ Article 134, Indecent Assault, at the time of the alleged incident were:

1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and
3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Promotion to O-6

The applicant was retired on October 31, 2017, at the grade of O-5. He acknowledged that there is ordinarily "a presumption of voluntariness … where an employee tenders his resignation or retires; the plaintiff bears the burden of coming forward with evidence to demonstrate that his resignation or retirement was not voluntary."[5] The applicant pointed out that the same court held:

> An otherwise voluntary discharge is rendered involuntary if, among other things, it is obtained under duress or coercion. In order to show that his discharge was the result of duress or coercion, [the applicant] must demonstrate that: (1) he involuntarily accepted the terms of the government; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of the government's coercive acts. In applying this test, duress or coercion is measured by objective evaluation of all the facts and circumstances. The government's failure to follow its own rules may constitute coercive action sufficient to result in an employee's involuntary discharge.[6]

The applicant argued that although he submitted his retirement request in July 2017 while the investigation was still pending, his decision was not voluntary given the totality of the circumstances. He claimed that his request was the culmination of "intentional maltreatment and systematic intimidation by Coast Guard leaders." He explained that after he was notified that his orders to the Sector in the Southeast United States were cancelled just a few days before the Change of Command ceremony, it took more than fifty days for new orders to be issued. During that time, he stated that he and his family were "homeless" as they had paid out of pocket to move across five different states in those eight weeks. He stated that he finally decided to relocate his family to a mid-western state, but then was notified in late July 2017 that he would be relocated to Washington, D.C. He was told by the Officer Personnel Management Branch (OPM) of the Personnel Service Center that he had five days to accept this assignment or voluntarily retire. The applicant stated that he requested an extension beyond the five days but his request was denied.

The stated that he was also encouraged to "seek counsel from [his] attorney about 'highest grade held' policies and how they pertain to military retirements." He stated that he interpreted this at the time as a threat that the Coast Guard would take punitive action against him by reducing his rank if he did not submit a retirement request immediately. The applicant also claimed that CGIS agents contacted his attorney's ex-girlfriend during this time period and "asked her questions about potential non-consensual sexual activity" between her and the attorney to intimidate the applicant and his attorney. He stated that he developed major depressive disorder and contemplated suicidal actions during this difficult time. He stated that he chose retirement because it was "the only hope for [him] to avoid taking [his] life" so that he could stay with his wife and children "and not subject them to further humiliation, anxiety and uncertainty."

The applicant explained that at this point he was two months into a twelve month evaluation period. He had begun to report daily to a nearby Coast Guard unit in order to try to serve to the best of his ability. However, he stated, he had received no guidance as to his duties or his supervisory chain. He knew that his "annual evaluation would be severely impacted by the 'lost' two months and that [he] would eventually be reporting into a position that was below [his] qualification level and would greatly handicap [him] for future assignments and promotability." He stated

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[5] *Carmichael v. United States*, 298 F.3d 1367, 1372 (Fed. Cir. 2002) (internal citations committed).
[6] *Id.*

that he chose "to continue living and avoid future harassment by the Coast Guard" and sent in his letter requesting retirement. The applicant stated that at this point, around October 2017, he began terminal leave and went on a family vacation to Disney World with his family. He stated that while there, he received an email with the disputed OER. He decided not to read the evaluation while on vacation, but he forwarded it to his attorney. The applicant stated that four days later he received a call from his attorney who told him the Coast Guard indicated that they would charge the applicant with Unauthorized Absence or Absence Without Leave if he did not acknowledge receipt of the email, despite the fact that he was in a documented "leave" status. The applicant therefore promptly acknowledged receipt of the email and the attached OER in order to avoid further harassment.

The applicant asserted that the "totality of [the] circumstances … leaves little doubt that his request was the product of both duress and coercion." He argued that he "involuntarily accepted the terms of the government" in order to avoid risking "almost certain punishment as indicated in the threat communicated by the Captain at OPM." He acknowledged that he could have "theoretically" requested that his retirement be cancelled at any point up until it became effective. He argued, however, that this was never an option for him based on RDML S's findings and the disputed OER. The applicant stated that although he submitted an addendum for inclusion in the OER, the Coast Guard provides no opportunity for a meaningful, substantive appeal of a negative OER outside of a request to this Board. The applicant argued that given his imminent retirement date of November 1, 2017, he did not have time to appeal his OER to this Board. He asserted that it "would have been futile for him to request that his retirement orders be cancelled because he would have never been promoted given the contents of the OER, RDML [S's] findings, and the fact that he did not have any adequate means of redress to clear his name." He also claimed that he was later told that had he not submitted his retirement request, the Coast Guard would have brought criminal charges against him.

The applicant argued that the OER alone provides enough grounds for the Board to find that his decision was based on coercion and duress. He asserted that the issuance of the disputed OER was wrongful and the Coast Guard lacked reasonable grounds to issue it. "It is clear that the issuance of the non-regular OER left [the applicant] without any viable option other than retirement." Therefore, he argued, the OER on its own constitutes sufficient duress such that the applicant's retirement should be characterized as involuntary. He asserted that but for his involuntary retirement and the erroneous OER, he would have been promoted to O-6 in accordance with his promotion orders and he is therefore entitled to promotion for purposes of retired pay and back pay, as well as any other relief the Board finds equitable and just.

SUMMARY OF THE RECORD

The applicant entered CGA in 1991 and graduated and received a commission as an ensign in 1995. He was first assigned as a Deck Watch Officer aboard a cutter homeported with CGA in New London, Connecticut, and he served aboard the cutter from June 1995 to August 1997. He did not receive any negative marks or comments on his OERs while assigned to the cutter. Subsequently, the applicant served in many positions, including Chief of Port State Control, Executive Officer, and Deputy Sector Commander, and received excellent OERs. He was promoted to Commander/O-5 on July 1, 2011.

On August 24, 2016, while serving as Deputy Sector Commander on the east coast, the applicant was selected for promotion to Captain by the Promotion Year 2017 selection board. He received orders to be a Sector Commander in the southeastern United States in 2017.

On May 30, 2017, the applicant was interviewed by CGIS agents regarding allegations that he had sexually assaulted a cadet in 1996. (The summary of the CGIS report is below.)

On June 15, 2017, the applicant received notice that his pending promotion to Captain had been temporarily delayed due to "pending potential adverse information." He was informed that he would be contacted when it had been determined whether he would be promoted or further administrative action was necessary.

On July 26, 2017, the applicant received standard Permanent Change of Station orders to be a division head in Washington, D.C. He was instructed to report for duty by August 30, 2017. The standard orders contain a paragraph that states:

> If member does not intend to execute these orders and is otherwise eligible to request resignation, retirement or release from active duty, he/she must advise PSC-OPM-2 by message/memo within 5 working days of the issuance date of these orders in direct access, otherwise member will be determined to have accepted these orders.

On July 31, 2017, the applicant submitted a request for voluntary retirement in lieu of the orders he had received on July 26, 2017. He stated that he understood that he would be ineligible for promotion if he had already been selected for the next higher grade.

On September 26, 2017, RDML S submitted a memorandum titled Final Action on Investigation regarding the applicant. RDML S wrote that he had been designated as the Consolidated Disposition Authority for "all disciplinary and administrative action related to the investigation into reports of sexual assault at the United States Coast Guard Academy between 1992 and 2006." He stated that he had received a CGIS report regarding the allegations of misconduct committed by the applicant. He was directing preparation of a non-regular OER to document the applicant's "criminal culpability and misconduct" because, based on the CGIS report, he had determined "by a preponderance of the evidence that [the applicant] committed a violation of the [UCMJ], specifically article 134 (indecent assault)." The memorandum states:

> The Non-Regular OER should document that:
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> In the summer of 1996, [the applicant], then an ensign, committed indecent assault against a current active duty member, then a first class cadet at the United States Coast Guard Academy, at his home … Under the version of the UCMJ that was in effect at the time of the offense, the crime was punishable by five years confinement, forfeiture of all pay and allowances, and dismissal.
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> [The applicant] digitally penetrated the victim's vagina and performed oral sex on her without her consent and despite the fact that she repeatedly and persistently objected to the sexual activity by stating "no" or "stop" or some combination thereof. In response to the victim's protests, [the applicant] repeatedly stated that she should "Quit being such a fucking baby," or words to that effect. [The applicant] had no reasonable mistake of fact with respect to whether the victim consented to the sexual act. [The applicant's] actions caused injury to the victim's vagina, the pain from which persisted for at least three days.

The disputed OER is dated September 26, 2017, and states that it was submitted pursuant to Article 5.F.3.b. of COMDTINST M1000.3 "to document the final reviewing authority's action on an investigation directing an OER due to criminal culpability and per Article 5.H.1. …, this OER is a derogatory report. Dimensions were marked 'Not Observed' due to the limited time of the OER." In the eighteen performance categories, sixteen are marked "N/O" for "Not Observed." In the performance categories Judgment and Responsibility, the applicant received the lowest possible mark of 1 (on a scale of 1 to 7 with 7 being the best). The comments for this section state, "A [CGIS] investigation contains sufficient facts by which a fact finder could conclude that the [applicant] committed serious sexual misconduct, that violated the Uniform Code of Military Justice, early in his career as an officer, significantly impacting another service member. Unlikely [the applicant] would have been promoted if misconduct had been discovered and investigated near the time of the events." On the comparison scale, the applicant received a mark of "Unsatisfactory," the lowest mark on the scale, and he received a promotion mark of "Do not promote." The associated comments state, "The statute of limitations bars prosecution, but investigation supports a determination which would have supported preferral of charges with a view towards court-martial. I do not recommend [the applicant] for promotion or further service after considering this previously undiscovered serious misconduct." RDML S was the Reviewer for this OER.

The applicant provided comments to the disputed OER in the form of Reported-On Officer's Comments. He stated that he "vehemently disagreed with the contents" of the OER. He stated that the allegation is false and the investigation contained uncorroborated accusations. The applicant alleged that the allegation against him had in fact been reported to senior leadership at CGA "at the time it allegedly occurred" and so saying that he likely would not have been promoted had the allegations been known at the time should be removed because the allegations were known and he was promoted. He asserted that the officers who were in the best position to weigh the credibility of the accuser took "no action" against him but that fact was "completely ignored by the investigation" and the OER.

The applicant retired on November 1, 2017. He had twenty-two years, five months, and seven days of active duty service. His characterization of service is honorable and his type of separation is "Retirement/Resume Retirement." His pay grade upon retirement was O-5.

The finalized CGIS report is dated December 6, 2017. It contains notes on all of the interviews with persons with knowledge and the alleged victim in this investigation. Below is a summary of relevant entries and interviews.

- March 8, 2016: The CGIS agent interviewed VX who stated that she attended CGA from 1993 to 1997. She stated that she was aware of "multiple female cadets" being sexually assaulted while at CGA. She stated that if such incidents were reported, there was a wide and unpredictable range of responses, but overall there was very little accountability. At this time she declined to share her own personal experiences because she wanted time to think about whether she wanted to re-visit those experiences.

- May 9, 2016: The CGIS agent interviewed a person with knowledge (PK1).[7] PK1 stated that she arrived at CGA in 1994. She stated that she had heard rumors that the applicant and another male cadet had gone to a nearby college, provided female students with alcohol, and then gone to a room and assaulted them. The CGIS agent noted that this allegation had been previously investigated. PK1 stated that the applicant was in the class of 1995 and she never met him. She stated that at that time, cadets were not allowed to lock the doors to their dorm rooms so it was common for male cadets to come into the females' rooms and get in bed with them. PK1 also had heard that the applicant went into VX's room and got in bed with her, but VX "wiggled out from under him, ran out of the room and hid in a closet." PK1 stated that she remembered that the applicant was attempting to "hunt [VX] down but she had hid in a gear locker out of fear." The applicant did not find VX to PK1's knowledge. When PK1 was asked about an incident that happened outside of CGA, the CGIS agent noted that he "was given the impression that her and [VX] have talked over the years and did not want to breach their trust bond by saying too much."
- The report contains summaries of several interviews with VX between March and November 2016 wherein VX asked questions about potentially participating in the investigation. The agent stated that it was clear that VX "was deeply conflicted and it appeared that something had happened in the past at [CGA] but she was concerned about reporting it and being involved in an investigation and any potential trial." After multiple meetings and asking for time to think things over, VX informed the CGIS agent that "because of personal, family considerations, she was not going to be involved and was going to decline an interview with CGIS."
- Entered into the report was a memorandum dated December 13, 2016, from VX's special victims' counsel. Counsel stated that at that time, VX did not wish to participate in the investigation but she wished to be told when the applicant would be informed of the accusation against him so that she could plan and "be reasonably protected from the accused."
- March 17, 2017: Criminal history check of the applicant came up with negative results.
- May 4, 2017: The CGIS agent interviewed VX (who had presumably changed her mind about participating in the investigation).
    - VX stated that during the summer of 1996, when she was transitioning from junior year to senior year, the applicant "had sexually assaulted her at his residence." She stated that she had attended a barbeque at the applicant's home. She stated that the applicant had been two years ahead of her at CGA and he was an Ensign at the time. She had planned to take a ferry to get back to where she was stationed that summer but she missed it. She was unsure how to drive back and the applicant stated that he had an atlas so they went to his room. VX described the layout of the room. She stated that she could not recall "how it began" or how long it lasted, but somehow she was on her back and the applicant was on top of her. She could not recall "if she said 'no' or 'stop' or some combination of both. All she could remember was him saying was 'stop being a fucking baby'" multiple times. She stated that she

[7] Each subsequent person with knowledge will receive a new PK number. However, the Board received a redacted copy of the CGIS report and it is possible that one or some of the persons with knowledge were interviewed more than once, but it is impossible to tell with the redactions.

was "trying not to be an asshole" when she was telling him to stop and she finally gave up and laid still. She stated that he put his fingers in her and performed oral sex. She stated that she was not sure what had hurt her, but she was sore for three days after and it hurt to urinate. As she told others, she was not completely sure what he put in her because it "felt cut or abraded." She could not recall when or why he stopped. After it was over she gathered her things and left.

- VX stated that following the assault, she told one female friend and a professor who was the committee chair for the Defense Advisory Council on Women in the Service. VX stated that the professor told her that she "could either choose to do something about it or be in the Coast Guard." VX stated that she decided to stay in the Coast Guard and "leave it alone." VX stated that she became angry afterwards, particularly because it was common knowledge that the applicant had been restricted "for previously raping a … College student." She stated that she told her sister and a few of her friends, and she was not sure if her friends betrayed her trust or if the applicant told people but "it became an open debate on whether she was telling the truth." She stated that the applicant was well-liked by many people, and her life at CGA became very difficult after this point. She stated that it was "almost worse not to be believed by people she thought knew her and cared about her."
- VX stated that at one point, perhaps around November 1996, she was told by another cadet that the applicant was in the barracks looking for her. She stated that "she was afraid and went to the trunk room" to hide from him.
- On another occasion he appeared at her home and she dropped an iron and burned herself. She stated that she did not even know how he knew she was at that residence. She stated that she did not say "no" during the second encounter. She stated that they "did everything but have sexual intercourse" and it was consensual on this second visit. She had stated "I wanted to choose; if this shit's going to happen, I'm going to choose." She stated that she was "disappointed she didn't scream or fight but she wasn't going to take another 'browbeating' like the first time."
- She decided to write her Capstone project in graduate school on victim recovery options for sexual assault victims in the Coast Guard. She stated that she thought this would be what she could do to make a difference because she knew walking away from confronting him "was the wrong thing to do."
- She noted that she had recently had a nightmare wherein the applicant found her and choked her. She stated that she has been having health problems and has been worrying and having nightmares. She stated that she "has kept track of where [the applicant] was getting stationed for contact avoidance."

- May 15, 2017: The CGIS agent interviewed PK2. (Although this interview is included in this CGIS report, based on the dates discussed, it apparently concerns a separate, earlier sexual assault allegation against the applicant, rather than the alleged assault on VX in 1996.) PK2 stated that he attended CGA between 1990 and 1994. He stated that he and a victim became "intimate friends" after they met around October 1992 but the relationship was never exclusive. He recalled this victim telling him around January 1993 that she had been sexually assaulted by the applicant in 1992 and the assault occurred in her dorm room. He stated that the victim was upset and crying while she was telling him. She stated that

she kept telling the applicant to stop but he did not. PK2 could not recall the exact phrasing used by the victim but he was under the impression but that there had been penile-vaginal penetration. PK2 stated that the victim's roommate had also been sexually assaulted the same night by a different cadet (a CGIS report number is included in the report). PK2 stated that the victim and her roommate took a few weeks to decide what to do and finally reported the incident. PK2 stated that he remembered the victim being interviewed because she was upset when she came out of the interview. PK2 stated that he believed the cadet conduct board was held for this offense in May 1993 for both the applicant and the other cadet. He stated that he believed the applicant received restriction and the other cadet was disenrolled. PK2 stated that he had never heard of the applicant being involved with other sexual assaults.

- May 24, 2017: The CGIS agent interviewed PK3, who attended CGA between 1993 and 1997. He stated that there were always "conversations or commentaries amongst male cadets objectifying women, it was very pervasive." PK3 stated that he and VX were close but there was never "anything sexual" between them. He stated that he became conflicted in their friendship when the applicant arose in conversation and VX became "disgusted and irritated." PK3 got the idea that something was wrong "but didn't want to hear it" and he never asked any follow up questions. PK3 stated that, in hindsight, he did not do the right thing by not asking follow up questions because he remembered thinking the applicant had done something he should not have.
- May 30, 2017: The CGIS agent interviewed the applicant.
    - The applicant stated that he was accused of sexual assault during his junior or senior year while at CGA (not by VX). The investigation involved him and another cadet who was also accused of sexual assault. The applicant stated that he did not know exactly what he was punished for but he received restriction but remained at CGA. He asserted that he did not sexually assault anyone. The applicant stated that he believed the relationship between the other cadet and the other victim "went south and he somehow ended up in the middle of that quarrel as the result of him having sex with her roommate."
    - Regarding VX, he stated that she was a year or two behind him at CGA. He stated that they were "good friends at the CGA and remained good friends after he graduated." He stated that he remembered "kind of hooking up" with her while at his house after he graduated. He described the encounter as them being naked in bed and touching or masturbating at the same time. He stated that they did not have sexual intercourse. He stated that after this encounter they stopped talking but he did not know why.
    - The applicant recalled being at CGA after this encounter but could not remember why he was there. He stated that he made plans with mutual friends and asked if she would be there and his friends told him not to ask.
    - The applicant described another encounter with VX at her home when they "messed around," which he described as "being naked, fondling each other's genitals, and kissing" but no sexual intercourse. He stated he could not even remember if this happened before or after the above encounter.

- June 7, 2017: The CGIS agent interviewed PK4. PK4 stated that he attended CGA between 1993 and 1997. He stated that he had an on and off dating relationship with VX for about three years while at CGA. He stated that the summer before their senior year they were assigned to different stations. One day, she called him and stated that she had been at a party where people were drinking and the applicant "forced himself on her." He stated that he could not remember the exact words she used but thought that "rape" may have been one of them. He recalled that she stated that during the assault "she had been looking around the room and just wanted it to be over." He stated that VX was "really upset" while she was telling him about the assault. He stated that as time progressed, she displayed a wide range of emotions "to include guilt, shame and anger." PK4 stated that he had felt a lot of the same emotions and that if he had not been stationed so far away, maybe this would not have happened. He stated that VX "relived the experience many times and beat herself up over it." He stated that based on his impression there was penile-vaginal penetration and that the applicant was on top and she was on bottom. PK4 stated that he would never forget the phone call from VX because she had been a strong and independent woman but, after the assault, she "became vulnerable, sensitive, embarrassed, ashamed and had self-doubt." He thought that VX did not pursue any reporting options for multiple reasons, one of which being that she was a cadet and the applicant was an officer and it would be his word against hers.
- June 27, 2017: The CGIS agents interviewed PK5. As a lieutenant, he was assigned to CGA from 1989 to 1993 as an instructor and coach. PK5 stated that he recalled two separate instances where he was asked to be an advisor for a male cadet accused of sexual assault.
    - The first instance involved four cadets, two male and two female cadets, who had been drinking on a field at CGA. One of the male and female cadets ended up making out outside of a dorm room and the male followed the female into her dorm and "became very touchy and grabby." PK5 stated that the male cadet was disenrolled, but he believed that it was for other repeated violations such as drinking rather than for sexual assault.
    - The second instance involved two male friends (one of which was the applicant) who went to a nearby college. One of the cadets was dating a female student and wanted to bring the applicant to meet her roommate. The applicant and the roommate ended up together and having sex. She later reported being sexually assaulted after seeing him again at CGA. PK5 remembered that both of their stories were very similar. Both of them acknowledged drinking. The female had alleged that she was too intoxicated to give consent but the applicant said he did not know she was intoxicated and she never said no. During the investigation, "it came out that the victim was allegedly leaving the room and doing shots then coming back in and not telling [the applicant] what she was doing." It was also revealed that she performed oral sex on the applicant and climbed on top of him. The applicant went before the Executive Board but PK5 did not believe there was enough evidence to disenroll him.
- September 1, 2017: The CGIS agent interviewed VX again. VX stated that she did not recall drinking any alcohol while she was at the barbeque but she remembered seeing cans of beer outside on the deck. She assumed the applicant had been drinking because it was

his house and his barbeque. She stated that she could not recall the exact conversation that led up to the sexual assault. She stated she remembered him trying to kiss her but "she tried to playfully indicate that she wasn't interested; she didn't sense the danger." The next thing she remembered was him being on top of her. She told him to stop. Her arms were at her side but she could not remember if his hands were holding hers down or not. She stated that she was crying and asking him to stop. She stated that the applicant told her to "stop being a fucking baby." She stated that she did not perform oral sex on him during this encounter, but did during their second encounter. She stated that she did not know why the applicant showed up at her home before the second encounter. She stated that she was not happy to see and him did not want to participate in any sexual act with him, but acted as she did because she wanted to be the one to choose instead of allowing the applicant to do something to her again.

VIEWS OF THE COAST GUARD

On November 20, 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.

The JAG stated that Article 5.C.1.b. of the Coast Guard Military Justice Manual provides for a Consolidated Disposition Authority in cases involving multiple subjects from different commands engaged in closely related misconduct. On October 4, 2016, RDML S was designated as the Consolidated Disposition Authority for all disciplinary and administrative actions related to investigations into reports of sexual assault at CGA between 1992 and 2006. The authority included "the power to follow any logical leads and dispose of cases directly related to this investigation." The authority also includes "the administration of any non-punitive measures deemed appropriate … and appropriate disposition of any allegations" within his "sole and unfettered discretion." The JAG argued that this meant that RDML S had the authority and discretion to dispose of individual matters through either criminal or administrative proceedings. In the applicant's case, RDML S chose to issue a non-regular OER, which is a non-punitive, administrative action. The JAG asserted that because an OER is an administrative action, RDML S properly applied the "preponderance of the evidence" standard of proof in reaching his conclusion, and the applicant was not entitled to the constitutional rights of a criminal defendant at a criminal proceeding.

Regarding the applicant's assertion that he did not voluntarily request to retire, the JAG stated that resignations are presumed voluntary unless there is sufficient evidence to rebut this presumption and establish that the resignation was involuntary.[8] This presumption remains "even if a service member, in making a resignation decision, is confronted with 'a choice of unpleasant alternatives.'"[9] The presumption can only be rebutted if it can be demonstrated that 1) the member retired under duress or coercion caused by the government, or 2) the government misrepresented information and that the member detrimentally relied upon that information.[10] The JAG stated

[8] *Covington v. Dep't of Health and Human Srvs.*, 750 F2d. 937, 941 (Fed.Cir. 1984).
[9] *Nickerson v. United States*, 35 Fed.Cl. 581, 586 (1996), *citing Sammt v. United States*, 780 F.2d 31, 33 (Fed.Cir. 1985).
[10] *Nickerson* at 586.

that a resignation is considered to have been submitted under duress when "(1) one side involuntarily accepted the terms of another; (2) the circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party."[11]

The JAG argued that the applicant failed to prove that his retirement was obtained by means of coercion or duress. The applicant submitted a request for voluntary retirement on July 31, 2017, wherein he requested retirement in lieu of orders and acknowledged that he would be ineligible for promotion if already selected. The JAG also noted that a declaration was provided by RDML S in which he stated that he did not take or direct any action to compel the applicant to retire. The JAG pointed out that it is of significant import that the applicant had a reasonable alternative to requesting retirement – he could have accepted his orders and taken the position in Washington, D.C. In addition, the JAG asserted that most of the circumstances that made accepting the position untenable were of his own doing (such as moving to a mid-western state) and not ordered by the Coast Guard.

The JAG asserted that courts have also held that a service member's resignation is voluntary when he had the option of fighting the separation through court-martial or other proceedings.[12] Here, the JAG argued, the applicant had two viable options to contest the inclusion of the disputed OER in his record if he remained on active duty instead of retiring. He first could have applied for relief through the Personnel Records Review Board (PRRB) which has the authority to review applications for correction of error in personnel records (subject to exclusions not applicable here). Second, as mentioned by the applicant, he could have applied to the BCMR. The JAG stated that the applicant's claim that he did not have time to pursue relief from the BCMR is "simply false" because he could have accepted his orders to Washington, D.C., and remained on active duty, which would have provided him the necessary time to pursue the various administrative remedies available to him.

In response to the applicant's assertion that OPM's guidance that he should seek counsel on the highest grade held was a threat, the JAG stated the Coast Guard is required to make a grade determination to certify the retired grade of officers before their retirement.[13] The Military Separation Manual states that for "officers, derogatory information that may result in retirement at a lower grade includes, but is not limited to … a derogatory officer evaluation report."[14] This determination is made at the time of retirement. The JAG asserted that OPM's statement, therefore, was not a threat but a factual advisement that the Coast Guard might consider additional administrative action in light of the disputed OER. For these reasons, the JAG recommended that the Board deny relief.

In making these recommendations, the JAG adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). PSC stated that the applicant did not submit an application to the PRRB, as authorized by policy. PSC asserted that the delay of the applicant's promotion to O-6/Commanding Officer was supported by the potential adverse

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[11] *Christie v. United States*, 207 Ct.Cl. 333, 518 F.2d 584, 587 (1975).
[12] *See Moyer v. United States*, 190 F.3d 1314, 1320-21 (Fed.Cir. 1991); *Kim v. United States*, 47 Fed.Cl. 493, 498 (2000); *Brown v. United States*, 30 Fed.Cl. 227, 230 (1993).
[13] *See* Military Separations Manual, COMDTINST M1000.4, Article 1.C.12.b.
[14] *Id*. at Article 1.C.12.a.

information in the CGIS investigation into allegations of sexual assault, because of which the applicant was found to be unqualified to assume command of a sector. He was therefore given orders for an O-5 position in Washington, D.C. The orders included language stating that if the applicant did not intend to execute the orders, he had five work days to request retirement. PSC stated that this language is standard language included in all Transfer Orders issued to officers with more than twenty years of service.[15]

PSC also noted that in the applicant's addendum to the disputed OER, he appears to have conflated his two sexual assault allegations. One occurred while the applicant was a cadet with a different alleged victim and one occurred with VX after he graduated CGA and is at issue here. Although the applicant asserted in his addendum that CGA leadership was aware of the allegation and had taken no action, the actions that are addressed in the OER did not occur while he was attending CGA and any allegations of misconduct that occurred while he was a cadet are not relevant to the OER. The OER only addresses incident that occurred while he was an ensign, which was after he graduated CGA, and that incident was not officially reported by VX at the time.

PSC asserted that in 2017 a comprehensive investigation was conducted into the allegations that the applicant committed sexual assault. The investigation revealed "sufficient evidence to support the allegation that the applicant sexual assaulted [VX] while an officer on active duty in the Coast Guard." PSC stated that RDML S's actions were in accordance with Coast Guard policy and asserted that the applicant's retirement was voluntary. PSC argued that the applicant did not present sufficient evidence to overcome the presumption of regularity or to show that an error or injustice exists in his record. PSC therefore recommended that the Board deny relief.

The Coast Guard provided with its Advisory Opinion a declaration from RDML S. He stated that as the Consolidated Disposition Authority, he is "responsible for disposing of cases arising from [investigations] into certain historical reports of sexual assault." He stated that his responsibility is broad and he is in charge of final disposition of all cases, which includes directing punitive or administrative actions. He stated that in October 2017,[16] he directed preparation of a non-regular OER for the applicant under the authority of Articles of 5.F.2. and 5.H.1. of COMDTINST M1000.3. He asserted that before coming to this decision, he considered all of the evidence provided to him and contained in the CGIS report. After reviewing the evidence and consulting with the Staff Judge Advocate, he concluded by a preponderance of the evidence that the applicant had violated the UCMJ as outlined in the disputed OER. He stated that the applicant had submitted a request to voluntarily retire. He stated that he "did not take or direct any action to involuntarily separate [the applicant] from the Service, nor [was he] aware of any such action." He asserted that he did not take or direct any action to compel or coerce the applicant into submitting a retirement request.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

The Chair sent the applicant a copy of the Coast Guard's views and invited him to respond. The applicant, through counsel, replied and stated that he disagreed with the Coast Guard's Advisory Opinion.

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[15] Military Assignments and Authorized Absences, CIM 1000.8, Article 1.A.2.e.
[16] It was September 26, 2017.

The applicant acknowledged that an OER is a non-punitive, administrative action. He stated that the Coast Guard missed the point entirely, however, by saying that he was not entitled to due process because an OER is merely an administrative action. The applicant stated that his argument was that the Coast Guard adjudicated the allegation that he had committed a "crime" through an administrative means *in order to* limit his due process and ease the burden on the government to prove the allegations. Regarding the alternative to voluntary retirement, the applicant stated that he addressed this issue in his original filing, but added that he did not have the opportunity to address these issues at a court-martial because RDML S chose to adjudicate the allegations in an administrative action. The applicant argued that the assertion that he could have requested relief through the PRRB or this Board while remaining on active duty is "unpersuasive" due to the time required for decisions. The applicant was given only five days to make the decision whether to accept the given assignment or request retirement. He claimed that applying to either board was therefore not a meaningful option.

The applicant reiterated that the circumstances surrounding OPM's discussion with him made him feel as though their "guidance" was indeed a threat. He argued that even if the Board does not find his explanation in his original filing persuasive, this was merely one of a "variety of factors that contributed to the overall duress and coercion surrounding his resignation." He argued that the other factors should be sufficient to demonstrate that his retirement request was not voluntary. He stated that the Coast Guard's Advisory Opinion ignored the rest of the evidence he provided, including evidence pertaining to the context surrounding his retirement request. He asserted that the totality of the circumstances supports a finding that his request was a product of coercion and duress and was therefore not voluntary. The applicant asked that the Board find in his favor and grant the relief requested in his original filing.

APPLICABLE REGULATIONS

Article 5.F.3.b. of the Officer Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A ("Officer Manual"), states that a special OER "must be submitted when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority's action on an investigation includes direction that an OER must be prepared. In courts martial cases, this OER must be initiated once the convening authority has taken action and the finding of guilty has not been disapproved." (Emphasis added.)

The OER Manual, PCSINST M1611.1C, Article 4.B.1., states that on an OER, members of a rating chain may not mention "a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, [PRRB, BCMR], or any other investigation (including discrimination investigations) … except as provided in Article 5.F.3. of [COMDTINST M1000.3] and Chapter 15 of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding."

Article 15.C.3.c.[4] of the OER Manual states when preparing a derogatory OER, the description of duties section shall list the findings of the investigation. Article 15.C.4.a. states that the report shall clearly include the "nature of the proceeding prompting the report and the result of the proceeding (e.g., … final reviewing authority's action directing a OER due to criminal culpability)."

Article 15.C.5. states that other information "may be included as necessary to accurately reflect the performance being evaluated. Information about the proceeding may be included in the report even if the proceeding took place outside of the reporting period." The evaluation must be limited to the areas affected by the conduct, because all other dimensions will have been evaluated in the regular OER. Those dimensions must be marked as "Not Observed."

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.

2. The applicant alleged that his September 26, 2017, OER and his retirement at O-5 were erroneous and unjust. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed OER in an applicant's military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.[17] Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.[18] To be entitled to correction of an OER, the applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[19]

3. The applicant argued that the September 26, 2017, OER is erroneous and unjust because the facts do not support a finding that he committed the acts discussed therein. The Board disagrees. The OER and RDML S are accorded a presumption of regularity, and the applicant has not provided enough evidence to overcome that presumption. RDML S relied on the CGIS report, which contains enough evidence to support his finding that the applicant committed a sexual assault against VX in 1996. Although the applicant claimed that the CGIS report did not corroborate VX's account of the alleged sexual assault, the Board disagrees. For example, the applicant pointed out that a witness stated that there had been penile penetration and claimed that VX had denied it. But VX stated that she had been penetrated at least by his fingers and that she had stared at the wall during the assault and was not certain what else he had used but she had felt sore and abraded for days thereafter. PK2 told CGIS that he believed there had been penile penetration, but he was speaking about the incident with the college student roommates and not the incident with VX. PK4, who had been dating VX at the time, stated that he believed there had been penile penetration, but given VX's description of the assault, his belief does not lead the Board to find that either his or her statements to the CGIS agent are not creditable or should not have been relied

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[17] 33 C.F.R. § 52.24(b).
[18] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[19] *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

on by RDML S. Given VX's description of the assault, the fact that PK4 concluded that the applicant had penetrated her with his penis does not cast doubt on the overall credibility their statements to CGIS. PK4's statement to CGIS strongly supports VX's claims, which are by themselves convincing. The record contains ample evidence to support the findings of CGIS and RDML S and the latter's decision to document the applicant's misconduct in an OER in accordance with Article 5.F.3.b. of COMDTINST M1000.3A. The applicant has not proven by a preponderance of the evidence that RDML S's decision and the content of the disputed OER are not supported by substantial, sufficient, and reliable evidence.

4. The applicant argued that the OER should be removed because the UCMJ violation cited in the OER no longer exists. In 1996, the relevant UCMJ violation was Article 134, Indecent Assault. Today sexual assault remains an offense but is charged under Article 120, Rape and Sexual Assault. The fact that RDML S opted to refer to the UCMJ article in effect in 1996 to address misconduct that occurred in 1996 does not render the OER erroneous or unjust. Moreover, his choice of citation appears correct under Article 16.C.7. of the OER Manual, which states that when "drafting a Historical OER all policies and procedures that were in place at the time of the original OER must be used."

5. The applicant argued that the OER should be removed because the statute of limitations has run for the crime that he is accused of in the OER. The applicant was never charged with the crime and did not stand trial in either a military or civilian court. Statutes of limitations prevent the government from trying many criminals for their crimes. RDML S specifically noted that the five-year statute of limitations in effect for UCMJ Article 134 had passed.[20] But a derogatory OER directed under Article 5.F.3.b. of COMDTINST M1000.3A is not a charge or felony conviction for a criminal offense and does not violate the statute of limitations. The Board will not grant relief on this ground.

6. The applicant argued that the OER should be removed because without a trial and the opportunity to question his accusers, he was denied due process and the "overall way in which this case was investigated and adjudicated was entirely improper, unfair, unjust, and inequitable." The Board disagrees. The applicant was not charged with a crime and so he was not entitled to all of the due process that comes with criminal proceedings and their potential consequences. RDML S was the Consolidated Disposition Authority for all disciplinary and administrative action related to the investigation. He clearly knew he could not press criminal charges because of the statute of limitations, but he had the authority to direct the preparation of the disputed OER under Article 5.F.3.b. of COMDTINST M1000.3A. This action entitled the applicant to the due process provided for OERs in the OER and Officer Manuals, which included filing an OER addendum (which he did), applying to the PRRB for removal of the OER within a year (which he did not do), and applying to this Board (which he did after retiring). Moreover, given all of the circumstances of this case, including the nature of the offense and the passage of time, the Board finds that the applicant's inability to question the witnesses in an adversarial forum did not render the disputed OER erroneous or unjust.

7. The applicant's claims do not convince the Board that his OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the

[20] Manual for Courts-Martial, R.C.M. 907(b)(2)(B).

rating process, or a prejudicial violation of a statute or regulations."[21] The Board therefore finds that the applicant has not proven by a preponderance of the evidence that the disputed OER should be removed or amended.

8. The record shows that the applicant received all prescribed process throughout the proceedings. The applicant was interviewed for the CGIS investigation. He was allowed to submit an addendum for inclusion in his record with the OER. He was informed that his promotion was being delayed pursuant to Article 3.A.11.f. of COMDTINST M1000.3A due to the ongoing investigation and adverse information therein. Since he was not being promoted, the Coast Guard canceled his orders to the O-6 Sector Commander position and issued him new orders to an O-5 position in Washington, D.C. The orders contained the standard language informing the applicant that he could choose to accept the orders or submit a request to voluntarily retire within five working days. He submitted a request to voluntarily retire, which was accepted. The Board finds that the applicant has not proven by a preponderance of the evidence that the way the case was investigated and handled was improper, unfair, unjust, or inequitable.

9. The applicant claimed that his retirement was not voluntary, but was obtained by means of coercion and duress. As the Coast Guard stated, resignations are presumed voluntary unless there is sufficient evidence to rebut this presumption and establish that the resignation was involuntary.[22] To rebut this presumption, the applicant would need to prove that 1) he retired under duress or coercion caused by the government, or 2) the government misrepresented information and he detrimentally relied upon that information.[23] A resignation is considered to have been submitted under duress when "(1) one side involuntarily accepted the terms of another; (2) the circumstances permitted no other alternative; and (3) said circumstances were the result of coercive acts of the opposite party."[24] (Emphasis added.) The Board finds that the applicant has not proven by a preponderance of the evidence that he involuntarily requested retirement. He has not shown that he "retired under duress or coercion caused by the government" or that "the government misrepresented information" that he detrimentally relied upon. The applicant asserted that he did retire under duress or coercion based on a totality of the circumstances, including the fact that his orders to Washington, D.C., mentioned the option of submitting a request for retirement within five business days; a recommendation by someone at OPM that he seek advice on highest rank held policies, which apply when a member retires; and the eight-week wait time between his original transfer orders being canceled and his orders to Washington, D.C., being issued. The Board is not persuaded by any of the circumstances noted by the applicant. As noted by the Coast Guard, the option to retire, instead of accepting the orders, is included as standard language on all Permanent Change of Station orders for members who have been in the Coast Guard for over twenty years. The applicant provided no evidence that OPM suggested he seek advice about highest rank held policies, and even assuming this conversation did take place, the Board finds that such a statement is not coercive and would not put the applicant under duress. Advising the applicant to seek advice about the highest rank held policies and how they could affect his retirement would be informative, sound advice, not coercive, and would not remove his option to remain on active duty by accepting the transfer orders to be a division head in Washington, D.C. The Board also

[21] *Hary* at 1259.
[22] *Covington* at 941.
[23] *Nickerson* at 586.
[24] *Christie* at 587 (emphasis added).

does not find the eight weeks that the applicant waited to receive his new orders to be a coercive action by the Coast Guard's part. Because the applicant was not being promoted, the Coast Guard had to find an appropriate vacant O-5 position for the applicant to fill mid-cycle, and eight weeks was not an unreasonable period to do so. Nor did the Coast Guard order the applicant to move his family to the Midwest.

The applicant was not left without an alternative to retirement.[25] As the Coast Guard stated in its Advisory Opinion, he could have accepted the orders to be a division head in Washington, D.C., and so remained on active duty. If he wished to dispute the OER while remaining on active duty, he could have applied to the PRRB and then to this Board. The applicant stated that he only had five days to decide about retirement so applying to either board was not a realistic option. But he did not need a PRRB or BCMR decision on the disputed OER to accept the orders within five days. He could have accepted the orders with his record as it stood, including the disputed OER, and then applied to have the OER removed after accepting the orders. The fact that the applicant apparently considered accepting the transfer orders to be a worse alternative than retiring does not mean that it was not a viable option.[26] The Board finds that the applicant's retirement was voluntary and not the product of duress or coercion.

10. The applicant asked that he be promoted to O-6 for purposes of retirement pay and that he receive all appropriate back pay. Although the applicant was selected for promotion to O-6 on August 24, 2016, he voluntarily requested retirement before he was promoted to O-6. He was retired in pay grade O-5, and he never held the grade of O-6. He is therefore not entitled to be retired pay in pay grade O-6. The applicant has not proven by a preponderance of the evidence that his retirement as an O-5 constitutes an error or injustice.

11. Accordingly, the applicant's requests for relief should be denied because he has failed to prove by a preponderance of the evidence that the disputed OER, his retirement, or his retired pay grade are erroneous or unjust.

(ORDER AND SIGNATURES ON NEXT PAGE)

[25] *Id.*
[26] *Nickerson* at 586.

ORDER

The application of retired CDR [redacted], USCG, for correction of his military record is denied.

February 15, 2019

[redacted]