

DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of  
Coast Guard Record of:

BCMR Docket  
No. 86-96

DECISION OF THE DEPUTY GENERAL COUNSEL

I approve the Majority Opinion of the Board.

I approve the Minority Opinion of the Board.

  
Deputy General Counsel  
Delegate of the Secretary  
Department of Transportation

DATE: July 7, 1997

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FINAL DECISION

████████████████████

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on March 4, 1996, by the filing of an application for relief with the BCMR.

The Board reached a recommended final decision in this case on March 18, 1997. Two of the three duly appointed members, the majority, voted to deny relief. One member, the minority, voted to grant relief.

The applicant asked the BCMR to correct his record by removing an officer evaluation report (OER) for the period April 1, 1992 to June 30, 1993 (disputed OER). He also asked that his 1995 failure of selection for promotion to captain be removed from his record and that he be allowed two additional opportunities to be considered for selection to the grade of captain.<sup>1</sup> The applicant asked that if he is selected by the first selection board to consider him on the basis of a corrected record that his date of rank be adjusted to the date he would have had if he had been selected by the 1991 captain selection board.

On February 6, 1997, the Board received the views of the Coast Guard recommending that the applicant be granted limited relief.

On February 19, 1997, the Board received the applicant's rebuttal to the views of the Coast Guard in which he argued for complete relief.

**EXCERPTS FROM RECORD AND SUBMISSIONS**

The applicant had filed an application for correction, Docket No. 151-92, prior to filing his current application. The Board recommended that the application be granted and, on August 17, 1994, the Delegate of the Secretary approved the recommended decision of the Board in BCMR No. 151-92. The applicant's record was ordered to be corrected in the following manner:

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<sup>1</sup> The applicant also failed of selection for promotion to captain in August 1996.

... (1) by removing the disputed OER and all related documents and replacing it with a report for continuity purposes only; (2) by deleting all reference to the applicant's failures of selection by the 1991 and 1992 Captain Selection Boards; (3) by providing that the applicant shall be eligible for selection by the next two Captain Selection Boards that convene after this decision is issued; and (4) by providing, if the applicant is selected for promotion to the grade of captain by the next selection board, that he shall receive the date of rank that he would have received if he had been selected by the 1991 Board and he shall receive applicable back pay.

In a technical amendment to the order in BCMR No. 151-92, dated September 2, 1994, the Coast Guard was ordered to "offer the applicant, no later than October 1, 1994, the opportunity to return to the Coast Guard in active duty status with no break in active status."<sup>2</sup>

### **Applicant's Allegations**

#### Failure to Implement Board's decision in Docket No. 151-92

The applicant alleged that "the Coast Guard failed to correctly implement the Board's 1994 decision [in BCMR No. 151-52] by permitting [the disputed] OER that explicitly referred to [the applicant's] retirement to remain in his PDR [performance data record]." (The capital lettering has been deleted from the foregoing quote.) The disputed OER contained the following comment in section 3h.: "Worklife: Prepared for transition to retired status" (disputed comment). The applicant stated that the disputed OER was in his record when it was considered by the 1995 selection board and remains a part of his record to this day.

The applicant argued that the net effect of the Board decision in Docket No. 151-92 was to treat him as if he had not been passed over twice and retired. He claimed that the Coast Guard failed to ensure that his PDR was corrected fully in accordance with the relief directed in BCMR No. 151-92. Specifically, the applicant alleged that the disputed OER was permitted to remain in his record even though it referred to his retirement.

The applicant argued that permitting the disputed OER to remain in his record defeated the relief granted to him by the BCMR. The applicant stated that the disputed OER should be expunged from his PDR, or in the alternative, the disputed OER should be modified to delete the reference to his retirement.

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<sup>2</sup> As a result of the decision of the Board in Docket No. 151-92 that ordered certain corrections to his record, the applicant was recalled to active duty from retirement. His record was considered by the 1995 and 1996 captain selection boards.

### The Disputed OER

The applicant alleged that the disputed OER was "prejudicially perfunctory." He stated that the disputed OER violated Article 10-A-1b(1) of the Personnel Manual because it was an inaccurate, unfair, and subjective appraisal of his performance.

The applicant argued that because he had retired, the authors of the disputed OER merely went through the motions of preparing the disputed OER. The applicant argued that the timing of the disputed OER was evidence that the members of the rating chain treated the preparation of the OER as a "chore" because he was no longer on active duty. The applicant stated that he departed on terminal leave in May 1993 with a retirement date of June 30, 1993, but the disputed OER was not signed by the reviewer until November 1, 1993.

The applicant claimed that the comments in the disputed OER were terse and brief. The applicant complained that under the leadership and potential section, for example, the reporting officer wrote only eight words. Those eight words were "[i]maginative and innovative. Superb grasp of organizational issues." He also asserted that the inadequacy of the disputed OER was demonstrated by the fact that he was given a mark of 4 in each of the 23 areas designated for observed marks. The applicant noted that in his previous OER he had a range of numerical marks, including two 4s, thirteen 5s, five 6s and two 7s. The applicant argued that it is inconceivable that an officer supervised by the same individual (the supervisor/reporting officer on the disputed OER also served as a member of the rating chain for the previous OER) would go from so diverse a set of numerical marks to the monotonic (sic) 4s found in the disputed OER.

The applicant also asserted that block 2. of the disputed OER contained an incomplete description of his duties. He stated that his duties for only the last two months of the reporting period were stated in block 2. The applicant claimed that he had the same duties for the period covered by the disputed OER as he did for the period covered by the previous OER. (The applicant's PDR showed that the description of his primary duty changed seven times in the eight OERs he received as a CDR.)

The applicant concluded this portion of his argument by stating the following:

[The disputed OER] is an aberration both as a matter of Coast Guard practice and in terms of [the applicant's] PDR. Such an OER subverts the performance evaluation system. It is in fact a continuity report masquerading as a substantive OER.

### Nexus Between Failure of Selection and Error in Record

The applicant argued that the Board must determine whether a nexus existed between the alleged defect in the applicant's PDR and his failure of selection for promotion to captain. In determining the nexus question, the applicant stated that the

Board must apply a two-step evaluation: (1) would the applicant's record have been stronger if it had been correctly constituted, and (2) would the officer have been refused promotion in any event.<sup>3</sup>

The applicant argued that his record before the 1995 captain selection board would have been stronger without the reference to his retirement. He argued that this reference was highly prejudicial. The applicant stated that the disputed OER was also prejudicial because it omitted important duties from block 2 of the disputed OER, contained an unbroken string of 4s, and omitted any reference to whether the applicant should have been promoted. He also argued that the disputed OER suggested a dramatic downward trend in his performance because it was in sharp contrast to the higher marks he had received on previous OERs.

The applicant argued that there was no reliable way for the BCMR to determine whether, under the "best qualified" criterion, he would have been passed over in any event. In this regard, the applicant argued that there is no data as to the curve of OER marks or the relative standing of the other officers who were considered by the 1995 promotion board at the same time he was.

#### Views of the Coast Guard

The Coast Guard stated that the remark concerning the applicant's pending retirement properly reflected the applicant's performance and was not an error. The Service stated that nevertheless, in light of the Board's relief in BCMR No. 151-92, it would be appropriate for the retirement comment to be removed from the disputed OER. Thus, the Coast Guard recommended that the comment be deleted, but it did not recommend any further relief. The Service stated that comments about retirements were not prohibited in an OER, but the applicant's date of rank as a Commander and the comment regarding retirement could be construed as an indirect reference to his failures of selection.

The Coast Guard stated that the applicant has not shown that the disputed OER as a whole was erroneous or unjust. The Service argued that, pursuant to Article 10-A-4d(4)(d) and d(7)(d), Personnel Manual, OER comments are generally not required for marks of 4.

The Coast Guard stated that the applicant, as the reported-on officer for the disputed OER was required to complete sections 1 (administrative data) and 15 (return address) of the disputed OER and submit it along with performance input to his supervisor 21 days before the end of the period. The Service argued that the lack of a

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<sup>3</sup> The applicant improperly stated the standard for determining the nexus between the existence of an alleged error in his record and his failure of selection. The correct standard is as follows: (1) Was the applicant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? (2) Even if there was some such prejudice, is it unlikely that the applicant would have been promoted in any event? Engels v. U.S. 230 Ct. Cl. 465, 470-471.

date in block 1.o. (date submitted) indicated that the applicant did not fulfill his responsibility in this regard. The Coast Guard stated that the supervisor should have initiated the disputed OER when it first became obvious that the Reported-on officer would not initiate it. The Service stated that it was clear from the supervisor's statement (discussed below) that the applicant had little interest in completion of the report. The Service alleged that the applicant's failure to file a reply to the disputed OER was a tacit indication that he agreed with the views expressed by the rating officials.

The Coast Guard asserted that the disputed OER was an accurate reflection of the applicant's performance. The Service attached a statement from the applicant's supervisor who was also the reporting officer. The supervisor stated that the following statement was true to the best of his knowledge:

The [disputed] OER for this period was not completed in a perfunctory fashion; it is an accurate reflection of [the applicant's] performance for that period of time. Clearly, the fact that [the applicant] was preparing to retire was a significant factor in his decline in performance relative to his previous OER. Had he not been scheduled for retirement, [the applicant's] mental focus may have been more on his job. Consequently, I feel his performance would have been significantly better. Nevertheless, the report is accurate, and commensurate with his performance for that period.

[The applicant] did not provide any OER input to assist me in my preparation of this report. He indicated that he did not intend to do so. It was tacit that this was the case because [the applicant] was preparing to retire. Had he provided OER input, there would not have been any appreciable change in the report.

On the question of the nexus between the alleged error in the applicant's record and his failure(s) of selection for promotion to captain, the Coast Guard stated:

Even if the Board were to order removal of the entire contested OER and replacement with a continuity OER, it is highly unlikely that the [disputed OER] alone contributed to the applicant's multiple non-selections to Captain (O-6). With a stated opportunity of selection of 60 percent (in promotion years 1994-1997), the lowest allowed by law for those Commanders appearing before the selection board, selection to Captain is and will remain extremely competitive. Of his seven [substantive] OER[s] . . . as a commander (O-5), only two contain recommendations for promotion to Captain. Chapters 10 and 14 of the Coast Guard Personnel Manual, COMDTINST M1000.6A inherently instruct selection boards to consider the recommendations for promotion (or absence of such critical comments) in section 11, more so at the higher grades (i.e., Captain). Furthermore, the record contains a number of unfavorable comments and marks which indicate the applicant failed to meet the expected high

standards (earned below a mark of 4) for Coast Guard officers in the appearance and writing dimensions. Each of these factors would be and likely have been considered highly relevant to board members determining the applicant's potential for promotion.

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

The applicant argued that the Coast Guard has conceded that the comment in the disputed OER referring to his retirement was improper and should be removed. He also said that this admission by the Coast Guard dictated that his failures of selection be removed since the objectionable comment was prejudicial. The applicant stated that the Coast Guard's reply that "he would have been passed over in any event" is entitled to very little weight because it is not supported by substantial comparative evidence and reflects a prejudicially selective reading of the applicant's military record.

The applicant argued that promotions to captain on the active duty promotion list (ADPL) are required to be made on a comparative basis. The applicant stated that absent comparative evidence regarding the officer whose passovers are at issue and the officers against whom he or she actually competed for promotion, no intelligent judgment can be made as to whether the applicant would have been selected. The applicant complained that the Coast Guard has refused to release the statistical data regarding the distribution of OER marks.

The applicant argued that in recommending against the removal of his failures of selection the Coast Guard dwelled only on the negative aspects of the applicant's OERs. The applicant stated that there were many positive aspects to his performance. He argued that it was irrelevant that some of his OERs did not contain an express recommendation for promotion, particularly since the Coast Guard has failed to provide evidence that showed the extent to which an express recommendation for promotion contributed to the selection for promotion.

The applicant argued that he disagreed with the Coast Guard's view that it was the applicant's fault that the disputed OER was of a perfunctory nature. He stated that while submission of an OER is the reported-on officer's responsibility, the content of the OER is the responsibility of the rating chain. The applicant asserted that the disputed OER lacked detail and was prepared in a non-caring manner.

The applicant stated contrary to the advisory opinion, that the lack of a date in block 1.0 of the disputed OER was not evidence that the applicant failed to submit "performance input." The applicant argued that based on the supervisor's statement that any such input would have led to no "appreciable change" in the OER. The applicant stated that the Coast Guard's reliance on the fact that he did not submit a reply to the disputed OER is misplaced. He argued that before he could have submitted a reply to the disputed OER it would have been necessary for him to rewrite the OER and then refute it.

The applicant asserted that the seven month delay in preparing the disputed OER might explain why it lacked detail.

The applicant concluded by stating that "even if the only error were the [the Coast Guard's] concededly improper reference to [the applicant's] retirement, he would be entitled to the . . . relief which the Coast Guard wishes to deny him."

### FINDINGS AND CONCLUSIONS

The BCMR makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the applicant's military record, and applicable law:

1. The BCMR has jurisdiction of this case pursuant to section 1552 of title 10, U.S. Code. The application is timely.

2. The Chairman has recommended that the case be determined without a hearing. 33 CFR 52.31 (1993). The BCMR concurs in that recommendation.

3. Notwithstanding the Coast Guard's statement that the disputed comment could indirectly be a reference to the applicant's failures of selection for promotion, the Board does not find that the disputed comment, with regard to the applicant's retirement, violated the earlier order in Docket No. 151-92, which required all references to the applicant's 1991 and 1992 failures of selection for promotion to captain to be deleted from the applicant's record.

4. In reaching this conclusion, the Board notes that the disputed comment "Worklife: Prepared for transition to retired status" does not mention, in any manner, the applicant's failures of selection for promotion to captain, nor does the disputed OER itself make any references to the applicant's earlier failures of selection for promotion. As the Coast Guard made clear, the only way that any possible connection could be made between the disputed retirement comment and the applicant's failures of selection for promotion would be scrutinizing the applicant's date of rank. Additionally, the Coast Guard Personnel Manual does not prohibit mentioning the fact that a member is pending retirement in an OER.

5. Moreover, the Board finds that the comment could just as well have been referencing the retirement of the applicant for some other reason, or for no reason, other than he chose to retire after twenty years of qualifying service. The Personnel Manual permits the cancellation of a retirement request at the discretion of the Commandant. Since the applicant is still on active duty, the disputed comment could be viewed as a situation in which the applicant had a change of mind and decided to request cancellation of his retirement request. The applicant has failed to explain how the 1995 and 1996 captain selection boards could have known that his pending retirement resulted from the fact that he had twice failed of selection for promotion to captain in 1991 and 1992, rather than resulting from some other circumstance. It is not likely that a

selection board would have gone through the exercise of researching whether the applicant had twice failed of selection for promotion to captain. More importantly, the 1995 and 1996 captain selection boards were under a duty to consider the applicant on his own merits. The applicant has not demonstrated that the Coast Guard violated the Board's order in Docket No. 151-92.

6. The Board disagrees with the Coast Guard that the comment should be removed. The mentioning of a member's pending retirement is not error *per se* because such a comment is not prohibited by the Personnel Manual. Also, the comment is factually correct. The reporting officer/supervisor stated that "the fact that [the applicant] was preparing to retire was a significant factor in his decline in performance, relative to his previous OER." This comment infers, perhaps, that the applicant's preparation for retirement was at the expense of the more assiduous performance of his duties. The applicant has not contended that the statement or this possible inference was not factually correct. The Board finds that the probative value of the disputed comment outweighs any possible prejudice to the applicant because it helps to explain the marks of 4 and the mark of 3 in block 12.

The applicant argued that the intent of the BCMR order in Docket No. 151-92 was to remove references to his 1991 and 1992 passovers. However, this Board finds that the intent of the Board in its earlier order was to remove errors from the applicant's record that may have impacted his 1991 and 1992 failures of selection for promotion to LCDR. It was not the intent of the Board in its earlier order to provide the applicant with an excuse for any subsequent lackluster performance. As stated above, the applicant has not shown that the disputed comment is in violation of the Personnel Manual, nor has he shown that it is inaccurate. He has only argued that the comment could be read to refer to his 1991 and 1992 failures of selection. The applicant's argument in this regard is insufficient to establish error. If the applicant believed the disputed OER to be in error, he could have submitted a reply to it. This he did not do.

7. The applicant has also failed to establish that the disputed OER itself is in error or unjust. He claimed that the disputed OER is an inaccurate, unfair, and subjective appraisal of his performance, but offered no corroboration to support his allegations other than his own argument. The applicant must do more than allege that the disputed OER is inaccurate. He either must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446, 1460. The applicant has done neither in this case.

8. The applicant has failed to prove that block 2 of the disputed OER contained an incomplete description of his duties. While he argued that his duties for the period covered by the disputed OER were the same as those identified on the previous OER, he did not submit any corroboration that his duties were other than identified on the disputed OER. Additionally, the applicant's PDR shows that the description of his duties changed no less than seven times over a period covered by eight OERs (including the disputed OER and excluding the two OERs for continuity purposes only). It is not self-evident to the Board that the applicant's duties for the period covered by the

disputed OER were the same as those described in the previous OER. An obvious error, such as that alleged here, would seem to dictate a reply by the applicant. The applicant did not file a reply. A prompt reply would have lent credibility to the applicant's claim that block 2 of the disputed OER is in error. As stated above, alleging or proving that an OER seems incomplete is not enough to cause its removal from a service record. The applicant must show a clear and prejudicial violation of a statute or regulation or a misstatement of a significant hard fact. Germano at 1460. The applicant has made allegations and arguments but submitted insufficient proof to support his claims.

9. The applicant claimed that the disputed OER was "prejudicially perfunctory," and he claimed that it was prepared in a non-caring manner by the rating chain because the applicant had retired. The supervisor stated that the applicant did not provide input to the disputed OER, and the applicant indicated to the supervisor that he did not intend to do so. The applicant should not be heard to complain about the brevity of the OER contents, if he declined to provide any input to them. The applicant's opinion, and his disagreement with the contents of the disputed OER, do not make the evaluation of his performance inaccurate. Again, the applicant offered no corroborating statements that his performance was other than as described in the disputed OER. The Board cannot say based on the evidence of record that the disputed OER does not fairly represent the quality of the applicant's performance for the period in question.

10. The applicant's allegation that the comments on the disputed OER did not cover the entire portion of the space allotted for them does not set forth an error or injustice. Article 10-A-4d(4)(d) and d(7)d) state that comments are not required for marks of 4. The applicant argued that the disputed OER is in error because he only received marks of 4 while on his previous OER he received marks ranging from a low of 4 to a high of 7. The disputed OER could be viewed as suspect because it referenced the applicant's retirement and assigned him only marks of 4 (except for the mark in block 12). However, the Board cannot find that the disputed OER is in error because the applicant has not demonstrated, by a preponderance of the evidence, that the disputed OER is an inaccurate assessment of his performance. The fact that the disputed OER contains grades that are lower than those on the previous OER does not make the disputed OER inaccurate, unless the applicant can show that his performance was other than stated in the disputed OER.

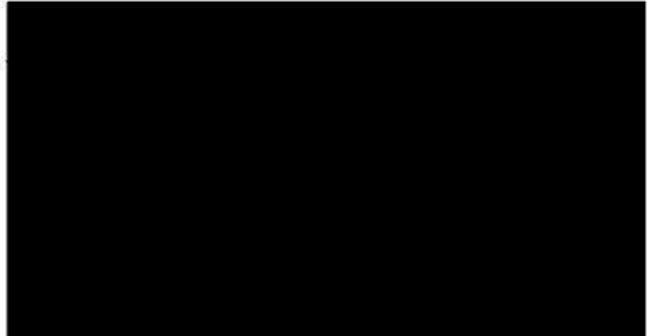
10. The applicant has failed to demonstrate an error or injustice with regard to the disputed OER or that the disputed comment with regard to his retirement is in error or unjust. Thus, no basis exists to consider removing the applicant's 1995 failure of selection for promotion to captain.

11. Accordingly, the applicant's request should be denied.

ORDER

The application of  
his military record, is denied.

USCG, for correction of



(see minority opinion)



DEPARTMENT OF TRANSPORTATION  
BOARD FOR CORRECTION OF MILITARY RECORDS

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DISSENT AND MINORITY REPORT

██████████ Board Member:

1. For the reasons explained below, I respectfully dissent. I find for the applicant and I would grant full relief, as petitioned. This Minority Report is filed pursuant to 33 CFR § 52.62.
2. I find that all evidence presented to the Board for Correction of Military Records (hereinafter "Board") is competent evidence to be weighed accordingly. Evidence submitted by the parties is summarized below.
3. ██████████ submitted the following evidence: (a) Memorandum in Support of Application and Exhibits (with accompanying Verification<sup>1</sup>); (b) ██████████ (with accompanying Verification) to the Coast Guard's advisory opinion and accompanying documents; (c) ██████████ (d) BCMR No. 151-92 record; (e) Appendix documents include (i) OER submitted prior to disputed OER; (ii) disputed OER; (iii) BCMR No. 151-92 Memorandum in Support of Application (including application); (iv) BCMR No. 151-92 disputed OER and OER Reply; (v) BCMR No 151-92 exhibit from Coast Guard (Commander Cook's endorsement to OER Reply; (vi) BCMR No 151-92 exhibit from (Applicant's response to Commander Cook's endorsement to OER Reply; (vii) ██████████; communication to PY92 Promotion Board (with endorsement); and (viii) Secretary of Transportation Decision in BCMR No. 151-92.
4. The Coast Guard submitted the following evidence: (a) Coast Guard advisory opinion dated February 6, 1997; (b) Coast Guard Personnel Command letter dated October 9, 1996; (c) Applicant's service record; and (d) a statement from Captain ██████████

<sup>1</sup> ██████████ declared under the penalties of perjury that the Memorandum in Support of Application is true and correct. I find this sufficient to establish that ██████████ adopts the Memorandum as his statement and would be his testimony if called to testify. In the Board's file, the page captioned Verification is found after the page captioned Appendix. I find this is a clerical mistake that in no way limits the scope of the verification on the materials submitted by ██████████

## Procedural History

5. This saga is not limited to this single application, but extends to an application filed several years ago. See BCMR Docket No. 151-92. This fact is pertinent to this case before the Board because (1) the Coast Guard failed to fully execute the Secretary of Transportation's Order<sup>2</sup> issued in BCMR No. 151-92, and (2) the original error set into motion a series of events that ultimately lead to the instant application, which included the Coast Guard's failure to evaluate [redacted] Walking through the history of [redacted] first application is enlightening, and helps set the stage for his current application, now before the Board.
6. [redacted] filed his first application (BCMR No. 151-92) on December 20, 1991. The Board did not immediately docket his application because of a pending review before the Personnel Records Review Board (PRRB); final action was taken on the PRRB application on February 26, 1992. No relief was granted by the Personnel Records Review Board. By letter dated April 13, 1992, through his attorney, [redacted] advised the Board of the PRRB's final decision, and [redacted] asked the Board to docket his application. By a letter dated the same day, April 13, 1992, [redacted] attorney notified the Board that [redacted] was being considered for promotion in August (his second consideration for promotion).
7. On April 17, 1992, BCMR No. 151-92 was docketed by this Board pursuant to 10 U.S.C. § 1552. The issue [redacted] presented to the Board was whether the disputed officer evaluation report (OER) "fail[ed] to reflect a reasonably accurate picture of the Reported-on Officer's performance and potential, constituting error on the part of the Coast Guard. Cf. BCMR No. 220-912." See BCMR No. 151-92, Decision of the Deputy General Counsel Acting Under Delegated Authority, dated August 17, 1994, page 2, paragraph marked 9.
8. On June 23, 1992, the Coast Guard submitted its response to [redacted] application. [redacted] replied to the Coast Guard's response by letter, dated July 10, 1992. On January 7, 1993, [redacted] informed the Board that he had been passed over for promotion for a second time and would be compelled to retire no later than June 30, 1993. See also, Letter, dated December 2, 1992, from Coast Guard to [redacted] informing him that "you will be retired under the provisions of 14 U.S.C. § 285."<sup>3</sup> [redacted] requested the Board to set aside

<sup>2</sup> The decision in BCMR No. 151-92 was issued by the DOT Deputy General Counsel under delegated authority. While the merits of BCMR No. 151-92 were considered and decided by the Office of the General Counsel, and ultimately a decision was issued by the Office of the General Counsel, the Decision and Order issued are from the Secretary of Transportation under the authority granted pursuant to 10 U.S.C. § 1552. See Sanders v. United States, 594 F.2d 804; 219 Ct. Cl. 285, 299 (1979) ("Congress conferred broad powers on Secretaries to remedy errors and injustices.")

<sup>3</sup> 14 USCS § 285 (1996): § 285. Regular lieutenant commanders and commanders; retirement for failure of selection for promotion.

this second passover. On April 19, 1993, the Board sent its recommended decision<sup>4</sup> and Order to the Office of the General Counsel for review and approval, and marked his application and record with "expedite." Over 12 months after was forced to retire, the Board's recommendation, with changes, was adopted on August 17, 1994, with a technical amendment dated September 2, 1994. See BCMR No. 151-92.

9. During the 16 month time period of April 1993 to August of 1994, several critical events occurred. [redacted] was forced to retire at the end of June 1993, and the OER that is the subject of this application, BCMR No. 86-96, was executed at the end of October 1993, several months post-retirement. During the last half of 1993, and the first half of 1994, no one at Coast Guard knew what would happen to [redacted] application for the correction of his military records, which was submitted over a year before [redacted] involuntary separation from the Coast Guard; [redacted] retired, and no one at the Coast Guard knew that [redacted] would be coming back to active duty.

#### Application before the Board

10. The application before the board presents two issues: (1) Did the Coast Guard properly execute the Order of the Secretary of Transportation in BCMR No. 151-92; and (2) Did the Coast Guard evaluate [redacted] disputed OER in the current application before the Board, BCMR No. 86-96)? As for this second issue, whether an evaluation was performed, the applicant has properly framed this question as an issue of whether [redacted] performance was evaluated in the first instance, and not an issue of whether the disputed officer evaluation report (OER) failed to reflect a reasonably accurate picture of the Reported-on Officer's performance and potential, constituting error on the part of the Coast Guard (i.e., whether the evaluator should have given [redacted] for example, a five instead of a four). While the difference is subtle, it is important. A brief discussion of this difference is warranted because the legal analysis depends on how the second issue is framed.
11. I will address the situation involving a disagreement over numerical ratings and inaccurate comments first because this reflects the majority's findings and conclusions. Previous Board cases are instructive for determining what is actionable conduct. In each of the following cases, the Board considered whether the evidence,

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Each officer of the Regular Coast Guard serving in the grade of lieutenant commander or commander, who has failed of selection for promotion to the grade of commander or captain, respectively, for the second time shall:

- (1) if he has completed at least 20 years of active service or is eligible for retirement under any law on June 30 of the promotion year in which his second failure of selection occurs, be retired on that date; or
- (2) if ineligible for retirement on the date specified in clause (1) be retained on active duty and retired on the last day of the month in which he completes twenty years of active service, unless earlier removed under another provision of law.

<sup>4</sup> The Board's recommended decision ruled in [redacted] favor.

the rating, and the comments on the disputed OER were contradictory and therefore inaccurate: In BCMR No 221-88, the Board considered whether professional bias was actionable and the disputed OER was inaccurate (application denied); in BCMR No. 40-87, the Board considered whether the evidence supported a finding that the disputed OER was inaccurate and the supervisor was personally biased (application granted); and in BCMR No. 22-88, the Board considered gender bias and discrimination and whether the disputed OER was inaccurate (application granted). All of these decisions reflected an actual evaluation process that was performed, yet allegedly flawed. Each required the Board to consider evidence that went to the heart of the conduct evaluated and the evaluation itself, similar to the first BCMR application. Cf. BCMR No. 151-92. Unlike the allegations, each of the above-referenced cases reflects performance that was evaluated.

12. In contrast to the cases described above, [redacted] contends that an evaluation was not conducted or performed. From the research conducted, this appears to be an issue of first impression. Therefore, the broad legal principles used in BCMR cases should be followed. See, e.g., Sanders, 219 Ct. Cl. at 302 (“We hold that a substantially complete and fair record is a necessary requirement of proper consideration by a selection board.”) and 303 (“Regulations prescribe that OERs are to be objective and prepared in a certain way. If a particular officer’s OER has not been so prepared and that defect could have resulted in his nonselection for promotion followed by discharge, this is legal and factual error and an injustice to the officer as well.”). See also, 10 U.S.C. §§ 1552 et seq. Also, federal law and Coast Guard personnel procedures shall be applied by the Board in making its finds and conclusions. The Board is required to receive and consider all relevant evidence, and make findings and conclusions consistent with that evidence.
13. Without looking at the substance of an OER, a completed form, on its face, entitles the Coast Guard to a presumption that the evaluation was performed, without addressing the issue of whether the evaluation was proper. Without any other evidence, the presumption survives and the Coast Guard carries the day. However, our inquiry does not end with a presumption and a completed form.
14. All evidence, including the substance of the disputed OER, shall be considered and weighed by the Board in finding whether an evaluation was performed. Such other evidence can include, but is not limited to, written statements by the parties, other documentary evidence, and the record as a whole. While the Board cannot look behind the rating itself, it can consider, for example, whether the disputed OER presents a reasonable rating distribution, whether circumstantial evidence of failure to evaluate, or whether inferences indicate a failure to evaluate. If the applicant carries his burden and is able to prove by a preponderance of the evidence that the evaluation was not performed, the burden of proof shifts to the Coast Guard. The Coast Guard must come forward with evidence that the disputed OER was prepared with the usual and customary care in evaluating officers. The substance of the OER can be used as

conformity between proscribed procedures in the Personnel Manual and the disputed OER. The indicia does not look to whether the evaluation is correct or accurate, but rather did information exist at the time of the evaluation upon which an evaluation could be based, and was the information used. For example, this evidence may be notes maintained for evaluation purposes, or statements from others involved in observing the performance of the reported-on officer, stating that they provided substantive information to the rating chain for evaluation purposes. The substance of information to the rating chain is not important; the fact that substantive information was provided to the rating chain for evaluation purposes is important.

15. Given this framework, application should be evaluated accordingly.

### Facts

16. The disputed OER was completed in the last half of 1993, after retired. The disputed OER indicates that the reported-on officer was "not available for signature." See disputed OER, page 2. The evaluation period covers 14 months, April 1, 1992 to June 30, 1993, during which time he was considered for promotion for the last time before he would be forced into retirement.
17. was returned to active duty, as required by the Secretary's Decision and Order in BCMR No. 151-92. Shortly after returning to active duty, and before his next consideration for promotion, visited the Military Personnel Command and reviewed his PDR. Upon review, discovered the Coast Guard's mistake (disputed § 3h comment), objected to the mistake, and attempted to correct the mistake administratively, but to no avail. See Memorandum in Support of Application, page 4. As a result of the Coast Guard's failure to correct record in conformance with the Secretary's Decision and Order in BCMR No. 151-92, the disputed OER was in OER at the time he was considered for promotion in 1995 and 1996. Even after the Coast Guard was put on notice of its failure to comply with the Secretary's Decision and Order, the Coast Guard did nothing to correct its error. The Coast Guard concedes its error: "given the applicant's date of rank to Commander, the comment regarding retirement could be construed as an indirect reference to his failure of selection." See Coast Guard advisory opinion, enclosure 1 (Personnel Command letter dated October 9, 1996), page 4. Not only was the damage done, it could have been prevented by the Coast Guard if it had properly and fully executed the Secretary's Order.
18. In addition to the disputed comment in § 3h of the disputed OER, the OER as a whole is challenged. The Coast Guard Personnel Manual (hereinafter "Manual") is appropriate evidence of how an OER is to be completed. The Manual contains a chapter entitled "Evaluation of Personnel" and has a section for officer evaluations, identified as section A. Article 10-A-1 through Article 10-A-7 cover all aspects of the Officer Evaluation System (OES).

19. Under Article 10-A-1(b), it is the duty of each commanding officer to ensure “accurate, fair, and objective evaluations. . . .” This puts the responsibility on each commanding officers to (1) evaluate each officer under his command, and (2) ensure the evaluation is completed properly. Further, evaluations are to be completed “on schedule.” The timeliness of evaluations is underscored in Article 10-A-2(a) (rating chain “ensures accuracy, timeliness, and correctness of reporting); see also, Article 10-A-2(b)(2) (subsection d requires “procedures that will ensure timely submission of reports). Article 10-A-3 establishes the time when the rating period ends (for Commander, rating period ends the last day of March). The Coast Guard does not deny or rebut the evidence that the disputed OER was not prepared in a timely manner.

20. The purpose of the important duty of preparing and processing an OER can be found in Article 10-A-1(a)(1):

To provide information upon which important personnel management decisions regarding individual officers can be based. Especially significant among these are promotions and assignments. (Emphasis added).

21. . . . challenges the first part of the evaluation process, i.e., the duty to evaluate each officer. While the timeliness of the evaluation is not an issue, it is an important factor in understanding what occurred, and supports contention that an evaluation was never performed.

22. The Manual provides guidance and prescribes certain mandatory obligations on the Supervisor and the Reporting Officer in the Rating Chain. See Article 10-A-2(d) and (e). Also, Article 10-A-4 proscribes procedures for the Rating Chain to follow when processing Officer Evaluation Reports (OERs). Article 10-A-4(b) underscores the purpose of evaluations, which includes “potential for promotion” as one of the OER functions.

23. Article 10-A-4(d)(2) proscribes how § 2 of the OER is to be completed. This section of the OER is completed by the supervisor in the Rating Chain. As it happened, supervisor, [REDACTED] was also his Reporting Officer. Below are excerpts from the Manual on procedures to follow in completing §2 of the OER:

The supervisor will write a summary of the most important aspects of Reported-on Officer’s job. Primary duties, collateral duties and special projects should be included. \* \* \* \*

All major duties assigned to the Reported-on Officer during the reporting period should be discussed. The officer’s primary duty title should be underlined. \* \* \* \* (Emphasis in original.)

Duties and responsibilities should be described to provide an overall understanding of the job. \* \* \* \* Include number of people supervised, funds controlled, unit operations or Organizational relationships as appropriate. \* \* \* \*

\* \* \* \*

24. Now I turn to [redacted] contentions that "the 'duties' information set forth in § 2 is materially incomplete." See Memorandum in Support of Application, page 6. In support of his contention, [redacted] states the "form merely recites . . . assigned duties for the final two months of the reporting period . . . and simply fails to include other significant duties for the first twelve months of the OER rating period.
25. The Coast Guard does not deny or rebut this evidence. However, in support of the Coast Guard's position, [redacted] prepared a statement, but the statement addresses performance only. While [redacted] statement does focus on [redacted] retirement, which occurred at the end of the rating period, [redacted] statement does not focus on [redacted] duties. Also, [redacted] statement includes a shocking admission: even if [redacted] had pointed out errors in the OER (following his forced retirement), [redacted] [redacted] could not have corrected the errors ("Had [redacted] provided OER input, there would not have been any appreciable change in the report.") See Captain [redacted] statement, dated July 16, 1996. Given the [redacted] retirement, why should [redacted] make extra work for himself? It appears that if [redacted] would have complained that § 2 was incomplete, [redacted] would not have corrected the error. There is more evidence to prove that § 2 of the OER was not complete.
26. The disputed OER does not contain [redacted] primary duty title. As required under Article 10-A-2(d)(b), [redacted] duty title (Assistant Chief, Case Management Division) is listed on the OER that precedes the disputed OER. See Exhibits submitted with [redacted] application. In addition, the disputed OER does not contain any information about the number of people supervised, funds controlled, unit operations or organizational relationships, as required by Article 10-A-2(d)(c). [redacted] states that his duties during the period of the disputed OER remained the same as the previous OER. This evidence is uncontroverted. This included supervision of 12 case officers, 5 claims managers and 5 clerical staff, yet the disputed OER does not reference those facts, as is required by the Manual.
27. It is important to recognized that during the first half of the disputed OER rating period, [redacted] was to be considered for promotion. It seems contrary to common sense, the disputed OER, the Coast Guard's position, and human nature to believe that this officer, who was about to face a promotion board and had previously worked hard to compete for promotion, would work less, would allow his

performance to degrade, and give up responsibility that would kill any chance for promotion.

28. Similarly, after [redacted] was passed over for a second time and notified by the Coast Guard of his pending forced retirement, he notified the Board and request expedited handling for his case. This is evidence of an officer who believed in his case and his ability to be promoted. He pressed for resolution of BCMR No. 151-92 before he was forced from the service. [redacted] did not fear that his performance would hold him back. Yet, he knew that Coast Guard errors would hold him back.
29. Because [redacted] case could not be resolved in a timely fashion, he was required to transition and prepare for retirement. Transition is a common experience and a simple analogy is helpful. At the end of a voyage, a ship returning to port is not brought into the harbor at maximum speed. Similarly, an individual is not given more responsibility and more duties just before he or she leaves a job; this is common sense, and for most people, a common experience. Not by his choice, and surely not his making, [redacted] was required to transfer responsibilities and duties before he left the service. This was an involuntary separation and an involuntary reduction in duties and responsibilities during [redacted] last two months of the disputed OER rating period. The majority's position on the retirement comment in § 3h ignores the Coast Guard admission and the record as a whole.
30. I find that [redacted] version of events is credible and persuasive.
31. I find that § 2 of the disputed OER only reflects those duties performed during the last 2 months of C [redacted] service before he was forced into retirement. Further, § 2 of the disputed OER is materially incomplete and contrary to the provisions of the Coast Guard Personnel Manual.
32. In addition to the above mentioned errors, the disputed OER contains other indications that the OER was not a true evaluation, but "the authors were merely going through the motions" as alleged. Each of these indicators will be discussed.
33. [redacted] was given all 4s in each of the required numerical rating factors. The significance of this fact is two-fold. First, as explained below, all 4s allowed the Rating Chain to complete the disputed OER in a cursory, perfunctory fashion. Second, from a practical point of view, the chance of anyone rating all 4s (23 in all) is extremely remote. Clearly, the distribution of numerical values on the disputed OER does not reflect a normal statistical distribution for OERs in general, or OERs specific to [redacted]. If [redacted] was in Las Vegas or Atlantic City, he would have hit the jackpot. Here, [redacted] prize should be winning his case.
34. Returning to the idea that the disputed OER was completed in a cursory, perfunctory fashion, without any evaluation, the Manual itself provides insight into the

significance of assigning a rating of 4. Two Manual subsections provide: “the [rating chain officer] shall include comments citing specific aspects of the Reported-on Officer’s performance and behavior for each mark that deviates from a ‘4.’” (Emphasis added.) See Article 10-A-4(d)(4)(d) and (d)(7)(d). It is important to remember that at the time the disputed OER was executed, ( ) was in retirement (the Rating Chain knew this), the disputed OER was late (the Rating Chain knew this), and it was important to complete all evaluations as required by Coast Guard procedures (presumably this work item was important to each officer in the Rating Chain because of his or her own performance and OER; late OERs would have a negative consequence for each officer in the Rating Chain). With this background and the Rating Chain’s need to complete late OERs, the motive for marking all 4s in the disputed OER becomes apparent. With each mark of 4 on the disputed OER, ( ) was not required to justify his mark with a comment. The fastest way to clear out late OERs is to reduce workload by avoiding any comments. To avoid the requirement to make comments, ( ) simply marked a 4 in each of the 23 rating areas on the disputed OER without evaluating

35. Similarly, a review of § 11 of the disputed OER illustrates why contention is correct. First it is important to note that § 11 is labeled “Leadership and Potential.” The descriptive instructions that appear to the right of this label state: “Describe demonstrated leadership ability and overall potential for greater responsibility, promotion, special assignment, and command.”). The Manual commands “[t]he Reporting Officer shall comment on the Reported-on Officer’s leadership ability and potential for greater responsibility in the Coast Guard. (Emphasis added.) See Article 10-A-4(d)(8)(a). Taken together, it is obvious that § 11 is designed to appraise an officer who will remain in the service for another rating period and who may be considered for promotion. Similarly, as described above, not only did the Rating Chain know that ( ) would not be around for another rating period, they knew he had retired and would not be returning. As discussed below, ( ) did not complete § 11 as required because the possibility of promotion for ( ) was non-existent — why complete a meaningless exercise???

36. Comparing the previous OER to the disputed OER demonstrates that § 11 was not completed as required, and is additional evidence that ( ) was not evaluated. See Exhibits attached to Memorandum in Support of Application. The table below contains the § 11 evaluation from both OERs

<u>Previous OER</u>	<u>Disputed OER</u>
<p style="text-align: center;"><u>demonstrated his leadership</u></p> <p>during the particularly demanding and stressful first few months in the organizational life of the NPFC. He proved willing to take controversial but</p>	<p>Imaginative and innovative. Superb grasp of organizational issues.</p>

correct positions on a number of issues. He also proved willing to accept final decisions and move on, even when he disagreed with those decisions. He is strongly recommended for promotion. (Emphasis added.)

37. In the previous OER, it is clear that [REDACTED] is evaluating and not just writing fluff and filler. In the previous OER, [REDACTED] followed the § 11 instructions: "[d]iscuss demonstration of leadership ability." (See underlined words at the beginning of OER comparison table in paragraph 36.) Similarly, [REDACTED] ends the previous OER evaluation with "[REDACTED] is strongly recommended for promotion." In contrast, the disputed OER contains eight words in § 11. None of these eight words even hint at describing demonstrated leadership, or any of the other required areas such as potential for greater responsibility, promotion, special assignments and command. The inference from this evidence is inescapable. [REDACTED] did not complete this section in accordance with the OER instructions and Article 10-A-4(d)(8)(a) because he knew that [REDACTED] retired in June and would not be given greater responsibilities in the Coast Guard, would not be promoted in the Coast Guard, would not get special assignments in the Coast Guard, and would not be considered for promotion in the Coast Guard. [REDACTED] did not complete § 11 because he knew [REDACTED] was no longer in the Coast Guard. Additional supporting evidence includes the date the disputed OER was executed, October 29, 1993, approximately five months after [REDACTED] was forced into retirement, and approximately eight months after the end of the rating period (March of 1993).

38. I find that § 11 of the disputed OER was not completed as part of an evaluation, and the Rating Chain merely filled in the blocks to clear out the (late) disputed OER.

### Errors and Injustice

#### *Did the Coast Guard properly execute the Order of the Secretary of Transportation in BCMR No. 151-92?*

39. The Secretary of Transportation's Order in BCMR No. 151-92 states that [REDACTED] military records shall be corrected "(2) by deleting all reference to the applicant's failures of selection by the 1991 and 1992 Captain Selection Boards . . . ." (See BCMR No. 151-92) The Coast Guard failed to remove the offensive reference in the disputed OER, even after the error was brought to the Personnel Commands attention. The Coast Guard properly concedes that the above-referenced comment about retirement is an indirect reference to [REDACTED] failures of selection. Therefore, in light of the Coast Guard's concession, and the weight of the evidence discussed under the factual section of this minority report, the Coast Guard failed to properly execute the Order of the Secretary in BCMR No. 151-92. Such a failure is a legal error that the Secretary is required to correct. Under the statutory duties of this

Board, through the Secretary of Transportation, this Board is required to recommend that relief be granted to \_\_\_\_\_ under the first issue presented. See Sanders, 219 Ct. Cl. at 299-300.

*Did the Coast Guard evaluate \_\_\_\_\_ (disputed OER in the current application before the Board, BCMR No. 86-96)?*

40. "OERs are the single most important documents in an officer's records." Sanders, 219 Ct. Cl. at 300. Because OERs are so very important to Officer and his career, the Rating Chain is obligated to ensure that the OER is substantially complete and fair. See Sanders, 219 Ct. Cl. at 302.
41. Because a completed OER exists, the Coast Guard is entitled to a rebuttable presumption that the Officer was evaluated by the Rating Chain. Here, \_\_\_\_\_ has rebutted this presumption based upon all of the evidence before the Board. The burden of proof now shifts to the Coast Guard to produce evidence that an evaluation was conducted. The evidence supplied to the Board is scant and does not support its position that an evaluation was performed. \_\_\_\_\_ version of the events that occurred is credible and persuasive. Conversely, the Coast Guard's position is not credible and the disputed OER is suspect on its face.
42. "Regulations prescribe that OERs are to be objective and prepared in a certain way. If a particular officer's OER has not been so prepared and that defect could have resulted in his nonselection for promotion followed by discharge, this is legal and factual error and an injustice to the officer as well." Sanders, 219 Ct. Cl. at 303. The Coast Guard Personnel Manual prescribes procedures and guidelines to be followed when the Rating Chain is preparing and processing an evaluation.
43. I have found that these Manual processes were not followed and the required evaluation was not conducted. Consequently, \_\_\_\_\_ selection boards did not have a properly constituted record before it and this defect could have resulted in his nonselection for promotion. He is now subject to an involuntary discharge in June of this year. See 14 U.S.C. § 285 (1997) This defect constitutes legal error and factual error, and an injustice to \_\_\_\_\_ and he is entitled to relief. Under the statutory duties of this Board, through the Secretary of Transportation, this Board is required to recommend that relief be granted to \_\_\_\_\_ under this second issue presented. See, Sanders, 219 Ct. Cl. at 299-300.
44. Also, I find extremely prejudicial \_\_\_\_\_ statement that no matter what information \_\_\_\_\_ presented to the Rating Chain, the information would not have changed the disputed OER. I find \_\_\_\_\_ position and the Coast Guard's position shocking and a manifest injustice which further supports a correction of \_\_\_\_\_ record and demands of relief.

*Other allegations and arguments*

45. Selection boards must consider an officer's record on a "fair and equitable basis." BCMR No. 411-91 (1993), at 2, citing Paskert v. United States, 20 Cl. Ct. 65, 71 (1990); Sanders, 219 Ct. Cl. At 302. In passover cases in which the fairness of OERs or their compliance with agency regulations is at issue, the Board is required to determine whether there is a nexus between the defects in the officer's PDR and his or her passover(s). The nexus analysis requires a two-step evaluation: (1) would the officer's record have been stronger if it had been correctly constituted, and (2) would the officer have been refused extension in any event. See, e.g., Germano v. United States, 26 Cl. Ct. 1446, 1465-66 (1992). The Coast Guard has the burden of proof on this issue. Engles v. United States, 230 Ct. Cl. 465, 678 F.2d 173, 175 (1982).
46. As to the first prong, if the disputed OER had not been in PDR in 1995, his record would have been stronger when he came before the promotion board that year. The disputed OER's reference to his retirement was highly prejudicial. In addition, the OER as a whole is prejudicial because it omits important duties in the prominent § 2, completely fails to evaluate leadership ability in § 11, and contains an unbroken string of mediocre 4s. All of these are in sharp contrast to his prior OER. The result would have been to suggest a dramatic downward trend (for which there is no basis in fact and of which [redacted] received no notice). Without the disputed OER, his substantive OERs would have ended on the high note struck by the report for the period ending March 31, 1992 (which reflected, among other achievements, his receipt of a third Coast Guard Commendation Medal).
47. As for the second prong, absent data as to the curve of OER marks or the relative standing of the other officers who were considered by the 1995 promotion board with him, there is no reliable way for the BCMR to make a determination whether, under the "best qualified" criterion which that board was required to apply, (see 14 U.S.C. §§ 259(a) and 260(b) (1988)), [redacted] would have been passed over in any event. Engel, 230 Ct. Cl. 465; Germano, 26 Cl. Ct. 1446; BCMR 298-86 (1988). In this regard, the Deputy General Counsel noted in 1994 that the Coast Guard had made no argument that [redacted] record was such that he would have been passed over in any event. Secretary of Transportation Decision and Order, BCMR No. 151-92, pp. 2-3. That Decision added there is "no basis from which to make such a determination independently." Id., at 3. The same is true today.
48. As for an analysis concerning [redacted] 1996 passover, the foregoing analysis is adopted in whole and incorporated by reference.
49. Therefore, having found that the Coast Guard has failed to meet its burden of proof on this issue, both passovers should be voided.
50. Finally, a brief discussion of the majority's findings and conclusions. The majority requires the applicant to "corroborate" his evidence while accepting the Coast Guard's evidence on its face. Further, the majority ignores the vast documentary

evidence submitted by . I believe this enhanced burden on the applicant constitutes legal error on the part of the Board.

51. I hereby incorporate by reference paragraphs 1 through 50 as my findings of fact and conclusions of law. Any finding of fact that is more appropriately deemed to be a conclusion of law, and any conclusion of law that is more appropriately deemed a finding of fact is hereby adopted as such, and incorporated by reference.

**Conclusion**

I RESPECTFULLY RECOMMEND to the Deputy General Counsel, acting under delegated authority on behalf of the Secretary of Transportation, that .  
. be granted full relief as petitioned.

Respectfully submitted this 30th day of March, 1997.

