

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2022-063**

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**FINAL DECISION**

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair received the applicant's completed application form on July 28, 2022, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 12, 2023, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**PROCEDURAL BACKGROUND**

On February 1, 2015, the applicant was discharged from active duty. On February 2, 2021, he filed suit on this matter in the United States Court of Federal Claims and asked the court to remand his case to this Board. The government acquiesced, and on August 27, 2021, the court remanded the case to the Board. The court required the applicant to submit a BCMR application within 45 days and required the Board to issue a decision within 180 days. On July 12, 2022, the applicant submitted an incomplete, unsigned application form.<sup>1</sup> In response to a July 19, 2022, voicemail from the Chair, the applicant's attorney submitted a signed copy of the application by email on July 28, 2022. On August 9, 2022, the court directed the Board to issue a decision no later than November 25, 2022. This deadline was later extended to January 13, 2023.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant, a former lieutenant (LT/O-3) who was honorably discharged from active duty for substandard performance on February 1, 2015, asked the Board to make the following corrections to his record:

- Remove all derogatory records, including Officer Evaluation Reports (OERs);

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<sup>1</sup> 33 C.F.R. § 52.21 (requiring the Chair to receive a completed, signed application form, DD-149, before docketing a case).

- Remove a Non-Judicial Punishment (NJP) and Punitive Letter of Reprimand;
- Void his discharge and reinstate him on active duty since February 1, 2015, with back pay and allowances;
- Reimburse him for three days of leave improperly charged to him; and
- Grant any other relief that is equitable and just.

The applicant also requested an audio transcription of his Board of Inquiry, and—presumably if his discharge is not voided and he is not reinstated—he asked the Board to make the following corrections to his discharge form DD-214, some of which appear to have already been made since the DD-214 in the applicant’s military record was issued on March 23, 2021.

- Block 2: USCG Active (currently USCG AD, for Active Duty)
- Block 15a: No (currently No)
- Block 19a: (different post-separation mailing address redacted)
- Block 26: GHF (currently GHK)
- Block 28: Failure to meet standards prescribed by the Commandant (currently Substandard Performance)

The applicant stated that he is entitled to these corrections for the reasons summarized below, which are presented in the order addressed in the brief.

### ***Allegations About Origins of Retaliation***

The applicant stated that on May 9, 2008, he reported instances of hazing, inappropriate comments, and fraternization on the part of the Commanding Officer (CO) of his cutter to his CO’s chain of command. Specifically, he reported that he had observed the CO refer to a female crewmember as a “dyke” and ask if “it needed to get plugged.” He also reported that he had observed the CO make comments that Hispanics from Los Angeles should not be in the Coast Guard. He apparently also complained about being denied qualifications because on May 14, 2008, the parent command initiated an investigation into the denial of his qualifications aboard the cutter. Then, in September 2008, in retaliation, his CO removed him from his primary duties and he was temporarily reassigned to the local District office. Subsequently, he received a derogatory OER documenting his removal from primary duties, and his CO and Coast Guard Headquarters initiated a board to determine whether his name should be removed from the lieutenant promotion list. Therefore, he was not promoted as scheduled on December 15, 2008. The applicant called this his first “show cause” proceeding and stated that in January 2009, a Determination Board decided that his name should remain on the promotion list and so he was subsequently promoted to lieutenant with a backdated date of rank.

### ***Three Days of Leave***

The applicant alleged that in January 2012, while serving as a financial analyst at Coast Guard Headquarters, he received temporary active-duty orders to participate in an Officer programs Interview Board on January 11, 12, and 13, 2012. During that period, he received a call from his supervisor, LCDR S, who accused him of violating the Uniform Code of Military Justice (UCMJ) by being Absent Without Leave (AWOL). A week later, on January 19, 2012, his CO took him to mast and awarded him NJP for being AWOL for those three days. Then,

LCDR S improperly charged him with three days of leave without authority. Therefore, he argued, he should be reimbursed for those three days of leave. (His DD-214 shows that he was reimbursed for 54 days of leave upon his discharge.)

### ***Determination Board***

The applicant stated that on October 22, 2012, the Coast Guard notified him that it was convening a show cause board to determine whether he should be processed for separation. Then on January 10, 2014, over a year later, he was notified of the results and that the Coast Guard would convene a Board of Inquiry (BOI).

### ***Board of Inquiry***

The applicant stated that the BOI convened on May 5, 2014, but when he received the transcript on June 4, 2014, it was incomplete and not authenticated. He alleged that it was missing about 90 minutes of testimony by LCDR S, who was his supervisor as a financial analyst. However, COMDINST M1000.4, the Military Separations Manual, requires the Coast Guard to provide the member with a verbatim transcript of the BOI.

Moreover, the applicant stated, when he later requested a copy of the original audio file, he was informed that it had been deleted. The applicant argued that the record of his BOI is thus incomplete, and part of it was destroyed contrary to policy.

The applicant stated that in the missing testimony of LCDR S, his supervisor had admitted (a) that he had failed to advise applicant of his Article 31(b), UCMJ, rights before questioning him about alleged violations of the UCMJ and (b) that he had fabricated certain documents that had been submitted to the Board. Regarding this missing testimony, the applicant argued the following:

The admissions by [LCDR S] raise significant due process issues with the way in which the show cause action was initiated and with the authenticity of the evidence used against [the applicant]. This alone is a basis to invalidate the BOI findings. The Service's failure to capture this testimony in the record of BOI proceedings is additionally problematic, as it establishes that the Review Board did not have access to this important testimony during its review of the BOI. Obviously, the Review Board's decision was based on an incomplete record, which renders its decision erroneous and void.

### ***Board of Review***

On August 29, 2014, the applicant stated, he was notified that a Board of Review (BOR) would be convened. Then from September 19 to September 23, 2014, he received several calls from officers trying to "coerce" him to resign. They noted that a BOR could result in him being "dropped from the rolls," which would cause him to lose his entitlement to veterans' benefits. However, he refused to resign.

The BOR convened on October 2, 2014. Although there had been minority members on the other boards, there was no minority member of the BOR. He argued that this was both erroneous and unjust as there was no one of the same or a similar ethnic background on the

BOR. The applicant did not cite any applicable policy but argued that “[e]ven if this Board determines no such requirement existed for the Board of Review, you should nevertheless conclude that the lack of a minority member resulted in an unfair, unjust, and inequitable result and grant the requested relief.”

The applicant stated that he learned that the BOR had recommended his separation on October 5, 2014.

### ***Lack of Pre-Separation Medical Examination***

The applicant stated that he was finally informed that the recommendation of the BOR had been approved on December 30, 2014, which left him very little time to complete separation processing. On January 9, 2015, he requested a delay of his discharge date to provide more time to undergo a complete pre-separation medical examination, but his request was denied. Although the Military Separations Manual requires members to undergo a pre-separation medical examination, the applicant stated that he did not receive one but was nevertheless discharged on February 1, 2015.

On January 31, 2015, the applicant stated, he submitted an Article 138 complaint against his command. He alleged that no action was ever taken on the complaint.

### ***Allegations About Retaliation or Reprisal***

The applicant stated that on May 9, 2008, he made a protected communication to the Service to alert them to a variety of acts of misconduct on the part of his commanding officer. Thereafter, “the command took multiple adverse actions against [him] including, but not limited to, transfer to the Coast Guard [redacted] District, issuance of an adverse evaluation authored by [his cutter’s CO] (the subject of the protected communication), initiation of an administrative investigation into [the applicant], delay of his promotion to Lieutenant, initiation of the first show cause action, and, eventually a second show cause action and ultimate discharge from the Service.” The applicant stated that these acts of reprisal were direct violations of the Military Whistleblower Protection Act and DoD Directive 7050.06. The applicant argued that it is “impossible to separate the issue of this protected communication from the various adverse action the command took against [the applicant] following that communication. The only appropriate relief for this gross violation of law is to reinstate [the applicant]” on active duty.

### ***Arguments About the Propriety of the Second Board of Inquiry***

The applicant alleged that he was subject to two Boards of Inquiry and that the second BOI was a violation of 10 U.S.C. § 1182,<sup>2</sup> which states the following in paragraph (d)(3)(B):

An officer who has been required to show cause for retention on active duty under subsection (b) of section 1181<sup>3</sup> of this title and who is thereafter retained on active duty may not again be

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<sup>2</sup> 10 U.S.C. § 1182(a) begins, “The Secretary of the military department concerned shall convene boards of inquiry ...” 10 U.S.C. § 101(a)(8) defines “military department” the Department of the Army, Navy, or Air Force.

required to show cause for retention on active duty under such subsection solely because of conduct which was the subject of the previous proceedings, unless the findings or recommendations of the board of inquiry that considered his case are determined to have been obtained by fraud or collusion.

The applicant stated that the Service “initiated two Boards of Inquiry. Both Boards were based on the same underlying alleged misconduct [need to check to see if this is true] [*sic*]. The first Board voted ..... [fill in details here] [*sic*]. The result of the first BOI was that [the applicant] was retained in the Service. Under 10 U.S. Code § 1182, the Service was precluded from initiating another BOI based on the same alleged misconduct as the first. However, that is exactly what the Service did, which renders the second BOI and its results invalid and void.”

To support his allegations, the applicant submitted copies of the reports of the Determination Board, BOI, and BOR and a copy of his military personnel record. He also submitted documents with his response to the Coast Guard’s advisory opinion. These documents are included in the Summary of the Record below.

### SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 21, 2002. After completing recruit training, he served short tours at two recruiting offices before being selected for and attending Officer Candidate School. He graduated on December 15, 2004, with a commission as an ensign (O-1) in the Coast Guard Reserve to serve on an extended active duty (EAD) contract for three years, through December 14, 2007.

#### *First Cutter: Deck Watch Officer*

On January 5, 2005, the applicant reported for duty as a Deck Watch Officer (DWO) of a cutter. On July 14, 2005, he filed an Article 138 request for redress against the Commanding Officer (CO) of his cutter. He asked to be transferred immediately to a similar cutter in another District. The applicant received transfer orders the next day, and the CO responded to his Article 138 complaint on July 25, 2005, noting that the applicant had already been transferred.

The applicant received his first Officer Evaluation Report (OER) for his service aboard the first cutter. Dated July 15, 2005, the OER shows that the applicant received ten “standard” marks of 4 and eight marks of 5 (on a scale from 1 (worst) to 7 (best)) in the various performance categories. He was also recommended for promotion “with peers” and assigned a mark in the middle (fourth) spot on the officer comparison scale as “one of the many competent professionals who form the majority of this grade.”

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<sup>3</sup> 10 U.S.C. § 1181(a) states, “Subject to such limitations as the Secretary of Defense may prescribe, the Secretary of the military department concerned shall prescribe, by regulation, procedures for the review at any time of the record of any commissioned officer (other than a commissioned warrant officer or a retired officer) of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Space Force to determine whether such officer shall be required, because his performance of duty has fallen below standards prescribed by the Secretary of Defense, to show cause for his retention on active duty.”

***Second Cutter: Deck Watch Officer***

From August 10, 2005, through May 26, 2007, the applicant served on another cutter as a DWO. While assigned to this cutter, the applicant received four increasingly good semiannual OERs, with mostly 4s and 5s on the first to mostly marks of 6 on the last. In addition, he consistently received a mark in the fifth spot on the officer comparison scale as “one of the many competent professionals who form the majority of this grade” and was recommended for promotion “with his peers.” On June 15, 2006, he was promoted to LTJG. Upon his transfer, the applicant received an Achievement Medal for his performance of duty aboard this cutter.

***Third Cutter: Operations Officer***

On June 6, 2007, the applicant reported for duty as the Operations Officer (OPS) of a cutter. The Executive Officer (XO) of the cutter was his Supervisor, and the CO of the cutter was his Reporting Officer.

On September 17, 2007, the applicant signed another extension contract to run from December 15, 2007, through June 30, 2009.

On January 31, 2008, the applicant received a semiannual OER with ten marks of 4, seven marks of 5, and one mark of 6 for “Professional Presence.” He received another mark in the middle (fourth) spot on the officer comparison and a recommendation for promotion “with peers.”

On February 14, 2008, the applicant was integrated from the Reserve to the regular, active duty Coast Guard.

***Temporary Active Duty (TAD) Assignment to Fourth Cutter: Deck Watch Officer***

From July 1, 2008, to September 19, 2008, the applicant was sent on TAD orders to serve as a DWO of another cutter. From September 7 to 12, 2008, an officer in the Officer Personnel Management branch at Coast Guard Headquarters and the COs of the third and fourth cutters exchanged emails discussing the applicant’s performance and potential relief from his primary duties. The CO of the third cutter wrote the following:

[The applicant] struggled during his time onboard [third cutter] as the Operations Officer. Specifically, he struggled with trip planning and watch scheduling, did not work well with the ILT and BMC to plan for scheduled AtoN work., and did not have a firm grasp of navigation. He also struggled to get his underway qualification primarily because he required constant oversight to make sure he was standing his required watches and completing his WQS. We also devoted a lot of energy to developing his shipdriving abilities because when he arrived, it was clear he did not have a firm grasp of the different forces acting on a ship making many of his early mooring evolutions onboard [the cutter] very stressful events that required a lot of coaching. Most importantly, he did not exhibit a command presence on the bridge which definitely didn’t accelerate his qualification process.

So, his January marking period came around. My XO and I struggled with his marks because we felt he had aptitude as an officer but was just not cut out to be a cutterman. With a lot of prodding and effort on our part, we pushed him to complete his inport qualification on Jan 31 so we could at

least document that in his Jan OER. In the end, I sent in an OER that I felt would not damage his career as an officer but would show that he needed additional time to develop as a cutterman - if he wanted to continue in that track. In hindsight., this was my biggest mistake - trying to give this officer the benefit of the doubt.

In February, I had a conversation with [Officer B] about [the applicant]. Basically, the conversation was about potentially relieving him of his primary duties as Operations Officer. While I had conducted several informal counseling sessions with this officer and was also using my CPO Mess and XO to try and help move hill along, he just wasn't getting it. My problem once again was that I didn't have enough formal documentation of the problem to have good cause to relieve him. So, I began putting together some formal documentation but, at the same time, redoubled my efforts to work with him and try to bring him along. This included getting him to the USN Navigator Course at [local port] and the POPS Course at CGA as well as the lion's share of the stick time on the bridge. But the fact of the matter was he just wasn't putting all the pieces together. I had another conversation with [Officer B] in April to let him know that I might be relieving [the applicant]. At that point, I let [Officer B] talk me out of it until after he returned from the POPS course to see if that would smooth out any remaining rough edges. However, when he returned from the POPS Course, he met with me and the XO on his first day back and read us a four page statement prepared by his \$409/hr lawyer in Washington, d.c. that informed us he was going to [the District] to file a command climate complaint and that we (my XO and I) were preventing him from being successful onboard [the cutter] due to our discrimination towards him based on his race, previous afloat history and officer accession source.

He left the ship on May 12th. A nearly two month admin investigation followed. In the end, the previous [District officer] came over to tell me that the command climate was not a problem and 99% of the problem rested with the member. My 1% was the documentation of his performance problems and kicking him in the butt more. However, when the investigation was forwarded to [the District command], it provided two options - 1) relieve the member of his primary duties; or 2) hold member accountable for crying wolf without just cause and return member to [the cutter]. The former [District officer] created a third option which was to send the member to [the fourth cutter] for an 'independent evaluation' during their trip to [redacted island] and see if he could complete his underway OOD qualification. The latter was the course of action taken.

Since May 12th, we've gotten a new District Commander, new Chief of Staff, new [District officer] and a new [District officer], all of whom were major players when the incident went down. I had been keeping [two District officers] apprised of my problems with this officer but with the regime changeout, a lot of this corporate knowledge was lost between the acting personnel serving as Acting (des) and no one really wanting to take any action until all the new players arrived. During this period, we also learned that while he was at the POPS course, he had not retaken his DWO exam as required by COMDTINST 16672.SA for a person in a command designated OOD billet and his transfer orders. More interestingly, when he was required to retake the open book exam as part of the POPS course, he failed it. I recently submitted a pg7 to document this fact which he refused to sign. He did successfully pass his exam in August after [another officer] and his XO pushed him to study and take the exam.

So, since 12 May, I haven't had an Ops Officer. I have one first-tour LTjg with PCS orders to Sector [local Base] who has volunteered to stay through 15 Sep to fill the Ops Officer role. After he transfers, I will potentially be one officer short. I have told [the District] that I am willing to fleet up [an ensign] to the Ops Officer position until he transfers in AY09 and solicit for a new Ops Officer then. I would then ask to backfill the first tour 30 billet with an OCS or DC officer this fall or winter.

However, this still leaves the prickly problem of getting [the applicant] off my PAL. This would normally require a derogatory OER to relieve him of primary duties. Unfortunately, with the regime change at [the District], I am getting some preliminary signals that the default option of the senior staff is to return this member to [the third cutter] after [the fourth cutter] returns.

It is not a viable option for the member or the ship. If the default position is to send [the applicant] back to [the third cutter] after he felt that he was being discriminated against based on his race, afloat history, and accession source, it is apparent to me that [he] has not had a change of heart since he was informed of the investigation's findings. In fact, after he was counseled by the senior staff that his complaint had no grounds, he continued to send emails to his personal circle of mentors and friends telling them that he had been exonerated and the investigation showed that there was a command climate problem (if that were the case - you'd probably be soliciting for my billet now). This required the old [District officer] to re-engage the [applicant] while he was u/w on [the fourth cutter] to tell him to stop spreading mistruths. I'm sure other emails of a similar nature were sent, we only learned of a few of them.

He also burned a lot of bridges with personnel on the ship with his actions. While the XO, ILT, DIVO and BMC have changed out, many of his subordinates are still here and I have learned since his departure, how caustic he was with them at times. I have also learned that he routinely socialized with several of the non-rates that were previously assigned here. He was not a good team player and he expected others to work with him instead of trying to work well with others. He refuses to take accountability for his actions and instead now seems to think that he has been vindicated. The crew and the ship took the whole process pretty hard and now that several months have passed, the healing process has occurred and we are beginning to move forward as a crew.

Based on the former [District] regime, I was also told [the applicant's] OER period would be extended until [the fourth cutter] returned from [being underway] on 18 Sep. At that point, I would submit a departure OER that would be a derogatory OER for the [applicant]. [The command of the fourth cutter] would send a concurrent or special OER to document his performance during his time on [the fourth cutter]. This would accomplish a couple of things, it would get him off my PAL but provide some additional documentation to help salvage his career as an officer. It was also my understanding from the prior [District] regime that upon [the fourth cutter]'s return, he would not come back to [the third cutter] and that [the District] would work with [the command of the third cutter] to ensure we received TAD augmentation until final personnel action was taken. With the new regime, I am now being told that I need to submit a regular OER for the period ending 31 Jul along with some signals on how the OER should [be] written.

I know and realize that I made mistakes in the process. I should have better documented and relieved him sooner. I was trying to build my case but he was able to 'launch a pre-emptive strike' and cut-off that option for me by filing his command climate complaint. Now, I feel that I am getting backed into a corner and will have to take this member back in some capacity which is not going to be good for the ship or the member.

I recommend the member be sent ashore to [the District office] until he can transfer in AY09 as scheduled. He is not WPB XO material and I will not recommend him for continued afloat service in this OER.

The Headquarters officer agreed that a relief from primary duties was appropriate, especially given the independent assessment of the applicant received from the command of the fourth cutter, who wrote that the applicant

did qualify as DWO on [fourth cutter]. He displayed the technical competence to stand a watch on [the cutter] however, my concerns are not that. It takes more than that to be a good officer and maintain the high standards we all strive for and demand. I'm not a detailee but I would guess that not every qualified DWO has the high - sustained performance that makes them competitive to be afloat or in a Command cadre position.

He is an average officer who requires a lot of prodding from the XO to make things happen. Frankly speaking, I would expect a person in his position, with potentially a struggling career - to



be blazing a trail here on [the cutter] - he is doing just enough to get by. Again, to put it bluntly, I believe he thinks he is better than he really is. If he has any hope of a career in the Coast Guard - he definitely needs to shed that mentality.

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During the past few weeks - he has been late with projects; and the quality was less than what is expected for someone commensurate with his pay grade. Most recently, he asked for an extension on a simple project (a deployment after action report) in which we told him no. He has known about it since before leaving [the homeport of third cutter].

[The applicant] then proceeded to have a closed door session with the XO claiming she had been treating him unfairly and disrespectfully. The XO told him the expectations and the consequences. I think he didn't like hearing he has shortcomings. I/we treat all our officers the same •••• we expect a lot and challenge them. I have a boot ensign that frankly, is blowing him out of the water with regards to performance.

The applicant received a Concurrent OER for his TAD assignment from the command of the fourth cutter with four below-standard marks of 3 and fourteen standard marks of 4 in the various performance categories. The low marks were supported by the following comments:

Made progress in completion of K-Bay W AMS; established time to view waterway/solicit user feedback. Did not communicate time-lines or request extended due dates with supervisors; action plans missing or lacking followthrough/coordination w/ command. Qualified as U/W OOD; completed 7 mooring/unmooring evs, 1 Aton, 1 anchorage in variety of conditions; displays firm grasp of cutter's technical capabilities, developing command presence/initiative/leadership. Required reminders and detailed task explanations resulting in sub-standard products; did not use peer resources as directed; work returned for additional information/edits in most circumstances. Drafted plan for MoBoard trg to inc OOD relative motion understanding. Trained bridge BM's on anchoring nav info incl swing v. drag circle. As COO, completed AtoN discrepancy msg, coord w/ Bosn/other cutters for response. Passed DWO recert exam. Supervised 3 shipboard evolutions as COO; all evolutions completed safely.

Presented 1 modified nav brief; all information clear & correct. Conducted on-watch training; led to increased tech knowledge of watchstanders. Drafted 1 press release, 2 FIRs. Second FIR met minimum stds. UCMJ investigation well-researched/written, required some grammar/spelling edits and revisions. After Action Report did not follow tasking, was missing large sections of req'd info and required re-submittal.

The CO of this fourth cutter stated the following about the applicant's performance while on TAD orders:

ROO [Reported-on Officer (the applicant)] met the technical expectations to qualify as DWO, made correct rules of the road recommendations & proper decisions during conning evolutions. ROO has potential to be a solid officer if he continues to develop initiative, ability to resolve tasking ambiguity and command presence. Recommend Sector Waterway Management billet, District Command Center or District (dpw) or other staff positions ashore for continued growth, development of time & project management skills and enhanced leadership opportunities. Cannot give recommendation for command cadre afloat or post grad recommendation because of short length of TAD period.

On September 19, 2008, the applicant was counseled on a "Page 7" (CG-3307) for being 120 days late in paying his government credit card bill in the amount of \$450.18.

***Removal from Primary Duty as Operations Officer and Derogatory OER***

On September 19, 2008, the applicant was removed from his primary duties as the Operations Officer of the third cutter. On the “derogatory” OER documenting his removal, the applicant received three low marks of 2 for Planning & Preparedness, Professional Competence, and Responsibility, ten below-standard marks of 3, four standard marks of 4, and one above-standard mark of 5 from the XO and CO. He received a mark in the third spot on the officer comparison scale from the CO. The comments supporting these low marks state the following:

Most u/w this period was for AtoN/LE in contrast to previous period that consisted primarily of TSTA in homeport. Had difficulty planning AtoN trips; unaware of & failed to prioritize discrepancy responses. Poor coordination of AtoN work skeds w/ILT & BMC frequently required CO or XO intervention to confirm AtoN work skeds so that correct buoys & AtoN hardware were loaded. Frequently unprepared at weekly Dept Head meetings to discuss upcoming operational plans, leading to much frustration by other Dept Heads. Despite showing some improvement in planning abilities during 2wk LE patrol that produced 20 at-sea boardings, regressed during subsequent u/w periods. In fact, departed TAD & left subordinate w/no info or plans for Apr LE trip despite specific tasking to do so. Cutter logs often turned in several months late despite repeated prompting & required many corrections. Did not adapt u/w plans to account for AtoN discrepancies when needed. Counseled often on the need to show a command presence as an OOD. Often late to relieve watch & failed to conduct thorough pre-watch rounds. Also failed to complete required Watch Qualification System (WQS) requirements for u/w DWO qualification. All major factors to this officer still not receiving his u/w OOD & Navigator quals this period. Showed growth as a shiphandler but was provided a majority of the avail conning opportunities. Sent to Prospective Ops Officer course to help improve skills.

Comfortable speaking to junior crewmembers, especially in informal or social situations. Avoided comms w/peers; relied on e-mail to pass most tasking to subordinates. Did not communicate well w/other dept heads; expected other department heads to come to him w/info. Did not proofread unit smooth logs closely; returned by CO for many corrections. After action reports often lacked key details & needed extensive revisions.

Delegated much of own work to subordinates to complete, resulting in their professional development. Required extensive oversight & prodding from command to complete most assigned tasks. Loss of confidence in his abilities to complete most routine administrative work resulted in work being delegated to other JOs; increasing workload & frustration of peers. Did not always have a clear idea of what was going on within his own department; remained secluded & often tasked subordinates by e-mail vice interacting w/them face-to-face. Disregarded advice & guidance given by command, fellow junior officers & Chiefs Mess. As a result, this officer alienated the CPOs & his fellow JOs. Not a team player; expected all Dept Heads to come to him vice reaching out and working closely with them during patrol planning and when confirming AtoN work schedules. Not an effective team player w/his fellow JOs which became detrimental to the overall workplace climate onboard the cutter. Developed and cultivated an extensive network of mentors & peers whom he frequently consulted. EERs & one OER for a subordinate submitted as required. Member provided no input for this OER marking period.

Performance remained well below expectations for a second tour JO despite extensive counseling & the personal involvement of both me & my XO. Extra steps were taken, including myself or my XO standing all watches w/this member, to help w/his u/w OOD & Navigator qualification process & to ensure this member received the counseling & clear direction he felt he needed to succeed. However, member's performance did not improve as expected during this period, resulting in my decision to relieve this officer of his primary duties.

Made attempts to improve process for preparing & submitting unit logs by holding off-site mtg w/subordinates to discuss process improvements. Subordinate did initiate effort to augment unit boarding teams w/Sector LE personnel. Liaised w/[District] staff prior to April LE patrol but failed to pass on info prior to departing TAD; acting Ops Officer left w/no patrol plan or info for 2wk LE patrol. Did not take personal responsibility for shortcomings. Failed to present completed WQS package required for u/w OOD qual, yet expected command to give him an u/w qual board. Appeared to harbor an attitude that his role as Ops Officer should not require him to stand watch inport or u/w; stood watch begrudgingly at times even though he typically stood only one break-in watch per day u/w. Did not exhibit the command presence as an OOD expected from a 2nd tour JO. A likeable, sociable person away from the ship. Could be entrusted to represent the unit & CG well in a variety of venues; one of several unit representatives at annual CG Foundation dinner. Maintained good uniform appearance & personal grooming standards; rendered customs & courtesies as required. Maintained a good fitness level; exercised regularly. Supported unit's sports day program.

Recent performance indicates this officer is not ready to assume duties w/increased responsibility. Do not promote to LT at this time. Struggled as Ops Officer, needs improvement in his planning, time mgmt, personal accountability & professional relationships. Mbr sent TAD for 3 months to another WLB, earned a OOD qual. Shows potential for continued service as a CG Officer. Recent decision to integrate from reserve to regular commission indicative of his devotion to CG & desire to be an officer. Assign to staff positions ashore to help member get career back on track. His professional presence makes him a good candidate for service as an Officer Recruiter or similar positions.

On October 24, 2008, the applicant acknowledged this derogatory OER but waived his right to submit an addendum with comments for inclusion in his record.

### ***Delay of Promotion and Backdated Promotion***

Upon his removal from the cutter, the applicant was temporarily reassigned to the local District office. On November 20, 2008, the applicant's CO informed him that his promotion to lieutenant, which was slated for December 15, 2008, was being delayed and that whether he received the promotion would be determined by Commander, Personnel Service Center. The CO's notification stated the following:

Based upon your relief from your primary duties and performance documented in your last semi-annual Officer Evaluation Report (OER) from me and the concurrent OER you received while temporarily assigned to [the fourth cutter], I have recommended to Coast Guard Personnel Command that your promotion to Lieutenant be delayed. Specifically, you were below average in several performance dimensions including: Planning and Preparedness; Results/Effectiveness; Adaptability; Directing Others; Teamwork; Judgment; and, Responsibility. In addition, you failed to complete the required Watch Qualification System package required for underway Officer of the Deck qualification onboard this unit and required excessive prodding to complete your inport Command Duty Officer qualifications. As the Operations Officer, you failed to meet the performance expectations outlined in Enclosure (1). The combination of these shortcomings necessitates this personnel action.

The Personnel Command delayed the applicant's promotion and convened a special board to determine whether his name should be removed from the promotion list. When the special board concluded that his name should not be removed from the promotion list, the applicant was promoted to lieutenant (O-3) with a backdated date of rank.

On March 19, 2009, the applicant was permanently transferred from Cutter Z to a staff support position in the District office. On September 15, 2009, he was reassigned to the District's Incident Management Branch and worked as a Command Duty Officer at the Command Center.

On July 13, 2010, the applicant received an OER for his work as a Command Duty Officer at the District Command Center. He received marks of 5 and 6 in the performance categories, a mark in the fifth spot on the officer comparison scale, and a recommendation for advancement to lieutenant commander "with peers."

### *Headquarters Assignments*

On July 14, 2010, the applicant reported for duty at Coast Guard Headquarters to serve as a financial analyst. On his first OER in this position, dated May 31, 2011, the applicant received six marks of 5, eleven marks of 6, and one top mark of 7 for "Workplace Climate." His Reporting Officer highly recommended him for promotion "with best of peers" and assigned him a mark in the fifth spot on the officer comparison scale, denoting "Excellent performer; give toughest, most challenging leadership assignments."

On January 19, 2012, the applicant's supervisor, LCDR S, sent the applicant an email concerning approved leave and cc'ed the Personnel Services and Support Unit. This email includes the following:

Requestor: [applicant's name]  
Employee ID: [redacted]  
Begin Date: 1/23/2012  
End Date: 1/25/2012  
Leave To Be Charged: 3  
Leave Address: N/A will be at work. [address redacted]  
Office: Mandatory LV as requested by chain of command for UA for period 11-13 JAN 12.

On his regular annual OER dated May 31, 2012, for his work as a financial analyst, the applicant received four low marks of 2 for Results/Effectiveness, Evaluations, Judgment, and Responsibility, five below-standard marks of 3, eight standard marks of 4, and one high mark of 6 for Health & Well-Being. In addition, he received a mark in the second spot on the officer comparison scale, denoting a "marginal performer [with] limited potential." The low marks were supported with the following comments:

Member failed to balance time needed to complete cost analysis tasking with collateral duties and periods of absence. [The applicant] utilized the expertise and guidance of a variety of subject matter experts to complete [redacted] and [redacted] Independent Cost Estimates (ICE). Assigned tasking was not well-executed by ROO and contained multiple omissions which required command level intervention to correct; reprimanded by command for poor quality of UAS ICE and associated briefing given to SES/FLAG leadership. Questionable technical expertise as evidenced by failing to correct issues with cost analysis software models (used to develop cost estimates) by assigned deadlines. Critical cost reports often late and required significant editing to meet standards/expectations.

Participated in multiple recognition events supporting superiors as well as fellow junior officers and enlisted. Negative attitude of member occasionally affected member's own ability to complete assigned tasking and had detrimental impact on productivity of staff/office and workplace climate.

Did not engage or involve contractor support staff sufficiently or to the level expected during development of life cycle cost estimates; resulted in contractors being unsure of direction and assigned tasking, and necessitated more direct involvement by the chain-of-command to engage with contractors to get tasking completed. [Redacted] ICE brief submitted late to chain of command without previously-requested corrections and missing critical analysis slides. Failed to meet own [Officer Evaluation System] responsibilities as Reported-on Officer; failed to submit own officer evaluation report support data as directed by Supervisor, and did not prepare and forward OER in accordance with Article 5.A.2.c.2.d of COMDTINST M1000.3.

ROO's performance overall this evaluation period did not meet expectations of chain of command. ROO demonstrated a pattern of behavior over the course of several instances of lacking maturity and professionalism when confronted by supervisors regarding issues of own non-performance; ROO demonstrated inability to be introspective & to embrace constructive feedback for improvement. Demonstrated lack of reliability for completing primary duties, resulting in other staff members having to finish ROO's work. Commitment & enthusiasm less than expected of a more senior O-3.

Took initiative to develop unique MWR events for command. Demonstrated limited ability to exercise sound judgement: departed for a TAD recruiting trip without ever receiving supervisory permission to do so; resulted in chain of command temporarily suspending ROO's Leave and TAD request privileges, and in delays to ROO's completion of tasking to make updates to a critical [redacted] ICE. Member failed to act responsibly or take responsibility for own actions as evidenced by several documented instances of tardiness to work without communicating with supervisor and insubordinate conduct towards his superiors; received formal counseling to be more forthcoming with communications on his whereabouts and to reiterate office expectations regarding attitude and work ethic. [The applicant's] uniform appearance was sharp and ROO engaged in multiple fitness activities to maintain a high fitness level.

ROO's performance this period led chain of command to question ROO's desire for additional responsibility and authority; depicted a level of enthusiasm less than that expected of service O-4s. Questionable ability to succeed in O-4 pay grade as result of performance this eval period; poor judgment, work ethic, sense of responsibility & communications w/in chain of command all indicate ROO lacks maturity necessary to handle leadership role in more demanding assignments. ROO is not recommended for further afloat assignments, or for positions of increased responsibility based on observations this period; ROO can reverse this trend thru attitude & work-ethic improvement.

The OER Reviewer added comments supporting the assigned marks and noting that the applicant had refused to sign the OER to acknowledge receipt.

### ***Non-Judicial Punishment and Punitive Letter of Reprimand***

On August 15, 2012, the applicant was taken to mast and awarded NJP for violating the following articles of the UCMJ: Article 86 (Absent Without Leave), Article 90 (Failure to Obey Lawful Order from Superior Commissioned Officer), and Article 92 (Failure to Execute Order/Tasking Related to Primary Duties). He was awarded a Punitive Letter of Reprimand fined \$200 per month for two months. As a result of the NJP, the applicant was removed from his primary duties and received another derogatory OER documenting that removal. The Punitive Letter of Reprimand in his record states the following in pertinent part:

[Y]ou are hereby reprimanded for your conduct at USCG Headquarters on 28 February 2012. You behaved in a reproachable manner in that you violated UCMJ Article 86 as you were absent without leave by failing to report to work prior to 0830 in accordance with [HQ Instruction

12620.3, on work schedules] and by failing to receive authorization for special liberty in accordance with [HQ Instruction 1000.2B, on leave, liberty, and absences due to illness]. You violated UCMJ Article 90 by disobeying two lawful commands from two superior officers to not depart and/or to return to a meeting. Furthermore, you additionally violated UCMJ Article 92 by failing to complete an assigned task related to your primary duties as directed.

### ***OER Documenting Removal as Financial Analyst***

On the OER documenting the applicant's removal from his primary duties as a financial analyst, dated August 15, 2012, he received the lowest possible mark of 1 for Responsibility and low marks of 2 and 3 for Planning & Preparedness, Results/Effectiveness, Professional Competence, Speaking & Listening, Teamwork, Workplace Climate, Initiative, and Judgment. (Other performance categories were marked "Not Observed" due to the shortness of the evaluation period.) His Reporting Officer also assigned him the lowest possible mark on the officer comparison scale, denoting unsatisfactory performance. These marks were supported by the following comments:

Failed to meet expectations for the 20Jun2012 briefing of the latest status on progress in developing the [aircraft] acquisition program; briefing was intended to be received by [redacted] & had to be cancelled due to ROO's lack of preparation for & lack of readiness to provide the briefing. Undermined own credibility by claiming via email that the 20Jun2012 briefing was cancelled as of 19Jun2012, alleging that ROO's supervisor requested a pre-brief and that a specifically-named [redacted] front office admin assistant was supposed to have sent out a meeting cancellation; ROO's supervisor never requested such a pre-brief, & the [redacted] front office admin assistant verified that the meeting had never been cancelled & that no request for a cancellation had ever been submitted at any time by any personnel within the [redacted] chain of command. ...

Failed to listen carefully; failed to prepare 20Jun2012 briefing [in accordance with] assigned tasking, & despite formal written guidance/tasking from his office chief reported late for work & failed to be proactive in communicating whereabouts to his supervisor. ...

An undependable team member; not reliable for executing assigned tasking or complying with guidance provided. Contributed to an uncomfortable work environment. Reported late for work on three consecutive days (20-22 June 2012) and in each instance failed to provide satisfactory explanations for the tardiness (no explanations provided at all on 21 & 22 June); when counseled by his supervisor he failed to take ownership of his actions, took issue with the fact that the counseling occurred in the vicinity of personnel work cubicles & left his supervisor in a "no win" scenario since ROO had previously taken issue with previous performance counseling he received from his supervisor in a more private space. ...

ROO's non-performance of primary duty as a cost estimator continued trend established in previous evaluation period. Demonstrations of poor commitment to duties, poor support of chain of command tasking & dubious credibility have resulted in loss of confidence in ROO by this chain of command. ROO is poor fit for current assignment. ...

Member failed to engage in any measurable effort to pursue professional development and training opportunities to improve own competence as a cost estimator. Demonstrated dubious ethics/integrity & circumvented the chain of command by sending a personal email directly to [redacted] on 19July2012 questioning why own request for TDY reassignment to [another HQ office] from [redacted] was not granted, stating that he had been "advised by OPM-3 not to sign my (31May2012) OER at this time and to route a rating chain exception memo through my HQ chain of command". TDY orders to [redacted] were legal/appropriate (i.e. ROO had no basis for

jumping the chain of command to question them) & OPM-3 confirmed w/ [OPM-3] that at no time had it ever advised ROO to refrain from signing his OER. Failed to live up to service Core Values of Honor and Devotion to Duty. ...

Do not promote; recent conduct indicates officer is not prepared at this point in time to assume duties with increased responsibilities. Not ready & not recommended for further afloat assignments; ROO lacks the maturity, judgment, work-ethic & integrity needed to succeed in afloat department head & command cadre positions. Member failed to foster confidence in own ability to properly use the chain of command & function as a good team player; this command holds no confidence in ROO's ability to perform as an effective team leader.

The OER Reviewer added a page of comments to this OER:

I agree with Supervisor and Reporting Officer (RO) comments and assert the comments are consistent with the ratings.

[The applicant] failed to take to heart guidance given at the end of the previous evaluation period to remedy own insufficient work ethic, adopt a healthy respect for authority, and refocus on Coast Guard core values of Honor, Respect, and Devotion to Duty. Instead, ROO chose to demonstrate lack of commitment to own duties, causing others in the chain of command to absorb additional workload to maintain day-to-day operations within the branch. Rather than earnestly attempting to support the chain of command, ROO instead chose to contest it by repeatedly questioning the decision to send ROO TDY to [one office] instead of [another office], offering no basis for contesting it other than it did not suit his personal needs. Rather than being accepting of the fact that the chain of command made a good faith attempt to meet ROO's personal needs through this TDY assignment, he instead elevated the matter via email to the direct attention of [a flag officer] and "jumped" four levels of the chain of command by doing so. In this email to [the flag officer], ROO also conveyed his intention to bring this matter to the attention of his congressman. This was entirely ROO's right to do and not at all discouraged by this command, but at the same time it created the perception that ROO was attempting to intimidate the [flag officer] chain of command into making and changing decisions to best suit ROO's own purposes and preferences. Furthermore, in accordance with Article 8-2-1(1) of USCG Regulations (COMDTINST M5000.3), "remonstrating against orders or details to duty, complaining of particulars to duty ... are forbidden."

As a result of this chain of command's loss of confidence and trust in this officer, ROO is removed from duties within [redacted]. ROO's actions demonstrate that he is unwilling to establish a collaborative effort with his supervisors or make an earnest effort to embrace his own development as a cost estimator.

Block 1.b is blank in OER because member has refused to sign. In accordance with COMDTINST M1000.3, article 5.A.4.c.(14) ROO has been given the opportunity to review and sign OER and understands that signature does not mean the ROO agrees or disagrees with the content of the OER.

NOTE: an addendum was solicited from [the applicant] and not received.

### ***Reassignment***

Following his removal from his primary duties as a financial analyst, the applicant was temporarily assigned to a different Headquarters office as a claims manager. On February 8, 2013, he received a Concurrent OER for his performance as a claims manager, as well as a "not observed" OER from his permanent duty command. The applicant was assigned to a different Headquarters office to serve as a claims manager. On the Concurrent OER, which covered 133

days of duty, the applicant was assigned six below-standard marks of 3, ten standard marks of 4, and two marks of “not observed” for “Developing Others” and “Directing Others.” His rating chain supported the lower marks by noting that the applicant had not completed his qualifications despite having sufficient time to do so, had completed less than 25% of the work assigned to him, and had been chronically late for work. The Reporting Officer assigned the applicant a mark in the third spot on the officer comparison scale, denoting a “Fair performer; recommended for increased responsibility.” The Reporting Officer did not include a recommendation for promotion and stated the following:

On individual tasks, ROO demonstrated capability and skills in working with certain financial documentation and within EXCEL workbooks in organizing costs & financials. During this period member left to manage own work at own pace and the mutually agreed upon goals and objectives were not achieved. The period of evaluation provided enough time to meet the objectives. Mbr required more supervision than expected for paygrade. Recommend assignment to a functional area or staff that has regular and highly structured processes and deliverable deadlines.

Upon completing the temporary assignment in February 2013, the applicant was assigned to another Headquarters office as a program manager.

### ***Determination Board***

On December 11, 2013, the Personnel Service Center (PSC) convened a Determination Board, which reported the following:

After a review of the official record and all relevant documents, it is the opinion of at least a majority of the members of the Board that [the applicant], USCG should be required to show cause for retention on active duty and a Board of Inquiry should convene in accordance with the Military Separations Manual, Article 1.A.14.

The Board determined that the performance and conduct exhibited by [the applicant], as noted in multiple substandard Officer Evaluation Reports, as well as relief from permanent duties at two separate commands, is grounds for requiring this officer to show cause for retention on active duty. [The applicant] has received multiple opportunities under numerous commanding officers to demonstrate his capabilities and to receive mentoring from various individuals in order to improve his performance. In each of these instances he has not demonstrated a commitment to a level of sustained performance which is required of his current grade.

Specifically, [the applicant's] performance and behavior meets the following causes for separation listed in the Military Separations Manual, Article 1.A.14.c:

(1) Conditions indicating substandard performance of duty or failure to meet standards prescribed by the Commandant:

(a) Downward trend in overall performance resulting in unacceptable service or a consistent record of substandard service.

• [The applicant's] record displays recurring significant downturns in performance after a slight period of acceptable performance. The first downturn occurred after his tour on [second cutter] and during his initial period of performance on [third cutter] where he was subsequently relieved of his primary duties. Notably, the same trend and tendencies were again repeated following an acceptable assignment at District [redacted] and subsequent tour at [first Headquarters office], where he was again relieved from primary duties for many of the same



deficiencies, His performance when placed in leadership roles expected of someone of his pay grade was average at best. The times where he did show some improvement were when leadership and responsibilities appeared to have been removed, and he was below average for the periods ending in 2008/09/14 and 2012/05/31. In both of these instances, he was put in positions requiring increased leadership acumen organizational skills, teamwork, and effective communication, which tested his ability to continue to progress in the USCG. Despite these opportunities, [the applicant] once again failed in spite of the best intentions and assistance of his commands.

(b) Failure to keep pace or progress with contemporaries; e.g., consistent below average performance when compared to other officers of the same grade and length of service.

- As documented in Relief for Cause OER dated 2013/02/08, [the applicant] failed to complete assigned work without any indication that the work was unreasonable, did not communicate difficulties completing required tasking within his chain of command, and failed to follow orders despite specific guidance as documented in his performance from [third cutter].

(c) Failure to exercise necessary leadership or command expected of an officer of the same grade.

- While serving as the Operations Officer on [third cutter], [the applicant] failed to discharge supervisory duties. He repeatedly delegated much of his own work to his subordinates without providing guidance, information, or oversight causing him to lose sight on the status of his own department. In turn, this caused his department to fail in the execution of its responsibilities to the unit.

(d) Failure to assimilate the technical proficiency required of his or her grade.

- [The applicant] failed to complete Claims Adjudication PQS, obligatory training required of his position - a basic and entry-level position expected of officers involved in financial management.

- [The applicant] failed to qualify as an underway Deck Watch Officer on [third cutter] in a timely manner, while serving as the Operations Officer.

(e) Apathy, a pattern of conduct showing the development of a defective attitude, or other character and behavior disorders including inability or unwillingness to expend effort.

- Specifically, as recorded in the member's 2008/09/30 OER, [the applicant] displayed a disregard of the Commandant's principle of "servant leadership" in that he asserted to his command someone in his position should not be required to stand duty. He also failed to qualify as an underway Deck Watch Officer, forcing his shipmates to assume a disproportionate share of the duty. These traits are detrimental to the good order and discipline of the unit and are unbecoming of an officer of this rank.

(2) Conditions indicating moral or professional dereliction:

(a) Discreditable intentional failure to meet personal financial obligations.

- CG-3307 (negative) dated 19 September 2008 reflected that [the applicant] was more than 120 days late of paying \$450.18 Individually Billed Government Travel Charge Card (GTCC).

(b) Mismanaging personal affairs detrimentally affecting the officer's performance of duties.

- In addition to Government Travel Card neglect, a Punitive Letter of Reprimand dated 20 August 2012 reflected that [the applicant] behaved in a reproachable manner in which he

violated UCMJ Article 86 as he was absent without leave (AWOL) by failing to report to work prior to 0830 without authorized special liberty; violated UCMJ Article 90 as he willfully disobeyed two lawful commands from two superior officer as he departed a meeting (and did not return) after he had been directed to stay in the meeting; and violated UCMJ Article 92 when he failed to complete an assigned task related to his primary duties as directed.

(b) Conduct unbecoming an officer.

- The ROO [the applicant] has not adhered to the Commandant's core values of honor and devotion to duty in that he has:

- o Been away without approved leave.
- o Consistently late or absent without communicating with his chain of command.
- o Misrepresented facts to his command, professionally and personally, as documented in his OERs.
- o Did not qualify as a DWO in a reasonable time to share the load with his shipmates.
- o Expressed a disdain for standing duty.

(3) Condition which causes serious doubt as the advisability of permitting the officer to retain a commission and when combined with other known deficiencies could form a pattern which, when viewed in relation to an officer's overall record, requires separation:

(a) Derogatory evaluation report. Member received multiple derogatory evaluation reports throughout his career and as documented throughout this report.

Consequently, the Board determined that [the applicant] should be required to show cause for retention at a Board of Inquiry.

### ***Board of Inquiry***

On May 5, 2014, the BOI convened. A "show cause" hearing was held, which required the applicant to show why he should be retained in the Service despite the evidence and findings of the Determination Board. The BOI's report states the following:

After reviewing all evidence and hearing live testimony, the Board of Inquiry concurs with the Determination Board's findings in that:

[The applicant's] performance and behavior meets the following causes for separation listed in the Military Separations Manual, Article 1 .A.14.c:

(1)(a) Downward trend in overall performance resulting in unacceptable service or a consistent record of substandard service and (1)(b) Failure to keep pace or progress with contemporaries; e.g., consistent below-average performance when compared to other officers of the same grade and length of service.

- [The applicant's] record repeatedly displayed substandard performance across multiple units following an acceptable initial period of observation. The first downturn occurred during his tour on [third cutter] where he was relieved of his primary duties. This pattern repeated itself during his assignment at [the office where he was a financial analyst], where he was again relieved from primary duties for many of the same documented deficiencies.

- Given a chance for a fresh start at the [next Headquarters office], [the applicant] was late to work twice during the first week of reporting. Additionally, [he] received a substandard Officer Evaluation Report (OER) from [this office] which the Board viewed as continuance of a downward trend. At all three units, [the applicant's] OERs documented below average ratings on the comparison scale.

(1)(e) Failure to properly discharge assignments commensurate with his or her grade and experience. As documented in:

- Relief for Cause OER dated 2008/09/19, [the applicant] struggled with planning, time management, accountability and relationships;
- Unmanned Aerial Surveillance (UAS) briefing as documented in the annual OER dated 2012/05/31. Failure to produce reasonable and acceptable results as related to the UAS brief; and,
- On three occasions under separate commands, [the applicant] failed to produce supporting documentation as required by his chain of command for OERs with end of period dates: 2008/09/19, 2012/05/31, and 2013/02/08.

(1)(f) Apathy, a pattern of conduct showing the development of a defective attitude, or other character and behavior disorders including inability or unwillingness to expend effort.

- After a solid start, when confronted with constructive criticism and challenging circumstances, as demonstrated aboard [third cutter], while assigned to [two Headquarters offices], [the applicant] displayed a defective attitude that lasted through the remainder of time assigned to the unit. The Board found that the defective attitude was evidenced by:

- o Failure to complete qualification requirements at [third cutter] and the [second Headquarters office] NPFC demonstrated an unwillingness to expend effort;
- o UAS Brief as discussed above; and,
- o [The applicant] displayed a chronic problem of not reporting to work at the expected time demonstrated throughout his career at multiple different units.

On his next OER, dated May 31, 2014, the applicant received one mark of 4, eight marks of 5, and nine marks of 6. His Reporting Officer recommended him for promotion “with peers” and assigned him a mark in the fifth spot on the officer comparison scale, denoting “Excellent performer; give toughest, most challenging leadership assignments.”

### ***Board of Review***

On October 2, 2014, the BOR convened. The BOR report states the following in pertinent part:

7. The Board then proceeded to review all information considered, including the record and documented evidence made part of the Board of Inquiry convened on 5 May 2014. The Board examined the official record and all relevant documents pertaining to [the applicant], USCG. [The applicant] did not elect to submit any additional information or correspondence to this Board.

8. After a review of the official record and all relevant documents, it is the opinion of at least a majority of the members of the Board that [the applicant], USCG should be separated from the U.S. Coast Guard in accordance with Article I.A.14, Military Separations, COMDTINST M1000.4. [The applicant's] performance and behavior meets the following causes for separation listed in Article I.A.14.c, Military Separations, COMDTINST M1000.4:

- (1)(a) Downward trend in overall performance resulting in unacceptable service or a consistent record of substandard service.
- (1)(b) Failure to keep pace or progress with contemporaries; e.g. consistent below average performance when compared to other officers of the same grade and length of service.
- (1)(e) Failure to properly discharge assignments commensurate with his grade and experience.
- (1)(f) Apathy, a pattern of conduct showing the development of a defective attitude, or other character and behavior disorders including inability or unwillingness to expend effort.

While any one of these may be a basis for removal, [the applicant] exhibited a consistent pattern of substandard performance of duty and failed to meet multiple standards prescribed by the Commandant.

On December 3, 2014, the proceedings, findings, and recommendation of the BOR were approved. On December 30, 2014, the applicant was notified that the Commandant had approved the BOR's recommendation to discharge him as follows:

1. On 2 October 2014, a Board of Review convened under Article 1.A.14.i. of reference (a) to recommend to the Commandant whether you should be separated for cause. On 3 December 2014, the Commandant approved the Board of Review's recommendation to separate you for cause. A copy of the Board Report and associated documentation considered by the Board are provided as an enclosure to this memo.
2. You will be discharged under 14 U.S.C. 323 with an "Honorable" Characterization of Service and half separation pay in accordance with Article 1.A.18.c of reference (a). You will be separated no later than 1 February 2015 in accordance with Article 1.A.14.j. of reference (a). However, you may request to separate at an earlier date.
3. Please acknowledge receipt by signing and dating the attached endorsement. Return the signed endorsement immediately to Commander, Coast Guard Personnel Service Center (CG PSC (OPM-1)).

On January 8, 2015, the Personnel Service Center issued Separation Orders for the applicant to be discharged on February 1, 2015, due to "special board action" with an honorable discharge for Substandard Performance with the corresponding separation code GHK.

On January 30, 2015, the applicant acknowledged receipt of the December 30, 2014, BOR result and separation notification and submitted a request to delay his discharge in order to complete his separation physical examination.

Also on January 30, 2015, the applicant submitted an Article 138 complaint against his chain of command. He complaints included the following:

(1) His assigned counsel had been an attorney who was currently assigned to one of the offices that had previously given him a derogatory OER.

(2) The BOI transcript included a gap of 74 minutes of the testimony from his supervisor, LCDR S, who admitted that he had accused the applicant of violating the UCMJ, that he had not read the applicant his rights, and that he had "fabricated" some of the documents in the record before the BOI. Therefore, the BOR had received and based its decision on an incomplete record. He also stated that the JAG's offer to let him "regurgitate" the missing testimony from his own

memory for the record had not been reasonable because it would have been impossible for anyone to do so.

(3) Before the BOR convened on October 2, 2014, the applicant had been encouraged by several officers to offer his resignation in exchange for an honorable discharge and full separation pay. One or more of those officers had improperly shared his personal phone number to contact him.

(4) His notification of the approval of the BOR recommendation for separation was delayed until December 30, 2014, and that delay had “was unnecessary, malicious, and caused [him] significant damage and injury” as it gave him fewer than 27 days to prepare for his separation. The applicant explained that when he requested an appointment for a separation physical examination, the first available slot was on January 26, 2015, and he was told that it would take at least 30 days to complete the entire examination. He requested relief including an honorable discharge and a delay of his discharge until May 21, 2015.

On February 1, 2015, the applicant was honorably discharged from the Reserve. The narrative reason for discharge on his DD-214 is “Substandard Performance” and his separation code is GHK.

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

On August 23, 2022, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the requested relief.

#### ***JAG’s Arguments About the Board’s Statute of Limitations***

First, the JAG argued that the applicant failed to submit a timely application within three years of his discovery of the alleged errors and has failed to show why it is in the interest of justice to excuse his delay, as required by 10 U.S.C. § 1552. He stated that the applicant knew of the alleged errors in his record no later than his date of discharge, February 1, 2015, and so he failed to apply to the Board before the three-year statute of limitations expired.

The JAG also argued that the applicant failed to justify his delay or show potential merit to his requests for correction based on a cursory review of the record, which are the two issues the Board is required to consider before refusing to waive the Board’s three-year statute of limitations pursuant to *Allen v. Card*, 199 F. Supp. 158, 166 (D.D.C. 1992). With regard to the untimeliness of the application, the JAG stated that the applicant “has not provided any reason for initially missing the statutory filing deadline by three years, nor for his failure to apply in a timely manner when provided a second chance in the court’s remand order” dated August 27, 2021. The JAG acknowledged that the United States Court of Federal Claims had remanded the case to the Board but argued the following regarding the potential merit of the case:

Conducting any review here, cursory or otherwise, shows that, although the applicant makes numerous claims of error throughout his application, his only supporting documentation is his personnel record, which fails to support any of his claims of error or injustice. Admittedly, the Coast Guard confirmed the assertion that there was a small period of time during his separation proceeding that was either not audio recorded or recorded but inadequate to support transcription, and therefore not verbatim transcribed as was required by policy. [Footnote omitted.] The

applicant, however, was provided the opportunity to remedy this error by filling in the missing time with his account of the testimony, which would then be included in the record up to the final reviewing authorities prior to his separation. [Footnote omitted.] The applicant was provided this opportunity to fill the gap in the record, and presumably could have made sure the record included any of the missing testimony if he deemed it important to his case, however he waived the opportunity as well as any opportunity to allege error with the proceedings by affirming that he had no rebuttal to the proceedings. [Footnote omitted.] As such, the applicant's claim that the missing 60 minutes of testimony contained significant exculpatory evidence, and the Board of Review was deprived of critical information, are unsupported, as are the remainder of the applicant's claims.

### ***JAG's Arguments About Three Days of Leave***

Regarding the applicant's claim that he was erroneously charged with three days of leave without authority and should be compensated for those days, the JAG noted that the applicant had not submitted any evidence to support this claim. He argued that while the applicant claimed that he was participating in official duties, on orders, for the three days he was supposedly charged leave, he submitted nothing to show that he was conducting Coast Guard business for those days and nothing to show that he was charged those three days of leave. Moreover, even if he was charged leave for those three days, that would not prove that they were deducted without the applicant's consent. The JAG further argued that Coast Guard policy does not allow a command to charge a member with leave to cover an unexcused absence, and the applicant has not submitted evidence to show that his command did that or to overcome the presumption of regularity accorded his chain of command.

### ***JAG's Arguments About the Lack of a Minority Member on the Board of Review***

In response to the applicant's claim that the Board of Review (BOR) was improperly convened because there was not a minority member when it considered his case, the JAG stated that there is no such requirement in COMDTINST M1000.4, Article 1.A.14. And although the applicant asked the Board to find that the lack of a minority member on the BOR resulted in an unjust result, the JAG argued that there is no evidence that a lack of a minority board members on the BOR prejudiced the applicant. Nor is there any evidence that the applicant requested a minority member and was refused. The JAG argued that the applicant's claim that he was prejudiced by the lack of a minority member is speculative and fails to rebut the presumption that the members of the BOR carried out their duties correctly, lawfully, and in good faith. The JAG concluded that the applicant has failed to prove either error or injustice in the membership of the BOR.

### ***JAG's Arguments About the Gap in the BOI Transcript***

In response to the applicant claim's about Board of Review basing its decision on an incomplete record because the Coast Guard had failed to make a verbatim transcript of the BOI proceedings and had missed the testimony of a witness who admitted to fabricating some of the documents submitted to the BOI, the JAG admitted that there was an error with the audio recording during the BOI proceedings and so part of the testimony of one of the witnesses could not be transcribed verbatim as required by policy. The JAG alleged, however, that the applicant's claim that this testimony contained exculpatory evidence and was material to the determination

to separate him is disingenuous. The JAG stated that when the Coast Guard learned of the error in the audio recording from the transcription service, it informed the applicant's counsel and offered the option to recreate the missing testimony as he believed it had occurred. According to the JAG, on July 31, 2014, the following email was sent to the applicant's counsel but no offer to supplement the record with a description of the missing testimony was received in response:

Please find the attached verbatim transcript of the Board of Inquiry proceedings for your review. The file is encrypted with a password. I will send the password in a following email. Please note that there is a one hour portion of the transcript missing on day 2 dated May 6, 2014. It cuts out at 0847 and comes back at 0947 and then a session break goes from 0948 to 1001. If desired, the respondent's counsel is authorized to write a description of what transpired during that period. If the respondent's council decides to provide a description of the missing hour, please forward that information to the recorder prior to 20 August 2014. When both the respondent's counsel and government recorder agree on what transpired, please return it to me for official inclusion into the transcript. Once the description is included in the transcript, I will notify respondent's counsel of the start of the 10-day clock for a rebuttal. The rebuttal should be limited to matters brought before the special board.

The JAG stated that the applicant's description of the witness's missing testimony would have been included in the record provided to the BOR. However, the applicant chose to waive that opportunity. The JAG argued that, had the missing testimony been so important and exculpatory, surely the applicant would have availed himself of the chance to include his recollection of it in the record for the BOR's consideration. The JAG argued that the applicant's failure to take advantage of the opportunity strongly suggests that the missing testimony was inconsequential. Therefore, although there was a "technical procedural error with the transcript missing a small portion," the JAG argued that it should not invalidate the applicant's discharge proceedings because he was offered a suitable remedy, which he refused to exercise, and he has not shown that the missing testimony was material to the separation proceedings.

The JAG further argued that there is no truth to the applicant's claim that the Coast Guard improperly deleted the audio recording of the BOI. The JAG noted that by policy, the applicant was entitled to a verbatim transcript, not the audio files, and the applicable records schedule—National Archives General Records Schedule GRS 2.5 Employee Separation Records—does not require the audio files to be maintained after their transcription. The JAG stated that the Coast Guard's review of records in conjunction with the applicant's BCMR case failed to locate the audio file, but that does not mean that it was improperly deleted. The JAG noted that the significant delay of over seven years between the applicant's separation and his application to the BCMR has prejudiced the Coast Guard, which can no longer determine when the audio file was deleted.

### ***JAG's Arguments About Separation Medical Examination***

Regarding the applicant's claim that on January 9, 2015, he requested a delay of his discharge to undergo a separation medical examination, which was denied, the JAG stated that the Coast Guard has no record of the applicant requesting to delay his discharge. The JAG stated that the applicant was given a medical examination after his discharge, but the delay was not attributable to Coast Guard. To the contrary, the JAG argued, the record shows that the Coast Guard emailed the applicant on January 9, 2015, prior to his separation, and informed him that

he was scheduled for a separation medical exam. The Coast Guard also confirmed with medical officials that there was time to complete the separation physical before the applicant's discharge on February 1, 2015. However, Article 1.A.9.b. of COMDTINST M1000.4 states that it is the member's responsibility, not the Coast Guard's, to schedule any necessary physical examination to be completed before separation, and that policy does not allow the delay of a discharge solely because the member failed to complete a scheduled physical examination. The JAG stated that the applicant's medical records show that he completed a separation physical examination ten months after his discharge, on December 22, 2015. Therefore, the JAG argued, the applicant has failed to prove that the Coast Guard erroneously or unjustly delayed or denied his separation medical exam.

### *JAG's Arguments About Retaliation or Reprisal*

In response to the applicant's claims that his investigation by a PIO, transfer to the District staff, receipt of a negative OER, delayed promotion, repeated separation proceedings, and discharge were reprisal and retaliatory for a protected report he made against the CO of his cutter in May 2008, the JAG noted that many of the allegations were investigated by the civil rights office in 2009, and the Final Agency Decision found that there had been no reprisal. The JAG also argued that record shows that there was a legitimate basis for the alleged reprisal actions. And the applicant has not shown that the Coast Guard's proffered legitimate reasons were factually baseless, were not the actual motivation for their decisions, or were insufficient to motivate their actions:

- The JAG argued that the applicant has not shown that his transfer to the District staff was the product of reprisal or retribution for making a protected report against the CO of his cutter in May 2008. Although the applicant appears to allege that this transfer was punitive, it was an administrative action, and there is no evidence of any animosity or maliciousness. The JAG stated that the applicant's claim of reprisal regarding his transfer is purely speculative and not logical because if he was experiencing interpersonal friction with his command and believed that his command did not have his best interest in mind, then a transfer to a different command would have been in his interest. As such, the JAG argued, the applicant has not sufficiently demonstrated that the administrative purpose of the transfer was pretext, and he has not rebutted the legitimate articulated reasons and fails to prove that his transfer to the District staff was an act of reprisal.
- The JAG argued that the applicant has also not shown that the issuance of an adverse OER was the product of reprisal, as found in the 2009 Final Agency Decision. The command of the cutter had noted many deficiencies in the applicant's performance prior to the applicant's "protected communication." Further, the command had articulated numerous performance-based, non-retaliatory reasons for the decision to relieve the member from his primary duties. When the CO of the cutter relieved the applicant of his primary duties, Article 10 of the Personnel Manual dictated that the command submit a Removal from Primary Duties OER. Moreover, the applicant has submitted no evidence to show that the command's performance-based reasons for the removal were pretext. As such, the JAG argued, the applicant failed to prove that his Removal from Primary Duties OER was an act of reprisal.



- The JAG alleged that the applicant's depiction of the administrative investigation as retaliatory is a complete mischaracterization. The JAG argued that there is no evidence that the investigation was initiated maliciously. Instead, it was initiated for the benefit of the applicant to investigate his own claims that the command climate was preventing him from getting qualified. Furthermore, the investigation was convened by the District Commander, not by the CO of the cutter, and the applicant has produced no evidence that the District had any reason to act in a retaliatory manner towards the applicant. The JAG argued that because the applicant has provided no evidence disproving the legitimate non-retaliatory reasons for the District command to investigate the applicant's claims that he was being blocked from earning qualifications, he has failed to prove that the administrative investigation convened by the District command was an act of reprisal.
- The JAG argued that the delay of the applicant's promotion and the initiation of the first "show cause" board were not retaliatory and were justified by policy and the applicant's substandard performance at his rank. The JAG pointed out that the delay of the applicant's promotion and convening of the show cause board were also addressed in the 2009 Final Agency Decision, which found no reprisal. The JAG stated that in accordance with the Personnel Manual then in effect, a command is responsible for initiating proceedings to delay a promotion if they feel that an individual has disqualified themselves after being placed on a promotion list, and disqualification means any circumstance that casts doubt on the moral or professional qualifications of the officer concerned. In this instance, the JAG argued, the CO of the cutter had cited numerous performance based, non-retaliatory reasons for delaying the applicant's promotion. The JAG argued that while the timing of the action, coming after the applicant's May 2008 "protected communication" might make the delay appear retaliatory, timing alone is insufficient to infer ill intent. Furthermore, the JAG noted that the basis of the recommendation was the applicant's conduct on the cutter, most of which had occurred before the applicant's protected communication. The JAG stated that the applicant's characterization of the action as reprisal is speculative and rebutted by the command's numerous legitimate reasons for this action. Further, the JAG argued, the CO of the cutter could only make a recommendation to the Personnel Service Center to delay the promotion; the actual decision of whether the applicant would have to go through a show cause board rested with the Personnel Service Center after a review of the applicant's record. The JAG stated that there is no evidence or reason why Commander, Personnel Service Center would have retaliated against the applicant. The JAG stated that the applicant has never disproved the articulated reasons for the delay of his promotion or proved that the Coast Guard was motivated by reprisal. Therefore, the JAG argued, the applicant has not shown that either the delay of his promotion or the convening of the first show cause board was an act of reprisal. Furthermore, the JAG noted, the Coast Guard ultimately promoted the applicant to lieutenant and backdated his date of rank to what it would have been had his promotion not been delayed, so there is nothing for the BCMR to correct regarding this issue.
- Finally, the JAG argued that the second show cause proceedings, including the 2014 Determination Board, BOI, and BOR, which led to the applicant's separation, were

“demonstrably not retaliatory and far too attenuated from the applicant’s 2008 ‘protected communication’ to be an act of reprisal.” The JAG stated that the record shows that the second show cause action was initiated due to the applicant’s “sustained subpar performance throughout his career, particularly his second relief from primary duties, which occurred at a completely different unit,” where the applicant was being asked to perform duties that bore no relation to the duties that he had struggled to perform on the cutter. The JAG stated that the second show cause action was also partly related to the applicant’s receipt of NJP and “had no connection” to the applicant’s “protected communication” six years earlier. The JAG stated that the applicant has submitted no evidence connecting his 2014 separation proceedings to his protected communications regarding the CO of the cutter in 2008 and his claim that such a connection exists is “conjecture.” The JAG concluded that the applicant has not shown that any of disputed administrative actions were not based on his actual performance and so he has not proven that they were retaliatory acts of reprisal.

### *JAG’s Arguments About the Propriety of the Second Board of Inquiry*

Regarding the applicant’s claim that the Coast Guard “improperly initiated the second Board of Inquiry, which resulted in [the applicant’s] erroneous discharge,” the JAG noted that the applicant cited 10 U.S.C. § 1182, which does not apply to the Coast guard and that Coast Guard separation proceedings are covered under 14 U.S.C. §§ 2158 through 2164. The JAG argued that pursuant to 14 U.S.C. § 2158, “[t]he Secretary may at any time convene a board of officers to review the record of any officer of the Regular Coast Guard to determine whether he shall be required to show cause for his retention on active duty.” In addition, 14 U.S.C. §§ 2159(d) and 2160(c) permit an officer to again be required to show cause for retention after a prescribed period. Therefore, the JAG argued, the Coast Guard may not require an officer to repeatedly show cause for retention based on the same grounds. In this case, however, the proceeding in 2009 was not even a “show cause” board to determine whether he should be retained on active duty. Instead, the 2009 board was a special board convened to determine whether the applicant should be promoted to the rank of lieutenant. The JAG stated that even if the 2009 board had not voted to promote the applicant, it would not have resulted in his discharge from the service. Instead, the applicant would have been considered to have been passed over once for promotion to lieutenant, and he would still have been eligible for subsequent promotion boards. The 2014 show cause proceedings and subsequent separation boards, convened under 14 U.S.C. §§ 2158 to 2160, were the first show cause proceedings and separation boards to be initiated for the conduct that prompted the 2009 promotion review plus substandard performance and conduct. Therefore, the JAG argued, the applicant has not proven that the Coast Guard was erred by initiating the 2014 Board of Inquiry and ultimately separating him.

### *JAG’s Allegations about the Coast Guard’s Response to the Request for Redress*

Finally, the JAG noted that the applicant had made a “quasi-allegation” in his application that the Coast Guard had failed to respond to his January 30, 2015, Request for Redress. The JAG stated that the record shows that the Coast Guard responded to the Request for Redress even though it was no longer under an obligation to do so after the applicant’s separation.

## APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 21, 2022, the applicant submitted his response to the advisory opinion, which consisted of the following in pertinent part:

2. Several errors in the Advisory Opinion are noted. First, as to timeliness, a significant portion of any delay in filing was related to the Coast Guard losing the audio from the board. The Coast Guard's failure to maintain that evidence merits waiver of the statute of limitations.
3. The failure of the Coast Guard to appoint a minority member upon request is an issue of equity that serves to protect the integrity of the board from concerns that race had played a role in the proceeding. For the Coast Guard to ignore this request calls into question the importance of race to the institution.
4. As for the issues related to his TDY, evidence is provided here substantiating that [the applicant] was on official TDY. He was on a trip for scheduled OCS/CSPI interviews. Emails are enclosed demonstrating he was part of that process.<sup>[4]</sup> Additionally, included are emails where [his supervisor, LCDR S] went into the HR system and charged him leave for the days he was in NC.
5. We also note that the Investigation was geared toward identifying why [the applicant] failed to qualify as a Deck Watch Officer. Not so much if there was a toxic work environment of reprisal. Documents were provided demonstrating a pattern of reprisal. As noted in prior submissions, [the CO of the third cutter] provided him with three positive graduate school recommendations after he was transferred temporarily to the District Office. It wasn't until later that he was relieved of duty. The adverse OER was reprisal otherwise he would have not provided [the applicant] with recommendations for grad school.
6. Additionally, emails are included in which [the CO of the third cutter] basically says that he does not want [the applicant] on the boat. OPM directed him on how to draft the derogatory OER. The Coast Guard alleged that the first BOI was related to his removal from the promotion board. The Notice of Intent to Delay Promotion from [the CO] was rooted in the 90-day OER. If one reviews the email dialogue between CO's, the District Office, and OPM, the intent itself was retaliatory. Additionally, the first BOI convened on 16 Jan 2019, [the CO] submitted his Summary of Events (basically documenting all things he presumably did wrong after the fact) on 28 April 2019.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was not timely filed within three years of the applicant's discovery of the alleged error in his record, as required by 10 U.S.C. § 1552. However, the Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>5</sup> In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for

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<sup>4</sup> This allegation appears to concern either the 3 days of leave charged to the applicant for the period January 11 to 13, 2012, or the period of unauthorized absence in February 2012 for which he received NJP, but he did not submit any emails showing involvement OCS/CSPI interviews in or around January or February 2012.

<sup>5</sup> 10 U.S.C. § 1552(b).

untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”<sup>6</sup> to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”<sup>7</sup> The applicant in this case did delay filing his application more than four years past the Board’s three-year statute of limitations and did not justify his delay. And although a cursory review of the case reveals many allegations but little supporting evidence, because the United States Court of Federal Claims has remanded the case to the Board, the Board will excuse the application’s untimeliness and consider the applicant’s claims on the merits.

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

3. The applicant asked the Board to reinstate him on active duty and remove the derogatory OERs and the NJP from his record based on allegations of retaliation and other errors and injustices. In considering such allegations, the Board begins its analysis by presuming that the disputed records in an applicant’s military record are correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that they are erroneous or unjust.<sup>8</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations and other documents.<sup>9</sup>

4. **Alleged Retaliation in 2008 Removal from Primary Duties:** The applicant alleged that his removal from his third cutter and the derogatory OER he received from the command of that cutter were retaliatory for a complaint he submitted on May 9, 2008, regarding the command climate and the command’s denial of his OOD qualification. He noted that there is no derogatory information pre-dating his complaint in the record before the Board. The Board notes, however, that the applicant’s first OER from the command of his third cutter, dated January 31, 2008, is at best mediocre, with primarily middle, “standard” marks of 4 on a scale from 1 (worst) to 7 (best). While marks of 4 are not officially “derogatory,” they do demonstrate that the applicant had failed to distinguish himself in his performance.

Although the report of the investigation is not in the record, the preponderance of the evidence indicates that following the applicant’s complaint on May 9, 2008, the Coast Guard conducted a two-month investigation that concluded with a finding of no discrimination on the part of the command of the third cutter. But before allowing the CO to remove the applicant from the cutter for poor performance, the District command sent the applicant TAD for an independent assessment as a Deck Watch Officer aboard a fourth cutter. Although the applicant qualified as an OOD aboard the fourth cutter, the TAD command was not enthusiastic about the

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<sup>6</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>7</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<sup>8</sup> 33 C.F.R. § 52.24(b).

<sup>9</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

applicant's performance and noted that even a brand new "boot" ensign aboard that cutter was surpassing the applicant's performance.

The applicant alleged that the CO's email in early September 2008 shows that the applicant's removal from his position as the Operations Officer was retaliatory, but the Board disagrees. The email states that the CO of the cutter had asked about removing the applicant as the OPS before the applicant submitted his complaint on May 9, 2008, but the CO was deterred by a District officer who recommended sending the applicant for extra training instead. And when the applicant returned to the cutter from a navigation course and POPS training, he promptly submitted his complaint. The email further shows that in June and July 2008, numerous District officers transferred, and the new District command opted to send the applicant TAD to another cutter for an independent assessment before allowing the CO to remove the applicant. The email indicates that the CO's actions were based on the applicant's performance and on the applicant's impact on the crew. The CO mentioned several concerns about the applicant's performance, and he has not offered any argument or fact that rebuts those concerns. Therefore, despite the timing of the applicant's complaint and the removal, the Board finds that he has not proven by a preponderance of the evidence that he was removed from his position as the Operations Officer as retaliation or reprisal for his May 9, 2008, complaint.

5. **2008 Derogatory and Concurrent OERs:** The applicant asked the Board to remove these adverse OERs from his record. To be entitled to removal of an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.<sup>10</sup> In this case, the applicant has not submitted evidence that refutes the marks or negative comments in the OERs. Nor has he shown that they were prepared in violation of a statute or regulation or that they were adversely influenced by factors "which had no business being in the rating process," such as discrimination or retaliation. Therefore, the Board finds no grounds for removing these OERs from his record.

6. **Three Days of Leave:** The applicant alleged that in January 2012, while serving as a financial analyst at Coast Guard Headquarters, he received temporary active-duty orders to participate in an Officer programs Interview Board on January 11, 12, and 13, 2012, and that his supervisor accused him of being AWOL for those three days and then charged him leave for those three days. The applicant did not submit any evidence to support his allegation that he was actually performing duty those three days. An email in the record dated January 19, 2012, which was sent to the applicant, shows that the applicant was charged leave for those three days in lieu of being considered AWOL. The applicant's failure to complain promptly about being accused of being AWOL and being charged leave for those three days is significant evidence that he agreed with his supervisor's action. Article 2.A.16.3. of COMDTINST M1000.8 states the following:

Personnel absent without proper authority in excess of 24 hours will forfeit leave credit for each day or part of day absent unless such absence is excused as unavoidable in accordance with

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<sup>10</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

Article 2.A.16.b. below. When absence is not excused, leave will not be charged; however, time lost will be charged as deductible time.

Therefore, the email charging the applicant with leave presumably indicates that the supervisor decided to excuse the applicant's unauthorized absence from duty as somehow being "unavoidable," instead of charging him with being AWOL. The applicant has not proven by a preponderance of the evidence that he did not agree with his supervisor's decision to charge him with leave or that he was erroneously or unjustly charged with three days of leave from January 11 to 13, 2012.

7. **Non-Judicial Punishment:** The applicant asked the Board to remove his NJP and Punitive Letter of Reprimand, dated August 15, 2012, for being AWOL and committing other offenses on February 28, 2012. He apparently did not appeal the NJP; he submitted nothing to show that these records are erroneous or unjust; and the records are presumptively correct.<sup>11</sup> He alleged that his supervisor had accused him of misconduct without warning him of his Article 31(b) rights, but assuming that is true, it would not invalidate his NJP on the charges. A missing rights warning may preclude charges from being tried by court-martial, but it does not preclude a command from awarding NJP at mast.<sup>12</sup> The Board finds no grounds for removing the NJP or the Punitive Letter of Reprimand from the applicant's record.

8. **2012 Derogatory OERs:** The applicant asked the Board to remove his two adverse 2012 OERs from his record. As noted above, to be entitled to removal of an OER, an applicant cannot "merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense," but must prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating

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<sup>11</sup> 33 C.F.R. § 52.24(b).

<sup>12</sup> Article 31, at 10 U.S.C. § 831, states the following:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial. [Emphasis added.]

Military Justice Manual, Article 1.D.1.g., COMDTINST 5810.1E (stating that most of the federal rules of evidence do not apply at mast and that "[j]udicial exclusionary rules involving rights warnings and search and seizure do not apply at mast, and the commanding officer may consider evidence that would be inadmissible at court-martial." The Manual for Courts-Martial, Part V, para. 4.c.(3). See *Sasen v. Spencer*, 879 F.3d 354 (1<sup>st</sup> Cir. 2018) (holding that the exclusionary remedy set out in Article 31(d) is available only at a court-martial and not at NJP), relying on *Kindred v. United States*, 41 Fed. Cl. 106, 112 (Fed. Cl. 1998) ("because plaintiff was not the subject of a court-martial, but the subject of an administrative discharge, the Article 31(d) remedy does not apply").

process,” or a prejudicial violation of a statute or regulation.<sup>13</sup> In this case, the applicant has not submitted evidence that refutes the marks or negative comments in the OERs. Nor has he shown that they were prepared in violation of a statute or regulation or that they were adversely influenced by factors “which had no business being in the rating process,” such as discrimination or retaliation. Therefore, the Board finds no grounds for removing his 2012 OERs from his record. These OERs reflect a significant decline in performance that led the Personnel Service Center to initiate the “show cause” procedures that led to his discharge.

9. **Allegation of Improper Second Board of Inquiry:** The applicant alleged that the Coast Guard erroneous and unjustly convened two “show cause” for retention actions in 2008 and 2012 based on the same alleged conduct in violation of 10 U.S.C. § 1182. This argument fails for a few reasons. As the JAG noted, that statute applies to the Army, Navy, and Air Force, but not the Coast Guard.<sup>14</sup> More significantly, however, is the fact that no “show cause” action was initiated for the applicant in 2008. Instead, PSC convened a special board to determine whether the applicant’s name should be removed from the promotion list, and his name was not removed from the promotion list. The record shows that the one and only “show cause” action for the applicant was initiated after the applicant’s second removal from primary duties in 2012.

10. **Incomplete Transcript of BOI:** According to the applicant’s Article 138 complaint dated January 30, 2015, 74 minutes of the BOI hearing were not properly recorded, and those 74 minutes included some of the cross-examination of his supervisor, LCDR S. In his application he claimed that about 90 minutes were missing, while the JAG claimed that 60 minutes of testimony were missing. The applicant stated (a) that in the missing testimony, LCDR S admitted that he had failed to advise the applicant of his Article 31(b), UCMJ rights before accusing him of violating the UCMJ; (b) that in the missing testimony, LCDR S admitted to having fabricated certain documents that had been submitted to the BOI; and (c) that because of the missing testimony, the BOR based its recommendation on an incomplete record. Regarding these allegations, the Board finds as follows:

- (a) Regarding the alleged admission of not providing a rights warning, the Board notes that because the applicant was never tried at court-martial, his supervisor’s failure to advise the applicant of his Article 31(b) rights before accusing him of violating the UCMJ is immaterial to any of the administrative separation proceedings. While officers are supposed to advise members of their Article 31(b) rights before questioning them about suspected offenses—so that those charges can later be tried at court-martial—failure to do so does not prevent a command from offering the member a hearing at mast, awarding non-judicial punishment, or initiating administrative separations.<sup>15</sup>

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<sup>13</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

<sup>14</sup> The Coast Guard’s BOI statute, 14 U.S.C. § 2159(d) states, “If a board of inquiry determines that the officer has established that he should be retained, his case is closed. However, at any time after one year from the date of the determination in a case arising under clause (1) of section 2158 of this title, and at any time after the date of the determination in a case arising under clause (2) of that section, an officer may again be required to show cause for retention.”

<sup>15</sup> See footnote 12, above.

- (b) Regarding the second allegation about LCDR S admitting to having “fabricated” documentation for the BOI, the Board notes that the applicant failed to identify which if any documents in the record before the BOI were fabricated by LCDR S. As the applicant’s supervisor, LCDR S apparently wrote the email charging him with leave, dated January 19, 2012; presumably prepared the Report of Offenses for which the applicant received NJP; may have drafted the Punitive Letter of Reprimand for signature by his superior; and presumably drafted the applicant’s OERs while he was assigned to LCDR S’s office, but none of these “fabrications” is improper. The applicant has not identified any of the documents allegedly “fabricated” by LCDR S and so he has not shown that the missing testimony about the fabrications could have biased the separation proceedings against him.
- (c) The preponderance of the evidence shows that the record of the BOI reviewed by the BOR was missing some 60 to 90 minutes of testimony by his supervisor, LCDR S. Article 1.A.14.h.4.j. of the Military Separations Manual states that following a BOI, the applicant is entitled to a verbatim transcript of the hearing, but the Coast Guard could not provide one because of the gap in the recording reported by the transcription service.<sup>16</sup> Unfortunately, the manual does not identify the remedy for a technological error that creates a gap in the recording and the transcript.

Although the transcript was incomplete, the Board is not persuaded that the Coast Guard was required to abandon the separation procedures because of the error. Nor would trying to repeat the hearing have been proper as the parties’ questions would have been known to the witnesses in advance. To try to remedy the error, the record shows that on July 31, 2014, approximately three months after the BOI hearing, the Coast Guard offered the applicant’s attorney the opportunity to add into the record a description or recollection of LCDR S’s missing testimony with the concurrence of the Recorder, but the applicant did not do so. Had the applicant or his attorney heard significant testimony by LCDR S that did not appear in the transcript, they could have described it; gotten the BOI Recorder’s concurrence with their description; and so entered the information into the record of proceedings that was reviewed by the BOR. Their failure to exercise the offered remedy indicates that they saw no value in doing so—no value in describing LCDR S’s missing testimony about the lack of an Article 31(b) warning and no value in describing his testimony about fabricating documents for the BOR to review. Under these circumstances, the Board is not persuaded that the Coast Guard’s offered remedy for the error was insufficient or that either the BOI or the BOR proceedings were rendered invalid or unjust because of the missing testimony.

11. **Lack of Minority Member on the Board of Review:** Neither 14 U.S.C. § 2161, the Coast Guard’s own “show cause” statute, nor the Military Separations Manual requires a BOR to include a minority member when the officer under review is a member of a minority

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<sup>16</sup> The Board notes that the applicant requested a copy of the audiotape of the BOI hearing, but the JAG stated that the Coast Guard could not find one and that audiotapes are normally deleted after the transcription is completed.



race or ethnicity. Although the applicant argued that the lack of a minority member on the BOR rendered the result fundamentally unfair, the Board disagrees. In this regard, the Board notes that the applicant admitted that there were minority members on the Determination Board and the BOI, and both of those boards found multiple bases for separating the applicant. The applicant has not provided any grounds for this Board to believe or assume that the outcome of the BOR might have been different had one of the BOR members been of a minority race or ethnicity.

12. **Lack of Pre-Separation Medical Examination:** The applicant alleged that the Coast Guard erroneously and unjustly refused to delay his separation so that he could complete a pre-separation physical examination. According to the Coast Guard, on January 9, 2015, medical personnel informed PSC that the examination could be completed before the applicant was discharged on February 1, 2015. The applicant stated that he was told that it was impossible to complete the examination before his discharge and so he requested a delay of his discharge. The record shows that the applicant's request was not submitted until January 30, 2015. Article 1.A.9.b. of the Military Separations Manual states the following about such examinations:

An officer being separated shall schedule any necessary physical examination so it is completed at least 60 days before the effective date of separation or release, although Commander (CG PSC-OPM) will not delay a separation or release date solely because the officer failed to complete a scheduled physical examination. A scheduled separation or release date may be delayed only if a question exists about a member's unfitness for continued service so as to require convening a medical board under reference (c), Physical Disability Evaluation System, COMDTINST M1850.2 (series), or if serious disease or injury intervenes.

The policy thus assumes that an officer will have at least 60 days' notice of a separation, but Coast Guard Separation Authorizations are typically issued only 30 days before the date of discharge. In this case, the applicant was aware that he was the subject of separation proceedings for well more than a year before his discharge date, but he apparently did not undergo a physical examination during that period. The Coast Guard stated that he instead underwent a qualifying examination on December 22, 2015, nearly a year after his discharge.

There is conflicting evidence about whether the applicant could have completed a complete physical examination from the time he was officially notified of his separation until his date of separation. But Article 1.A.9.b., quoted above, clearly states that if the officer does not complete the examination before his date of discharge, his discharge will not be delayed unless "a question exists about a member's unfitness for continued service so as to require convening a medical board." The applicant has neither alleged nor proven that at the time of his discharge there was a question about his physical fitness for continued military service that would warrant delaying his discharge to convene a medical board. Nor has he shown that he was harmed or prejudiced by not completing the physical examination before his separation. Therefore, the Board finds that the lack of a pre-separation physical examination is not grounds for voiding the applicant's discharge or reinstating him on active duty.

13. **Separation as Retaliation or Reprisal:** The applicant alleged that the discharge proceedings from 2012 through 2015 were retaliatory or a result of retaliation for the complaint he submitted against the CO of his cutter on May 9, 2008. As explained in finding 4, above, however, he has not proven by a preponderance of the evidence that his removal from his primary duties in September 2008 or the adverse OERs he received in September 2008 were

retaliatory or acts of reprisal. Nor is there any evidence that the 2012 NJP and removal from primary duties were retaliatory or acts of reprisal. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that his separation from the Coast Guard was a result of retaliation or reprisal.

14. The applicant has not proven by a preponderance of the evidence that his discharge from the Coast Guard on February 1, 2015, was erroneous or unjust. The Board finds no grounds for voiding his discharge or reinstating him on active duty.

15. The applicant requested, as alternative relief, certain corrections to the entries on his DD-214. The record shows that the Coast Guard made the necessary corrections and reissued his DD-214 in 2021. The Board finds no errors to correct on his DD-214. Although the applicant asked to have his mailing address changed on the form, DD-214s are not updated after issuance to reflect changes in veterans' mailing addresses. They are supposed to be accurate as of the date of issuance, and the applicant has not shown that the mailing address on his DD-214 was inaccurate as of February 1, 2015. Nor has he shown that his narrative reason for separation and separation code are erroneous or unjust. Accordingly, his requests for additional corrections to his DD-214 should be denied.

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

ORDER

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

January 12, 2023

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