

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-084

██████ ██████ ████
LT (O-3)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 2, 2021, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated September 15, 2023, 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, an active-duty Lieutenant (LT/O-3), asked the Board to correct his record by removing his Officer Evaluation Report (OER) for the June 1, 2017, through May 31, 2018, rating period. The applicant's allegations and arguments appear below the Summary of the Record.

SUMMARY OF THE RECORD

On September 21, 2004, the applicant enlisted in the United States Coast Guard where he trained as a Boatswain's Mate and a Maritime Enforcement Specialist, and advanced to the rank of Petty Officer, First Class (E-6), before being commissioned an ensign on May 2, 2012. He was promoted to lieutenant in 2015.

On July 18, 2016, the applicant received Permanent Change of Station (PCS) orders and became a member of the intelligence staff.

In January 2018, the applicant was given orders to participate in a special operation, which required him to travel outside his normal duty station.

On January 17, 2018, according to a subsequent report of investigation, while participating in the special operation, the applicant stopped at a seafood restaurant, well outside the area of operation, to walk the docks and check boats at night, alone. The applicant did this without clearing

his activity with his chain of command or notifying the command center. An investigation revealed that while walking the docks, the applicant noticed a fishing vessel—previously the subject of the applicant’s own reporting—at the docks, and he saw four men with suitcases walking away from the vessel. The applicant approached the men, identified himself as a Coast Guard member, and began questioning them and asked what was in the suitcases. After not receiving an answer and requiring the individuals to provide identification, he asked the four men to “hold on” while he called local authorities. The applicant called 911 and specifically asked that assistance to the scene include a K-9 unit. When members of the local sheriff’s office and police department arrived, they handcuffed and detained the four men and searched their suitcases and vessel. During their search, authorities found no contraband. The applicant also conducted a search of the vessel with the local authorities. During the detention and searches, the applicant contacted his Sector to relay the information to them.¹

On January 24, 2018, the applicant emailed his supervisor and requested a meeting with her. The content of the email is as follows:

Good morning. I have been thinking about this for several days and the best way forward to address my concerns. Specifically, the uniform issue from the other night, uniform issue from a year ago, CGIS lack of communication/support from Intel, Command Communication, shop morale, trust, overall communication with the team, your expectations, plans for when you are on leave for 3 months and general teamwork.

I would like to set up a meeting with you in [redacted] on Friday morning. I would like LT [H] to be present to discuss my concerns to you at our level (LT to LT).

Will 1000 on Friday work for your schedule?

I hope this will have a positive effect that will open up communication, build trust and make us a better team.

On January 29, 2018, the applicant’s supervisor agreed to meet with him to discuss the applicant’s concerns on January 31, 2018, at 1300.

On January 29, 2018, the applicant emailed his supervisor and requested the meeting be moved to another time due to medical appointments. The applicant also informed his supervisor that he was under administrative investigation.

On February 6, 2018, the applicant emailed the Coast Guard’s Civil Rights and Civil Liberties (CRCL) to initiate an Anti-Hate and Harassment Investigation (AHHI) complaint process.

On February 21, 2018, the applicant emailed the CRCL office and attached his AHHI complaint. The applicant provided the names of the individuals he claimed violated CRCL policy, one of which was his supervisor. The applicant alleged the following:

I believe I have been subjected to harassment that was created by LT [T], Command Intelligence Officer of Sector [redacted], while assigned to Sector [redacted] Intelligence—Detached Duty [redacted]. Beginning on 30 December 2016, LT [T] accused me of not wearing my uniform during intelligence collection support to

¹ This information was obtained from the “Final Action on the Investigation of Alleged Intelligence Collection Activity Misconduct of 17 January 2018” memorandum.

Sector [redacted] Enforcement for Operation [special operation] in [redacted]. I believe that LT [T] has made false accusations about me from information received from S/A [P]. I believe she has spread false rumors and lied directly to me that command center watchstanders, by her account, have questioned if I was wearing my uniform during intelligence collection [30 DEC 2016, 17 Jan 2018, 23 Jan 2018]. These events have eroded my trust in my supervisor and created a hostile work environment. These events were witnessed or can be substantiated by Mr. [M], IS1 [K], MEC [A], LT [C], LT [H], Officer [F] ([Redacted] Department of Natural Resources), Officer [M] (NOAA) and Officer [H] (NOAA). LT [T], Command Intelligence Officer has not made efforts for me to address the source of these accusations and rumors. This intimidating and hostile work environment has eroded my trust with my supervisor and LT [T] has limited my direct access to the Command Staff. To support my position, I have supporting documents that are Law Enforcement Sensitive and I request personal interviews be conducted.

These statements are honest and true to the best of my knowledge.

I believe I have been subjected to harassment that was created by S/A [P], Resident Agent in Charge of Coast Guard Investigative Service (CGIS) [redacted] when I was Commanding Officer of USCGC [redacted] and after being assigned to Sector [redacted] Intelligence - Detached Duty [redacted]. Beginning on 30 April 2015, S/A [P] informed me of CGIS Roles and Responsibilities after I was approached by HSI [redacted] due to interagency intel/information sharing that was conducted at [redacted] with local, state and federal partners. Since this incident, S/A [P] made efforts to impede my individual work performance by creating an intimidating and hostile work environment. I believe that S/A [P] has spread false rumors about me, made false accusations about me, made inflammatory remarks about me, made efforts to not support law enforcement intelligence information sharing, impeded law enforcement intelligence collection efforts and told agents not to work with the D-[redacted] Intel Staff [30 DEC 2016, CY2017 and 17 Jan 2018]. This has been witnessed by LT [T], Mr. [M], IS1 [K], LTJG [H], LT [P], CBP Supervisor [D], CBP Air & Marine Agent [L], S/A [M] (HSI Resident Agent in Charge – [redacted]), S/A [M] (HSI [redacted]), S/A [S] (HSI [redacted]), S/A [D] (CGIS - Reserve), MEC [A] (Sector Charleston Enforcement), LT [C] (Sector [redacted] Enforcement Chief), BMCS [K] (OINC STA [redacted]), BMCS [L] (OINC STA [redacted]), LT [H] (Sector [redacted] Incident Management), LT [F] (CO – [redacted] Regional Fisheries Training Center) and MSSE2 [G]. LT [T], Command Intelligence Officer has not made efforts to address the issues that have led to an intimidating and hostile work environment for me and other members of the intelligence staff. To support my position, I have supporting documents that are Law Enforcement Sensitive and I request personal interviews be conducted.

These statements are honest and true to the best of my knowledge.

On May 17, 2018, CAPT R issued a memorandum “Final Action on Anti-Hate and Harassment Investigation” wherein he concurred with the Preliminary Investigating Officer’s recommendation and found that the allegations made by the applicant did not meet the definition of prohibited harassment, as there is no protected status for individuals who fail to maintain positive professional relationships. CAPT R further stated that the matters of the applicant’s performance of duties have not been properly documented in the past and his most recent questionable activity was being reviewed. CAPT R found that based on the timing of the applicant’s civil rights allegations, the applicant’s actions appeared to be a tactic to deflect from the investigation into the applicant’s alleged intelligence gathering misconduct. As a result, the AHHI investigation was closed.

On July 17, 2018, the applicant’s commander, CDR W, requested a meeting to review the events of January 17, 2018. Those who attended the meeting were: CDR W, RAC P, LT P – IOC State Coordinator the for local Law Enforcement Division, CDR B, and the applicant. CDR W stated that the purpose of the meeting was to have a non-confrontational meeting with others from a law enforcement and intelligence background to ask additional questions pursuant to the

investigative report, for better understanding surrounding the January 17, 2018, incident. Additionally, CDR W wanted to use this meeting to make a final command decision into the investigation pursuant to the investigative report. CDR W stated that the meeting would influence the command decision towards the final outcome of the investigation.

During the meeting the applicant repeatedly asked for the assistance of counsel, However, CDR W stated that the investigative report did not find the applicant's conduct criminal and the meeting was for administrative purposes, so the assistance of counsel was not required. CDR W asked the applicant if he had asked for the four men's identification cards prior to the local law enforcement arriving, to which the applicant replied that pursuant to the investigative report, "Findings of Facts" 39, 44, and 46 answered CDR W's questions. CDR W wanted additional information and asked the applicant "Did you hold onto the identification cards?" and the applicant answered, "Yes." The applicant further explained that only three of the four individuals provided identification voluntarily, and the fourth individual did not present identification and the applicant alleged that he did not attempt to illicit any further information from this individual. The applicant noted that his Sector's normal, consensual interviewing procedures allowed for holding, reviewing, and taking pictures of documents, which the applicant did in his government vehicle. At this point, RAC P stated that when the applicant asked for the individual's identifications, it was considered a "Terry Stop." The applicant replied by presenting varying Coast Guard policies. RAC P reiterated that because the applicant was a Coast Guard member in uniform, a reasonable and prudent person would have felt compelled to provide their identification when asked. CDR W discussed safety and expressed concern that at the time the event occurred, in addition to the individuals encountered, the applicant put himself and others at risk. After discussing safety concerns, the applicant admitted that safety should have been a top priority. RAC P stated that backing away and notifying CGIS would have alleviated the entire situation and that intelligence personnel should notify CGIS, trust that the information is being looked into, and move on.²

On August 8, 2018, the applicant signed and acknowledged his OER for the June 1, 2017, through May 31, 2018, rating period. For this rating period, the applicant received five 3s, three 4s, two 5s, seven 6s, and one 7 on a scale from 1 (worst) to 7 (best). On the Officer Comparison Scale, the applicant received a mark of "marginally performing officer," which is the second lowest mark out of seven available marks, and on the Promotion Scale the applicant received a mark of "Promotion Potential" which is the second lowest mark, just above "Do Not Promote." The following comments were provided in the OER:

Performance of Duties: Key contributor in planning for first ever compliance visit; yielded positive results/kudos from [redacted] team. Successfully vetted Detached Duty (DD) Intel [redacted] move into no-cost DHS spaces, synergized relation/resources w/co-located security task force/Homeland Security Investigations. Enhanced maritime security through vsl screening on approx. 3,000 merchant vsls that entered AOR; allowed CG & interagency teams to manage limited resources & prioritize vsl targeting/boardings. Keenly adapted to needs of operational partners & CG operations; yielded timely incident reporting & joint boarding opportunities. Confidently briefed current events/intel products at myriad of venues w/Fed/State/local partners to include bi-weekly MICO Mtgs. Produced & released 44 Field Intel Reports (FIRs), provided valuable info for analysts, operational cmdrs, and other decision makers; 4 FIRs were converted to Intel Info Reports (IIRs) & disseminated to the broader Intel Community. Mbr failed to keep supervisor informed during unplanned after hour activity; could not discern LE actions & policy w/intel

² The memorandum from this meeting was 8 pages in length. Accordingly, only the information pertinent to the applicant's application were summarized here.

collection; displayed inadequate application of intel specialty; did not practice acceptable operational risk management, placed self & CG program at risk.

Leadership Skills: Enthusiastically assisted subordinate work-life balance & staunch advocate for mbr recognition. Volunteered for next of kin notification for tragic death of subordinate; meticulous coordination facilitated a top-notch ceremony including military escort of body & military honors in 2 cities w/ interagency partners. Mentored others seeking to advance in/enter CG. Trained LE BOs & Collateral Duty Intel Officers at local CG units on CG intel capabilities & support to interagency partners; enhanced info sharing vastly impr'vd intel collection turnaround & provided better sit'l awareness. Utilized ADT multiple times for Reserve LT to receive field collection experience and improved coordination w/other units & [redacted] Intel. Mbr submitted OES responsibilities w/ insightful input. Evals of staff well-thought out & timely. Mbr's actions during marking period showed a lack of respect for supervisor and created interpersonal tension in Intel Division; resulted in strained work environment & relationships w/partners.

Personal and Professional Qualities: Motivated self-starter. Aggressively sought ways to highlight CG Intel credibility to other LE/Intel agencies. Advanced LE intel info sharing among fed/state/local LE partners; identifying networks that exist in AOR while emphasizing coordination beyond AOR for a regional approach. Facilitated more precise intel reporting for unit while taking intel duty calls. Committed to being a positive CG role model for youth in the local community; assisted in CG/ Military outreach at local schools. During marking period, mbr began rigorous CrossFit workout routine enhancing overall fitness. Volunteered as soccer coach & maintained CG boat crew/LE semi-annual fitness standard below age category. Demonstrated a severe lack of judgment/poor decision making while in the field & detained individuals after questioning, outside of CG policy, which brought discredit to the Coast Guard.

Reporting Officer Comments: Remarkable dedication to fallen shipmate; proved strong character in the face of tragedy among unit. Member actively sought out opportunities to expand collaboration and the CG Intelligence program's relevance w/partners. Initiative & enthusiasm w/ subordinate & information sharing among port partners is admirable; advanced intelligence driven operations through member's operational background and local knowledge. Member crossed the lines between intelligence and law enforcement authorities with his unorthodox methodology & activity. Lack of respect toward supervisor demonstrated military demeanor not w/in CG policy. Although inconsistent w/past OERs, mbr had positive performance highlights, yet made poor choices this period; mbr has promotion potential. Will evaluate performance over next performance period to determine recommendations on future billets.

On August 20, 2018, CAPT R issued a memorandum "Final Action on the Investigation of Alleged Intelligence Collection Activity Misconduct of 17 January 2018," wherein he provided his opinions and directed that certain actions be taken as a result of the January 17, 2018, events. The contents of this memorandum are as follows:

1. Having considered references (a) through (c), appropriate actions are hereby ordered, and this administrative investigation is closed. A summary of the pertinent facts and my opinions based on those facts are herein provided.
2. Factual Summary.
 - a. LT [applicant], of the detached duty intelligence office in [redacted], was alleged to have conducted improper intelligence collection activities that crossed the line into unauthorized law enforcement actions; the combination of which ran afoul of Coast Guard policy. These activities included stopping and detaining individuals he suspected of illicit activity subsequent to a line of questioning, without the proper authority or mandate for him to conduct such activities.
 - b. In January 2018, LT [applicant] was given orders to participate in an operation called [special operation]. He was required to travel to [redacted], for the operation. LT [applicant] also utilized

this operation to help familiarize the new [CG district] intelligence reserve officer with the area of operations (northern [redacted] coast) and to introduce him to various contacts in that area.

c. After leaving [redacted] and without clearing his activity with his chain of command or notifying to the Command Center, LT [applicant] stopped at the [redacted] Seafood House, well outside the area of operations for [special operation], to walk the docs and check boats at night while alone. He noticed vehicles he recognized as associated with captains or owners of vessels in the area, but also noticed a vehicle he did not recognize.

d. LT [applicant] noticed a fishing vessel; previously the subject of his own reporting, at the docks. As he walked down the dock, he saw four men with suitcases walking away from the fishing vessel of interest. He approached the men, identified himself as a Coast Guard member, and began questioning them and asking what was in the suitcases. After not receiving an answer to the question about the suitcases and requiring the individuals to provide their identification, he asked the four men to “hold on” while he called the local 9-1-1 operator and specifically requested [redacted] County’s Sherriff Department provide assistance at the scene to include a K-9 unit.

e. When the Sheriffs and Police department arrived, they handcuffed and detained the four men, searched their suitcases and the vessel and found no contraband then LT [applicant] accompanied the local law enforcement officers on a search of the vessel. During the detention and searches, LT [applicant] contacted the Sector to relay the information on the incident.

3. Opinions.

a. LT [applicant’s] actions clearly crossed the line into unauthorized law enforcement activities. His roles as an intelligence officer cannot, and should never, be in question when it comes to actions that violate an individual’s fourth amendment rights. His requiring and withholding the identification documents of the individuals he was questioning (or interviewing), then asking them to “hold on” while he called the Sherriff was a detention—a detention that he had no authority or legal right to undertake. It could have been construed as a custodial interrogation.

b. LT [applicant’s] activities did not align with passive intelligence collection activities that he is authorized to undertake within his duties. His actions blurred the lines between the authority given to intelligence officers and to those performing law enforcement investigations or enforcement actions. This, along with performing collection activities alone without conducting a proper risk assessment, is a violation of Coast Guard policy.

c. This is not the first situation LT [applicant] was alleged to have blurred the lines between intelligence and law enforcement activities. Previous allegations were neither properly investigated nor documented.

4. Directed Actions.

a. LT [T] [applicant’s supervisor] shall develop an Individual Development plan so LT [applicant] will have a full understanding of applicable Intelligence policy and its limitations going forward. This plan shall define steps and thresholds for LT [applicant] to earn back the trust of the command and partners in order to fulfill his primary duties.

b. I direct that LT [applicant] work more closely with his chain of command to approve his intelligence activities.

c. I direct Deputy Sector Commander, CDR [W], to perform an intervention to facilitate better communication and a more productive working relationship among members of the intelligence division.

THE APPLICANT'S ALLEGATIONS

The applicant alleged that his OER was administratively inaccurate, and it contained information that was wrongfully included by his supervisor.³ Specifically, the applicant contested:

- The marks of 3 he received for “Planning & Preparedness” and “Professional Competence” and the following supervisor comments for “Performance of Duties” section of the OER: “Mbr failed to keep supervisor informed during unplanned after hour activity; could not discern LE actions & policy w/intel collection; displayed inadequate application of intel specialty; did not practice acceptable operational risk management, placed self & CG program at risk.”
- The mark of 3 for “Workplace Climate” and the following supervisor comments for the “Leadership Skills” section of the OER: “Mbr’s actions during marking period showed a lack of respect for supervisor and created interpersonal tension in Intel Division; resulted in strained work environment & relationships w/partners.”
- The marks of 3 he received for “Judgment” and “Professional Presence” and the following supervisor comments for the “Personal & Professional Qualities” section of the OER: “Demonstrated a severe lack of judgement/poor decision making while in the field & detained individuals after questioning, outside of CG policy, which brought discredit to the Coast Guard.”
- Reporting Officer Comments: “Member crossed the lines between intelligence and law enforcement authorities with his unorthodox methodology & activity. Lack of respect toward supervisor demonstrated military demeanor not w/in CG policy. Although inconsistent w/past OERs, mbr had positive performance highlights, yet made poor choices this period; mbr has promotion potential. Will evaluate performance over next performance period to determine recommendations on future billets.”

The applicant alleged that there are numerous inconsistencies found in his OER. For example, the applicant stated that he has no previous written derogatory documentation or verbal counseling for the behaviors described in his OER. The applicant also stated that he was marked down for not practicing “acceptable operational risk management” but the Coast Guard Intelligence Manual, COMDTINST M3800.6A (December 2017), which was in effect at the time of his rating period, did not include “operational risk management” but instead simply used “risk management.” Accordingly, the applicant alleged that he was held to a standard not yet published until the March 2018 manual was published. The applicant argued that he did follow “risk management” as he called 911, his Command Center, and his supervisor to notify him and for further direction.

The applicant explained that on January 17, 2018, he was the subject of an investigation for alleged intelligence collection activity misconduct. The applicant alleged that he was originally suspected of undercover surveillance and search and seizure of civilians. The applicant further

³ The applicant provided a resume of his work history. However, not only is this information contained in the applicant’s record, but his Coast Guard resume, assignments, and awards have no bearing on the allegations before this Board, and will therefore not be summarized here.

alleged that he was asked numerous times if he was wearing his uniform, and was previously questioned without merit for not wearing his uniform a year prior by his supervisor during the same period. The applicant explained that during the events of January 17, 2018, he was operating under the collection plan in his Sector's FY2017 Intelligence Staff Standard Operations Procedures Manual. The applicant claimed the investigation should not be a part of his OER pursuant to the "Final Action on Investigation of Alleged Intelligence Collection Activity Misconduct," because the investigation was finalized on August 20, 2018, and was therefore 81 days outside of the rating period.

The applicant stated that on January 29, 2018, he was issued Uniform Code of Military Justice (UCMJ) and Article 31B Miranda/Tempia Rights regarding his conduct on January 17, 2018. The applicant alleged that he willingly provided a personal statement, Field Incident Report (FIR), the local Sheriff Office's Incident Report, and a Sheriff's Department video to validate his claims that he was in uniform and not conducting undercover surveillance. The applicant explained that between January 24 through January 29, 2018, he sent multiple emails to his supervisor and specifically requested a meeting to address accusations made by Coast Guard Investigative Services' (CGIS) Resident Agent In-Charge (RAC) that the applicant conducted undercover surveillance activities. The applicant alleged that he also requested the opportunity to discuss the lack of communication between CGIS and Sector Intelligence, command expectations, unit morale, trust, and overall communication concerns up and down the chain of command. According to the applicant, this was the first time he attempted to address his concerns prior to pursuing an elevated course of action. The applicant claimed that he cancelled the request to meet with his supervisor after being informed that he was under investigation. The applicant alleged that the Civilian Intelligence Operations Specialist (CIOS) confided in him numerous times the difficulties he experienced with the Chief Intelligence Officer (CIO), and that the CIOS used the Defense Equal Opportunity Management Institute (DEOMI) to raise concerns about the CIO and their command staff's leadership. The applicant explained that the CIOS worked directly for and alongside the CIO.

The applicant explained that on January 31, 2018, he contacted the Civil Rights Directorate, and on February 21, 2018, he submitted an AHHI "Workplace Climate" complaint against his supervisor and RAC, for their prior accusations of the applicant not wearing his uniform, other workplace climate-related issues with the RAC dating back to 2015-2016. The applicant stated that interviews conducted by the AHHI IO of others who worked with him corroborated his claims about his supervisor and intelligence commanders. The applicant claimed that he had no previous verbal or written documentation of disrespect toward his supervisor and that information from the May 17, 2018, AHHI was prohibited from being used to take adverse personnel action on him. The applicant alleged that comments in his OER were included because he filed an AHHI complaint against his supervisor and RAC. According to the applicant, the comments he received in his OER as a result of his AHHI complaint indicates that his supervisor, Reporting Officer, and Reviewer used comments in the AHHI Report to form an opinion that he showed "disrespect" toward his supervisor.

The applicant explained that on May 18, 2018, he met with his OER Reviewer, the Sector Commander at the time, and his OER Supervisor, who was the Deputy Sector Commander at the time, and that during this meeting he was informed that his AHHI complaint was completed and

that no civil rights had been violated. The applicant alleged that the Sector Command told the applicant that he was upset that the applicant filed the complaint because the applicant was under investigation at the time. The applicant further alleged that he was questioned by the Sector Commander and Deputy Commander on events pertaining to the ongoing intelligence misconduct investigation. The applicant stated that he was informed that the investigation was still ongoing and that someone would be interviewing him. The applicant claimed that the Sector Commander stated, "I need 100% honesty," and that he "needed to understand what happened." The applicant stated that during this meeting, he was never read his Article 31B rights, which signaled to him that the Sector Commander was not an impartial party to either investigation. The applicant again stated that he had no previous derogatory written or verbal incidents in his record and that information from an AHHI cannot be used to take personnel action someone because they filed a complaint and participated in the EEO process. The applicant argued that the Coast Guard failed to follow the required timeline for his AHHI complaint because the investigation took 77 days to complete, outside the 30-day requirement established by the Coast Guard EEO complaint process.

The applicant claimed that on June 7, 2018, he was advised that the intelligence misconduct investigation had been reopened after the applicant's command was not satisfied with the outcome of the March 5, 2018, Administrative Investigations Memorandum. As a result, the applicant stated that on June 7, 2018, he was again read his Article 31B rights, at which point he elected to make a statement and consult with an attorney. The applicant argued that because the investigation was still ongoing on June 7, 2018, seven days after the end of the reporting period, the January 17, 2018, alleged misconduct should not have been included in his OER, because the final report was not issued until August 20, 2018.

The applicant alleged that on July 17, 2018, he attended a meeting at his Sector where he was questioned regarding the events that occurred on January 17, 2018. The applicant claimed he was told that the purpose of the meeting was for the applicant to answer additional questions that would influence the command decision toward the final outcome of the intelligence misconduct investigation. The applicant claimed that the Sector Commander, Deputy Commander, RAC, and other intelligence leaders were present at this meeting. The applicant alleged that he requested that other individuals who worked in his unit and who allegedly corroborated his account of harassment, be present, but his request was denied by the Deputy Sector Commander. The applicant claimed that following this meeting he was asked to provide a memorandum highlighting the talking points of their meeting. The applicant stated that at this point the investigation into his alleged intelligence misconduct was still ongoing, he had previously been read his Article 31B rights, and he was now being asked questions regarding the investigation. The applicant claimed that during the meeting he requested the opportunity to consult with his attorney, but the meeting went forward without the presence of his attorney, and he was never read his Article 31B right at any point during the meeting, and as a result his rights were violated. The applicant argued that the meeting took place 47 days after the end of his rating period and should never have been included in his OER.

The applicant explained that his OER was finalized by his supervisor on July 31, 2018, 61 days after the end of his reporting period. The applicant argued that his supervisor should not have had access to the Final AHHI Investigative Report, or the ongoing investigation into his intelligence misconduct, as it was finalized 20 days after she signed his OER. The applicant alleged

that this proves that his supervisor's comments were manipulated by the Reviewing Officer and/or Reviewer. The applicant further alleged that this also highlights that the Sector Commander was not an impartial party to the investigation.

The applicant explained that the OER was finalized by the Reporting Officer and Reviewer on August 7, 2018, 68 days after the reporting period ended. The applicant argued that the Reporting Officer would not have had access to the Final Action memorandum of the applicant's alleged intelligence misconduct and should never had access to the AHHI Final Action memorandum.

The applicant stated that in accordance with the Coast Guard Officer Accessions, Evaluations and Promotions Manual, COMDTINST M1000.3A, his midterm counseling came four months late. According to the applicant, he was on leave for two weeks after the midterm counseling and his Reporting Officer was on maternity leave from May 1, through May 31, 2018, of the applicable rating period and remained on leave until July 18, 2018. The applicant alleged that his supervisor did not observe his performance during this time period. The applicant stated that his supervisor signed his OER 61 days after the reporting period ended and that information from the Final Action memorandum and AHHI should not have been given to his supervisor. The applicant argued that comments pertaining to information from these investigations and reports were based on findings from after the reporting period.

The applicant alleged that information contained in his OER was used as punitive measure for the investigation into his intelligence misconduct. The applicant claimed that opinions contained in the Final Action memorandum highlight that it could have been "construed" as a custodial interrogation. The applicant argued that "construe" is an opinion, and that he either did or did not violate another person's rights. The applicant stated that he was never counseled on what policy he violated and was only told that he violated Coast Guard policy. The applicant further stated that he was never court-martialed and never received Non-Judicial Punishment (NJP). The applicant claimed that the information he was given on the night of January 17, 2017, was given to him freely and that pursuant to Coast Guard Intelligence Manual, COMDTINST M3800.6A, during a consent-based interview, "Any Coast Guard member may acquire information provided voluntarily." According to the applicant, pursuant to Article 3-51 of COMDTINST M3800.6A, Coast Guard personnel conducting consent-based interviews must:

1. Disclose their affiliation with the Coast Guard (there is no requirement for the collector to announce their affiliation with CGI [Coast Guard Intelligence]).
2. Obtain an individual's consent to conduct an interview or access private property.
3. Conduct the interview in a non-threatening/non-hostile manner.
4. Ensure consent is given freely and voluntarily
5. Terminate the conversation when requested by the person being interviewed.

The applicant argued that he followed policy during the events of January 17, 2018.

The applicant alleged that his filing of an EEO AHHI complaint for a hostile work environment against his supervisor and RAC was used against him in his OER. The applicant claimed that the Sector Commander interpreted his EEO filing as disrespectful and as a possible deflection method. The applicant argued that using the information from an EEO complaint and claiming “disrespect” for filing a lawful complaint can be interpreted as taking personnel action and/or retaliation, which is a direct violation of the Department of Homeland Security’s (DHS) policy.

The applicant explained that information contained in his OER discusses relationships with professional partners, but the main partnership strained during his five years at the Sector was that of the RAC. The applicant claimed that dating back to 2015, he had been unsuccessful in developing a relationship with the RAC, but it was not for a lack of trying. The applicant alleged that he maintained positive partnerships with many agencies throughout the area.

Finally, the applicant stated that as an Afloat Operations officer the majority of his career, he always valued Coast Guard missions and the importance of intelligence. The applicant stated that he decided to pursue a secondary career path in intelligence because he wanted to enhance law enforcement efforts with operational experience. According to the applicant, in almost 17 years in the Coast Guard, his service record reflects a superb career with the exception of the contested OER. The applicant argued that this OER was inconsistent with his demonstrated career performance as indicated by numerous favorable OERs and character references contained within his application. Additionally, the applicant argued that this single OER will have a drastic impact on his ability to compete for senior ranks despite follow-on evaluations documenting superb performance. The applicant stated that he learned a tremendous amount from this event, and often considered what could have been done differently to affect another outcome. However, he believed very strongly that his intelligence collection efforts greatly enhanced DHS and other federal partners’ understanding of transnational criminal networks exploiting the southeast coast of the United States (Enclosures (9, 34-36)). The applicant argued that he has continued his strong performance and dedication to the Coast Guard through a successful tour as the Operations Officer of a cutter and earning of orders to another cutter as the Executive Officer. Considering all the above, the applicant respectfully requested that his OER be stricken from his record.

To support his application, the applicant submitted various Coast Guard instruction manuals, investigations, emails and character references. The Board has access to all pertinent Coast Guard manuals, so they will not be summarized here. Any supporting documentation submitted by the applicant, not summarized in this decision, was found by this Board to either be unpersuasive as to affect the outcome of this decision or was irrelevant to the applicant’s claims of an erroneous OER.

- A character statement from Mr. M, wherein Mr. M stated that during the applicant’s tour with intelligence staff, the applicant worked endless hours providing top-notch intelligence products and support throughout their Sector’s area of responsibility, and vastly improved working relationships with local, state and federal partners in the region. Mr. M reaffirmed the applicant’s claims that the contested comments in his OER were false. Like the applicant, Mr. M described a volatile and unpleasant working environment for the intelligence crew assigned to the unit. Mr. M described a revolving door of commanders

who rarely visited the crew and unit. Mr. M claimed that over time, the morale of the entire staff degraded.⁴

- A statement submitted by IS1 K as requested by the Preliminary Investigating Officer (PIO) for the AHHI complaint submitted by the applicant. IS1 K's statement dealt specifically with the AHHI investigation and had nothing to do with the applicant's contested OER. In addition, much of IS1 K's statement revolved around the applicant's dealings with a Mr. P, not the applicant's supervisor, LCDR T. Accordingly, IS1 K's statement will not be summarized here.
- A character statement from Mr. A wherein Mr. A spoke of the applicant's ability to build and foster partnerships with numerous federal, state, and local partners, which ultimately led to numerous interagency operations. Mr. A noted that when he struggled with providing law enforcement members to support local patrols, the applicant stepped up and re-certified as a Boarding Officer to help with operations. Mr. A claimed that the applicant was also known to conduct risk assessments prior to each mission and would expressly clarify if the mission was for law enforcement or intelligence even though such clarification was not required. Mr. A stated that each law enforcement mission was passed to the Sector Command Center, but intelligence was not required, and that the applicant always wore his uniform. According to Mr. A, the applicant always identified himself as being a member of the Coast Guard. Mr. A described an event where the applicant was accused of not properly identifying himself as being in the Coast Guard as well as conducting operations outside of policy. Mr. A claimed that after this incident, the Intelligence Chief's perception of the applicant changed, and that the applicant was constantly questioned, and his actions were micromanaged. Mr. A explained that on the night of January 17, 2018, the applicant called him and asked him to remain on the phone with him while he questioned certain individuals. Mr. A further explained that the applicant identified himself as being a member of the United States Coast Guard. Mr. A clearly stated that the applicant was in uniform on the night of January 17, 2018, as evidenced by a photo from the night of the incident. Mr. A stated that he was questioned and told those investigating the matter that the reason the applicant called him was because the applicant had worked that area with Mr. A and his team numerous times. Mr. A's opinion was that the applicant followed Coast Guard policy. Mr. A stated that during the investigation he was interviewed by the Commanding Officer and Deputy Sector Commander and accused him and the applicant of colluding. Mr. A alleged that the Commanding Officer was biased and used the applicant's OER to wrongfully hold him accountable. Mr. A concluded by stating he believed the applicant was dependable, honest and trustworthy, who is a model Coast Guard officer with the utmost moral character and integrity.
- A character statement from Mr. K wherein he stated that the applicant contributed key intelligence information to a strategic analytic product which provided situational

⁴ Mr. M's statement went as far as to provide a detailed counter argument for each one of the applicant's contested OER marks. However, not only was Mr. M a civilian employee and not the applicant's supervisor, but he was also not present on the night in question. The fact that Mr. M disagreed with the comments made by the applicant's supervisor in the applicant's OER, does not prove error or injustice. Accordingly, and for efficiency, Mr. M's personal take on the applicant's OER comments and marks will not be summarized here.

awareness of Transnational Organized Crime (TOC) and that the applicant's product was of such high value that it was briefed directly to the Secretary of Homeland Security. Mr. K described the applicant as someone highly regarded by the Department of Homeland Security (DHS) as being a consummate professional. Mr. K stated that the applicant's expertise in the maritime environment is exceptional and that the applicant introduced DHS Intelligence field personnel to multiple key partners and served as a touchpoint for nefarious activities throughout their region. Mr. K claimed that the applicant's professional network enabled DHS Intelligence field personnel to obtain intelligence information in a timely and effective manner, which significantly contributed to mission accomplishment. Overall, Mr. K stated that the applicant's actions ensured that DHS senior policy makers understood current TOC activity along their coastal region, in addition to narcotic trafficking activity in other countries.

- A character statement from Mr. D, wherein he stated that the applicant was a consummate professional and a tremendous resource to the combined DHS mission. Mr. D stated that the applicant's analytical abilities and attention to detail contributed key intelligence to multiple collaborative efforts and added value to multiple government agency investigations as they pertained to their area of responsibility. Mr. D claimed that the applicant's maritime environment expertise assisted in identifying numerous connections between TOC and key players in their coastal region. According to Mr. D, the applicant was a key player in the success of information sharing between federal, state, and local law enforcement partners.
- A character statement from Mr. H wherein he stated that while the applicant was assigned to his region, the applicant was tasked with providing intelligence support to guide Customs and Border Protection (CBP) targeting of high-risk vessels, crewmembers, and cargo shipments. Mr. H stated that the applicant led his staff with a strong sense of pride, duty and attention to detail. Mr. H explained that the applicant utilized his years of maritime and intelligence expertise and provided guidance to CBP officers on interview techniques, smuggling trends and global intelligence. Mr. H claimed that the applicant was instrumental in the interception of five stowaways that attempted to enter the United States via cargo vessels arriving in their area.⁵

VIEWES OF THE COAST GUARD

On December 23, 2021, a Judge Advocate (JAG) for the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the PSC.

The JAG argued that the applicant failed to provide sufficient evidence to meet the standard for the correction of an OER. The JAG argued that under *Hary v. United States*,⁶ the applicant

⁵ The applicant submitted three additional character references, but the Board found these letters redundant as they speak of the applicant's unquestionable morals, integrity, contribution to the intelligence community, and ability to build relationships and therefore did not add substantially new information to the applicant's claims. Therefore, for efficiency, those character statements were not summarized here.

⁶ *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The applicant must demonstrate, by competent evidence (1) a misstatement of a significant hard fact, (2) clear violation of specific objective requirement of statute or regulation, or (3) factors adversely affecting the ratings which had no business being in the rating process.⁷

In the instant case, the JAG argued that the applicant appeared to imply a misstatement of significant hard fact in his contested OER as evidenced by the applicant's challenge to the statement, "[d]id not practice operational risk management, placed self & CG program at risk." The JAG stated that the applicant argued that this comment was a misstatement of significant hard fact based on the technicality of the difference between operational risk management cited in his OER and regular risk management, with the applicant stating that he was held to a different standard. The JAG argued that the applicant has failed to show that he was held to a higher or different standard and has not proven that this was a material misstatement of significant hard fact. The JAG explained that the difference between the comment stating operational risk management, versus risk management, does not demonstrate material error, nor does it rebut the essence of the comment, which is that the applicant's command believed that the applicant improperly placed himself and the CG program at large, in danger. The JAG stated that the applicant argued that he followed risk management by calling 911, but failed to account for the situation prior to calling 911. According to the JAG, it was within command discretion to find that the applicant placed himself in a dangerous situation by actively questioning and seizing the identification of the individuals prior to calling 911. The JAG argued that regardless of the applicant's claims regarding the word "operational," the applicant has failed to prove that the comment was a misstatement of significant hard fact or material error.

The JAG further argued that the applicant also failed to take certain key steps afforded by policy to challenge the comments and marks contained with the OER. Specifically, the JAG stated that the applicant failed to submit a Reported-on Officer (ROO) Reply as authorized by policy, in addition to filing an application for relief with the Personnel Records Review Board (PRRB). The JAG explained that in addition to failing to take necessary steps to contest his OER, in the instant case, the applicant did not contest the contents or facts of the OER until almost 3 years after the OER was signed and finalized by the applicant. The JAG claimed that this failure to timely contest the contents of his OER, or avail himself of the available remedies afforded to officers, is substantial evidence that when he received the OER in August 2018, that he accepted it as valid even if he did not like it.

Regarding the second prong of the *Hary* test, the JAG stated that the applicant alleged multiple violations of the Officer Evaluation System Manual, PSCINST M1611.1C. First, the applicant alleged that he was not provided with timely mid-period counseling. However, the JAG argued that the applicant's contentions that counseling must be midway through the marking period is incorrect. The JAG claimed that Article 5.g. of PSCINST M1611.1C specifically states that the date counseling is conducted is not mandated, only that "ideally" the counseling should be midway through the period. According to the JAG, this allows for discretion and does not require the counseling to be at the mid-point. In addition, the JAG argued that pursuant to Coast Guard policy, the burden to coordinate and request mid-period counseling ultimately falls on the service member. The JAG stated that the evidence submitted by the applicant shows that he and his

⁷ *Id.*

supervisor attempted to coordinate a meeting around the mid-period of the rating period to discuss many things relating to the applicant's performance, as well as supervisor expectations. The JAG claimed that the applicant requested to cancel the mid-period meeting due to the pending investigation and it seemingly was not rescheduled until April. The JAG argued that this delay was not an error because it was the result of the applicant's actions.

The JAG stated that the applicant also alleged that his OER violated policy because information from the final outcome of the memorandum into the applicant's January 17, 2018, alleged intelligence misconduct was contained in this OER. The JAG stated that the applicant's claims are incorrect. The JAG argued that pursuant to PSCINST M1611.1C, expressly states that while the rating chain shall not mention an administrative or investigative proceeding, the rating chain is not precluded from including comments on the conduct that is the subject of the proceeding. The JAG explained that here, the applicant has failed to show that any of the OER comments referenced the investigation, and were therefore prohibited. The JAG further explained that while the final outcome of the memorandum the applicant has relied upon was finalized outside of the rating period, the report was not mentioned anywhere in the OER, and the underlying conduct that was the subject of the memorandum, as well as the investigation that was completed in March 2018, was within the applicant's marking period. The JAG argued that the applicant failed to provide evidence that his rating chain relied upon the August 20, 2018, memorandum or the May 17, 2018, "Final Action AHHI" memorandum in drafting the applicant's OER.

Next, the JAG stated that the applicant alleged policy violations in the preparation of his OER because "the Supervisor's comments were manipulated by the reporting officer and/or reviewer." According to the JAG, the applicant's claims are founded on the assertion that his supervisor would not have been privy to the misconduct finalized in a memorandum on August 20, 2018, or the AHHI final action memorandum finalized on May 17, 2018, but his OER contains information from both. As argued previously, the JAG stated that the comments made by the applicant's supervisor in the applicant's OER, do not reference the investigation or final action memorandum. The JAG explained that the applicant's OER comments only speak to the underlying conduct that was the subject of the investigation, of which the applicant's supervisor had first-hand knowledge. In addition, the JAG argued that there are no comments in the applicant's OER that reference the AHHI investigation of the final action memorandum. The JAG stated that the applicant referenced claims of disrespect mentioned in his OER, but the applicant failed to prove that these comments have any nexus to the AHHI final action memorandum or the investigation. Regarding the applicant's claim that because his OER was not finalized until two months after the rating period, it gave his rating chain time to manipulate the comments and incorporate information from outside of the rating period, the JAG argued that the applicant has failed to support his claims. The JAG stated that while the applicant's OER was finalized two months after the end of the rating period, the applicant failed to prove that this delay had any material effect on his evaluation.

Finally, regarding the third *Hary* prong, the JAG claimed that while the applicant did not explicitly implicate this factor, he did imply that he faced reprisal from his rating chain because he filed an AHHI claim against his supervisor. To support his claim, the JAG stated that the applicant pointed to the comment that he allegedly disrespected his supervisor. The JAG argued that the applicant failed to establish his claim that being accused of disrespecting his supervisor, after he

filed an AHHI complaint against his supervisor can be interpreted as taking personnel action and/or retaliation. The JAG further argued that the applicant failed to demonstrate that the comments contained in his OER, specifically, “Mbr’s actions during marking period showed a lack of respect for supervisor...” and “Lack of respect toward supervisor demonstrated military demeanor not w/in CG policy,” had a connection to the AHHI complaint or that they were included as reprisal. Accordingly, the JAG claimed that the applicant failed to prove that his evaluation was the result of bias or personal animosity or other factors which had no business being in the rating process.

To support his advisory opinion, the JAG submitted a sworn declaration from CAPT R, wherein he stated that he believed the applicant’s supervisor appropriately documented the applicant’s performance during the applicable rating period. CAPT R explained that after learning that a member of his intelligence staff had been involved in a late-night boarding, he directed an investigation into the events surrounding a law enforcement action initiated by the applicant. CAPT R stated that the applicant mentioned being a part of an approved collection plan, but that plan was for operations in the northern portion of the Sector and involved support from other members of the Sector. CAPT R further stated that he remembered reviewing the information from the dash cam footage of the local law enforcement responding to the scene and was a bit concerned about law enforcement actions of this type being initiated by a lone intelligence officer operating on his own. CAPT R explained that he believed the footage, if viewed by this Board, will reinforce what he believed to have been a failure to follow the most basic of established guidelines of the Coast Guard’s intelligence officers and possibly violated the constitutional rights of people to be free from unlawful search and seizure. According to CAPT R, he called the applicant into his office and let him know that they would not be using NJP as an option, rather his chain of command would use his annual OER to document the applicant’s actions the night of January 17, 2018. CAPT R stated that while the applicant’s intentions may have been pure, he ultimately used local law enforcement to conduct a stop and search of people leaving a vessel based on his suspicions. CAPT explained that the officers who responded did so with their lights and sirens at night, through a small town, at risk to themselves and the public because the Coast Guard told them these individuals were involved in illicit activity. CAPT R further explained that it did take a long time to receive the necessary input from local law enforcement and to complete the formal investigation, but CAPT R believed it was necessary. CAPT R stated that they received input from the Intelligence Program, MIFC, and their district in making a decision on the applicant’s conduct, ultimately choosing not to pursue NJP in lieu of documenting the actions taken in the applicant’s OER.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 8, 2022, the Chair sent the applicant a copy of the Coast Guard’s advisory opinion and invited him to respond within thirty days. The Chair received the applicant’s response on September 30, 2022.

The applicant stated pursuant to the first *Hary* prong, he was subjected to a 7-month long intelligence misconduct investigation, a workplace climate/AHHI investigation against his supervisor, received an annual OER with negative comments, and was severely struggling mentally after the loss of his one and only subordinate, IS1 K. The applicant alleged that he worked by himself, three hours from his supervisors in the nearest Field Office for eight months until he

received a new IS1. The applicant described himself as defeated, and trying to comprehend the enormity of the stress that had recently occurred in his life, while balancing his family and three children. The applicant stated that the enormity of the situation clouded any motivations he had to act. According to the applicant, he put his head down and continued working, in order to ensure his next OER spoke to his true performance and character. The applicant alleged that it was only after conducting research and receiving counsel from other mentors and supervisors that he was able to identify “material errors/injustices” that were categorically not “fair or equitable.” The applicant argued that his application was within the three-year statute of limitations. The applicant claimed that he believed submitting an application to this Board would allow for a third-party to ultimately make a decision without any Coast Guard influence and/or predispositions. The applicant argued that when he submitted his application for relief to this Board, he was communicating that he did not accept his OER as valid.

Regarding the second *Hary* prong, the applicant argued that the multiple character references attached to his original application, which attested to his character and ability were never addressed by the Coast Guard. The applicant claimed that immediately apparent are the contradictions in the Supervisor’s and Reporting Officer’s comments found in his OER. The applicant pointed to the following two statements as contradictory to one another:

Supervisor comments: “Mbr’s actions during marking period showed a lack of respect for supervisor and created interpersonal tension in Intel Division; resulted in strained work environment & relationships w/ partners;” and

Reporting Officer comments: “Member actively sought out opportunities to expand collaboration and the CG Intelligence program’s relevance w/ partners” and “Initiative & enthusiasm w/ subordinate & information sharing among port partners is admirable; advanced intelligence driven operations through member’s operational background and local knowledge.”

The applicant argued that these comments are in stark contrast to one another. The applicant further argued that the Reporting Officer and Reviewer both authenticated that they concurred with the comments of the supervisor. The applicant stated that if he was praised for his collaboration to expand the CG Intelligence Program and information sharing with partners, the comments of him straining partnerships was a “gross material error” and inaccurate. The applicant argued that his Reporting Officer and Reviewer should have selected the “Do Not Concur” bubble contained in the OER, if they did not agree with the Supervisor’s comments. The applicant asked the Board to refer back to the character references he submitted with his original application, especially those of Mr. M and IS1 K, who, according to the applicant, both stated that they had never seen the applicant show a lack of respect toward his supervisor.⁸ The applicant requested that the Board look back as to why he filed an AHHI complaint against his supervisor in this first place and noted that the supervisor and reporting officer failed to submit a response to the Coast Guard’s advisory opinion. The applicant stated that he did not see his supervisor in over a year, which was confirmed by Mr. M in his character reference of the applicant. The applicant cited to Mr. M’s character reference and Mr. M’s belief that the applicant’s supervisor’s comments were “material errors/injustices” and that they were not “fair or equitable” to support his own claims that the comments contained in his OER were erroneous and unjust. The applicant claimed that

⁸ Although IS1 K’s personal statement was not summarized, at no point in his statement did he state that he never witnessed the applicant show a lack of respect for his supervisor.

there is no other documentation that he showed his supervisor a lack of respect and respectfully requested that Mr. M's statements be strongly considered.

The applicant stated that his OER is based on false and misleading claims derived from an investigation and falsely makes statements of negative performance, which was found to be inaccurate. Regarding the statement claiming the applicant "Demonstrated a severe lack of judgment/poor decision making while in the field & detained individuals after questions, outside of Coast Guard policy..." the applicant argued that the investigation determined that he did not "detain individuals after questioning, outside of CG policy." The applicant claimed that the investigation concluded that he did not violate Articles 97—Failure to Obey an Order or Regulation, and 133—Conduct Unbecoming an Officer. According to the applicant, to make such a statement in an OER when an investigation concluded that he did not commit these acts demonstrates that the test in the OER was incorrect and a false representation of his performance during the rating period. The applicant stated that ultimately, the information above is enough proof, or "a clear violation of a specific objective requirement of a statute or regulation."

Regarding CAPT R's sworn declaration the applicant stated that he would like to reemphasize that the investigation concluded that he did not violate the Manual for Court-Martial. The applicant stated that if he did violate the rights of the four individuals that he stopped, as CAPT R stated he did, then the local law enforcement individuals would have been in violation as well. The applicant argued that CAPT R's statement that the applicant "possibly violated," further proves that CAPT R did not agree with the findings of the investigation or the IO who is a federal attorney. The applicant claimed that CAPT R used the applicant's OER to hold him accountable for CAPT R's personal beliefs, not those of Coast Guard policy. The applicant stated that to this date, his CO has still not specifically identified what policy or regulation the applicant violated on the night of January 17, 2018. Because of this, the applicant claimed he did not know what conduct the comments in his OER was referring to in that the "comments only speak to the underlying conduct that was subject of the investigation." According to the applicant, his CO did not have the preponderance of the evidence to hold him accountable for failure to follow an order or regulation, unlawful detention and/or conduct because his district legal staff found that he did not violate any regulation. However, the applicant stated that in order to demonstrate that he did follow all policies, he provided another third-party statement from a Commander who was once a Coast Guard Branch Chief for Intelligence from 2017-2021. The applicant argued that taking all of the above information into consideration, including that contained in his original application to this Board, the third prong of the *Hary* test was satisfied.

Finally, the applicant stated that from an administrative standpoint and having no other derogatory information in his record to support the unmerited negative performance, further supports why this OER contained "material errors/ injustices" that was not "fair and equitable." The applicant claimed that his official record, including all of his enlisted and officer evaluations only speak to his high level of performance. The applicant stated that he recognized that this one OER has impacted his ability to promote to LCDR. The applicant further stated that he believed this contested OER, as a junior Lieutenant will ultimately determine if his career ends in 2024, and lead to an incorrect decision as a result. Accordingly, he humbly asked the Board for a favorable consideration by removing his OER.

To support his response to the advisory opinion, the applicant submitted two personal statements written on his behalf. The first was once again from a Mr. M, who previously worked with the applicant. However, as stated in footnote 3, Mr. M's statements will not be fully summarized because they contained his own subjective review of the applicant's performance and how Mr. M felt the comments contained in the applicant's OER were erroneous and unjust. Mr. M provided a breakdown of each erroneous comment and his review of the applicant's performance as he observed it to be. Mr. M discussed his own resume and the actions he took while assigned to the applicant's unit. Mr. M stated that he was a previous Major in the United States Air Force, with over 19 years of service. However, as previously stated, Mr. M was a civilian at the time, not a Coast Guard officer or the applicant's supervisor. The fact that Mr. M personally challenged the applicant's OER, and the comments found in the OER, does not prove error or injustice. The second statement was from CDR D, a Coast Guard Intelligence Officer. CDR D summarized his own resume and the applicant's activities on the night of January 17, 2018. After reviewing the applicant's actions on January 17, 2018, in connection with Coast Guard policies, CDR D stated that it was his opinion that the applicant operated within the scope and authority of applicable regulations.

APPLICABLE LAW AND POLICY

Title 14 U.S.C. § 2120(b) provides the following guidance on Special Selection Boards:

(b) Officers considered but not selected; material error.

(1) In general. In the case of an officer or former officer who was eligible for promotion, was considered for selection for promotion by a selection board convened under section 2106, and was not selected for promotion by that board, the Secretary may convene a special selection board to determine whether the officer or former officer should be recommended for promotion, if the Secretary determines that –

(A) an action of the selection board that considered the officer or former officer –

(i) was contrary to law in a matter material to the decision of the board; or

(ii) involved material error of fact or material administrative error; or

(B) the selection board that considered the officer or former officer did not have before it for consideration material information.

(2) Effect of failure to recommend for promotion.--If a special selection board convened under paragraph (1) does not recommend for promotion an officer or former officer, whose grade is that of commander or below and whose name was referred to that board for consideration, the officer or former officer shall be considered –

(A) to have failed of selection for promotion with respect to the board that considered the officer or former officer prior to the consideration of the special selection board; and

(B) to incur no additional failure of selection for promotion as a result of the action of the special selection board.

(c) Requirements for special selection boards.--Each special selection board convened under this section shall–

(1) be composed in accordance with section 2107 and the members of the board shall be required to swear the oaths described in section 2109;

(2) consider the record of an applicable officer or former officer as that record, if corrected, would have appeared to the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board and that record shall be compared with a sampling of the records of –

(A) those officers of the same grade who were recommended for promotion by such prior selection board; and

(B) those officers of the same grade who were not recommended for promotion by such prior selection board; and

(3) submit to the Secretary a written report in a manner consistent with sections 2117 and 2118.

(d) Appointment of officers recommended for promotion.—

(1) In general. An officer or former officer whose name is placed on a promotion list as a result of the recommendation of a special selection board convened under this section shall be appointed, as soon as practicable, to the next higher grade in accordance with the law and policies that would have been applicable to the officer or former officer had the officer or former officer been recommended for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(2) Effect.--An officer or former officer who is promoted to the next higher grade as a result of the recommendation of a special selection board convened under this section shall have, upon such promotion, the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active duty promotion list as the officer or former officer would have had if the officer or former officer had been recommended for promotion to that grade by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(3) Record correction.--If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer not eligible for promotion or a former officer whose name was referred to the board for consideration, the Secretary may act under section 1552 of title 10 to correct the military record of the officer or former officer to correct an error or remove an injustice resulting from the officer or former officer not being selected for promotion by the selection board that should have considered or did consider the officer or former officer prior to the consideration of the special selection board.

(e) Application process and time limits.--The Secretary shall issue regulations regarding the process by which an officer or former officer may apply to have a matter considered by a special selection board convened under this section, including time limits related to such applications. ...

Article 5 of The Coast Guard Officer, Accessions, Evaluations, and Promotions Manual, COMDTINST M1000.3A (September 2013), provides the following guidance on the Officer Evaluation System (OES):

Article 5.A.1.a. Purpose. This Chapter states policies and standards for conducting performance evaluations for Coast Guard officers.

The OES has been designed to:

(1) Provide information for important personnel management decisions. Especially significant among these decisions are promotions, assignments, career development, and retention,

- (2) Set performance and character standards to evaluate each officer,
- (3) Prescribe organizational values by which each Coast Guard officer can be described, and
- (4) Provide a means of feedback to determine how well an officer is measuring up to the standards.

...

Article 5.B.5. For this Chapter, commanding officers include area and district commanders, commanders of logistics/service centers, commanding officers of Headquarters units and subordinate units or organizations, and cutters. Commanding officers must:

- a. Ensure accurate, fair, and objective evaluations are provided to all officers under their command. In using the OER, strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

...

Article 5.I. Prohibited Comments. The rating chain must not:

1. Mention a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, civilian criminal proceedings, Personnel Records Review Board (PRRB), Coast Guard Board for Correction of Military Records (BCMR), or any other investigation (including discrimination investigations) except as required by a non-regular OER. Referring to the fact conduct was the subject of a proceeding of a type described above is permissible when necessary to respond to issues regarding that proceeding first raised by an officer in a reply under Article 5.K. of this Manual. These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.

...

11. Discuss reported-on officer's performance or conduct which occurred outside the reporting period except as provided in Article 5.F.3. of this Manual.

Article 1 of the Coast Guard Officer Evaluation System Procedures Manual, PSCINST M1611.1C, provides the following guidance on the role of the rating chain in the officer evaluation process:

...

Article 1.A. The Rating Chain. The rating chain provides the assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and Reviewers who present independent views and ensure fairness, accuracy and timeliness of reporting. It reinforces decentralization by placing responsibilities for development and performance evaluation at the lowest levels within the command structure. The rating chain consists of the Reported-on Officer, the Supervisor, the Reporting Officer, and the Reviewer (if applicable).

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on the applicant's military record and submissions, the Coast Guard's submission and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record.

The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was timely filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

3. The applicant alleged that his OER for the period June 1, 2017, through May 31, 2018, was erroneous and unjust because it contained comments that were in violation of Coast Guard policy. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in the military record, and the applicant bears the burden of proving, by a preponderance of the evidence, that the disputed information is erroneous or unjust.⁹ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."¹⁰ To be entitled to relief, the applicant cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹¹

4. To begin, the Board notes that the contested OER was signed by the applicant on August 8, 2018, but the applicant made no attempts to contest this OER until his application to this Board on June 2, 2021. The applicant claimed that it was not until after speaking with other commanders that he realized the errors contained in the OER. But the applicant also admitted that he decided to put his head in his work and hope that his next OER would be better, so he clearly knew that the OER contained ratings and comments that reflected poorly on his performance. Furthermore, the applicant had been in the Coast Guard for fourteen years, six of those years as an officer. Accordingly, he knew the significance of an OER on an officer's promotion and did not need commanders to point out potentially negative information contained in an OER. This kind of retrospective consideration of one's OER gives the Board reason to believe that the applicant did in fact accept the comments and marks of this OER as valid upon its issue and contested its contents as a means to contest a non-selection to Lieutenant Commander.

5. The applicant claimed that multiple comments contained in his June 1, 2017, through May 31, 2018, OER were erroneous and unjust. As stated above, in order for the applicant to be entitled to relief, he cannot "merely allege or prove that an [evaluation] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed evaluation 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.¹² For the following reasons,

⁹ 33 C.F.R. § 52.24(b).

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

¹¹ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

¹² *Id.*

the Board finds that the applicant has failed to prove that the comments contained in his June 1, 2017, through May 31, 2018, OER were in violation of Coast Guard policy:

- a. Regarding the comment, “Mbr failed to keep supervisor informed during unplanned after hour activity; could not discern LE actions & policy w/intel collection; displayed inadequate application of intel specialty; did not practice acceptable operational risk management, placed self & CG program at risk,” the applicant alleged that the comment is erroneous and unjust because it mentions the word “operational risk management” when the manual in effect at the time simply uses the word “risk management.” The applicant claimed that his supervisor’s reliance on the word “operational” held him to a higher standard. The Board finds the applicant’s reliance on the word “operational” to support his claims of error and injustice unfounded and unpersuasive. The record shows that on the night of January 17, 2018, the applicant, while in uniform, was walking the piers alone when he approached four individuals and asked them for their identifications. The record further shows that not only was this pier outside of the special operation’s boundaries, but the applicant failed to notify his supervisors of his activities. The fact that the supervisor used the wording “Operational risk management” as opposed to “risk management” does not change the fact that the applicant failed to adequately assess the risk he undertook when he approached these individuals in uniform, alone, at night. Although the applicant’s subjective opinion is that he did follow “risk management” when he called local authorities, his rating chain felt otherwise, and the applicant has failed to prove, by a preponderance of the evidence, that this comment was a “misstatement of significant hard fact,” contained factors that “had no business being in the rating process,” or was a prejudicial “violation of a statute or regulation.”
- b. Regarding the comment, “Mbr’s actions during marking period showed a lack of respect for supervisor and created interpersonal tension in Intel Division; resulted in strained work environment & relationships w/partners,” the applicant alleged that his supervisor’s comments are factually untrue as evidenced by the numerous character references he submitted. However, the fact that numerous individuals spoke highly of the applicant is not proof that the applicant never disrespected his supervisor or created interpersonal tension that strained the work environment and relationships with partners. The applicant relied heavily on the personal statement from Mr. M as proof that he never disrespected his supervisor. However, Mr. M was a civilian, and was not a party to every conversation the applicant had with his supervisor. Mr. M’s subjective opinions and observations are not proof that the applicant did not disrespect his supervisor or create a tense working environment for her. According to the applicant, the numerous character references prove that he never created tense working relationships with other law enforcement partners. The Board is not persuaded. The Board accepts the fact that the applicant fostered strong relationships with certain law enforcement and intelligence partners, but that does not prove that his negative opinion of his supervisor did not pour over and create tension that resulted in strained relationships with partners not named or who did not submit character references in support of the applicant. The Board also accepts that the applicant’s supervisor was in possession of information—information this Board and the applicant was not privy to at the time of the OER—that led her to believe that the applicant created a tense workplace environment that strained her working relationship with other law

enforcement partners. Finally, the applicant relied on the fact that he has no previously documented occurrences of disrespecting his supervisor. However, the fact that the applicant's chain of command took a more generous approach to addressing his disrespect or poor performance and chose not to formally document the occurrences is not evidence that the conduct described in the OER was erroneous or unjust. Accordingly, the applicant has failed to prove, by a preponderance of the evidence, that his supervisor's comment was a "misstatement of significant hard fact," contained factors that "had no business being in the rating process," or was a prejudicial "violation of a statute or regulation."

- c. Regarding the comment that the applicant "Demonstrated a severe lack of judgement/poor decision making while in the field & detained individuals after questioning, outside of CG policy, which brought discredit to the Coast Guard," the applicant alleged that the investigation that was conducted unequivocally cleared him and proves that this comment is false. The Board is not persuaded. The Record shows that on the night of January 17, 2018, while walking alone and in uniform, the applicant approached four individuals and began questioning them. During the applicant's questioning, he requested the individual's identification and upon receiving the identifications, walked away with the identifications still in his possession. The applicant has admitted to these actions, which is further supported by the answers he gave CDR W during a July 17, 2018, meeting to further discuss the events in question. Here, the applicant has failed to provide a policy, and the Board could find none, that prevented his chain of command from documenting the events of January 17, 2018, in his OER. To support his claims, the applicant pointed to the fact that he was not charged with any violations of the UCMJ, however, the fact that the applicant was not charged criminally, is not proof that the applicant was innocent of violating Coast Guard policy or the constitutional rights of the individuals he stopped. The applicant's command was worried that because the applicant stopped these individuals while he was in uniform, the individuals stopped may have felt that they did not have the right to refuse the applicant's request and that this conduct could have been construed as a violation of the individuals' constitutional rights. Article 3.H.1 b. of the Coast Guard Intelligence Manual, M3800.6, states, "When interacting with human sources of intelligence, protections of civil liberties and privacy of citizens is paramount." The preponderance of the evidence shows that the applicant came dangerously close to violating these rights and thereby violating Coast Guard policy. The fact that the applicant's chain of command chose to document this conduct in the applicant's annual OER in lieu of administrative discipline is not erroneous or unjust.

The applicant also pointed to a character reference from CDR B, who stated that in his opinion, the applicant operated within Coast Guard policy. However, CDR B was not present the night of January 17, 2018, nor was CDR B in the applicant's chain of command. CDR B may have had a different opinion of the applicant's conduct, but that does not make the findings and opinions of the applicant's chain of command erroneous or unjust. It was the applicant's chain of command, not CDR B, who was responsible for the applicant's actions on the night of January 17, 2018, and ensuring that those actions did not happen again. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his supervisor's comment was a "misstatement of

significant hard fact,” contained factors that “had no business being in the rating process,” or was a prejudicial “violation of a statute or regulation.”

- d. The applicant alleged that the disputed OER is erroneous and unjust because the supervisor’s comments and the reviewer’s comments were in stark contrast to one another and contradicted one another. However, the fact that the Reviewer chose to use other commentary to supplement the applicant’s OER and did not mimic the supervisor’s comments does not make his comments erroneous or unjust. The applicant’s supervisor did not claim that the applicant did not contribute to intelligence sharing; she only stated that the applicant created a tense working environment that strained relationships with partners. The Reviewer was not required to mirror the supervisor’s comments in order for him to “concur” with them. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the OER contained a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a prejudicial “violation of a statute or regulation.

6. Finally, the applicant alleged that the disputed OER is erroneous and unjust because the command relied on an investigation, completed outside of the rating period, to support the comments made in the OER. The Board disagrees. Coast Guard policy only prohibits OERs from rating performance and commenting on performance that took place outside of the applicable rating period. The record shows that the comments in the OER address the applicant’s conduct that took place on January 17, 2018, which was well within the rating period and so are in accordance with Coast Guard policy. Furthermore, even assuming the applicant’s chain of command relied on the findings and recommendations of the administrative investigation, which was completed after the rating period, the investigation itself was based on conduct or performance that took place within the applicable rating period and so comments about the applicant’s performance during the rating period, as revealed by the investigation, did not violate policy regardless of when the investigation took place. Accordingly, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that his OER contained comments on performance that occurred outside of the applicable rating period.

7. The applicant presented numerous letters from current service members and civilian employees who shared their opinions on the applicant’s conduct the night of January 17, 2018. Specifically, these letters indicated that the applicant was great to work with and contributed to the intelligence community, that he was never seen disrespecting his supervisor, that he did not create a tense working environment, and that his conduct on the night of January 17, 2018, did not violate policy in their opinion. However, the members who wrote the letters of reference were not privy to all of the events on the night of January 17, 2018, or the applicant’s communications with his chain of command. The Board finds these letters unpersuasive and speculative about the facts of this case. The Board finds that the applicant’s OER is supported by the preponderance of the evidence, as explained in the previous findings, and these letters do not persuade the Board that the OER was erroneous or unjust.

8. The applicant alleged that his supervisor used his OER to retaliate against him for filing an AHHI complaint against her, and he did make a protected communication by filing an AHHI complaint. However, the Board is persuaded that the applicant’s conduct on the night of

January 17, 2018, would have resulted in the applicant receiving low marks and negative comments in his OER for that rating period whether or not he filed an AHHI complaint against his supervisor.

9. The applicant made numerous allegations with respect to the actions and attitudes of various officers. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.¹³ Although the applicant claimed that his Command thought he was out of uniform during the incident on January 17, 2018, the record shows that his Command understood that the applicant was in uniform that night.

10. For the reasons outlined above, the applicant has also failed to show that his June 1, 2017, through May 31, 2018, OER contained a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a prejudicial “violation of a statute or regulation.”¹⁴ Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the OER should be removed from his record. Because the applicant has not proven that the disputed OER is erroneous or unjust, there are no grounds for directing the Coast Guard to convene an SSB. His requests for relief should therefore be denied.

¹³ 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”).

¹⁴ *Hary*, 618 F.2d at 708.

ORDER

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

September 15, 2023

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