

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-053


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 May 12, 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 July 11, 2024, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a Lieutenant (LT/O-3) on active duty, asked the Board to correct his record by removing his Officer Evaluation Report (OER) for the June 1, 2018, through May 31, 2019, rating period. The applicant further requested that all documents relating to his May 24, 2019, Non-Judicial Punishment (NJP), in addition to a May 29, 2019, Punitive Letter of Admonition that resulted from the NJP be removed from his record. Finally, although not specifically requested by the applicant, the Board assumes that the applicant intended to request Special Selection Boards (SSB) for those years that he was passed over for selection to Lieutenant Commander (LCDR) as a result of these errors, as authorized by 14 U.S.C. § 2120.

Through counsel, the applicant argued that the Coast Guard made several material errors that substantially prejudiced him. First, the applicant claimed that he received NJP for a violation of National Park Services regulations.¹ According to the applicant, the underlying incident that led to his NJP was within the scope of his official duties and was not an offense. The applicant argued that NJP may only be imposed for punitive offenses listed in Part IV of the Manual for Court-Martials (MCM). In addition, the applicant stated that pursuant to Article 2.D.3. of the Military Justice Manual, COMDTINST M5810.1G, “[n]ot every failure to follow Coast Guard policy forms a basis for an offense under the UCMJ.” Second, the applicant argued that the written record is clear that his command had no intention of documenting his NJP in his official record. Third, the

¹ 36 C.F.R. § 1.5 - 36 CFR § 1.5 - Closures and Public Use Limits.

applicant alleged that he was denied an opportunity to appeal the NJP because his command never intended to file the NJP in his official record. Fourth, the applicant claimed that mentioning the unjust NJP in his May 31, 2019, OER was improper. Finally, the applicant alleged that the processing of his OER was unorthodox due to edits that occurred after his command had already signed the document in July 2019, thereby invalidating the previously validated OER.

The applicant explained that a month after reporting to his new unit, in May of 2019, he was asked to travel, as an observer, on an oil spill exercise taking place within a national park. According to the applicant, in connection with this exercise, he requested and obtained permission from the U.S. Forest Service to use a drone to capture footage of the exercise for publication in the Coast Guard Commandant's State of the Coast Guard Address. However, during the exercise and unbeknownst to him, the coxswain transited three nautical miles from the National Park Service pier to an area with known gaps in radio coverage. The applicant claimed that once his vessel was in the area, with permission from the National Park Service, he launched the drone and recorded nine minutes of footage of Coast Guard assets participating in the exercise.

The applicant stated that during his vessel's return trip the coxswain learned that the National Park Service was not relaying radio transmissions to the Sector Command Center as previously thought. The applicant explained that this error created friction between Coast Guard Sector leadership and the National Park Service. The applicant alleged that this friction led to the National Park Service issuing the applicant a citation for violating 36 C.F.R. § 1.5, which he explained he chose not to fight. The applicant claimed that the tension between the two agencies was so severe that CDR K and a Chief traveled to the National Park Service headquarters to accept blame for the communication issues. The applicant stated that as a result of the incident, the coxswain lost her certifications.

On May 22, 2019, the applicant explained that he was informed that he would go before a Captain's Mast for his role in the April incident. However, according to the applicant, prior to accepting NJP, he was told that neither the NJP nor the Letter of Admonition would be placed in his permanent record. Accordingly, based on these promises, the applicant stated that on May 24, 2019, he accepted NJP. In addition, the applicant claimed that he was further promised that the NJP would not be mentioned in his OER. The applicant explained that he was found guilty of one specification of Article 134—General Article, for “flying a drone without proper authorization,” and on May 29, 2019, he received the Letter of Admonition as punishment. However, the applicant argued that an Article 134 allegation for “flying a drone without proper authorization” fails as a matter of law because the basis for this charge was the National Park Service's citation, which limits the “public” from flying drones in national parks. However, the applicant stated, when he was flying the drone, he was acting in his official government capacity, not as a member of the public. The applicant further argued that it was nonsensical for one government agency to issue a citation to a public servant of another government agency for a violation of a regulation aimed at restricting public activities. The applicant contended that the article he was cited for violating was intended to apply to members of the public, not active-duty Coast Guard members performing their duties.

The applicant further contended that pursuant to Article 2.D.3. of COMDTINST M5810.1G, NJP may only be imposed for punitive offenses listed in Part IV of the MCM. The

applicant claimed that a failure to follow National Park Service's regulations, as alleged in the NJP and Letter of Admonition, is not punitive under the UCMJ and therefore, the NJP and Letter of Admonition are defective as a matter of law and should be removed from his record. The applicant further claimed that there was a denial of his due process rights. According to the applicant, because his command never intended to record his NJP and Letter of Admonition in his permanent record he was never given an appeals process as both documents were intended to be locally filed.

To support his application, the applicant submitted an unsworn declaration from his immediate supervisor at the time, CDR H. The unsworn declaration reads as follows:

1. As the immediate supervisor for LT [Applicant] during the 2019 evaluation period, this memo is a summary of the events concerning changes to the member's OER post Non-Judicial Punishment (NJP).
2. On 29 May 2019, LT [Applicant] was involved in a deployment of members from Sector [redacted] and Station [redacted] to [redacted] National Park. The deployment resulted in lost communications procedures being initiated after we could not get ahold of the Station asset for an extended amount of time. The ensuing investigation also revealed that team deployed a drone without authorization by the National Park Service.
3. LT [Applicant] was taken to Captain's Mast and at the conclusion of the NJP hearing was found to have committed one of the three charges for flying a drone without proper approval. At the conclusion of the proceeding and after close consultation with OPM, LT [Applicant] was given a Letter of Admonition and informed that this letter would not go on his permanent record. Additionally, LT [Applicant] was informed that there would be no mention of NJP in the subsequent May 2019 OER. The member did receive a reduction in his OER and was counselled that he would have to work harder to ensure the board saw it as a lapse vice a trend in performance. As communicated to LT [Applicant], the Letter of Admonition was not submitted to the member's permanent record after NJP and no details of the NJP were captured in the members May 2019 OER.
4. Five months after LT [Applicant] departed the unit, OPM reached out to Sector [redacted] inquiring about the NJP and requested a copy of the Letter of Admonition and the full investigation. Sector [redacted] explained that the letter was not supposed to go on the member's record and that Sector [redacted] had the right to keep the letter per the initial guidance that the unit received from OPM prior to the NJP. OPM explained that they could not validate the member's OER without submission of the Letter of Admonition and required that an updated OER be submitted detailing that fact. I complied with the request and submitted an updated OER 6 months after LT [Applicant] departed the unit.
5. In conclusion, the command's intention was not to put the letter of admonition or any mention of NJP in LT [Applicant's] permanent record. If OPM did not change their original guidance, no written details of the NJP would be in the member's record. The member protested the changes and ultimately signed the OER in May 2020. Overall, LT [Applicant] is a stellar performer that made a single mistake that shouldn't end his career.

SUMMARY OF THE RECORD

The applicant was commissioned on July 10, 2012.

In July 2017, the applicant was assigned as the Enforcement Division Chief of his duty station.

On April 17, 2019, the applicant participated in an oil spill exercise held within a United States National Park. Exercise participants included a boat crew from the nearby station, members of the Sector's Incident Management Division, and the National Park Service (NPS). Later that

day, the applicant's commanding officer, CDR K, was notified that by the Sector Command Center (SCC) that following the completion of the oil spill exercise the applicant's response boat had transited into the national park for the purpose of an area familiarization and had missed its schedules ops and position report. After several efforts to contact the applicant's vessel by both the SCC and NPS, SCC initiated lost communications procedures and launched an MH-60 helicopter from a nearby air station to attempt to locate and establish communications with the applicant's crew. Eventually, the MH-60 was ultimately successful in locating the vessel, and determined that it was safe. The MH-60 then directed the applicant's vessel to return to the vicinity of the oil spill exercise located at the entrance to the national park. Later that day, CDR K was notified by the National Park Service Law Enforcement Ranger that the applicant had operated a handheld unmanned aerial vehicle (drone) in the National Park Service without permission and in violation of NPS regulations. When questioned by CDR K, the applicant insisted that he had gained permission from the NPS to operate the drone within the national park boundaries. However, upon further inquiry, it was discovered that the applicant had actually contacted the United States Forest Service, not the National Park Service. CDR K stated that as the Sector's former Command Duty Officer and the Sector's current Enforcement Chief, Command was concerned that the applicant had confused the two agencies.

On April 19, 2019, a Preliminary Inquiry Officer (PIO) was assigned to conduct a standard investigation into all the circumstances surrounding the lost communications incident.

On May 10, 2019, the PIO submitted his Report on Investigation (ROI). The PIO found multiple violations by the Coxswains Mate during the vessel's area familiarization mission. However, relevant to the applicant, the PIO found that the while being the primary organizer for the station's mission objectives, he flew a personal drone from the vessel without proper authorization. The PIO further found that there were no prearranged employment objectives between the Sector and the station for the purpose of transiting north into the west portion of the national park. The PIO stated that by having the applicant, who was the Principal Coordinator, onboard the vessel it could reasonably be inferred by the Coxswains Mate that her plan to transit north into the western portion of the national park was supported by Sector.² The PIO noted that the SCC believed there were only 6 crewmembers aboard the vessel during its mission, when in fact there were 9. The PIO further noted that had this situation ended up being a legitimate search and rescue case, there would have been confusion on the number of persons to search for. The PIO found that following the incident, the applicant advised a MST1 to draft and distribute an email to justify the vessel's previous mission. According to the PIO, because of the leisurely setting of the mission, complacency was produced throughout the entire crew which led to the loss of communications. In addition, the PIO cited the lack of professionalism by the entire crew. Based on his findings, the PIO made the following relevant recommendations:

- I recommend that a CG-4910 be issued to [Applicant] to investigate the elements required to constitute violation of (1) Article 133, UCMJ, Conduct unbecoming an officer and a gentleman; (2) Article 134, UCMJ, Crimes and Offenses Non-Capital. Evidence collected appears to meet elemental requirements contained in Findings 24, 2S, 29 and 30.

² As noted by the PIO, there were no prearranged employment objectives prior to the execution of the exercise and though it could have been inferred that the applicant's presence aboard reflected Sector's approval of the coxswain mate's decisions, there is no evidence to suggest that Sector placed the applicant in direct command of the boat, or its crew or that the applicant had any control at all over the coxswain mate's navigational decisions.

On May 23, 2019, the applicant was presented with an “Acknowledgement of Rights – Acceptance of NJP,” wherein he was notified that he was being awarded NJP for violations of Article 131(b)—Obstruction of Justice, Article 133—Conduct Unbecoming an Officer, and Article 134—Crimes and Offenses, Non-Capital. The notification summarized the following allegations:

On 17 April 2019, you directed a trip into [redacted] National Park aboard CG Station [vessel]. BM2 [M] was boat coxswain for the trip. Upon arrival at [redacted] National Park ([NP]), Ranger [R] ([NP]) provided a brief overview of [NP] and offered to provide a Ranger to serve as a guide into [NP]; this offer was declined. Based on a standard investigation completed on 10 MAY 2019, there was no clear USCG operational nexus for this evolution. One hour into the trip, [vessel] missed their scheduled comms check, ultimately triggering lost comms procedures including notification to coast Guard National Command Center ([redacted]), assumption of the Distress SAR phase, and the launch of an HH-60 Helicopter from AIRSTA [redacted]. Communications were re-established with [vessel] 1hr, 29 min after last comms. During the trip, you also launched a personal drone on two different occasions in violation of 36 CFR 13.50 which prohibits drone use in [NP] and violated USCG policy (BOAT Manual, Vol.1) prohibiting “use of Coast Guard personnel or property, including boats and equipment, for any purpose that connotes personal or recreational use.” Lastly, upon return to [station], the investigation alleges that you told MST1 [M] to be prepared with a multi-mission based rationale/justification for the evolution in the event any of the participants were approached.

The applicant acknowledged his rights and limitations regarding NJP, including his right to consult with an attorney to discuss his rights to demand a trial by court-martial and NJP procedures so long as it did not unduly delay the reasonable scheduling of mast. The applicant was further informed of his rights should he elect NJP over a trial by court-martial. The applicant initialed next to “I understand the rights and Information provided in this form. Any questions I had were answered to my satisfaction. I understand that I may consult with a military or civilian attorney before accepting or rejecting nonjudicial punishment,” and “With the understanding that I have the right and opportunity to consult with a military attorney provided at no cost to me, or a civilian attorney obtained at no expense to the government before accepting or rejecting nonjudicial punishment, I voluntarily waive the opportunity to consult with an attorney and make the following elections: I accept nonjudicial punishment.”

On May 24, 2019, the applicant went before a Captain’s Mast. The applicant was advised of his right to have a Mast Representative, but he declined to have one appointed. At the conclusion of the Captain’s mast, the applicant was found guilty of having violated Article 134— Crimes and Offenses, Non-Capital, and received a Punitive Letter of Admonition for his role in the April 17, 2019, incident.

On May 29, 2019, the applicant received a Punitive Letter of Admonition for his conduct on April 17, 2019. The letter admonished the applicant for having failed to follow National Park Service regulations when he launched a personal drone from a small Coast Guard boat without proper authorization, a violation of Article 134 of the UCMJ, Article 2.L.1.c. of the Military Justice Manual, COMDTINST M5810.1F, and Article 1.E.2. of the Discipline and Conduct Manual, COMDTINST M1600.2.

On July 12, 2019, the applicant signed his OER for the June 1, 2018, through May 31, 2019, rating period, wherein he received one mark of 3 (out of a scale of 1 to 7, with 1 being the lowest mark and 7 being the highest possible mark), nine marks of 5, seven marks of 6, and one mark of 7. The applicant received a mark of 4 out of 7 on the Comparison Scale, and a mark of 3

(“Promote”) out of 6 on the Promotion Scale. The applicant received the following relevant comments:

Description of Duties. Manages Sector response missions for MS, LMR, PWCS, DI & OLE in vast Southeast [redacted] COTP zone covering 2K islands. Directly supervises 02 Enforcement (ENF) staff; tasks/supports 02 WPBs, 02 Fast Response Cutters (FRC) & 02 PWCS Level 1 Stations encompassing 100+ personnel. Manages \$90K budget. Primary duties: Ops Planner, Cutter scheduler, LEI, BO ashore/afloat, LEDO, Air ops planner & agency liaison. Collaterals: Acting Response dept head (46 days), Edu Serv. Officer.

Personal and Professional Qualities. Outstanding initiative; pro-actively established ops in support of Opioid Epidemic; setup several 1 wk long surge ops w/ MSRT & partners, conducted 25 Intel driven boardings w/ PD and 40+ Ferry Security Ops; seized 11lbs of narcotics, \$10k in cash & 3 arrests. Displayed sound judgment w/ aggressive crewman, assessed persons demeanor & noted frustrations, increased officer presence w/ local PD to ensure compliance, verbally deescalated situation, led to narcotics violation & termination. ***ROO failed to maintain sit awareness as acting Dept Head; poorly planned & executed op resulted in loss comms w/ CG asset, and damage to partner relationship.*** Strong devotion to community; vol'd 20+ lessons to PIE, assisted Salvation Army, worked CG booth at local fest & coached swimming. Top fitness habits, participant in 5 CG/local sporting events, recruited 7 mbrs to improve fitness.

On April 27, 2020, under the guidance of OPM, the applicant’s rating chain made changes to the applicant’s original OER for the June 1, 2018, through May 31, 2019, rating period signed on July 12, 2019. Specifically, the applicant’s rating chain changed the verbiage in his “Description of Duties” section to include, “Mbr went to mast on 24MAY19; in vio of Art 134, rcvd ltr of admonition.”

On June 6, 2024, the Board reached out to the Coast Guard and inquired as to whether or not the applicant had been up for promotion to LCDR. On June 7, 2024, CWO S with Coast Guard PSC, responded to the Board and stated that the applicant was non-selected for LCDR on August 1, 2021, and August 7, 2022.

VIEWS OF THE COAST GUARD

On December 21, 2022, 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 Personnel Service Center (PSC).

Failure to Prove Error or Injustice Regarding NJP

The JAG argued that the applicant failed to provide sufficient evidence to prove error or injustice with his nonjudicial punishment. The JAG explained that although the BCMR may review the imposition of a nonjudicial punishment for correction of error or injustice, but in doing so, the Board must recognize that the commanding officer is the official responsible under statute and regulation for conducting the proceedings and determining an appropriate punishment. The JAG argued that the commanding officer had the opportunity to view the evidence, including the demeanor of the applicant and the witness against him. Accordingly, the JAG stated that the commanding officer’s decisions and findings are entitled to substantial deference. The JAG explained that absent proof that the commanding officer’s determinations were clearly erroneous, or that a substantial right of the applicant was materially prejudiced by clear procedural error, the

commanding officer's decision should be upheld. The JAG contended that the any decision of the NJP appeal authority affirming the punishment is similarly entitled deference.

The JAG explained that Article 15 of the UCMJ³ is a Congressionally established administrative means for military commanders to deal with minor violations, as an essential part of their responsibility to preserve discipline and maintain an effective armed forces.⁴ The JAG further explained that the NJP under Article 15 is intended to provide military commanders with a prompt means of maintaining good order and discipline and promoting behavior changes in members without the stigma of a court-martial conviction.⁵ Finally, the JAG explained that the authority to determine whether an offense occurred, and if so, the appropriate punishment for such an offense, is reserved in the UCMJ and service regulations for the commanding officer and designated appeals authorities. According to the JAG, in order to prove an error before this Board, the applicant must generally overcome a strong presumption that military officials performed their duties correctly, lawfully, and in good faith.⁶ The JAG stated that Congress, the President, and the Secretary, have specifically provided for factual and legal review of punishment imposed by establishing rights of appeal to the next superior authority in the chain of command.⁷

Here, the JAG stated that the applicant claimed that that his NJP was erroneous because “an Article 134, UCMJ allegation for flying a drone without proper authorization fails as a matter of law.” Specifically, the applicant alleged that the regulation relied upon by NPS to cite the applicant could not form the basis for an Article 134 violation under the UCMJ, but the JAG stated the applicant's contentions are incorrect. The JAG argued that the elements to establish a violation of Article 134 under the UCMJ are 1) the applicant did or failed to do certain acts; and 2) that, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces. The JAG contended that it was not unreasonably, nor was it erroneous, for the NJP authority to find that the applicant's actions, under the circumstances were of a nature to bring discredit upon the armed forces. The JAG stated that in this instance, due to the applicant's conduct, the national park authorities wanted to take action against the applicant. The JAG explained that the seriousness of the applicant's conduct is further emphasized by the necessity of the applicant's command to fly to the national park to diffuse the situation.

Next, the JAG addressed the applicant's allegation that he was erroneously denied due process because he was told before the NJP that it would not go on his record and that was the only reason he accepted NJP. However, the JAG argued that the evidence the applicant relied upon in his application, namely a statement from his previous commanding officer, does not support his claims. According to the JAG, the statement cited by the applicant only notes that after NJP the applicant was informed that there would be no mention of the NJP in the forthcoming OER and that the Letter of Admonition would not go on his permanent record. Accordingly, the JAG argued that there is no evidence that the applicant was misinformed prior to accepting the NJP and therefore, no error or injustice committed.

³ 10 U.S.C. § 815.

⁴ *Cochran v. United States*, 1 Ct. Cl. 759 (Cl. Ct. 1983); *Dumas v. United States*, 223 Ct. Cl. 465, 620 F.2d 247 (Ct. Cl. 1980).

⁵ *Manual/or Courts-Martial* (2019 ed.)(MCM), Part V, Para 1.c.

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (1992); *Sanders v. United States*, 594 F.2d. 804, 813 (Ct. Cl. 1979).

⁷ MCM, part V, para. 7.

The JAG further argued that the applicant's claim that because his chain of command never intended to record the NJP or subsequent punishment in his official military record, he was ultimately denied an appeals process, also fails. The JAG contended that while the applicant may have been informed that his chain of command did not intend to mention the NJP in his OER, the applicant was informed that the Punitive Letter of Admonition would be forwarded to Coast Guard's Officer of Personnel Management (OPM) a division of PSC and was expressly provided with an opportunity to appeal his NJP. Therefore, the JAG argued that the applicant failed to prove that he was denied any due process with regards to his NJP.

Failure to Prove OER Warrants Removal

The JAG also stated that the applicant failed to provide sufficient evidence to meet the standard for correcting an OER. The JAG stated that as outlined in *Hary v. United States*, the applicant must do more than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. He 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.⁸

Here, the JAG stated that the applicant's claim that his OER should be removed because he was promised that the NJP would not be mentioned in the OER does not establish a cognizable claim under the *Hary* prongs, but he will nonetheless address the applicant's claim under the assumption that the applicant was implicating a violation of policy because mentioning the NJP was neither a misstatement of significant hard fact nor a factor adversely affecting the rating chain. Under this assumption, the JAG argued that the applicant still fails to prove error or injustice. The JAG stated that assuming *arguendo* the BCMR upholds the NJP, the process was completed prior to the end of the marking period, on May 24, 2019, with the applicant making an immediate election not to appeal. The JAG explained that because the NJP and appeal processes were completed prior to the end of the marking period, the command was not required to write a Subsequent to Disciplinary Action OER for the applicant. Instead, the JAG stated that the applicant's chain of command could capture the NJP in his regular OER. The JAG explained that while the applicant's chain of command may not have intended to mention the NJP in the applicant's regular OER, policy required that an NJP be captured in an OER, either in a Subsequent to Disciplinary Action OER, or within a regular OER. Accordingly, the JAG argued that OPM's direction to the applicant's chain of command to include the NJP within the applicant's OER, in the "Description of Duties" section, was within policy and was neither erroneous nor unjust. Likewise, the JAG argued that pursuant to Coast Guard policy, the applicant's Punitive Letter of Admonition was also required to be mentioned in his OER.

Finally, the JAG argued that the applicant's claim that because the OER was amended after it was signed and submitted to PSC, the OER was invalid. Again, the JAG claimed that the applicant failed to prove an error or injustice. According to the JAG, PSC is responsible for validating all OERs, which they cannot do until the OERs are signed and received by their department. The JAG explained that policy required that the NJP/Punitive Letter of Admonition to be captured in the OER. Accordingly, when PSC received the applicant's Punitive Letter of Admonition in conjunction with the applicant's regular OER, they could not validate the OER.

⁸ *Hary v. United States*, 223 Cl. Ct. 10, 18, 618 F.2d. 704, 708 (1981).

Because of this requirement, the JAG argued that was neither erroneous nor unjust for PSC to request that the applicant's OER be amended to include his NJP and Punitive Letter of Admonition before the office could validate his OER. The JAG claimed that the fact that his OER was returned to his chain of command to ensure that it aligned with policy was not unorthodox as alleged by the applicant.

For the reasons outlined above, the JAG argued that the applicant failed to meet his burden and his request for relief should be denied.

To support his application, the JAG submitted a sworn declaration from the applicant's commanding officer at the time of the incident, CAPT K. The relevant portions of CAPT K's sworn declaration are recorded below:

...

5. The day after the event, [National Park] contacted District [redacted] to notify the Coast Guard that they intended to take law enforcement action against [Applicant] for the unauthorized drone use. Additionally, they were requesting an audience with the District Commander based on the lack of professionalism demonstrated by the RMB boat crew. With the permission of D [redacted] and in my capacity as the SECTOR Deputy Commander, I flew to [National Park] with my Command Senior Chief to meet with the Park Superintendent and Chief Ranger. The purpose of this meeting was two-fold: first, to reassure NPS leadership that this event represented an isolate[d] lapse in judgement by a single boat crew and did not represent the professionalism of the broader Coast Guard team, and; second, to request that [National Park] allow the Coast Guard to address any wrong doing by [Applicant] in lieu of National Park Service law enforcement action. By the end of the meeting, [National Park] appeared reassured that this was an isolated event and agreed to the Coast Guard addressing the unapproved drone use, as long as we provided them an update that a thorough investigation into the matter was conducted and suitable disciplinary measures were taken, if deemed appropriate.

6. An investigation into the events identified several significant issues that contributed to the lost comms, resultant execution of a multi-asset USCG and National Park Service search effort, and the unauthorized drone use within the National Park. Relevant to [Applicant], the investigation indicated a significant lack of planning, failure to apply appropriate risk management, and a lack of leadership, judgment and situational awareness. Though [Applicant's] lack of understanding in his responsibilities and specific failure to identify the difference between the US Forest Service and the National Park Service were concerning based on his position in the SECTOR Staff, the command also felt strongly that his failures in this instance illustrate a lack of professional competence, not an intent to deceive.

7. Therefore, based on the investigation and information provided by [Applicant] during the subsequent closed Captain's Mast, the command decided that issuance of a Punitive Letter of Admonition (PLA) was appropriate. This was based on direct affirmation from OPM-3 that this action did NOT trigger the requirement for a nonregular OER, nor the requirement for specific mention of this event in [Applicant's] regular annual OER submission.

8. At the time of the "Captain's Mast" in May 2019, [Applicant] was advised by SEC [redacted] Command that: 1) he would be issued a PLA; 2) a copy of the PLA would be sent to PSC (opm-3) he would not receive a derogatory, non-regular OER.

9. [Applicant's] regular annual OER was submitted to PSC (opm-3) in July 2019 without mention of the NJP or PLA. [Applicant] transferred to SECTOR [redacted] in summer 2019.

10. In Feb 2020, PSC (opm-3) contacted CDR [H] advising that [Applicant's] 2019 Annual OER submission was required to be amended before it could be validated. The amend[ment] included the addition of language

specifically indicating that [Applicant] had been subject to a Mast in May 2019 and that he had been issued a PLA. Though CDR [H] had pushed back to opm-3 based on the change in guidance, I do not recall the explanation that opm-3 provided to CDR [H]. CDR [H] contacted [Applicant] at his new assignment at SEC [redacted] and explained the situation.

11. An amended OER was signed by [Applicant] and submitted to PSC (opm-3) in May 2020.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 17, 2023, the Chair sent the applicant a copy of the Coast Guard's advisory opinion and invited him to respond within thirty days. The applicant requested and was given an extension to respond until March 31, 2023. The Chair received the applicant's response on March 28, 2023.

The applicant stated that he is not challenging the merits of the investigation, but the actions taken by his chain of command after his OER was already signed and approved with no references to his NJP or the Punitive Letter of Admonition. The applicant explained that the initial agreement by the command for concluding his case is what he seeks to restore.

The applicant stated that his request for relief is centered around the violation of his due process rights that were violated after his OER was changed nine months after the conclusion of his case and the Punitive Letter of Admonition was submitted six months after his case was concluded. The applicant made many of the same allegations that were already sufficiently addressed in his initial application to the Board, namely that had he been told the NJP and Punitive Letter of Admonition would be placed in his permanent military record, he would have appealed. Because these allegations were already recorded elsewhere in this decisions, for efficiency they will not be summarized again here.

In his response to the advisory opinion, the applicant provided four new pieces of evidence to support his position that he would appealed his NJP had he known that it would be placed in his military record. First, he included a letter from CDR H, who was the senior member of his sector's chain of command. The applicant argued that CDR H's letter clearly disputes the Coast Guard's advisory opinion's narrative that the NJP and Punitive Letter of Admonition were meant to be included in his record. CDR H's statement reads as follows:

Dear Board for Correction of Military Records,

I am writing to corroborate the events surrounding LT [Applicant's] Non-Judicial Punishment on May 24, 2019, and to voice my support for his request of this board to have this Officer Evaluation Report (OER) and Letter of Admonition (LOA) removed from his military, record.

I was the Response Department Head of Coast Guard Sector [Applicant], and I was one of three NJP board members. LT [Applicant] was serving, as my subordinate, in the position of Enforcement Division Chief. I was present throughout this entire period, and I was directly responsible for writing his OER and counseling him on the letter of admonition (LOA).

In May 2019, I asked him to sign the LOA and counseled him that doing so would not be entered into his permanent military record. In June 2019, I further did not include the NJP nor the LOA in his OER. LT [Applicant] was informed that the command's intent and decision to not include these documents in his

permanent military record was deliberate and intentional because of his previous exceptional performance, and his potential to serve in positions of greater responsibility in the future.

Unfortunately, Sector [redacted] command leadership was notified by Coast Guard Personnel Service Center (PSC) in February 2020, six months after submitting a non-NJP OER, that inclusion would be necessary in accordance with Coast Guard policy. By this point, LT [Applicant] had already transferred to Sector [redacted] where he had progressed in his career under the premise that he would maintain a clean record and was already successfully serving based on his demonstrated work ethic and abilities.

I can attest, from direct involvement in the command's discussions with PSC about LT [Applicant's] OER and LOA, that Sector [redacted] leadership was conflicted about inclusion of these documents in his permanent military record based on policy. However, Sector [redacted] was directed by PSC to amend LT [Applicant's] approved OER and retroactively include the LOA in his record. I acknowledge, with regret that this decision precluded LT [Applicant] from taking any administrative recourse because we were all misled about his options and his time period for appeal had expired.

I genuinely believe that LT [Applicant] would have appealed the NJP decision if we had received accurate information from PSC prior to the NJP proceedings and therefore been able to accurately counsel him. While this mistake was not overt by Sector [redacted], it has negatively impacted LT [Applicant] in a manner that was never intended by the command. I can say with a high level of certainty that the LOA would have never been written if we were properly advised by PSC. The LOA and NJP OER were not intended to be entered into LT [Applicant's] permanent military record. LT [Applicant] is an upstanding officer who embodies the Coast Guard core values of honor, respect and devotion to duty. Therefore, I am recommending to this board that it be permanently removed from his military record.

Second, the applicant submitted a February 25, 2020, email from a LCDR within PSC, which the applicant contended showed his Sector's resistance to OPM's guidance on requiring the NJP and Punitive Letter of Admonition be entered into his permanent military record. According to the applicant, his chain of command's intent can be clearly seen wherein it states, "the command is dragging their feet on putting the required verbiage into the OER...and being hesitant to attach the letter of reprimand to the OER." The applicant claimed that this statement is evidence that OPM observed his chain of command's failure to follow policy and thwart his right to due process. The applicant contended that this email further supports his claims that his chain of command had no intention of inserting the derogatory information into his permanent military record. Furthermore, the applicant claimed combining his Sector's delay of more than six months past the case conclusion before it even considered submitting of any NJP documentation to OPM, shows his command was either trying to maintain their initial guidance to him, or they were delinquent in their due diligence to submit the documentation. Either way, the applicant contended that the over six-month delay was professionally unacceptable for such a career altering event when the member has no right to refute the change. The applicant argued that the injustice to his record occurred outside of his appeal window to the detriment of his career and if he had been made aware of the derogatory information going on his permanent record within the appeal window, he would have utilized the appeal to save his career, but he was never given that chance.

Third, the applicant submitted the contested OER as it was originally drafted and agreed upon, showing that it was approved and signed by his chain of command. The applicant claimed that this OER supports his position that his chain of command never intended to include the NJP and Punitive Letter of Admonition in his OER.

Lastly, the applicant pointed to CAPT K's sworn declaration that was submitted with the Coast Guard's advisory opinion. The applicant stated that CAPT K's statements in paragraphs 9, 10, and 11 clearly shows that his sector intentionally submitted his OER with no mention of the NJP and Punitive Letter of Admonition in July 2019. The applicant also highlighted CAPT K's statement that Sector "pushed back to opm-3 on the change in guidance" which according to the applicant, shows Sector's resistance to including the derogatory information in his OER and his contentions that his NJP would not be entered into his military record. The applicant argued that the substantial gap in time for something was never intended to be placed in his record is why the Coast Guard's actions should not be allowed.

The applicant stated that in light of this new evidence, he believed it was clear that Sector did not originally intend to include his NJP or the Punitive Letter of Admonition in his official military record. He stated that he accepted responsibility and accountability for his actions that led to the mark of three (3) on his contested OER, but implored this Board to grant him relief based on this clear and compelling evidence that this record change was done in a dishonorable way that was unjust. He claimed that he is a good Coast Guard officer as demonstrated by a career of impeccable OERs and awards. He explained that Sector did not intend for this single event to derail his Coast Guard career but the insertion of the NJP and Punitive Letter of Admonition has done just that.

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.

The Manual for Courts-Martial, Part V (Nonjudicial Punishment), provides the following guidance on the nature of punishments issued at NJP and a member's right to appeal:

...

5.c. Nature of Punishment.

(1) *Admonition and reprimand.* Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. When imposed as nonjudicial punishment, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand provided for in paragraph 1g of this Part. In the case of commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing. In other cases, unless otherwise prescribed by the Secretary concerned, they may be administered either orally or in writing.

...

7. Appeals.

a. *In general.* Any Servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority.

b. *Who may act on appeal.* A "superior authority," as prescribed by the Secretary concerned, may act on an appeal. When punishment has been imposed under delegation of a commander's authority to administer nonjudicial punishment (*see* paragraph 2c of this Part), the appeal may not be directed to the commander who delegated the authority.

c. *Format of appeal.* Appeals shall be in writing and may include the appellant's reasons for regarding the punishment as unjust or disproportionate.

d. *Time limit.* An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown. A Servicemember who has appealed

may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the Servicemember so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken.

...

8. Records of Nonjudicial Punishment. The content, format, use, and disposition of records of nonjudicial punishment may be prescribed by regulations of the Secretary concerned.

Article 1 of the Coast Guard's Discipline and Conduct Manual, COMDTINST M1600.2, provides the following guidance on Punitive Letters of Censure:

1.E.1. Censure. Censure is a general term applicable to any form of adverse reflection upon individual character, conduct, performance, or appearance. Censure is a prerogative of command or administrative superiority, but certain exercises of the power of censure are governed by statute, regulations, and instructions. Censure includes both punitive and non-punitive measures.

1.E.2. Punitive Letters of Censure.

a. **Disposition.** Instructions for the issuance of punitive letters of censure, as a result of Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, are contained in reference (b), Military Justice Manual, COMDTINST M5810.1 (series). One copy of the punitive letter of censure, issued under Article 15 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946, with a copy of the individual's acknowledgment of receipt, shall be forwarded to Commander (CG PSC-OPM) or (CG PSC-EPM), as appropriate. This punitive letter shall be held until the appeal period specified by Part V, Paragraph 7 of reference (e), Manual for Courts-Martial (MCM), United States (current edition) expires. Upon expiration of the appeal period, the punitive letter shall be inserted into the member's CG Personnel Service Center (PSC) electronically imaged personnel data record (EI-PDR).

b. **Appeals.** If the member receiving the punitive letter of censure chooses to appeal, Commander (CG PSC-OPM) or (CG PSC-EPM) shall be notified by the officer who imposes punishment. The letter shall not be entered into the member's official Headquarters record until the appeal has been decided. If after action on the appeal, a punitive letter of censure remains effective, the authority who acts on the appeal shall forward a copy of the action on the appeal to Commander (CG PSC-OPM) or (CG PSC-EPM), as appropriate, for attachment to the Headquarters copy of the punitive letter of censure, and filing in the member's official Headquarters record. If the appeal is granted, and a punitive letter of censure no longer remains effective, a copy of the action on appeal shall be forwarded to Commander (CG PSC-OPM) or (CG PSC-EPM), as appropriate, and the punitive letter of censure shall not be placed in the Headquarters record.

1.E.3. Court Memorandums. Commanding officers shall forward the original of all Court Memorandums to Commander (CG PSC-OPM) or (CG PSC-EPM) as appropriate. (See reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).) The original of all Supplemental Court Memorandums shall be similarly forwarded. The Court Memorandums shall be subsequently filed in the individual's official record.

Article 15 of the Coast Guard Officer Evaluation Systems Procedures Manual, PSCINST M1611.1C, provides the following guidance on recording disciplinary actions in an officer's OER:

A. General.

1. This section describes the procedures for preparing and processing Officer Evaluation Reports (OERs), CG-5310 (series) to: document actions resulting in a civil court or criminal offense

conviction that bring discredit upon the Coast Guard; when an officer receives non-judicial punishment which is not subject to appeal; or when the final reviewing authority's action on an investigation includes direction that an OER shall be prepared. In courts martial cases, this OER shall be initiated once the convening authority has taken action and the finding of guilty has not been disapproved.

2. All general guidance and restrictions provided in Chapter 4 of this Manual apply.
3. The Commandant, commanding officers, higher authorities within the chain of command, convening authorities, and Reporting Officers may direct this report.
4. This OER can be defined as Derogatory as per Article 5.H.1. of Reference (a). Refer to Chapter 6 of this Manual for Derogatory OER procedural guidance.

B. Function of this OER.

1. This OER must be submitted when actions resulting in a civil court or criminal offense conviction bring discredit upon the Coast Guard and, except for minor traffic violations, shall be reflected in the performance evaluation of officers. Therefore, this OER is required after an officer is found guilty of a civil or criminal offense with a detailed description of the conduct documented in the OER as required by reference (e), Discipline and Conduct, COMDTINST M1600.2 (series).
2. This OER must be submitted when an officer receives non-judicial punishment which is not subject to appeal or when the final reviewing authority's action on an investigation includes direction that an OER shall be prepared. In courts martial cases, this OER shall be initiated once the convening authority has taken action and the finding of guilty has not been disapproved.
3. The performance evaluation describes the unacceptable conduct and is not merely referencing the type of proceeding. The conduct itself reflects negatively on the Coast Guard and requires documentation. It is the NJP, civil conviction, or investigation that prompts the report and therefore any discussion on conduct associated with them is considered within the period of report.

C. Preparation.

1. This OER presents unique preparation requirements for members of the rating chain and the Reported-on Officer. Rating Chains *are strongly encouraged* to contact CG PSC-OPM-3 or CG PSC-RPM-1 for guidance prior to preparing these reports.
2. This OER is optional if the conduct resulting in the court-martial, non-judicial punishment, or investigation occurs during the current reporting period and the process is completed, i.e., not subject to further review, by the time the regular report is due for the current period (within 30 days of the end of period of report). The basis for the court-martial, non-judicial punishment, or investigation shall be reported in the regular report and mentioned in the description of duties.

...

Article 18 of the Coast Guard Officer Evaluation Systems Procedures Manual, PSCINST M1611.1C, provides the following guidance on OERs that are sent back to the rating chain for administrative changes:

Article 18.A. General. Completed OERs are forwarded to CG PSC-OPM-3 or CG PSC-RPM-1, Officer Evaluations Branch for processing, review and validation.

...

Article 18.C. OER Review.

1. CG PSC-OPM-3 or CG PSC-RPM-1 review OERs for administrative and substantive errors. Particular attention is given to administrative data, Reviewer Comments, and inconsistencies between the numerical evaluations and written comments (where applicable). The review is not intended to question a rating official's judgment about a subordinate's performance, but to ensure OERs are prepared per OES guidelines.

2. Unacceptable Reports. Reports found unacceptable are returned to the original rating chain member identifying areas for correction. The initial submission shall be deleted to avoid duplication and / or confusion. Corrected OERs must be returned to CG PSC-OPM-3 or CG PSC-RPM-1 via the rating chain within 30 days.

Article 18.D. Correction of OERs.

...

3. Quality of Comments. Comments in the OER must be sufficiently specific to present a complete picture of the Reported-on Officer's performance and qualities during the period. They should be both reasonably consistent with the numerical marks assigned and justify those marks which deviate from a four (if applicable). On those marks indicated by CG PSC-OPM-3 or CG PSC-RPM-1 as not being supported, the rating chain should either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided.

4. Comments.

a. If an OER is returned to the rating chain due to comments, those marks and comments may be changed by the original Supervisor and Reporting Officer as appropriate. The signature dates should be adjusted to reflect the date that the necessary changes and reviews were actually made. The Reported-on Officer should be provided the opportunity to review and sign the updated OER.

b. CG PSC-OPM-3 or CG PSC-RPM-1 may make minor changes of a positive nature to marks and comments after receiving unanimous consent/direction from the rating chain. The Reported-on Officer must be informed of the change/s. Signature date adjustment is not required.

c. A new OER form should be used if the corrections are extensive.

5. All changes to the original OER must be initialed.

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 he was erroneously counseled that his NJP and subsequent Punitive Letter of Admonition would not be recorded in his regular OER for the rating period or in his permanent record. However, nearly a year after he signed his original OER, he was forced to sign a newly drafted OER that included his NJP and Punitive Letter of Admonition. According to the applicant, because of this erroneous counsel, he did not exercise his right to appeal his NJP proceedings or the Punitive Letter of Reprimand. As a result of these errors, the applicant requested that all documents relating to his NJP and Punitive Letter of Admonition be removed from his permanent record, that the erroneous OER be removed from his record, or at the very least the original OER replace the newly edited OER, and that he be granted two Special Selection Boards to have his record reviewed for promotion to LCDR absent the erroneous and unjust documents. 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. The Board's review of the record shows that on April 17, 2019, while being the senior member on a small Coast Guard boat, the applicant deployed a personal drone within the boundaries of a national park in violation of federal regulations. Although the applicant claimed to have received permission to use the drone within the national park, the record shows that in truth, the applicant did not receive proper authorization from the National Park Service because instead of calling the National Park Service for authorization, he erroneously called the U.S. Forest Service. As a result of the applicant's actions, friction was caused between the Coast Guard and the National Park Service that required the applicant's CO to travel to the national park to try and diffuse the situation. Finally, the record shows that the applicant's CO was able to come to an agreement with the National Park Service that included ensuring a proper investigation was conducted and that all individuals involved receive appropriate disciplinary action. The applicant's CO initiated an investigation that resulted in the applicant being referred to Captain's Mast, which the applicant accepted. Upon conclusion of his Captain's Mast, the applicant was found guilty of violating Article 134 of the UCMJ for flying a drone in a national park without authorization. He was given a Punitive Letter of Admonition as a result. The record shows that after his NJP and during his receipt of his Punitive Letter of Admonition, the applicant was assured by his supervisor that neither the NJP or the Punitive Letter of Admonition would be memorialized in his regular

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).

OER or entered into his permanent record. As a result of these assurances, the applicant waived his right to appeal his NJP and the Punitive Letter of Admonition.

However, nearly six months after the applicant signed his OER for the June 1, 2018, through May 31, 2019, rating period, after his appeal process had expired and he had already transferred to a new unit, he was notified by his previous rating chain that OPM had informed them that that his NJP and Punitive Letter of Admonition would need to be memorialized in his regular OER and entered into his permanent record. As a result of OPM's guidance, the applicant was forced to sign a new OER on April 27, 2020, wherein his NJP and Punitive Letter of Admonition was recorded. In addition, the applicant's NJP and Punitive Letter of Admonition was entered into his permanent record.

5. Error Regarding Punitive Letter and NJP. The applicant has alleged that the Coast Guard erroneously entered his Punitive Letter of Admonition and NJP into his official military record and then erroneously changed his OER after it had been signed. Article 1.E.2.a. of the Discipline and Conduct Manual, COMDTINST M1600.2, states that upon the issuance of a punitive letter, the letter "shall be held until the appeal period specified by Part V, Paragraph 7 of reference (e), Manual for Courts-Martial (MCM), United States (current edition) expires. Upon expiration of the appeal period, the punitive letter shall be inserted into the member's CG Personnel Service Center (PSC) electronically imaged personnel data record (EI-PDR)." Regarding appeals to a punitive letter, subsection (b) of this same article provides that if on appeal the punitive letter remains effective, the letter shall be filed in the member's official record. However, if a member's appeal of the punitive letter is granted, the letter no longer remains effective and the letter is not placed in the member's official record. Article 1.E.3. of COMDTINST M1600.2, states that commanding officers, "shall forward the original of all Court Memorandums to Commander (CG PSC-OPM) or (CG PSC-EPM) as appropriate. (See reference (i), Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).) The original of all Supplemental Court Memorandums shall be similarly forwarded. The Court Memorandums shall be subsequently filed in the individual's official record."

Finally, Article 15.A.1. of the Coast Guard Officer Evaluation Systems Procedures Manual, PSCINST M1611.1C, states that an OER, whether a disciplinary or regular OER must be issued to document when an officer receives NJP. Furthermore, regarding the review and validation of OERs, Article 18 of the same manual states:

Article 18.A. General. Completed OERs are forwarded to CG PSC-OPM-3 or CG PSC-RPM-1, Officer Evaluations Branch for processing, review and validation.

...

Article 18.C. OER Review.

1. CG PSC-OPM-3 or CG PSC-RPM-1 review OERs for administrative and substantive errors. Particular attention is given to administrative data, Reviewer Comments, and inconsistencies between the numerical evaluations and written comments (where applicable). The review is not intended to question a rating official's judgment about a subordinate's performance, but to ensure OERs are prepared per OES guidelines.

2. Unacceptable Reports. Reports found unacceptable are returned to the original rating chain member identifying areas for correction. The initial submission shall be deleted to avoid duplication and / or confusion. Corrected OERs must be returned to CG PSC-OPM-3 or CG PSC-RPM-1 via the rating chain within 30 days.

Accordingly, when PSC became aware that the applicant's NJP and Punitive Letter of Admonition were not properly documented in his regular OER as required by Coast Guard policy, PSC was required to return the OER to the applicant's rating chain to require the change in comments so that the OER could be brought into compliance with Coast Guard policy prior to its validation and entry into the applicant's permanent record. In this respect, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when PSC required the applicant's rating chain to correct the original OER.

6. Injustice. Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."¹² The Board has authority to determine whether an injustice exists on a "case-by-case basis."¹³ Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"¹⁴ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."¹⁵

As already stated above, upon the issuance of the applicant's Letter of Admonition, the applicant was assured that neither the punitive letter or his NJP would be recorded in his permanent record or memorialized in his regular OER. The record shows that because of these assurances, the applicant chose not to exercise his right to appeal his NJP. However, after he chose not to exercise his right to appeal, nearly six months after his original OER was signed and forwarded to PSC, he learned that his rating chain's guidance and assurances were wrong and that his Punitive Letter of Admonition and NJP were required by policy to be memorialized in his regular OER and filed in his permanent military record. Although this Board cannot say for sure what the outcome of the applicant's appeal would have been, the record is clear that the applicant relied on the faulty advice of his rating chain that resulted in him not exercising a crucial due process right. For those reasons, the Board finds that the applicant has proven, by a preponderance of the evidence, that the erroneous guidance he received from his rating chain resulted in an injustice that requires relief. Accordingly, the Coast Guard should remove the applicant's Punitive Letter of Admonition from his permanent military record and all documents relating to his NJP. In addition, the Coast Guard should restore to the applicant's record the original OER for the June 1, 2018, through May 31, 2019, rating period signed by the applicant on July 12, 2019, and remove from his record the corrected OER for the same rating period currently showing in his permanent record.

¹² *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.").

¹³ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

¹⁴ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

¹⁵ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

7. Special Selection Board. Because the Board has found, by a preponderance of the evidence, that the applicant's 2019 OER currently entered in his record should be replaced with the original OER signed by the applicant on July 12, 2019 due to erroneous guidance he received from his rating chain, the Board also finds that the applicant is entitled to an SSB for the PY2021 and PY 2022 LCDR promotion cycles, in accordance with 14 U.S.C. § 2120.

8. For the reasons outlined above, the Board finds that the applicant has proven, by a preponderance of the evidence, that he relied on erroneous information provided to him by his rating chain to his detriment when that advice led him to forgo his due process rights and appeal his NJP. Accordingly, the Coast Guard should remove from his record his Punitive Letter of Admonition and all records pertaining to his NJP. In addition, the Coast Guard should remove the applicant's June 1, 2018, through May 31, 2019, OER that is currently in his record and replace it with the original OER signed by the applicant on July 12, 2019. The applicant has also proven that because of this injustice he is entitled to an SSB.¹⁶ Therefore, the Coast Guard should order an SSB to evaluate the applicant's record for promotion for PY2021. If this SSB does not select him for promotion, the Coast Guard should convene a second SSB for PY2022 to evaluate his record for promotion. If neither SSB selects the applicant for promotion, no further corrections are warranted. If either SSB selects the applicant for promotion, the Coast Guard should place his name on the next promotion list for appointment to LCDR and, once he is promoted, backdate his date of rank to what it would have been had he been selected for promotion by the original PY2021 or PY2022 selection board, based on his selection by the applicable SSB, and he should receive all due backpay and allowances.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁶ *Hary*, 618 F.2d at 708.

ORDER

The application of LT [REDACTED] [REDACTED] USCG, for the correction of his military record is granted. The Coast Guard shall--

- Remove the May 29, 2019, Punitive Letter of Admonition from his permanent record.
- Remove all documentation pertaining to his Nonjudicial Punishment from his permanent record.
- Replace the current Officer Evaluation Report, for the period June 1, 2018, through May 31, 2019, from his military record and replace it with the original Officer Evaluation Report signed by the applicant on July 12, 2019.
- After his record is corrected, convene a Special Selection Board to evaluate his record for promotion by the PY2021 LCDR selection board. If that Special Selection Board does not select him for promotion, convene a second Special Selection Board to evaluate his record for promotion by the PY2022 LCDR selection board. If neither Special Selection Board selects him for promotion, no further correction of his record shall be made.
- If either Special Selection Board selects him for promotion, the Coast Guard shall place his name on the next LCDR promotion list for appointment to LCDR; once promoted, backdate his date of rank to what it would have been had he been selected for promotion by the original PY2021 or PY2022 LCDR selection board based on which SSB selected him for promotion; and pay him all back pay and allowances due him as a result of these corrections.

July 11, 2024

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