

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:



BCMR Docket  
No. 39-96

DECISION OF THE DEPUTY GENERAL COUNSEL  
ACTING UNDER DELEGATED AUTHORITY

☒ I approve the recommended Order of the Board

☐ I disapprove the recommended Order of the Board



Rosalind A. Knapp  
Deputy General Counsel  
as designated to act for the  
Secretary of Transportation

DATE: Aug. 7, 1996

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 39-96

FINAL DECISION AND FINAL DECISION ON RECONSIDERATION

This is a proceeding for new relief and for reconsideration of a final decision issued under section 1552 of title 10, United States Code. The decision to be reconsidered was issued by the Board for Correction of Military Records (BCMR) on August 11, 1995. The application for new relief and reconsideration was docketed by the BCMR on December 6, 1995.

The recommended final decision in this proceeding for new relief and reconsideration, dated July 19, 1996, is signed by the duly appointed members who were designated to serve as the Board in this case.

The applicant asked the BCMR to remove from his record an officer evaluation report (OER) for the period from December 1, 1991 to May 31, 1992 (first disputed OER). He also asked that his signal number on the register of officers be adjusted, if he were later selected for promotion to lieutenant commander (LCDR), to reflect the number he would have been assigned if he had been selected for promotion by the 1995 LCDR selection board, with appropriate back pay and allowances.

The applicant also asked the BCMR to reconsider its final decision in BCMR Docket No. 181-94 denying his request for the deletion of the Reviewer's comments from an OER for the period from June 1, 1992 to November 30, 1992 (second disputed OER).

On June 14, 1996, the BCMR received the views of the Coast Guard recommending that the applicant's requests be denied.

On June 25, 1996, the BCMR received correspondence from the applicant requesting an expedited review of his case because his record was scheduled to be considered by the LCDR selection board due to convene on August 12, 1996. He advised the Board that he had failed of selection for promotion to LCDR in 1995.

On July 10, 1996, the applicant submitted a response to the views of the Coast Guard. He disagreed with the Service.



**BCMR Docket No. 181-94 (Original Case)**

In asking the Board to remove the comments of the Reviewer (the unit's commanding officer (CO)) from the second disputed OER, the applicant alleged that these comments covered events that took place "outside the review period" and were inaccurate, unfair, and prejudicial.

The Reviewer wrote the following disputed comments:

I find this report, especially the supervisor's evaluation, to overstate this officer's performance. [The applicant's] performance has many positive aspects. However, his performance this period was also characterized by serious deficiencies which the report completely ignores. At the beginning of this period, following an investigation by the unit civil rights officer, I relieved [the applicant] of duties as [REDACTED] Officer because of multiple employee complaints that he created and tolerated an intimidating and oppressive work climate. Several female employees complained of conduct by [the applicant] that bordered on sexual harassment. Moreover, there was wide spread sentiment among [REDACTED] employees that if they displeased [the applicant] in any way he would find a way to "get" them (i.e. [sic] reduce their work hours or discharge them). I found his leadership style to be arrogant and abusive of his authority. Substantial inventory and accounting problems also surfaced at [REDACTED] after his reassignment. I believe [the applicant's] performance warrants generally lower marks on leadership skills. With respect to interpersonal relations (4a and 4b) I believe marks above "2" are clearly unwarranted. I believe [the applicant] is unsuited for any independent duty or command position.

In BCMR Docket No. 181-94, the Board considered two different statements prepared by the applicant's Supervisor for the disputed OERs.

1. The Supervisor, in a letter to the Personnel Records Review Board (PRRB) dated May 24, 1993, stated that he concurred with the applicant that it was error for the Reviewer to attach to the second disputed OER comments that related to the applicant's past duties as a [REDACTED] officer. He stated that during the period of the second disputed OER the applicant was assigned duties as [REDACTED] and not as [REDACTED] officer. The Supervisor stated that the applicant's performance as [REDACTED] officer had already been evaluated in the first disputed OER, which ended on May 31, 1992, wherein marks in 13 areas on that report had been lowered as a result of directions from the Reviewer. He stated that the CO's removal of the applicant as [REDACTED] officer was based on an informal investigation from which the CO concluded that a "hostile working environment" existed at [REDACTED]

The Supervisor stated that the second disputed OER accurately reflected the applicant's performance of his duties as [REDACTED] but he contended that the disputed Reviewer's comments related to the applicant's performance during a previous reporting period and should therefore not have been attached to the second disputed OER.

2. The Supervisor wrote a second letter on behalf of the applicant. This letter was addressed to the Chairman, BCMR, and dated March 22, 1994. The Supervisor stated that on June 1, 1992, he, the Reporting officer, and the applicant were called into the Reviewer/CO's office and informed that effective that date, the applicant would be removed from duty as the [REDACTED] officer and reassigned to duty as the [REDACTED]. The CO stated in that meeting that, based on an investigation conducted by the unit civil rights officer, the CO had determined that it was in everyone's best interest to reassign the applicant from duty as the [REDACTED] officer and assign him to duty as the [REDACTED]. The Supervisor stated that the applicant asked to speak with the Reviewer several times after June 1, 1992 to discuss the allegations, but he was never given the opportunity to do so.

The Supervisor stated that the CO's civil rights investigation never resulted in any disciplinary action against the applicant, and the applicant was never provided the opportunity to review the alleged complaints against him or to defend his position.

The Supervisor stated that personality conflicts existed within the [REDACTED] organization prior to, during, and after the applicant's tenure. The applicant's failure to resolve these conflicts was mentioned in the first disputed OER (December 31, 1991 to May 31, 1992). The Supervisor stated that after the applicant's assignment to the new position [REDACTED] deficiencies that related to his performance as [REDACTED] officer should not have been reflected in the second disputed OER (June 1, 1992 to November 30, 1992).

The Supervisor stated that OERs for lieutenants (LT) were due every six months. The reporting periods for them were from June 1 through November 30 and from December 1 through May 31. The Supervisor stated that at the time the applicant was reassigned to duty as [REDACTED] he was due an evaluation for the reporting period ending May 31, 1992 (first disputed OER) based on his performance as the [REDACTED] officer. After completing his portion of that evaluation, the Supervisor forwarded it to the Reporting Officer and Reviewer for action. The Supervisor stated that the applicant's OER for this period was subsequently returned to the Supervisor and he was told that the CO wanted him to redo the marks that he had assigned to the applicant because the marks as submitted were too high. The Supervisor stated that he argued against lowering the marks, but resubmitted the OER lowering the applicant's marks in 13 areas. The Supervisor stated that the lowered marks must have satisfied the CO because he signed the OER as resubmitted.

For the period June 1, 1992 until November 30, 1992 (second disputed OER), the Supervisor stated that the applicant was evaluated on his performance of duties as the [REDACTED]. The Supervisor stated that he was completely surprised by the Reviewer's comments attached to the second disputed OER, particularly since he was never informed of any deficiencies in the applicant's performance for this period. In fact, the Supervisor stated that the CO (Reviewer) had indicated his pleasure with the applicant's performance during the period covered by the second disputed OER. The Supervisor further stated that the applicant's performance as [REDACTED] officer had already been evaluated in the previous report (the first disputed OER). The Supervisor offered his opinion that the Reviewer had wronged the applicant by attaching the disputed comments to the first disputed OER.

Other Evidence Submitted by the Applicant in Docket No. 181-94

The applicant submitted copies of his other OERs as a lieutenant (LT). The OERs revealed that he had received no mark lower than 4 (out of a possible high of 7), and on several OERs he had received marks of 6 in block 4.a. (Interpersonal Relations/Working with Others) and marks of 5 in block 4.b (Human Relations). On the first disputed OER, he received marks of 4 in blocks 4.a. and 4.b.

The applicant also submitted copies of pertinent provisions from the Personnel Manual that dealt with the responsibilities of the rating chain in the officer evaluation system (OES). The Board also considered COMDTNOTE 1616, entitled Officer Evaluation System (OES) Annual Review.

The applicant submitted a copy of the PRRB decision denying his request for the removal of the Reviewer's comments from the second disputed OER. He also submitted copies of reports and memoranda that dealt with the operation of the [REDACTED] while he was [REDACTED] officer.

In Docket No. 181-94, the Board denied the applicant's request for removal of the Reviewer's comments. The Board found that nothing in the Personnel Manual at the time of the second disputed OER limited the Reviewer from making comments on the performance qualities, potential, or value of an officer during the past reporting period, "if these areas need to be expanded or explained further." The Board determined that it was for the Reviewer to decide whether there was such a need.

The Board also found that two Articles of the Personnel Manual (10-A-4d.(4)(b) and 10-A-4d.(7)(b)) limit the authority of the other members of a rating chain, the Supervisor and the Reporting Officer: "For each evaluation area, the Supervisor [and Reporting Officer] shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period" (emphasis added). The Board found that there was no comparable provision in the Personnel Manual in effect at that time with respect to the Reviewer.

**BCMR Docket No. 39-96 (Current Case):**

In addition to asking for the same relief as he did in BCMR Docket No. 181-94, the applicant asked for the removal of the first disputed OER. This was a request for new relief.

New Relief: Removal of OER for the Period December 1, 1991 to May 31, 1992 (First Disputed OER). The applicant stated that Article 10-A-2f.(2)(d) provides that the "Reviewer may not . . . direct in what manner an evaluation mark or comment is to be changed . . . " (emphasis in original).

The applicant contended that the Reviewer committed an error or injustice when he directed the Supervisor to lower the applicant's evaluation marks on the first disputed OER for the period ending May 31, 1992. The applicant alleged that the Supervisor and Reporting Officer were coerced by the Reviewer into lowering the marks on this evaluation, in violation of the Personnel Manual.

The applicant stated that the evaluation of his performance contained within the first disputed OER does not accurately reflect his performance for that period and reflected the opinions of the Reviewer, rather than the opinions of the members of the applicant's rating chain who most closely observed his day-to-day performance. The applicant argued that the first disputed OER should be removed from his record rather than corrected because the passage of time had made it difficult for the members of the rating chain to remember which marks were lowered and which comments were originally made.

Reconsidered Relief Previously Denied: Removal of Reviewer's Comments From OER for the Period June 1, 1992 to November 30, 1992 (Second Disputed OER). The applicant contended, which he did not do in his original case, that the Reviewer's comments on the second disputed OER related to an unofficial and unfinished investigation and the comments were in violation of the Personnel Manual. He argued that, since the investigation was never completed, it was unethical to mention it in the second disputed OER. The applicant asserted that if an investigation was conducted, then his "civil rights concerning these proceedings were violated." The applicant stated that he was (1) never given an opportunity to review the investigation; (2) never given the opportunity to refute, explain or express any opinion or provide any evidence concerning the allegations made against him; (3) never made a party to or given full party rights as required by the Civil Rights Manual; and (4) never given a special OER, which was required upon completion of the investigation since he was not exonerated or acquitted (Article 10-A-3b.(3) of the Personnel Manual).

The applicant interpreted Chapter 5.G.4.c. of the Civil Rights Manual to provide the following: (1) designation of the military member as a party; (2) representation by counsel; (3) right to make voluntary statements; (4) right to introduce evidence; and (5) right to examine the complete investigative report. (The BCMR could not find a



Chapter 5.G.4.c. in the Civil Rights Manual. However, Chapter 5-C does identify the above as the rights of an alleged discriminating official (ADO).

The applicant denied that he had engaged in the type of conduct that was the subject of the investigation. He contended that the Reviewer refused to speak with him about the disputed comments. The applicant claimed that if he had been given the opportunity to speak with the Reviewer, this matter could have been resolved three years ago. The applicant stated that Chapter 9-2-3 of COMDTINST 5000.3B provides that "[t]he right of any person in the Coast Guard to communicate with the commanding officer at a proper time and place is not to be denied or restricted."

The applicant alleged that the Reviewer did not like him and was biased against him because of the Reviewer's personal relationships and friendships with the other parties involved.

The applicant stated that the Reviewer for the disputed OERs is now assigned to Coast Guard Headquarters as [REDACTED]. He stated that to prevent undue influence on any comments that the Coast Guard is asked to provide, the BCMR should forward such request for comments to the Chief of Coast Guard Personnel's superior officer or forward the request for comments completely outside the Personnel Administrative Branch.

The staff of the BCMR contacted the Departmental Office of Civil Rights, the Regional Office of Civil Rights [REDACTED] and the Coast Guard for a copy of the pertinent investigation. None of these offices had an investigation relating to the applicant.

New Evidence Submitted by the Applicant in Support of His Request for Reconsideration

1. The applicant submitted another statement from his Supervisor, dated October 6, 1995. Concerning the second disputed OER, the Supervisor wrote that pursuant to the regulations in effect at the time, the Reviewer did not have the authority to attach comments to the applicant's evaluation that did not pertain to that reporting period.

The Supervisor stated that the Reviewer did not have the authority to "coerce" or "bribe" the Supervisor into changing his evaluation of the applicant's performance on the first disputed OER. The Supervisor stated that he was told specifically that if he did not lower the applicant's marks, the Reviewer would write negative comments about him (the applicant). The Supervisor stated that he had lowered 13 marks originally assigned to the applicant on the first disputed OER and "toned down" the comments to match the new marks.

The Supervisor stated that the Personnel Manual provides for the lowering of the grades of the Supervisor and Reporting Officer if the evaluations they prepare on their subordinates do not accurately reflect the performance rendered. The Supervisor argued that, apparently, the first disputed OER (after the grades were lowered) must have been viewed as an accurate evaluation of the applicant's performance, since neither the Supervisor's nor the Reporting Officer's evaluation marks were lowered for preparing an inaccurate OER on the applicant. Therefore, it was not necessary, according to the Supervisor, for the Reviewer to have attached the challenged comments to the second disputed OER.

The Supervisor stated that he was surprised when he was approached by the unit civil rights officer and told that she was conducting an investigation of the applicant for sexual harassment. He stated that the investigating officer (IO) would not provide him with any details of the investigation, but that the IO told him that "if there [was] any way, [she was] going to get that son-of-a-bitch." The Supervisor stated that he never placed any of this derogatory information in the applicant's OER because it was not true.

The Supervisor was subsequently transferred to Headquarters where he encountered the IO. She also had been transferred to Headquarters. The Supervisor recalled a conversation with the IO, in which she was alleged to have stated: that she realized she had made a mistake; that the applicant was not sexually harassing anyone or intentionally creating a harsh working environment; and that the applicant was an intense supervisor who got caught up in his work and possibly demanded too much from his employees. According to the Supervisor, the IO said she had been caught up in the investigation and her dislike for the applicant and had therefore "proved" the allegations against the applicant. The Supervisor stated that the IO was transferred shortly after her report. There is no statement from the IO in the record.

The Supervisor stated that the CO did not trust or like the applicant because he had never been formally trained to be an [REDACTED] officer. According to the Supervisor, the Reviewer had investigated the applicant's use of an American Express card, his travel claims, and his use of [REDACTED] money on an authorized buying trip. It was the opinion of the Supervisor that the Reviewer was looking for a way to remove the applicant as [REDACTED] officer and used the sexual harassment allegations to achieve that end.

2. The Reporting Officer, the same individual for both disputed OERs, submitted a statement on the applicant's behalf.

The Reporting Officer stated that on June 1, 1992, the applicant was relieved of his duty as [REDACTED] officer and reassigned to duty as [REDACTED]. He stated that the applicant's removal as [REDACTED] officer was based on a preliminary civil rights investigation into allegations made against the applicant. The Reporting Officer stated that he reviewed the investigation but did not comment on the investigation in the first

disputed OER, which ended May 31, 1992, because that investigation was never completed and the applicant was not provided an opportunity to comment on it.

In preparing the second disputed OER for the period ending November 1992, the Reporting Officer stated that he noted that the Supervisor had assigned the applicant marks of 5 in interpersonal relations. The Reporting Officer stated that he thought the CO would disagree with those marks of 5 and mentioned his concerns regarding the 5s to the Supervisor. The Supervisor thought the marks of 5 were accurate. The Reporting Officer stated that he expected the Reviewer to talk with the Supervisor concerning the marks, but instead the Reviewer attached his comments to the second disputed OER without discussing them with the Supervisor.

The Reporting Officer stated that he believed that the Reviewer's comments were precipitated by the events mentioned above, which occurred during the previous reporting period. He stated that he felt the comments were inappropriate. The Reporting Officer concluded by stating: "This entire incident was based upon an investigation that was never completed, which the accused never saw. [The applicant] has paid a dear price for the allegations against him and he was never allowed to know the charges, who filed them or present any defense. Based upon this unfairness alone, I feel that [the applicant] should be granted the relief he seeks."

3. The applicant submitted five letters of reference from women who worked with him. Each individual wrote that the applicant performed his duties as [REDACTED] officer in a highly professional manner and that he had always acted professionally in his dealings with them. None of the individuals indicated that they had observed any sexual harassment or other discriminatory behavior on the part of the applicant.

#### Views of the Coast Guard

The Coast Guard recommended that the applicant's request be denied.

On the request for reconsideration, the Coast Guard stated that the Board may grant a request for reconsideration of a final decision only if newly discovered evidence or information would, if true, result in a determination other than that originally made. In this case, applicant has not provided sufficient new evidence or information to change the opinion of the Coast Guard. The evidence submitted by the applicant included two statements from the Supervisor, one from the Reporting Officer, and several statements from female civilian employees. The Coast Guard argued that the applicant restated the same arguments made in BCMR Docket No. 181-94 and has not presented anything that would result in a determination other than that originally made.

Additionally, the Coast Guard stated that the Board may refuse to consider such evidence or information claimed to be newly discovered if it finds that such information or evidence could reasonably have been discovered and submitted to the Board prior to

the original decision, if the applicant had exercised reasonable diligence. The Coast Guard asserted that there appears to have been no unusual circumstances in the applicant's case that would have prevented him from filing timely submissions had he exercised reasonable diligence.

The Coast Guard stated that in BCMR Docket No. 181-94, the applicant maintained that the Reviewer for the first disputed OER directed the Supervisor and Reporting Officer to lower certain marks they had assigned to the applicant on that OER. The Service stated that while this issue was never the focus in earlier arguments, it has become the emphasis of the applicant's reconsideration request.

The Coast Guard stated that of the three letters written by the Supervisor, two while on active duty and one in retirement, it was this third letter in which the verbs "coerced" and "bribed" were first used to describe the manner in which the Reviewer directed changes to the first disputed OER. The Service stated that it learned through discussions with the Supervisor that it was the Reporting Officer who returned the OER to the Supervisor and conveyed the Reviewer's sentiments regarding its content. The Coast Guard stated that, according to the Supervisor, his concern for his and the applicant's performance evaluations grew out of the Reporting Officer's conversations with the Supervisor, and that as a result of the conversation between the Supervisor and Reporting Officer, the Supervisor acquiesced in the Reviewer's perspective. The Service stated that the Reporting Officer characterized his interactions with both the Reviewer and Supervisor as normal and proper reconciliation of rating chain inconsistencies. The Reporting Officer stated that he did not feel unduly influenced by the Reviewer to lower the applicant's marks, nor did he recollect directing the Supervisor to lower the applicant's marks. The Service stated that the Reporting Officer considered the first disputed OER to be an accurate representation of the applicant's performance. (The Coast Guard did not submit to the Board any corroboration of the alleged statements of the Supervisor and Reporting Officer or a contemporaneous memorandum of these conversations.)

The Coast Guard argued that the Reviewer's return of the evaluation report for reconciliation of inconsistencies between his observations of the applicant's performance and those made by the other rating officers was a practice that was consistent with OES guidelines. The Service asserted that the applicant misinterpreted Article 10-A-2f.(2)(d) of the Personnel Manual. The Service asserted that the applicant erroneously concluded that the Reviewer's return of the disputed OER to the rating chain for reconsideration constituted deficiencies in the Supervisor's and Reporting Officer's OES performances. Since the Supervisor and Reporting Officer did not deviate from prescribed procedures in completing the applicant's OERs, there was no reason for the Reviewer to counsel these officers on any deficiencies in their evaluations.

The Coast Guard asserted that the use of the word "investigation" by the Reviewer in the disputed comments attached to the second disputed OER was not restricted by Article 10-A-4g.(1) of the Personnel Manual. The Coast Guard argued that



the term restriction as used in this regulation applies to formally convened investigations that are pending completion and does not preclude comments on appropriate, objective, and supportable and relevant facts. The Coast Guard stated that the Reviewer's phrase, "following an investigation by the unit civil right officer" connoted a completed or finalized proceeding. The results of the investigation did not lead to disciplinary or other final formal proceedings requiring full party rights, but they were used as a source to document performance.

The Coast Guard argued that the Reviewer did not rely solely on the investigating officer's report to determine the facts, but spoke personally with several complainants to confirm the allegations made against the applicant. Although the Reviewer did not provide the applicant with complete access to the investigation report because of retribution concerns, the Reviewer did allow the applicant to respond to its general findings. According to the Service, the applicant prepared a multi-page reply to the report of investigation, which the Reviewer "used to temper his performance judgments."

The Coast Guard stated that the applicant submitted OER replies, although there was no indication of an OER reply for the first disputed OER. The Coast Guard stated that the applicant maintained that a reply was submitted to that OER, but it was returned to him by the rating officers because these officers agreed with the applicant that the first disputed OER was in error. There are no OER replies to the disputed OERs in the applicant's performance record.

The Coast Guard concluded that the applicant had not overcome the presumption of administrative regularity. The Service stated that the rating chain for the disputed OERs was properly constituted, and that the disputed OERs were completed in accordance with the Personnel Manual.

#### **Applicant's Response to the Views of the Coast Guard**

The applicant stated that the issues presented in this case were straightforward and compelled a grant of relief.

Reviewer's Comments on Second Disputed OER. The applicant described the Reviewer's comments attached to the second disputed OER for the period ending June 1, 1992 as "damning." He stated that the comments were improper because they refer to matters occurring outside the envelope of the reporting period. The applicant stated that the Personnel Manual currently states that Reviewers must confine themselves to the reporting period (just as their subordinates in the rating chain must do). According to the applicant, the prohibition against Reviewers including comments on an OER that occurred outside a pertinent reporting period, existed long before the Personnel Manual explicitly prohibited it in 1993. The applicant cited BCMR Docket No. 68-81, approved by the Deputy General Counsel, in which the Board indicated that the comments of a Reviewer on a Reserve fitness report should be "a simple and

objective evaluation of *petitioner's* performance and personal qualities *during the reporting period* " (Emphasis added).

The applicant argued that, even though BCMR Docket No. 68-81 was governed by the Administrative Manual for Coast Guard Reserve, rather than the Personnel Manual, that does not change the result. He asserted that the language in Para. 2-A-5(a)(4) of the Administrative Manual ("knowledge of the officer and the officer's performance of duty during that reporting period") shows that the Coast Guard believed long ago that the reporting period limit extended to reviewing officers. The applicant argued that it would be peculiar indeed if Reserve fitness reports were subject to a materially different rule on such a key point from that applicable to officers on the Active Duty Promotion List.

The applicant also invited the Board's attention to ALDIST 185/93, an official Coast Guard message from the Chief, Office of Personnel, reporting on the results of the annual review of the Officer Evaluation System for Promotion Year (PY) 1992. Paragraph 7 of this message stated:

7. COMMENTS IN AN OER SHOULD RELATE ONLY TO THE PERIOD OF THE REPORT. THE LATITUDE OF COMMENTS IN BLOCKS 8 AND 11 SHOULD NOT BE ABUSED TO ADDRESS PRIOR TOURS OF DUTY, ENLISTED SERVICE, EXPERIENCE GAINED IN OTHER SERVICES, OR PERFORMANCE OUTSIDE THE REPORTING PERIOD.

ALDIST 185/93 was issued on June 7, 1993, three months after the Reviewer's comments at issue in this case. The applicant argued that it cannot be dismissed as prospective and hence has no bearing on the issue presented in this case. The applicant argued that nothing in Paragraph 7 of the ALDIST or any other part of the message was intended to state a new rule, but rather the purpose of the message was to summarize Headquarters' analysis of the functioning of the OES during PY92. The applicant contended that since PY 92 ran from July 1, 1992 to June 30, 1993, 14 U.S.C. § 265a (1994), it applied to the OER and Reviewer comments at issue in this case (the Reviewer having signed the second disputed OER on March 4, 1993).

The applicant noted that the Board has sometimes applied current standards to earlier times. That approach, argued the applicant, is consonant with the remedial purposes of 10 U.S.C. § 1552 and should be followed here. The applicant also argued that the regulatory limitations on Supervisors and Reporting Officers could be readily circumvented if Reviewers could comment on matters occurring in earlier reporting periods.

The applicant also argued that the Reviewer's comments were both in error and unjust because they rested on a profoundly flawed investigation which was never completed. He contended that the Personnel Manual bars reference to an unfinished investigation in an OER. The applicant stated that, since the investigation was unfair

and contrary to agency regulations, it was improper to make reference to it in the second disputed OER.

The applicant stated that the (third) letter from the Supervisor showed that the officer who investigated the sexual harassment allegations against the applicant was personally biased against the applicant. The applicant further asserted that he was prejudiced in the investigation because he was never afforded an opportunity to examine the statements taken from or submitted by any witnesses, nor was he interviewed by the investigating officer. The applicant stated that the opportunity merely to see the finished product (assuming *arguendo* the report ever actually was finished) is a far cry from being afforded a meaningful opportunity to be heard by the investigating officer. This occurrence, argued the applicant, was entirely out of step with Coast Guard investigative practice and the requirements of the Administrative Investigations Manual and the Military Civil Rights Manual.

The applicant stated that the Coast Guard's attempt to dismiss the Supervisor's revelations concerning the investigation officer, because the Supervisor remained silent on the matter in previous correspondence with the BCMR, is preposterous. The applicant asserted that the Supervisor's statements speak for themselves and contain "the kind of rich detail that lend weight to their credibility." He further contended that the Coast Guard has failed to adduce any evidence to refute the Supervisor's account.

The applicant asserted that the Personnel Manual permits reference only to investigations that have been completed and in which the reported-on officer is afforded the rights of a party. The applicant stated that the Reporting Officer indicated that the investigation relied on by the Reviewer "was never completed" and the applicant was never afforded his rights as a party. The applicant therefore argued that the Reviewer violated Article 10-A-4g.(1) of the Personnel Manual by mentioning the investigation in his comments.

The applicant stated that he has submitted abundant evidence to show that the Reviewer's allegations are unfounded. The applicant further stated:

[T]here are problems even in the very language the Reviewer chose to employ. Especially egregious is his comment at one point that "[s]everal female employees complained of conduct by the applicant that bordered on sexual harassment." This is doubly flawed.

The first part of the quoted sentence is a "cop-out" because it states merely that complaints were received. If the Reviewer had determined the complaints were meritorious, he should have said so and taken appropriate action; if he determined that the complaints were unfounded, he should not have mentioned the matter. What he could not properly do is simply announce that there had been complaints, and leave the matter of [the applicant's] guilt or innocence to future readers of the OER and his

comments. This is a major abdication on the Reviewer's part, and a major unfairness to [the applicant].

The second flaw in the quoted sentence is a variant on the first, and focuses on the second half of the sentence. It is also a "cop-out" to put in an OER that an officer's comments "bordered on" any form of prohibited conduct, whether sexual harassment or criminality. The Reviewer could not, consistent with basic fairness, drop in a comment that suggests [the applicant] was "close to the edge." [The Reviewer] had an ethical duty to take a stand, so that both [the applicant] and future readers of the OER could deal with the matter appropriately.

The applicant contended that he was not counseled concerning the matters adverted to in the Reviewer's comments. He also claimed that it was undisputed that the Reviewer denied him the right of a personal audience guaranteed "from time immemorial" by Coast Guard regulations.

The applicant stated that the advisory opinion appeared to report information furnished to its author by the Reviewer. However, no statement from the Reviewer or anyone else has been filed with the Board by the Coast Guard. The applicant argued that the Board has in the past properly insisted that the Coast Guard file statements signed by witnesses, rather than simply providing a hearsay report. The applicant argued that rule applied to this case with full force.

#### STANDARD FOR RECONSIDERATION

Under § 52.67(a) of the Board's rules, the standard for reconsideration is as follows:

"(1) An applicant presents evidence or information that was not previously considered by the Board that could result in a determination other than that originally made. Evidence or information may only be reconsidered if it could not have been presented to the Board prior to its original determination if the applicant had exercised reasonable diligence; or

"(2) An applicant presents evidence or information that the Board, or the Secretary . . . , committed legal or factual error in the original determination that could have resulted in a determination other than that originally made."

#### COAST GUARD REGULATIONS

Article 10-A-3b.(3) of the Personnel Manual states that "a special OER is required upon final completion of . . . investigative action which does not exonerate or acquit the Reported-on officer and which relates to the Reported-on Officer's performance or any other matter on which he or she may be evaluated. . . . This special OER is not required

if the criminal, other disciplinary, or investigative action was completed -- and the subject conduct or performance occurred -- all within a regular OER reporting period. "

Article 10-A-4g.(1) of the Personnel Manual states that "[m]embers of the rating chain shall not comment on or make reference to any pending . . . ongoing investigation (including discrimination investigations). Reference to a final proceeding is only proper if the officer concerned has been made a party to and accorded full party rights during the course of the proceeding. The finality of a proceeding is governed by regulations applicable to its convening. . . . This restriction does not preclude comments on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings."

Article 10-A-4g.(3)(g) of the Personnel Manual (change 19), effective August 30, 1993, prohibits discussion of a reported-on officer's performance or conduct which occurred outside the reporting period. The Commandant stated in COMMANDANT NOTICE 1000 that this change was added to the Manual for consistency with the other Articles.

Chapter 5-C. of the Civil Rights Manual provides four methods for resolving a civil rights complaint. They are: "1. Informally through the chain of command; 2. Informally with a Military Civil Rights Counselor/Facilitator; 3. Formally through the Coast Guard chain of command in accordance with the Uniform Code of Military Justice; or 4. Formally with the Department of Transportation Director of Civil Rights."

Chapter 5-F-2.d. of the Civil Rights Manual states that "[t]he ADO [alleged discriminating official] has the right to know precisely what has been alleged and to be afforded a full and fair opportunity to present evidence in response to such charges."

Chapter 5-F-3. of the Civil Rights Manual states that "[a]t each stage of the discrimination complaint process, the rights of the ADO must be safeguarded.

"a. In some cases where an aggrieved person identifies an ADO during informal counseling, the Military Civil Rights Counselor will:

"(1) Advise the ADO that he/she has been identified as such by a potential complainant, the nature of the accusations made and the right to have a lawyer present during any subsequent interviews.

"(2) Solicit views from the ADO.

"(3) Honor any request by the aggrieved individual not to reveal his/her identity."

Subparagraph b. of this section of the Civil Rights Manual provides even more rights for the ADO in cases where a formal complaint is filed.

## FINDINGS AND CONCLUSIONS

The BCMR makes the following findings and conclusions on the basis of the applicant's record and submissions, the Coast Guard's submission, the final decision in BCMR Docket No. 181-94, and applicable law:

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application was timely.

2. The Chairman has recommended disposition of the case without a hearing. 33 CFR § 52.31 (1994). The Board concurs in that recommendation.

3. The Board finds that the applicant's request for removal of the first disputed OER is a new request not previously considered by this Board. The applicant's allegation of error with regard to the first disputed OER was used by the applicant in support of his previous request for removal of the Reviewer's comments from the second disputed OER. However, in the original application, the applicant never specifically asked for removal of the first disputed OER from his record. He now makes that request. The Board's rules do not require that an applicant bring all requests before the Board in the same application at the same time. The matter of removal of the first disputed OER from the applicant's record was not addressed in the findings and conclusions of the Board's decision in Docket No. 181-94.

4. There is sufficient evidence in the record to conclude that the CO caused the first disputed OER to be returned to the Supervisor and to be resubmitted with lowered marks. In a statement to the BCMR dated March 22, 1994, the Supervisor stated that the disputed OER was returned to him to be reworked because the CO thought the marks as assigned were too high. In a later statement to the Board, the Supervisor stated that when the OER was returned to him for resubmission, he understood that if he did not lower the marks, the CO would write negative comments about the applicant. The evidence shows that the Supervisor, after presumably arguing against any change, lowered 13 of the applicant's grades and modified the original comments to match the grades. Article 10-A-2f.(2)(d) of the Personnel Manual permits the Reviewer to return an OER if it contains errors, omissions, or inconsistencies, but this provision prohibits the Reviewer from directing in what manner an evaluation mark or comment is to be changed. In this case, the Reviewer's statement that the marks were too high, and that if the marks were not lowered the Reviewer would write negative comments about the applicant, was a clear indication to the Supervisor that the marks should be lowered.

5. The Coast Guard offered a recollection of discussions between its representative and members of the rating chain. The Service failed to provide the BCMR with written summaries of those conversations or written statements from these individuals. The Board finds the Coast Guard's allegation that the Reporting Officer

considered his interactions with the Reviewer and Supervisor to constitute normal and proper reconciliation of rating chain inconsistencies to be in contradiction with the written evidence of record. The written testimony of the Supervisor was that the disputed OER was returned to him to be reworked because the Reviewer thought the marks as originally submitted were too high. The failure of the Service to provide detail as to the nature of the inconsistencies that existed within the disputed OER causes the Board to doubt the validity of the assertion that the disputed OER was returned because of inconsistencies. The Board finds that the Coast Guard's offer of the Reporting Officer's oral statement -- that he did not feel unduly influenced to lower the applicant's marks and that the Reporting Officer did not remember directing the Supervisor to lower the applicant's marks -- to be too weak in substance to refute the unwavering written statements from the Supervisor that the disputed OER was returned to him to be resubmitted because the Reviewer thought the marks as originally submitted were too high.

6. Article 10-A-2a.(1) of the Personnel Manual states that the "rating chain provides the assessment of an officer's performance . . . through a system of multiple evaluators and reviewers who present independent views . . . ." The Board notes that the Personnel Manual provides an avenue for the Reviewer to comment on an OER, if the need exists, by attaching comments on a separate sheet of paper. That is what should have occurred regarding the first disputed OER -- not a return of the OER to the Supervisor with instructions to redo the OER because the marks as originally submitted were too high.

7. There is also validity in the applicant's argument that the first disputed OER is not an accurate reflection of his performance. The Supervisor has admitted as much by stating that he lowered the applicant's marks at the behest of the Reviewer, rather than evaluating the applicant's performance based on the Supervisor's frequent observation of that performance.

8. Accordingly, the Board finds that the first disputed OER should be removed from the applicant's record. The Board notes that the first disputed evaluation, while most probably an inaccurate assessment of the applicant's performance as observed by the Supervisor, is an average to above average OER.

9. The Board finds that the applicant's request for reconsideration of BCMR Docket No. 181-94 should be granted. In that case, the applicant asked the Board to remove the Reviewer's comments from the second disputed OER. The applicant has provided a new argument that the Reviewer violated Article 10-A-4g.(1) of the Personnel Manual by including in the disputed OER comments that were based on an incomplete investigation. In addition, the applicant submitted two new statements, one from the Supervisor and one from the Reporting Officer for the disputed OER, which bolster his contention that the investigation had not been completed when mentioned in the disputed OER. He also submitted five other new statements from women who either worked with the applicant or were at some time supervised by him. These



individuals offered testimony that they had observed no behavior on the part of the applicant that constituted sexual harassment.

10. The applicant has presented new evidence, not previously considered by the Board, that could result in a different determination than that reached in BCMR Docket No. 181-94. The applicant did not have a lawyer in BCMR Docket No. 181-94 and probably did not know that he could present alternative arguments for relief. The applicant has now hired an attorney who has assisted the applicant in presenting this material. The rules of the Board should not be construed to disadvantage those without lawyers.

11. The applicant, the Reporting Officer, and the Supervisor indicated in written statements that the civil rights investigation mentioned in the Reviewer's comments was an incomplete investigation. If true, this would be a violation of Article 10-A-4g.(1) of the Personnel Manual which prohibits members of the rating chain from commenting or making reference to any pending investigation. However, the Reviewer's own language in the disputed OER -- that "following an investigation by the unit civil rights officer I relieved [the applicant] as CGES officer" -- indicates to the Board that the Reviewer thought the investigation was complete and that the Reviewer concluded that the applicant was guilty of some manner of improper conduct. The Board notes that the finality of an investigation hinges on the type of investigation conducted. For example, a formal civil rights investigation would have more procedural requirements than an informal civil rights investigation. See Chapter 5-C of the Civil Rights Manual. Based on the fact that the Departmental Office of Civil Rights, the Regional Civil Rights Office in [REDACTED] and the Coast Guard did not have a copy of the investigation and based on the finality of the tone of the comments of the Reviewer as discussed above, it is safe for the Board to conclude that this was a local informal civil rights investigation, which the Reviewer considered to be complete.

12. The Coast Guard argued that since this was an informal investigation, the restriction of Article 10-A-4g.(1) of the Personnel Manual prohibiting comment on investigations in certain circumstances does not apply. The Board finds this argument to be without merit. This provision of the Personnel Manual makes no distinction between informal and formal investigations and states with specificity that "[r]eference to a final proceeding is only proper if the officer concerned has been made a party to and accorded full party rights during the course of the proceeding." The evidence is clear in this case that the applicant was not a party to the investigation against him. Therefore, the Reviewer committed an error by referencing the investigation in his comments attached to the second disputed OER.

13. Since this was a civil rights investigation, it should have been conducted pursuant to the Civil Rights Manual. For an informal civil rights investigation, the Civil Rights Manual provides that the ADO be advised as to the nature of the accusations against him and that his views on the matter be solicited. The applicant has denied that he ever saw the report, that he was ever given the opportunity to comment on it,



and that he was interviewed by the investigating officer. The applicant's Supervisor and Reporting Officer corroborated the applicant's statement that he was never permitted to see the investigation report or comment on it. Both the applicant and the Supervisor stated that the applicant sought, on several occasions, to speak with the Reviewer, but the request for an audience was denied by the Reviewer/CO. It was manifestly unjust for the Reviewer/CO to have written such damaging comments in the applicant's OER based on an investigation without obtaining the applicant's view on the allegations that were investigated.

14. The Coast Guard's reliance on that portion of Article 10-A-4g.(1) that permits comments in an OER based "on appropriate, undisputed, supportable and relevant facts, so long as no reference is made to the pending proceedings" appears to be misplaced. The evidence of record establishes that the facts involved in the investigation were disputed. The applicant denied that he engaged in the type of behavior identified in the Reviewer's comments. The Supervisor stated that allegations against the applicant were not true, and the statements from the five women indicate that the applicant acted in a very professional manner in his position. The Board notes that no disciplinary action was brought against the applicant as a result of this investigation.

15. Thus, the Board finds that the Reviewer committed a violation of the Personnel Manual by referencing the investigation in the disputed OER without the applicant being made a party to that investigation.

16. The Reviewer's comments attached to the second disputed OER should be removed.

17. The applicant's 1995 failure of selection for promotion to LCDR should be removed from his record. The applicant's record clearly appears better without the damaging Reviewer's comments that are attached to the second disputed OER. The Board finds that it is not "unlikely that the applicant would have been selected for promotion in any event." Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982).

18. The Board has considered the applicant's other allegations (lack of counseling, bias of the Reviewer against the applicant, and the Reviewer's improperly referring to events that occurred in a previous reporting period) and found them to be either moot or without merit. With regard to the Reviewer's comments, the Board notes that the Personnel Manual in effect at the time the second disputed OER was prepared did not restrict Reviewer comments to the events that occurred during a reporting period. In 1993, when the Coast Guard changed the Personnel Manual to prevent the rating chain from commenting on events that occurred outside the reporting period, it did not include a provision making this change retroactive.

- 19 -

ORDER

The application for final decision and final decision on reconsideration is granted. The military record of [REDACTED] USCG, shall be corrected by:

1. Removing the OER for the period December 1, 1991 to May 31, 1992 and replacing it with a report for "continuity purposes only."
  2. Removing the Reviewer's comments from the disputed OER for the period June 1, 1992 to November 30, 1992. The mark in block 14 (Reviewer Authentication/Comments Attached) shall also be removed from this OER.
  3. Removing the applicant's 1995 failure of selection for promotion to LCDR. If the applicant is selected by the first selection board to consider him on the basis of a corrected record, his date of rank, once promoted, shall be backdated to the date of rank that it would have been if he had been promoted by the 1995 LCDR selection board, with back pay and allowances.
- 