

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-195

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX, LTJG (former)

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on August 24, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 17, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, who was relieved of command of a patrol boat, the CGC XXXX, on April 4, 2007, asked the Board to correct his record by (1) expunging any and all documentation referring to special board proceedings and the delay of his promotion to lieutenant (LT), including memoranda dated May 2 and June 14, 2007; (2) vacating or overruling the special board proceedings as moot; (3) removing his special officer evaluation reports (OERs) for the periods January 26 to 27, 2007 (OER1) and April 26, 2006, to April 4, 2007 (OER2);¹ (4) promoting him to LT immediately; (5) backdating his LT date of rank to May 21, 2007; and (6) awarding him back pay and allowances.

¹ The applicant requested the removal of these OERs on February 25, 2008, several months after his application was docketed. In accordance with 33 C.F.R. §§ 52.26(a)(3) and (c), the Chair advised the applicant that he could amend his request for relief but that the ten-month deadline for a decision in his case would be extended as if his case had been docketed on February 25, 2008. She also informed him that his new request would be submitted to the Coast Guard for further review, since the Coast Guard had just issued its advisory opinion when the applicant's new request for relief was received. In response to the new request for relief, on July 8, 2008, the Coast Guard issued a supplemental advisory opinion, which was sent to the applicant on July 9, 2008. The applicant, having previously been granted an extension of the 30-day period for response, responded to both advisory opinions on August 26, 2008.

SUMMARY OF THE RECORD

On May 21, 2003, upon graduating from the Coast Guard Academy, the applicant was appointed an ensign. After spending the summer as a cadet platoon officer at the Academy, he was assigned to a medium endurance cutter as a deck watch officer (DWO). On his first OER in this assignment, the applicant received marks² of 4 and 5 in the various performance categories, a mark in the 5th spot on the Comparison Scale,³ and the comment that he was “[o]n track & highly recommended for promotion to LTJG w/ peers.” On his second OER as a DWO, the applicant received marks of 5 and 6 in the performance categories, a mark in the 5th spot on the Comparison Scale, and the comment that he was “[d]eserving of forthcoming promotion to O-2, on track for continued promotion with peers.” He was promoted to LTJG/O-2 on November 21, 2004. On this third OER as a DWO and his first as an LTJG, the applicant received primarily marks of 6 in the performance categories, a mark in the 5th spot on the Comparison Scale, and the comment that he was “on track for continued promotions with the best of his peers.”

From May 2005 to early June 2006, the applicant served as the Executive Officer (XO) of a patrol boat stationed in a combat zone. On his two OERs in this billet, which together cover his service from February 1, 2005, to April 25, 2006, the applicant received primarily marks of 5 and 6, marks in the 5th spot on the Comparison Scale, and the comment that he was “[h]ighly recommended for promotion [with] peers.” He also received his commanding officer’s recommendation for command afloat on a patrol boat.

According to the applicant’s DD 214, upon returning stateside, he attended two weeks of “Prospective CO” training and a week of “Antiterrorism/Force Protection” in June 2006 and a week of DWO renewal training in July 2006.

On July 17, 2006, as a 26-year-old LTJG, the applicant took command of the CGC XXXX, with a crew of eleven active duty members. The XXXX’s homeport is Xxx Xxxxxx, xxxxx, and it is a subordinate unit of Sector Xxxxxxx within the xxxxxx Coast Guard District.

The applicant was selected for promotion by the LT selection board that convened on September 25, 2006, and his name was placed on the promotion year 2007 (PY07) LT promotion list, which was subsequently approved by the Secretary on behalf of the President. As a result of this selection and if the applicant’s chain of command had reported no adverse information about him, the applicant would have been promoted to LT on May 21, 2007.

In January 2007, the XXXX entered drydock in xxxxxxx, xxxxx, for regular maintenance and repairs. On February 2, 2007, the xxxxxx District Commander sent the applicant a memorandum regarding his “Temporary Relief for Cause” as CO of the XXXX, which stated the following:

² Coast Guard officers are rated in a variety of performance categories on a scale of 1 (worst) to 7 (best).

³ The Comparison Scale on an OER form is not actually numbered, but as with the performance categories, there are seven possible marks on the Comparison Scale from the 1st (“unsatisfactory”) to the 7th (“a distinguished officer”). For ensigns and LTJGs, a mark in the 3rd, 4th, or 5th spot denotes “one of the many competent professionals who form the majority of this grade.” A mark in the 2nd spot denotes merely “a qualified officer.”

1. You are temporarily relieved of your duties as Commanding Officer USCGC XXXX (WPB xxxxx) under the provisions of [the Personnel Manual]. I am taking this action based on my loss of confidence in your ability to continue to serve in that position. This request is consistent with the Sector Commander's analysis, input and recommendation.
2. As detailed in enclosure (1), you have been repeatedly counseled by your Sector Commander and his staff for repeated lapses in judgment and failure to exercise leadership as Commanding Officer of USCGC XXXX. On 4 Oct 2006, you were involved in an incident involving a near miss with a deep draft vessel that caused your Commander and your Command Cadre to question your judgment. On 16 November 2006, you were involved in an incident responding to a SAR case that resulted in significant questions with regard to your command judgment. Due to that incident, XXXX was not able to sortie the next day for the SAR case. You were specifically counseled by the Sector Commander with regard to these incidents. You failed to respond to this counseling and again demonstrated poor judgment in failing to keep the Sector properly informed with regard to several issues as detailed in enclosure (1).
3. On 26 January 2007, you departed from USCGC XXXX on leave without leaving a qualified person in command. The person who you assigned as Acting was not qualified to act as commanding officer and did not know he was the Acting Commanding Officer. Your response to this violation indicated an absence of an appreciation for what it means to be in command. You were slow to return to your unit and have failed to exercise appropriate leadership since returning to USCGC XXXX.
4. You have failed to uphold your leadership responsibilities. These incidents demonstrate significant lapses in judgment, and have posed unacceptable risks to USCGC XXXX and its crew. Your actions have caused me to lose confidence in your ability to continue to serve in the position of Commanding Officer of USCGC XXXX (WPB xxxxx).
5. You are temporarily assigned to Sector Xxxxxxx while this action pends. You have the right to submit to me a detailed written statement, on your behalf, within five working days of your receipt of this letter. You also have the right to consult legal counsel. If you desire to consult legal counsel, contact ...
6. This action is independent of any potential UCMJ [Uniform Code of Military Justice] action that may be taken based upon the allegations contained in enclosure (1) which are still under investigation.

On February 15, 2007, the applicant submitted a reply to the notification of his temporary relief for cause (RFC). The applicant stated the following in pertinent part:

2. Upon taking command my guiding philosophy has been to champion the chain of command to create a culture of growth and achievement in the pursuit of operational excellence. In short, if it wasn't prohibited, improved morale, maintained discipline and accomplished the mission, I'd do it.
3. I recognized that creating a culture that valued initiative and innovation would be particularly challenging as I was not collocated with my Sector. I initiated command-concern updates monthly through my entire chain of command to the Sector Commander, and weekly through the Response Chief to overcome that challenge. Immediate feedback I received indicated those updates were not appropriate for the Sector Commander. In person feedback I received from the Response Department indicated those emails weren't helpful, so I stopped.
4. XXXX's decline in non-emergent communication with her Sector continued through my seven-month tour. Sector's weekly release of the Command Snapshot, an overview of highlights and upcoming events in our area of responsibility stopped. Highly anticipated Commanding Officer's

conferences turned into a forum for staff presentations, and much needed lessons learned from major evolutions like hurricane evasion and a cruise ship bomb scare were never promulgated. Despite my sense that performance could be measured by silence, I had improvements I felt obligated to make.

5. By engaging my Sector supervisors in person, we reviewed old policy to improve cutter employment standards. Our efforts ultimately overcame the unsustainable and frequent shifts between police-station model to fire-station model operations that were stifling morale, undermining efficiency and jeopardizing cutter performance. Our efforts realized over 5 weeks of motor-lifeboat SAR coverage without degrading XXXX's readiness or mission effectiveness.

6. Operating under the premise that a \$5M asset should be operated with \$5M worth of effort, I corrected cutter practices that were out of compliance with Commandant Instructions. Those corrections resulted in XXXX only logging underway hours when underway and only sailing with an operational communications suite. Additionally, by instituting the practice of realistic training, my crew was not just minimally qualified to do their job, but trained to meet that high level of performance we've come to expect of our cutter fleet. Their performance is documented in XXXX's after-action report of the nighttime interdiction and repatriation of 23 migrants ...

7. I believe I have arrived at this point because my failure to fully recognize that communication was my chief challenge. I continually struggled with performance challenges amongst my command cadre. My personal problems unavoidably filled the communication void and my supervisors recognized my attempt to take on command alone. While I was initially grateful for their effort to mentor, coach and protect me, I quickly became defensive to the new oversight as the boundaries blurred with their role as supervisors. Sector queries and my ego met with increasing amperage until our working relationship collapsed.

8. I appreciate the opportunities the Coast Guard has provided me, and the level of responsibility it has afforded me this early in my career. I'm particularly grateful for the experience of working with truly incredible officers whose influence has taught me to fear mediocrity, base initiative on innovation and the privilege of public service. I would like nothing more than to apply the lessons I learned from my 7 months in command and the last 2 weeks debriefing it, towards continued service.

On February 28, 2007, the applicant was taken to mast by the Sector Commander and awarded a Punitive Letter of Admonition as non-judicial punishment (NJP) for two violations of Article 92 of the UCMJ (dereliction of duty and failure to obey an order) committed on January 26 and 27, 2007. The Punitive Letter of Admonition, which was entered in the applicant's record as an attachment to OER1, and was delivered to the applicant on March 2, 2007, states the following:

1. In accordance with [Article 15, UCMJ, which concerns NJP; Article 1.E.2.a. of the Military Justice Manual; and Article 8.E.2. of the Personnel Manual], you are hereby ADMONISHED for your conduct on 25 and 26 January 2007 at xxxxxxx, xxxxx. You were derelict in your duties as Commanding Officer of USCGC XXXX when you left the cutter on leave and in the absence of the Executive Petty Officer (XPO) or any other person qualified and properly designated to assume Command. You also failed to obey an order to promptly return to the cutter and resume Command. By your actions, you placed the cutter and crew in jeopardy and you failed to fulfill your duties and responsibilities as Commanding Officer.

2. You are advised of your right to appeal to Commander, xxxxxx Coast Guard District in accordance with [Article 1.F. of the Military Justice Manual].

On March 1, 2007, the applicant's Supervisor notified CGPC-opm in an email that Sector Xxxxxxx "believe[s] that the PERSMAN requires that the promotion (May 2007) of [the applicant] be delayed due to imposition of NJP until his record can be reviewed by CGPC (opm). Yesterday, [the applicant] went to mast. He was found in violation of Article 92 – Dereliction of Duty and Article 92 – Failure to Obey an Order. He was awarded a Punitive Letter of Admonition. Our plan is to allow him his five days to file an appeal if he chooses to. Assuming no appeal is entered, we will prepare a recommendation to the District Commander for a PRFC at that time." The Supervisor also acknowledged that the Sector needed to prepare a special OER to document the NJP and a derogatory OER "[o]nce RFC becomes permanent."

On March 9, 2007, the District Commander notified the applicant that he was recommending to Commandant that the applicant be permanently relieved for cause.⁴ On March 16, 2007, the applicant submitted a reply to the Commandant through his chain of command, stating the following:

1. I have reviewed [the temporary and permanent RFC notification letters] and would like to respond to the stated grounds for my permanent relief for cause recommendation. [The District Commander] asserts that I've 1) continually made unsound operational and administrative decisions despite repeated counseling, 2) ignored the advice of my Engineering Petty Officer, and 3) failed to follow the advice of my chain of command. I disagree with the District Commander's analysis and respectfully request that you review this letter, the above references and all their enclosures before making a final decision to permanently relieve me for cause. I understand the basis for my temporary relief for cause, but I believe a permanent relief for cause is an extreme measure not suitable under these circumstances. I respectfully request instead to be transferred and given an opportunity to put into practice the lessons I have learned from this situation.

2. I am not aware of the repeated counseling sessions cited in the [temporary and permanent RFC notifications]. There were a number of brief conversations I had with the Sector Commander and his senior staff that took place to clarify facts. I did not realize these were intended to be counseling sessions. Had I realized these conversations were indeed counseling sessions, I would have responded accordingly without question. I appreciate that regardless of my understanding, I should have been more attentive. However, I do not believe that this is a basis to permanently relieve me.

a. I met the Sector Senior Staff on 9 Nov to discuss administrative errors I made handling a good order and discipline issue of a non-rate. My sense from that meeting was I'd lost my Deputy's confidence and severely shaken the Response Chief's. Before departing, I met with the Sector Commander who reassured me of his confidence in my ability to command. He also mentioned if I was guilty of anything it was being overzealous in handling a good order and discipline issue.

b. I met with the Sector Commander again on 14 Dec when he informed me my Chiefs had informed him, through the Sector Command Senior Chief, that I'd hazarded XXXX on two separate occasions. The Sector Commander informed me he ordered an administrative investigation into the M/V KYRIAKOULA incident but thought the F/V BIGGINS case was a non-issue. He also told me he was particularly concerned as my Chiefs (XPO/EPO) went around me, and if their allegations didn't have merit it would constitute insubordination. He also told me he'd be issuing me a letter of censure to "cover himself," which I fully appreciated. I realized at that point I'd lost my Sector Commander's confidence in my ability to command.

⁴ No copy of this March 9, 2007, permanent RFC recommendation notification appears in the record, but the applicant referred to it repeatedly in his reply to Commandant.

c. That day I also met with the Deputy and Response Chief. I told them of my reluctance to address my Chiefs' insubordination due to the perception of reprisal, especially amidst an ongoing investigation. I was unable to ever address this insubordination as the investigation was completed the day my XPO departed for CPO academy and XXXX's departure for drydock, where I was relieved.

d. The 4 Jan counseling I had with the Sector Commander lasted 2 minutes. Though the M/V KYRIAKOULA investigation was not yet complete, I received the letter of censure including inaccurate findings of that investigation. The counseling ended when I told the Sector Commander I was concerned with factual discrepancies throughout the letter. I was contacted by the Response Chief and told to provide an email addressing the factual discrepancies which would be filed with the letter of censure. I also spoke separately with the Deputy about my suggestion that I draft a formal reply addressing the discrepancies. She convinced me it was not worth the effort and instead to move forward. For that reason I discounted the contents of the letter of censure and the counseling I received by the Sector Commander, understanding the purpose of both was to "cover" the Sector Commander.

e. The 24 Jan counseling I had with my Sector Commander was part of our weekly leadership discussion. In that phone conversation he told me the M/V KYRIAKOULA investigation was complete and it revealed the incident wasn't nearly as concerning as he was led to believe. He also said he would be issuing me an action memo instructing me to do some things he knew I'd already done, including updating the CORM, verifying navigation standards and verifying log requirements as they were completed after the M/V KYRIAKOULA incident. I really didn't receive that final action memo until after I was relieved; however I did take that 24 Jan conversation as renewed validation of his confidence in my ability to command.

3. My perception of how I responded to the advice of my Engineering Petty Officer (EPO) is not the same as the District Commander's. My decisions executing the F/V Biggins SAR case on 16 Nov 06 were based entirely on the advice of my EPO. Only after verifying the cutter's endurance and consulting with the EPO did I respond. I disagree with the assertion in [the notification regarding permanent RFC] that I moored with an unacceptably low fuel state contrary to an expectation managed by Sector, District or Service guidance. While I requested and received both an escort and a 4-hour crew fatigue status in light of XXXX's extended exposure to an extreme sea-state, it was ultimately the CAT-IV casualty cited in [the notification regarding permanent RFC] that prevented our protracted participation in this SAR case.

4. I have never been insubordinate nor questioned my supervisors' qualifications, even in private. If I dissented to a decision, my objection was rare, private and made only once before adopting that decision as my own. While I believe my dissent has been taken as disloyalty, the [enclosures to the temporary and permanent RFC notifications], especially those emails written by me, document that simply is not the case. Though the continual criticism of my judgment despite my unit's consistent operational successes over time left me less than receptive to performance feedback, it never interfered with my ability to take tasking for action, nor my command responsibility to provide direct, honest feedback up the chain of command.

5. I am particularly upset by the suggestion that I refused to take advice. It was my effort to seek advice in handling the insubordination issues challenging XXXX that led to the miscommunication ultimately resulting in my Letter of Admonition. The details of that investigation are included in enclosure (1) of enclosure (2) of [the notification regarding permanent RFC].

a. My Sector Commander found I was derelict in not appropriately appointing a member to command in my absence, and slow to return to resume command. While I understand I made mistakes in how I handled my departure, and delegated my authority, I assert that I was more in command during the 20 hours in question than in my 2 days onboard (2-4 Feb) when I'd been unknowingly relieved of command. This assertion is evidenced by my 1) balancing a dynamic,

accelerated drydock schedule, 2) a pending Sector-assisted NJP proceeding and 3) providing guidance to my supervisors handling a government vehicle accident, during the 20 hours in question.

6. It is my sincerest regret that my failure to maintain the confidence in my ability to command has left XXXX operationally ineffective and placed a tremendous load on the crew of CGC XXXXX. I'm indebted to all the officers that have helped manage the operational load I couldn't.

7. I appreciate the time it takes to review this letter and its references. While I wish I wasn't responsible for taking this time away from the service's business, I want nothing more than to continue serving in the Coast Guard and not be permanently relieved for cause.

Disputed OER1, which was prepared in late March 2007, is a special OER covering the applicant's performance during a two-day period from January 26 to 27, 2007. Block 2 explains that OER1 was "submitted under Article 10.A.3.c.1.b. due to NJP awarded for violation of UCMJ Article (92), Failure to obey an order & Article (92) Dereliction of duty. Awarded a Punitive Letter of Admonition." Most of the performance categories in OER1 are marked "not observed," but the rating chain included the following low marks and comments:

2 for "Professional Competence"

[The applicant] was found to have committed a violation of Article 92 of the UCMJ, Dereliction of Duty, in that on 26 January 2007 [he] failed to leave USCGC XXXX under the command of a qualified individual in mbr's absence. Mbr was also found to have committed a violation of Article 92, Failure to Obey an Order, in that after being ordered to return to XXXX by the Chief of Response, [he] delayed his return by over 28 hours in violation of that order. Both of these behaviors exhibit performance well below the expectation of professional competence for a cutter Commanding Officer.

2s for "Directing Others" and "Teamwork"

Upon [the applicant's] departure from USCGC XXXX at the Master Marine shipyard in xxxxxxx, xx on 26 January 2007, mbr released a CO departure message in CGMS listing a BM1 as Acting Commanding Officer. Upon questioning by the Chief of Response, [he] admitted knowing that the BM1 was not on XXXX's Succession to Command letter because the BM1 had not yet qualified as an underway Officer of the Deck (OOD). However [the applicant] decided to put the BM1 in charge against Shipboard Regulations because XXXX was on blocks in the drydock with no possibility of getting underway. Mbr took this action without consulting or informing the Chief of Response or anyone on the Sector xxxxxxx staff. Upon further investigation, the BM1 in question departed XXXX with [the applicant] to XXXX's homeport of xxx xxxxxxx, an approximately 9 hour drive from the cutter in xxxxxxx, AL. The BM1 had not been informed he would be Acting Commanding Officer. The BM1 thought the MKC Engineering Officer was Acting Commanding Officer. This incident highlights [the applicant's] inability to properly direct mbr's crew or exercise the team cooperation expected of a Commanding Officer.

2 for "Judgment"

[The applicant] exercised poor judgment when he left his cutter "not under command" in the yards. Member's poor analysis and understanding of a WPB CO's authority and the fundamental nature of command led to a very bad decision. It also demonstrates a serious lack of risk management skills in an operational setting.

Comparison Scale mark in 2nd spot: “A qualified officer”

Potential: [The applicant] was already selected for O-3 based on performance at previous unit, but the member’s promotion & record should be reviewed due to this NJP. Recent actions in the high risk environment of WPB operations indicate that member is not prepared at this point in time to assume duties with increased responsibilities. Member should be assigned to a staff position where member will be given ample opportunity to hone leadership and management skills and again demonstrate high performance.

OER1 was signed by the Chief of the Sector Response Department, as the applicant’s Supervisor, on March 26, 2007; by the Deputy Sector Commander, as the applicant’s Reporting Officer, on March 27, 2007; and by the Sector Commander, as the Reviewer, on March 29, 2007. However, Sector Xxxxxxx’s published rating chain, which was issued on February 8, 2006, shows that the designated rating chain of the CO of the XXXX was the Chief of the Response Department as Supervisor; the Sector Commander (rather than the Deputy Sector Commander) as Reporting Officer; and the xxxxxx District Chief of Response (rather than the Sector Commander) as Reviewer. OER1 bears a stamp indicating that it was received from Sector Xxxxxxx and validated by the Coast Guard Personnel Command (CGPC) on April 18, 2007.

On April 4, 2007, the applicant was permanently relieved of command of the XXXX due to loss of confidence by Acting Commandant (CG-12). On May 2, 2007, a lieutenant in the Officer Personnel Management Division (opm-1) of CGPC, sent the applicant a memorandum regarding a “Delay of Promotion,” which stated the following:

1. You were scheduled for promotion to LT on 21 May 07. However, based on the information contained in [the email from the applicant’s Supervisor to CGPC-opm dated March 1, 2007], your promotion is delayed in accordance with Article 5.A.13. of [the Personnel Manual]. You will be contacted when it has been determined that either you will be promoted or further administrative action is necessary.
2. Your command shall ensure that you notify Commander, Coast Guard Personnel Command (opm-1) immediately upon receipt of this letter.

On May 15, 2007, the applicant acknowledged receipt of this memorandum and asked for a copy of the email from Sector Xxxxxxx to CGPC-opm dated March 1, 2007. The lieutenant at CGPC-opm replied the same day and forwarded the applicant a copy of the requested email.

OER2 covers the period April 26, 2006, through April 4, 2007,⁵ and was prepared in early May 2007 to document the applicant’s permanent RFC pursuant to Article 10.A.3.c.1.e. of the Personnel Manual. OER2 is a “derogatory” report.⁶

⁵ During the first 37 days of this period, the applicant was still serving as the Executive Officer of the XXX. He received a Navy and Marine Corps Achievement Medal dated May 9, 2006, for his service on the XXX, and the citation for the medal is attached to OER2.

⁶ Under Article 10.A.4.h. of the Personnel Manual, any OER that documents an officer’s removal from his primary duty due to poor performance or misconduct is considered “derogatory,” and so the officer is allowed to attach an addendum of written comments to the OER for entry in his record. U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL, Art. 10.A.4.h. (Change 40, 2005) (hereinafter “PERSONNEL MANUAL”).

MARKS AND COMMENTS IN OER2

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	3	<p>“Established a pattern of poor operational planning & lack of professional competence/adaptability. Prior to reporting to XXXX, failed to allow time to take second DWO exam accounting for mandatory re test waiting period required Sector to request last-minute HQ waiver to retake in sufficient time to execute orders as CO. Twice arrived in port on near-minimum fuel, the second time only one day after formal counseling on the same issue by Sector CO. Failed to follow proper risk management or prudent seamanship in near miss with commercial vsl w/ embarked pilot in xxx Xxxxxx. Invited media to ride along on potential migrant case in violation of public affairs guidance & w/o prior coord w/co-located Station CO; media did not embark aboard cutter and Station & cutter OODs had to escort them. Was argumentative and resistant to counseling on subject asserting that decision was right until presented w/ existing public affairs AMIO [alien migrant interdiction operations] guidance that mbr should have researched in advance. Demonstrated appropriate skills for administrative tasks before departing XXX; arranged & executed Joint Civ. Orientation Course (JCOC), demonstrating CG capabs & role in GWOT. Conducted smooth reliefs/changes of command for both XXX and XXXX. Scheduled projects to max XXXX’s 48-day drydock. Put XXXX on pace to exceed FY06’s 96% training completion rate. Assisted in early completion of FY07 WPB sked w/ sister WPB and boat manager.”</p>
3b	Using Resources	4	
3c	Results/ Effectiveness	4	
3d	Adaptability	3	
3e	Professional Competence	3	
4a	Speaking and Listening	3	<p>“Communications skills fell below expectations. Demonstrated reluctance to listen to advice, even when mbr had specifically requested assistance. When mbr found inconsistencies between pub & advice, mbr chose to act independently, requiring Sector staff to correct improper paperwork. Mbr resisted tasking to report to Sector for performance counseling; failing to understand a request by a more senior officer is an order. Writing skills equally sub-standard; wrote voluminous insubordinate e-mails defending own actions w/o making clear or valid points.”</p>
4b	Writing	3	
5a	Looking Out for Others	4	<p>“Leadership skills did not meet expectations; mbr is dedicated to mission performance but is ineffective at building teams and directing crew, resulting in unhealthy command climate aboard XXXX and increased work for Sector staff in correcting mbr’s actions. Inappropriately withheld cell phone privileges from mbr w/o NJP against XX legal advice. Own Chiefs sought advice fm Sector Cmd Chief due to negative command climate & their inability to establish daily routine due to mbr’s unpredictable actions. Mbr had difficulty building crew into a cohesive team; isolated self from crew during drydock; did not eat w/ crew nor meet w/ them for 5 days in one stretch; had to be ordered to meet daily w/ EPO during drydock. Took unnecessary risks with cutter without clearly communicating intentions to Sector, including TAD training plan while XPO was simultaneously TAD. Did not work well w/ Sector staff; advised Sector CO of issues prior to seeking resolution w/ staff. Became frustrated with speed of service from Sector admin & command center, failing to recognize that Sector’s nine other sub-units share support from same staff. Mbr did exhibit care for OCONUS crew of XXX; worked w/ Lant Area legal to alleviate mbr’s financial liability for third party damage to gov’t vehicle; enabled another mbr to take paternity leave fm xxxx.”</p>
5b	Developing Others	4	
5c	Directing Others	3	
5d	Teamwork	3	
5e	Workplace Climate	4	
5f	Evaluations	4	
6	Signature of the Chief of the Response Department, dated May 4, 2007		
7	Reporting Officer’s Comments	NA	<p>[Concurred with Supervisor’s evaluation.] “[The applicant] failed to perform as expected from a WPB CO in a demanding Sector multi-mission environ. Struggled to temper eagerness to complete oper missions w/ proper execution of assigned missions & correct use of chain of cmd. Mbr often expressed indignation at Sector oversight. Initially seemed to respond to counseling, then repeated some of behavior for which specifically counseled. Technically proficient; kept XXXX’s op hours & trng plans well on track & made good preps for drydock. However, had trouble with teamwork w/in unit & w/ Sector staff elements.”</p>
8a	Initiative	4	<p>“Mbr challenged beyond performance & leadership abilities working independently as WPB CO. Demonstrated initiative; helped create WPB SAR standby periods for MLB maintenance periods. Insightful feedback fm migrant transfer at sea/repatriation will aid in future Sector cases. Demonstrated questionable judgment & poor risk assessment skills. Got u/w [underway] for SAR case w/out prior fueling, didn’t notify SMC or request early release fm SAR pattern, resulting in unnecessary risk to cutter & crew. Lost sit[ua]tional awareness & didn’t properly brief Sector on close quarters nav situation w/ commercial vessel until issue was highlighted by XXXX chiefs to Sector Cmd Chief. Didn’t fully analyze & research CG policies before making decisions. Struggled w/ properly addressing personnel issues; on several occasions dismissed legal & Sector advice including filing add’l CG-3307s after Deputy advised against it. Resulted in improper admin in</p>
8b	Judgment	2	
8c	Responsibility	4	
8d	Professional Presence	5	

8e	Health & Well-Being	5	case of poor-perf nonrate & increased workload for Sector staff. Good professional presence & conveyed positive image of CG to public. VADM complimented appearance of XXX/crew while hosting JCOC mbrs. Enforced 3 times/wk XXXX crew workouts; maintained own personal fitness."
9	Comparison Scale	2	[A mark of 2 means that in comparison with all the other LTJGs he has known, the Reporting Officer rated the applicant as "a qualified officer."]
10	Potential	NA	"Despite best efforts of Command, [the applicant] did not develop as hoped. Made critical errors in judgment early; often resulting in add'l work for remainder of Sector staff. Several verbal counseling & coaching sessions proved fruitless as mbr rejected advice fm seniors & continued to struggle. [He] is a very intelligent JO with a strong operational background who initiated a number of constructive initiatives. However, mbr's brash demeanor hampers ability to build camaraderie and confidence in abilities. Already selected for O-3 based on previous performance. Mbr relieved of cmd of XXXX due to loss of confidence. Not recommended for increased responsibilities ATT [at this time]."
11	Signature of the Deputy Sector Commander as the Reporting Officer, dated May 4, 2007		
12	Signature of the Sector Commander as the Reviewer, dated May 23, 2007		
REVIEWER COMMENTS			
<p>Despite a history of strong performance, this officer was not ready for Command. Perhaps because of the super-high OPTEMPO and non-traditional missions/operational relationships experience as XO of the XXX, ROO was pre-disposed to take unnecessary risks, quick to dismiss advice and direction from others, and unable to leverage or develop the experience and expertise of his crew, particularly the CPOs. These short-comings could have been overcome in almost any other O2 position that allowed more leeway for professional growth. As a Commanding Officer, however, the risks to the crew and the mission were too high to continue to allow ROO to struggle with these responsibilities.</p> <p>Given the low tolerance for failure and associated high career risk that comes with assignment as CO, particularly in relation to other O2 assignments, ROO should be given every chance to continue CG career, and to be promoted to O3.</p>			

Prior to the Sector Commander's review of OER2 on May 23, 2007, the applicant, as the Reported-on Officer (ROO), submitted the following addendum addressing the negative comments in OER2, which was endorsed by the rating chain and forwarded to CGPC with OER2:

Comment: Poor operational planning pattern, lack of competence/adaptability demonstrated by DWO exam, fuel levels, near-miss, media invite.

Views of ROO:

DWO exam. Before returning stateside, twice requested later change-of-command date. Last-minute combat tour extension to 13 months as XXX XO, 80 days accumulated leave, no regular leave taken en route, only departing member of XXX unable to take 30 consecutive days of regular leave upon return to U.S. Operated in a region famous for Coast Guard's most intense OPTEMPO, on a cutter that logged the highest OPTEMPO of all CG patrol boats and Navy patrol craft (5500 hrs), citation documenting operational demands and performance attached to OER.

Fuel levels. Sector, District, Area, HQ have never promulgated a fuel-level expectation outside of hurricane season. Letter of Censure⁷ dated 4 Jan 07 cited ROO ignored "safe operational standards" without promulgating or citing a class-wide fuel standard.

Near-miss. Risk-based decision by ROO to get [underway] for tanker mooring vice remain anchored, determined to ensure cutter safety vice relegating both ships' safety to ship driving ability of unknown pilot.

Media-invite. 3-month-old public affairs detachment endorsed program. Involved same operational risk as when taking media underway for a scheduled ride-along. "Argumentative" and "resistant" comment not supported by read of email concurrent with incident; ROO obligated by position to provide direct honest feedback and express concerns up the chain of command; expres-

⁷ The applicant indicates that on January 4, 2007, he received an Administrative Letter of Censure for returning to port with very little fuel. As such letters are handed directly to an officer and are not entered in an officer's military record, no copy of this letter is in the record before the Board.

sion of views factual, focused, organized, and respectful in tone and content. OOD did not escort media; ROO did.

Comment: Communications skills—Reluctance to take advice. Acting independently amidst discrepancy between COMDTINST (referred-to publication) and advice. Fails to understand request by senior officer is really an order. Writing skills sub-standard, voluminous insubordinate emails failed to make clear or valid points.

Views of ROO:

COMDT guidance to FY07 promotion boards encourages promotion of officers with a bias for action. ROO acted in accordance with COMDTINST, perceived instruction from higher authority as an order vice “advice” from a lesser authority as advisory/interpretative. Performance counseling was less than a month from end of marking period. Emails explaining ROO’s actions were requested from superior; emails deferential in tone, factual, on-point, honest, and well-written.

Comment: Leadership skills—Ineffective team builder/crew director demonstrated by unhealthy command climate and increased Sector workload.

Views of ROO:

Team builder/crew director. ROO was catalyst for horizontal communication. Championed “team Xxxxxx” uniting effort of STA Xxxxxx and MSD Xxxxxx for cross-training and joint boardings. Led team of COs in creating new operating model incorporating cutter and station schedules around chronic motor-lifeboat casualties. Directed crew in 2 major protracted SAR cases, one extended migrant interdiction/repatriation and 1 accelerated drydock all in less than 7 months.

Unhealthy command climate. Improved climate was contingent on enforcing performance standards within framework of COMDTINST. Report of command climate issue was incident to XPO/EPO receipt of performance counseling and circumventing chain of command. Subsequent investigation crippled the command as it undermined CO’s authority and prohibited unit’s foremost command concern from being addressed: insubordination.

Increased Sector workload. Comment not substantiated. XXXX’s parent command is her only support command.

Illegal withholding of privileges. Policy (SORM) was being rewritten; crew couldn’t use cell phone during workday; enforcing policy already in place. Crew’s liberty and “recall-ability” during short-notice standby contingent on personal cell phones, standards promulgated in SORM.

Chiefs unable to establish daily routine due to ROO’s unpredictable actions. Drafting and enforcing plan of the day is XPO’s responsibility. EPO has no role establishing daily routine. ROO’s actions segregated responsibility IAW CG Regs. CO’s/ROO’s documentation of chronic performance deficiencies in XPO kicked off climate report to Sector Command Senior Chief. ROO denied the opportunity to address issues with XPO, due to ongoing investigation.

Isolation in drydock; ordered to meet daily with EPO. Assessment and order made from 430-mile distance without on-scene perspective. ROO consistently acted in best interest of XXXX. ROO well practiced in leading a crew on small units on long deployments in challenging environment. XXX averaged 25 days [underway] each month in combat zone for 1 yr. XXXX spent 3 weeks away from homeport for hurricane evasion and SAR standby. At time of RFC, in drydock for only 20 days. ROO had no knowledge of specific expectation for the frequency of dining or meeting with crew; experience is healthy level of separation is critical for unbiased decision-making and exercise of NJP authority. Five days at issue were during time Sector authorized ROO’s 14 days of [temporary active duty] for training and associated leave en route.

Advised Sector CO of issues before seeking resolution with staff. ROO advised Sector Commander in relief letter of intention to submit command concerns within a month. ROO submission cc’d the entire chain of command, and explicitly stated the content was not for action but for transparency. ROO acted in good faith and believed it appropriate for CO to forward his command concerns to his operational commander.

Frustrated with speed of Sector support. ROO recognized support demands of Sector staff; ROO believes frustration justified. Highlighted by XXXX XPO requesting a Sector-appointed investigating officer (IO) due to the small crew size—on the advice of Sector. Took a

month for the IO to submit the investigation to Sector, skipping XXXX altogether. Another month passed without XXXX receiving the investigation.

On June 14, 2007, Commander, CGPC sent the applicant a memorandum regarding “Proposed Board Action,” which stated the following:

1. Action has been initiated under Article 5.A.13. of [the Personnel Manual] to convene a board of officers to recommend whether or not your name should be removed from the PY07 Lieutenant Selection list. This panel will review your CG PC Personnel Data Record (PDR) and all documents related to [OER1; the Sector’s email to CGPC-opm dated March 1, 2007; and CGPC-opm’s memorandum to the applicant dated May 2, 2007].
2. Commander, Coast Guard Personnel Command (CGPC) may initiate special board action when information of an adverse nature is discovered. In your case, this action was initiated up receipt of [OER1], which documents NJP for violations of the UCMJ – Article 92 (Dereliction of Duty) and Article 92 (Failure to Obey an Order). In conjunction with the NJP proceedings, you were awarded a punitive letter of admonition. Specifically, on 26 Jan 2007, you “failed to leave CGC XXXX under the command of a qualified individual in his absence.” Also, “when ordered to return to the ship by the Chief of Response, [the applicant] delayed his return by over 28 hours in violation of that order.” As a result of these actions, you were relieved for cause as the CO, CGC XXXX.
3. Your scheduled promotion to Lieutenant on 21 May 2007 has been withheld pending the outcome of special board action.
4. You are extended an opportunity to submit comments on your behalf. Comments must be submitted to Commander, Coast Guard Personnel Command (CG-opm-1) via your chain of command as soon as possible upon receipt of this notification. To establish the date of notification, your command shall ensure that you execute and return the attached endorsement to Commander, Coast Guard Personnel Command (CGPC-opm-1) immediately upon receipt.
5. If you have any questions, you may contact ...

On June 19, 2007, the applicant acknowledged receipt of the memorandum dated June 14, 2007, and indicated that he would submit a statement on his own behalf. The proceedings of the special board of officers are not in the record, but the applicant was removed from the promotion list as a result of the proceedings, which constituted a “failure of selection.” He was not selected for promotion in 2007. As a result of this second failure of selection, he would have been involuntarily discharged from the service on June 30, 2008. Instead, he requested resignation and was honorably discharged on May 22, 2008, upon completion of his five years of required active service.

APPLICANT’S ALLEGATIONS

Allegations About the Denial of Promotion

The applicant alleged that he was removed from the LT promotion list in contravention of statutory authority and caselaw. His name appeared on the list of LTJGs selected for promotion to LT issued on November 1, 2006, and so he should have been promoted on May 21, 2007. However, on May 2, 2007, he was notified in writing that his promotion would be delayed. He alleged that the action to delay his promotion was undertaken by a lieutenant—someone without

authority and that the delay violated 14 U.S.C. § 271(f), which states that “[t]he promotion of an officer who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed without prejudice by the Secretary until completion of the investigation or proceedings.” The applicant alleged that in May 2007 he was not under investigation, he was not facing court-martial, and there was no “pending” board of officers.

The applicant stated that he was not notified that a board of officers would review his fitness for promotion until July 19, 2007, when he was shown a letter headed “Proposed Board Action” dated June 14, 2007. Therefore, there was no board of officers pending in May 2007 and he should have been promoted on schedule. The applicant argued that the meaning of “pending” in 14 U.S.C. § 271(f) was directly addressed in *United States v. Law*, 11 F.3d 1061, 1065-66 (1993), as follows:

Law’s further argument is that the delay was unlawful because no proceedings were “pending” before the board of officers as required by § 271(f) to sanction a delay of his promotion otherwise scheduled for June 1, 1990. There is no dispute that the officers of the Special Board were not selected until June 11, 1990, which was after Law’s originally scheduled promotion date. In Law’s view, specific officers must have actually met or convened by June 1, 1990 for proceedings to be “pending” before June 1. Judge Andewelt ruled that proceedings were pending against appellant from “the date on which the Special Board was approved, rather than the date on which it first convened.” 26 Cl. Ct. at 387 n.5. Again, we agree.

On April 25, 1990, the Chief of Personnel and Training referred the matter to a board of officers to be convened for the specific purpose of determining whether Law’s name should be removed from the active duty promotion list. The selection of officers for the Special Board thereafter was merely ministerial. We conclude that the interpretation of § 271(f) that matters were “pending” from the date the board was authorized does not conflict with any provision of any applicable statute and is reasonable. By analogy, court proceedings are “pending” before a case is assigned to a particular judge or judges. Accordingly, we cannot agree with Law that § 271(f) was improperly interpreted by the trial court.

Therefore, the applicant argued, under *Law*, a board of officers is only “pending” as of the date it is authorized. Since the applicant was not referred to a board until June 14, 2007, no board of officers was pending in May 2007, and he should have been promoted on schedule on May 21, 2007. Therefore, the applicant alleged the Coast Guard’s failure to promote him on May 21, 2007, was illegal, and he should be promoted illegally and awarded back pay and allowances. The applicant further alleged that if he had been properly promoted on May 21, 2007, there would have been no need for a board of officers to decide whether he should be promoted. Therefore, the proceedings of and any references to the board of officers should be removed from his record.

Allegations about Both Disputed OERs

In his addendum to his application, the applicant alleged that OER1 and OER2 should be removed from his record because they contain misstatements of significant hard fact. In addition, he alleged that both OERs were prepared in violation of the Personnel Manual because they were not prepared by his designated rating chain. Whereas both OERs were signed by the Deputy Sector Commander as Reporting Officer and the Sector Commander as Reviewer, the applicant alleged that his designated rating chain did not include the Deputy Sector Commander. Instead, the Sector Commander was his designated Reporting Officer and the Chief of Response

for the District was his proper Reviewer. In support of this allegation, he submitted a copy of "Sector XXXXXXX Instruction 1611.1," dated February 8, 2006, which contains a chart showing that the rating chains of all the officers in Sector XXXXXXX. The chart shows that the rating chain of the CO of the XXXX and another cutter includes the Chief of the Response Department as the Supervisor, the Sector Commander as the Reporting Officer, and the xxxxxx District Chief of Response as the Reviewer. The applicant alleged that the impermissible alteration of his rating chain was a prejudicial violation of the Personnel Manual and that the Deputy Sector Commander who erroneously acted as his Reporting Officer made erroneous comments and marks in the OERs.

Allegations about Errors in OER1

Regarding OER1, the applicant alleged that there is no evidence to support the claims therein that he failed to leave his vessel under the command of a qualified individual and that, upon being ordered to return to the vessel, he delayed his return by 28 hours in violation of Article 92 of the Uniform Code of Military Justice (UCMJ). The applicant argued that although Article 10.A.4.c.4.e. requires OER comments to be "sufficiently specific to paint a succinct picture of the officer's performance," neither OER1 nor the Punitive Letter of Admonition he received cited any policy or order that he had violated. Moreover, he alleged, the person he left in command had been "designated in accordance with existing Coast Guard policy." In addition, the applicant alleged that when he was ordered to return to his vessel, he did so "as quickly and safely as possible." He argued that because nothing in his record explains with specificity why his conduct was punishable, the negative claims in OER1 are erroneous and unjust.

Allegations about Errors in OER2

Regarding OER2, the applicant alleged that the comments in this OER are not objective or supported by evidence. He noted that he detailed the misstatements of fact in the addendum he prepared for OER2 to no avail as nothing was changed. The applicant alleged that the misstatements of fact in OER2 result from the Deputy Sector Commander's improper insertion of himself in the applicant's rating chain.

Regarding the comment in OER2 about poor planning, the applicant explained that his deployment on the XXX was extended from 12 to 13 months without notice. As soon as he was informed of the extension, he requested a later report date to the XXXX to no avail. Therefore, he had an entire month less time to prepare for his assignment to the XXXX than was expected and should not be blamed for not having had time to complete the DWO qualifications. Because of the extension of his deployment, upon arriving in the United States, he had no chance to take leave and was required to report immediately for several weeks of mandatory training and, from training, he had to report immediately to the XXXX.

Regarding the comment about fuel levels, the applicant argued that neither the Sector Commander nor the District had set fuel endurance standards. He stated that he was criticized for returning to port with an 18% fuel level on November 16, 2006, after the XXXX responded to an urgent SAR and for mooring for drydock with a 20% fuel level, which he had done "to

minimize fuel-storage costs.” The applicant stated that these fuel levels provided “a safe reserve of over 5 hours and 50 nautical miles of endurance at XXXX’s designed cruising speed.”

Regarding the comment about the “near miss” with another vessel, the applicant stated that the investigation showed that on October 4, 2006, the XXXX unmoored at 1610 hours “to clear the way for an inbound commercial vessel. [The applicant] maneuvered CGC XXXX to the west to maintain station, clear of the commercial vessel, during the commercial vessel’s mooring evolution.” The applicant alleged that the investigator concluded that his actions were not “reckless.” In addition, the applicant alleged that his CPOs did not report the “near miss” to his chain of command until the day after he had prepared a negative Page 7 for the XPO due to his missing a routine deadline for the third month in a row.

Regarding the comment that he violated public affairs guidance and was argumentative, the applicant alleged that

[t]he media was invited to ride along for a SAR case on 2 Dec 2006 in accordance with District x’s Public Affairs Detachment (PADET) endorsement of XXXX’s public affairs program dated 10 August 2006. I was the media’s only escort. The subject news crews did not get underway with XXXX due to a casualty to XXXX’s main propulsion plant. The public affairs guidance referred to was promulgated and dated 18 Dec 2006. The only exchange I had with my supervisor on the subject was her emailed suggestion that my crew film footage, and my reply stating safety concerns for a minimally manned unit sparing crewmembers for filming footage while engaged in an all-hands evolution.

Regarding the comment that he failed to listen to advice that he had specifically requested, the applicant alleged that it refers to the Deputy Sector Commander’s disagreement with his decision to dismiss a Report of Offense against a non-rate on his crew who had recurring disciplinary problems in lieu of issuing the non-rate a negative Page 7. When the non-rate filed an EEO complaint against the applicant, the Deputy Sector Commander ordered the applicant “to hold prepared documentation from being submitted into [the non-rate’s] record, undermining [the applicant’s] ability to maintain good order and discipline.” The applicant alleged that the Sector staff never had to correct any improper paperwork, and that this comment contradicts another comment in OER2 that says he “demonstrated appropriate skills for administrative tasks.” Regarding the comment that he withheld a member’s cell phone privileges against advice, the applicant stated that he encouraged his XPO and CPOs to enforce the Coast Guard’s existing policy prohibiting cell phone use during the work day. Moreover, he alleged, the advice he sought from the District legal office validated this course of action.

Regarding the comment that he resisted an order to report to the Sector for performance counseling, the applicant alleged that the comment reveals the existence of “a coercive command climate that ignored the special trust and confidence inherent in command.” He alleged that he never resisted any such tasking but merely questioned the necessity of the performance counseling since his performance evaluation was due in a few days. The applicant further stated that his CPOs complained to the Sector that he was hazarding the XXXX on December 11, 2006; his presence at the Sector was requested on December 12, 2006, “for counseling on formatting marks input”; his concerns about the timing of the counseling were raised and answered on December 13, 2006; and on December 14, 2006, he reported to the Sector office, where he was informed of his CPOs’ allegations and received marks formatting counseling.

Regarding the comment that he was ineffective at building teams and directing the crew, which created an unhealthy command climate on the XXXX, the applicant claimed that these assertions are not supported. He stated that the command cadre of the XXXX never filed any complaints of mistreatment against him or complaints about an unhealthy command climate even after he was relieved of command. The applicant stated that the comment that he increased the workload of the Sector staff “is indicative of Sector staff undermining my authority as commanding officer and executing tasking appropriate for XXXX’s department heads.” Regarding his chiefs’ alleged complaint about a negative command climate on the XXXX and their inability to establish a routine due to his unpredictable actions, the applicant stated that these complaints were made only after he formally counseled his XPO about significant performance problems. Regarding the comment about his isolation from the crew during drydock, the applicant alleged that the comment “suggests a standard for how to command during drydock, though such expectations were never made.” He stated that he maintained a “healthy level of separation from the crew during liberty hours” because of the ongoing disciplinary problems of a non-rate and enforced the segregation of duties to hold supervisors accountable. He alleged that his leadership resulted in the XXXX progressing through drydock 25% ahead of schedule.

Regarding the allegation that he took unnecessary risks with the cutter and went on TAD while his XPO was also TAD, the applicant alleged that his actions minimized the impact on Sector operations and that the command of the XXXX was properly left under the control of the Engineering Petty Officer (EPO) while he and the XPO were on TAD and the cutter was in drydock. Moreover, he stated that the comments in the OER showing that he coordinated and lengthy, complex, and dangerous interdiction and repatriation of illegal immigrants contradicts the comment suggesting that he was unable to calculate the XXXX’s fuel endurance and got underway for a SAR mission without enough fuel.

Regarding his relations with the Sector staff, the applicant alleged that after he sent an email listing his “command concerns” to his entire chain of command, the Sector Commander commended him for his proactive effort. The applicant alleged that he was frustrated by the month-long delay in his receipt of the investigation of the non-rate’s misconduct and that he honestly informed his Supervisor and Reviewer that the delay negatively affected his ability to maintain good order and discipline. The applicant further alleged that the comment about his eagerness to complete missions conflicting with the proper execution of missions and with his use of the correct chain of command is “not supported, confusing, and highlight[s] objections to style, not substance.” He argued that his email about his “command concerns” to his entire chain of command “champion[ed] transparency” and “invited oversight.”

VIEWS OF THE COAST GUARD

On February 6, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion regarding the applicant’s original application for an immediate, back-dated promotion. The JAG recommended that the Board deny the requested relief.

The JAG argued that the applicant’s promotion was lawfully delayed. He alleged that on May 21, 2007, the applicant was still “under investigation” as required by 14 U.S.C. § 271(f).

The JAG stated that due process demands that, prior to convening a special board of officers, the Coast Guard compile a thorough record for review and decision-making. The JAG stated that there is a “continuum of procedures for delaying an officer’s promotion [which] begins with an investigation and may conclude with a special board of officers’ decision to either remove the officer from the promotion list, or promote the officer to the next higher grade.” In addition, “there are various levels of investigations which are conducted concurrently and consecutively in order to accumulate the proper record.”

The JAG stated that the fact that the Sector Commander had concluded his own investigation of the circumstances of January 26 and 27, 2007, and had awarded the applicant NJP does not mean that the investigation of the applicant was complete. The JAG pointed out that the command notified CGPC that further steps were necessary in that the applicant’s promotion should be delayed so that CGPC could review his record. In addition, under the Personnel Manual, both the imposition of NJP and the permanent RFC required preparation of special OERs. The JAG pointed out that the applicant’s addendum to OER2 is dated May 22, 2007—the day after he would have been promoted. He submitted a declaration from the Chief of the Boards Section at CGPC-opm (see below), who stated that CGPC requires that adverse information be documented in an officer’s record in OERs before the “record read” begins to decide whether a special board should be convened. Therefore, before CGPC-opm-1 could complete its review, CGPC-opm-3 had to validate all of the information in the applicant’s record, including the two special OERs that were required by his NJP and RFC.

The JAG argued that it “would have been improper [for CGPC] to authorize, refer, or even convene a special board of officers hastily, without properly investigating and reviewing the record.” The JAG stated that because the applicant’s record was not yet complete on May 21, 2007, the investigation was ongoing. Therefore, CGPC-opm-1 warned the applicant in advance, in a memorandum dated May 2, 2007, that his promotion would be delayed. The JAG noted that in this memorandum, CGPC-opm-1 advised the applicant that he would be contacted “when it has been determined” whether further administrative actions were necessary, and that this language showed that CGPC’s investigation was ongoing. The JAG stated that this investigation was not concluded until June 14, 2007, when CGPC determined that a special board of officers was required and the applicant was informed of the outcome of CGPC’s investigation.

The JAG attached to the advisory opinion a declaration signed by the lieutenant commander who, as Chief of the Officer Boards Section at CGPC-opm, worked on the applicant’s case from February 2, 2007, when adverse information was first received by his section, until the special board process was complete. The Chief of the Boards Section wrote the following regarding Coast Guard law, policies, and procedures:

The process the Officer Boards Section follows in managing Troubled Officer cases is delineated by law, policy and practice to ensure the efficient management of the Service and [the] balance that is needed with upholding the due process of the member. The general process will be discussed, but with specifics regarding [the applicant’s] case.

While an officer is on a list of selectees for promotion to the next higher grade, it is possible that the officer could demonstrate some characteristics which cast doubt on his moral or professional qualities, and would potentially disqualify that officer for promotion to the next higher grade.

Boards Section considers this “adverse information.” (See PERSMAN 5.A.13.f. and 14 USC § 271(f).)

Normally, this adverse information is first presented informally, often by the chain of command, through a telephone call, electronic mail or memorandum. While we note that an offense may have been committed, a criminal investigation started, or an Article 15/32 hearing scheduled, Boards Section reserves judgment until the officer’s record is complete, to uphold the members’ due process. The timeline to complete the military justice aspect of the case, to submit and validate an acceptable [OER] documenting the case, and to complete a record review to determine if a Special Board is justified is often a lengthy process. Boards Section requires that a special OER document an officer’s misconduct or substandard performance, and that this special OER be validated and inserted into the officer’s CGPC PDR prior to commencing a record read to determine if a Special Board should ensue. The applicable policy on completing a special OER is found at Article 10.A.3.c.1. of the CG Personnel Manual. If the command pursues disciplinary action then the command would prepare a special OER after that process has run its course. The specific policy is found at Article 10.A.3.c.1.b. of the CG Personnel Manual. Upon receipt of the final OER, an internal review by Boards Section Chief, Boards Promotions Separations Branch Chief and Officer Personnel Management Deputy Division Chief recommends to convene a special board or not, and Officer Personnel Management Division Chief renders a decision based on the circumstances of the case, the officer’s record, and any other pertinent matters of record.

In an emerging case, where the record is not complete, and investigation into the officer’s continued qualification for promotion is ongoing, Promotions Section will notify the officer of a temporary delay to the scheduled promotion by memo, and ask the officer so notified to acknowledge receipt of the memo in writing. This memo is sent via the chain of command. In this way, the officer is put on notice that Boards Section is aware of potentially adverse information, that an investigation into these matters has commenced, and that the temporary delay of promotion was effected.

In the event that the circumstances do not support board action, opm-1 summarily promotes the officer with back date, pay and allowances to the day that he would have been promoted without the delay. In the event that a review of the officer’s record shows that doubt exists regarding the officer’s qualification to promote to the grade to which selected, a Special Board is initiated. The officer is notified of proposed special board action by memo and is asked to acknowledge receipt of the memo in writing. This memo is sent via the chain of command.

On July 8, 2008, after reviewing the applicant’s additional requests for relief and allegations concerning the disputed OERs, the JAG submitted a supplemental advisory opinion in which he recommended that the Board deny this request as well. The JAG argued that the applicant failed to rebut the presumption of regularity accorded his NJP and failed to prove that the comments about his violations of Article 92 of the UCMJ in OER1 were erroneous. The JAG also argued that the applicant’s violations of Article 92 were explained in sufficient detail in both OER1 and the attached Punitive Letter of Admonition. The JAG also noted that the applicant did not appeal his NJP, which caused the preparation of OER1, as permitted under section 1.F.1. of the Military Justice Manual.

Regarding the applicant’s claims about OER2, the JAG stated that the applicant has failed to prove his allegations of misstatements of fact by submitting supporting evidence. The JAG alleged that a BCMR applicant is required to prove his allegations about an OER with “clear, cogent, and convincing evidence.”

Regarding the applicant's allegations about the improper rating chain, the JAG stated that "[a]ssuming *arguendo* that failure to follow the Sector Instruction is a violation of regulation, the applicant fails to show prejudice." The JAG stated that the Personnel Manual allows a Deputy Sector Commander to be designated as a Reporting Officer. In addition, he pointed out that the Sector Commander, who was the applicant's designated Reporting Officer, did sign the disputed OERs as the Reviewer. He alleged that the Reviewer's signature on the disputed OERs shows that he concurred with the assigned marks. Therefore, the JAG argued, the applicant has failed to show that he was prejudiced by the alleged violation of regulation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 26, 2008, the applicant responded to the original and supplemental advisory opinions. The applicant alleged that there is no evidence in the record that the applicant was "under investigation" in May 2007 when his promotion was delayed. He alleged that he was never informed that he was still under investigation and nothing in the record indicates that there was an ongoing investigation at the time. In fact, he argued, the record indicates that the investigation was completed as of March 2007 "and that all military justice action(s) had been completed."

The applicant stated that Article 5.A.13.f.3. does authorize the Commander of CGPC-opm to delay promotions, but not a lieutenant in the CGPC-opm office. The applicant alleged that the memorandum he received dated May 2, 2007, shows that a mere lieutenant delayed his promotion, which is a violation of Article 5.A.13.f.3. In addition, the applicant argued, Article 5.A.13.f.3. requires the Commander of CGPC-opm to notify him in writing of the reasons for the delay, and the May 2, 2007, memorandum does not state that the applicant was "under investigation." The applicant alleged that the JAG's argument that the applicant was still "under investigation" in May 2007

suggests that all officers are always "under investigation" when they are being considered for promotion and are also "under investigation" if their records are being reviewed by CGPC for any reason whatsoever. This is nonsense, and tellingly there is no law or authority cited for this proposition. The record is clear that no formal or informal Administrative Investigation or CGIS investigation was being conducted at the time [the CGPC-opm lieutenant] delayed [the applicant's] promotion. The Coast Guard utterly fails to explain how or why its "review" of a "record" that it did not term an investigation at the time can be morphed into an after-the-fact "investigation" for the purpose of complying retroactively with 14 U.S.C. section 271(f). This is nothing more than a transparent attempt by legal counsel to transmute a non-compliant process into an "investigation" for the purpose of avoiding a records correction. ...

A "record read" does not constitute an investigation for the purpose of 14 U.S.C. section 271(f). The Coast Guard's premise relies on the possibility that CGPC-opm can conduct a "record read" and decide against convening a board of officers. Therefore, since a "record read" is a separate process distinctly different from a pending board of officers, a "record read" is the functional equivalent of an investigation. However, if a "record read" constituted an investigation, then the companion requirement that a "board of officers be pending" would be obviated and/or superfluous because a "record read" must be conducted before CGPC-opm can decide to convene a board of officers. The Coast Guard's excuse for its statutory non-compliance is weak and inconsistent with rules of statutory interpretation.

Regarding his declaration about the misstatements of fact in the disputed OERs, the applicant pointed out that his sworn statement is “competent evidence” and that the JAG did not challenge his claims with contradictory evidence. In addition, he pointed out that the JAG did not explain why the rating chain published in SECXXXINST 1611.A was violated. The applicant argued that the violation of the published rating chain is strong evidence that rebuts the presumption of regularity afforded his chain of command. In addition, he cited the purpose of the requirement that rating chains be published under Article 10.A.1.d.2. of the Personnel Manual, and alleged that the Sector’s failure to use the published rating chain “highlights the lack of common understanding of roles and responsibilities of the entire chain of command for the entire rating period. This confusion explains the heightened scrutiny and perception of insubordination that led to the loss of confidence in [the applicant’s] ability to command.” The applicant alleged that his chain of command lost confidence in his ability to command because of the “confusion of roles and responsibilities” and that the loss of confidence was not supported in the record.

Finally, the applicant alleged that he did not appeal his NJP because he thought it was in the best interest of his crew not to do so. He stated that if he had appealed his NJP, his own reassignment and thus the assignment of a new CO for the XXXX would have been delayed.

APPLICABLE LAW

Under 14 U.S.C. § 271(f), the “promotion of an officer who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed without prejudice by the Secretary until completion of the investigation or proceedings. However, unless the Secretary determines that a further delay is necessary in the public interest, a promotion may not be delayed under this subsection for more than one year after the date the officer would otherwise have been promoted. An officer whose promotion is delayed under this subsection and who is subsequently promoted shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held had his promotion not been so delayed.”

Article 5.A.13.f. of the Personnel Manual provides the following procedures for delaying the promotion of an officer whose name is on a list of selectees:

1. Each officer in the chain of command or Commander, (CGPC-opm) is responsible for delaying a promotion if he or she knows the appointee has disqualified him or herself after being placed on a promotion list. Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers, courts-martial, or investigative proceedings (14 U.S.C. 271(f)).
2. A complete report of the circumstances recommending removing the selectee from the promotion list under Article 5.A.4. shall be sent to Commander (CGPC-opm). If the promotion letter is used for notification, include it if received; a copy of the OPAL need not be included. The selectee shall be furnished a copy of the report and required to acknowledge receipt. Attach a signed copy of the acknowledgment as an enclosure to the report.
3. If Commander (CGPC-opm) initiates delaying a promotion, he or she shall advise the officer concerned in writing of the reasons for so doing and require acknowledgment of receipt.

4. The Commandant shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list. The officer concerned will be afforded 21 days' notice of the proceedings, and may communicate directly by letter to the board, in care of Commander (CGPC-opm-1), before the board convenes. Chain of command endorsements are optional. Enclosures or attachments are limited to copies of official records and materials allowed to be submitted with Officer Evaluation Reports under Article 10.A.4.c.3. Letters from other officers shall not be solicited or submitted as enclosures. To receive an acknowledgement, the officer should submit a completed, self-addressed Acknowledgement/Referral Card, CG-4217, with the letter.

5. The President of the Board will forward a report of the proceedings of the board containing a recommendation to the Commandant as to whether the officer should be promoted, along with reasons for the recommendation. If the Commandant finds removal from the promotion list appropriate, he or she will forward the report with endorsements to the Secretary of [Homeland Security] (acting as the alter ego of the President), who is the final reviewing authority. If the Commandant determines that removal is inappropriate, the case is closed, and the delay of promotion is cancelled. [Emphases added.]

Article 5.A.4.h.3. of the Personnel Manual provides the following regarding the removal of an officer from a list of selectees for promotion:

An officer whose name is removed from a list under these subparagraphs remains eligible for consideration for promotion. If promoted as a result of selection by the next selection board, he or she holds the date of rank and position on the ADPL in the grade to which promoted which he she would have held if his or her name had not been removed. However, if the next selection board does not select the officer or if his or her name again is removed from the list of selectees, the officer shall be considered for all purposes as having twice failed of selection for promotion (14 U.S.C. 272).

Regulations Regarding Relief for Cause (RFC)

Article 4.F.1.a. of the Personnel Manual states that "relief for cause" (RFC) is "the administrative removal of a commanding officer (CO) or officer in charge (OIC) from his or her current duty assignment before the planned rotation date." It "normally consists of a two-step process: 1. The flag officer in the unit's chain of command orders a temporary RFC; and 2. Commandant ... orders a permanent RFC after reviewing the case." Article 4.F.3. of the Personnel Manual provides that the bases for RFC may be misconduct, unsatisfactory performance, unacceptable relationships, or loss of confidence.

Article 4.F.4. states that after deciding to institute the temporary RFC process, the relieving authority must notify the member in writing of the "RFC action being taken and the reason for it" and of "[h]is or her right to submit a statement in writing on his or her behalf within five working days." The member is temporarily reassigned while the permanent RFC action is pending. If grounds for a permanent relief for cause are substantiated, the relieving authority should "recommend the CO's or OIC's permanent RFC and send appropriate documentation to the Commandant."

Article 4.F.6.2. prohibits forwarding a request for permanent RFC to the Commandant until the CO being relieved has had five working days to submit a statement on his own behalf. Article 4.F.6.3. states that "[t]he command must afford the member the advice of counsel within

the meaning of UCMJ Article 27(b)(1) during the temporary RFC process and in preparing any statement he or she submits about the permanent RFC request.”

Regulations Regarding Special OERs

Article 10.A.3.c.1.b. of the Personnel Manual states that a

special OER is also required when an officer receives non-judicial punishment [NJP] which is not subject to appeal or when the final reviewing authority’s action on an investigation includes direction that a Special OER shall be prepared because the evidence established that the officer was criminally culpable. ... The report shall clearly state: (1) the nature of the proceeding prompting the report and the result of the proceeding, e.g. criminal conviction, non-judicial punishment, or final reviewing authority’s action directing a special OER due to criminal culpability; (2) any punishment imposed as a result of criminal conviction or non-judicial punishment; and (3) other information as necessary to accurately reflect the performance being evaluated. Information about the proceeding may be included in the report even if the proceeding took place outside of the reporting period. The evaluation shall be limited to those areas affected by such conduct, since all other dimensions will be evaluated in the regular OER. Any dimension which is not evaluated shall be marked "not observed." A Section 9 comparison or rating scale mark and Section 10 comments on the officer’s potential are required. This OER does NOT count for continuity.

Article 10.A.4.h. requires the preparation of a special, derogatory OER whenever an officer is relieved for cause (RFC) from his or her duty as a commanding officer (CO). The Reported-on Officer is shown the OER by the Reporting Officer before the OER is forwarded to the Reviewer and is permitted to submit an addendum of comments to explain a failure or to provide an alternate view of his or her performance within 14 days of receiving the OER from the Reporting Officer. A derogatory OER prepared under this article counts for continuity. Article 10.A.4.h.2.d. states that

[t]he Reviewer shall ensure that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reviewer finds otherwise, he or she shall return the report to the Reporting Officer for additional information and/or clarifying comments. Any substantive changes to the OER require its return to the Reported-on Officer to provide another 14-day opportunity for the Reported-on Officer to revise the addendum.

Responsibilities of the Command and Rating Chain

Article 10.A. of the Personnel Manual governs the preparation of officers’ OERs. Article 10.A.1.b.1. states that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Every officer normally has a “rating chain” of three senior personnel, including a Supervisor, a Reporting Officer, and a Reviewer. Personnel Manual, Article 10.A.2.e.1.e. Article 10.A.2.b.2.b. states that each command must designate and publish an officer’s rating chain. Article 10.A.1.c.4. states that the Supervisor is “[n]ormally, the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements.” The Reporting Officer is normally the Supervisor’s supervisor, and the Reviewer is normally the Reporting Officer’s supervisor.

Article 10.A.2.d.2.a. states that it is the responsibility of the Supervisor to evaluate the reported-on officer in the execution of her duties and to prepare the Supervisor's portion of the OER form.

Article 10.A.2.e.2.a. states that it is the responsibility of the Reporting Officer to evaluate the reported-on officer based on direct observation, reports of the Supervisor, and other reliable reports and to prepare the Reporting Officer's portion of the OER form. Article 10.A.2.e.2.c. states that an Reporting Officer

[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed.

Article 10.A.2.f.2.a. states that the Reviewer "[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential." Article 10.A.2.f.2.b. states that the Reviewer "[a]dds comments as necessary, using form CG-5315 (series), that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer." Article 10.A.2.f.2.c. states that the Reviewer "[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer may not direct in what manner an evaluation mark or comment be changed."

Instructions for Preparing an OER

Article 10.A.4.c.3. states that block 2 of an OER shall reference any Punitive Letter of Admonition or Censure received by the officer during the evaluation period.

Article 10.A.4.c.4. instructs Supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for Reporting Officers, who complete the rest of the OER, except for any comments the Reviewer may choose to add on a separate page):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.4.c.8.a. instructs the reporting officer to complete the comparison scale on an OER by filling in the circle that most accurately reflects his or her ranking of the reported-on officer in comparison to all other officers of the same grade whom the reporting officer has known. Article 10.A.4.c.9. states that in the comment block titled "Potential," the reporting officer "shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard."

Enclosure 6 of the Military Justice Manual provides the following text for a Punitive Letter of Admonition awarded at NJP:

1. In accordance with references (a), (b), and (c), you are hereby [REPRIMANDED or ADMONISHED] for your conduct at [PLACE] on [DATE]. You behaved in a reproachable manner in that you [SPECIFY THE EXACT CONDUCT BEING ADMONISHED OR REPRIMANDED, EXPLAINING SURROUNDING FACTS AND CIRCUMSTANCES].

2. You are advised of your right to appeal to [APPROPRIATE NJP APPEAL AUTHORITY] in accordance with Section 1.F. of reference (b).

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant alleged that his promotion to LT on May 21, 2007, was improperly delayed under Article 5.A.13.f.3. of the Personnel Manual because (a) the officer who notified him of the delay in a memorandum dated May 2, 2007, was a lieutenant assigned to CGPC-opm, rather than Commander, CGPC-opm; and (b) on May 21, 2007, he was not under investigation, nor was his special board "pending," as required by 14 U.S.C. § 271(f) for the delay of a promotion. Absent specific evidence to the contrary, the Board presumes that Coast Guard officers, including the applicant's chain of command and those within CGPC-opm, have acted correctly, lawfully, and in good faith in performing their duties.⁸ The applicant alleges and bears the bur-

⁸ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

den of proving by a preponderance of the evidence⁹ that the Coast Guard committed an error or injustice in removing his name from the list of selectees for promotion.

3. Article 5.A.13.f.1. of the Personnel Manual states that “[e]ach officer in the chain of command or Commander (CGPC-opm) is responsible for delaying a promotion if he or she knows the appointee has disqualified him or herself after being placed on a promotion list.” Article 5.A.13.f.3. states that “[i]f Commander (CGPC-opm) initiates delaying a promotion, he or she shall advise the officer concerned in writing of the reasons for so doing and require acknowledgment of receipt.” The applicant’s notification of delay, dated May 2, 2007, is signed by a lieutenant within CGPC-opm rather than by the head of that office. The applicant alleges that the fact that the notification was signed by a lieutenant proves that the delay of his promotion was not properly authorized by Commander (CGPC-opm). Article 5.A.13.f.3., however, does not require that Commander (CGPC-opm) personally notify the officer that he has delayed that officer’s promotion. A member of his staff may be delegated to send the notification.¹⁰ The Board is not persuaded that the fact that the notification memorandum was signed by a subordinate of Commander (CGPC-opm) overcomes the presumption that the lieutenant acted with proper authority in that Commander (CGPC-opm) had in fact authorized the delay of the applicant’s promotion and delegated the notification to the lieutenant. In this regard, the Board notes that the delay of the applicant’s promotion was long expected. A comment in OER1, for example, indicates that the delay of the applicant’s promotion was anticipated by his chain of command at least as early as March 2007, when they prepared OER1. The comment states that the applicant “was already selected for O-3 based on performance at previous unit, but the member’s promotion & record should be reviewed due to this NJP.” Moreover, the Chief of the Officer Boards Section, which is part of CGPC-opm, stated in his declaration that his office first became aware of the adverse information about the applicant on February 2, 2007, when the applicant was temporarily relieved for cause. His declaration indicates that the Officer Boards Section was aware of and had been working with the chain of command on the applicant’s case for three months when the notification of delay of promotion was sent to the applicant on May 2, 2007. Therefore, the mere fact that the notification was signed by a lieutenant within CGPC-opm rather than Commander (CGPC-opm) does not persuade the Board that the delay of the applicant’s promotion was unauthorized.

4. Title 14 U.S.C. § 271(f) states the “promotion of an officer who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed without prejudice by the Secretary until completion of the investigation or proceedings.” The applicant alleged that he should have been promoted on May 21, 2007, as scheduled and that his promotion was illegally delayed because no board of officers was “pending” against him and he was not “under investigation.” He pointed out that in *United States v. Law*, 11 F.3d 1061, 1065-66 (Fed. Cir. 1993), the court rejected the plaintiff’s argument that a special board was not “pending” until the officers for the board were selected and found that “selection of officers for the Special Board thereafter was merely ministerial. We conclude that the interpretation of §

⁹ 33 C.F.R. § 52.24(b).

¹⁰ U.S. COAST GUARD, COMDTINST M5000.3B, UNITED STATES COAST GUARD REGULATIONS, Chap. 4-1-2.A. (Change 2, 1994) (“At a commanding officer’s discretion, portions of [his] authority may be delegated to subordinates for the execution of details, but such delegation of authority shall in no way relieve the commanding officer of continued responsibility ...”).

271(f) that matters were ‘pending’ from the date the board was authorized does not conflict with any provision of any applicable statute and is reasonable. By analogy, court proceedings are ‘pending’ before a case is assigned to a particular judge or judges.” In the instant case, Commander, CGPC notified the applicant that the special board would be convened on June 14, 2007, and the applicant contends that he should have been promoted because the special board was not “pending” until that date.

5. In the advisory opinion, the JAG ignored the question of the date the special board began to pend. “Pending” means “[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is ‘pending’ from its inception until the rendition of a final judgment.”¹¹ In *Law*, the court held that “the interpretation of § 271(f) that matters were ‘pending’ from the date the board was authorized does not conflict with any provision of any applicable statute and is reasonable.” The court did not expressly state that it was unreasonable for a special board to be considered “pending” before the officer is notified that it has been initiated. In this regard, the Board notes that by June 14, 2007, the Officer Boards Section in CGPC-opm had been aware of and working on the applicant’s case for more than four months when Commander, CGPC officially notified the applicant that special board proceedings had been initiated. In addition, the delay of promotion notification dated May 2, 2007, cited the article of the Personnel Manual which authorizes the Commandant to convene a special board of officers when adverse information is received that casts doubt on the qualification of an officer on a promotion list.¹²

6. The Board need not decide, however, whether a special board was “pending” for the applicant on May 21, 2007, because the Board agrees with the JAG that the applicant was, in fact, the subject of an investigation by CGPC at that time. The applicant argues that he was not “under investigation” pursuant to 14 U.S.C. § 271(f) because the investigation that resulted in his NJP on February 28, 2007, had been completed, and his chain of command had not convened an administrative investigation under the Administrative Investigations Manual. The Board is not persuaded, however, that Congress intended such a narrow definition of “investigation.” As indicated in the declaration of the Chief of the Officer Boards Section and in Article 5.A.13.f. of the Personnel Manual, the decision of whether to authorize a special board is based on a review of the officer’s record. Therefore, after an officer’s chain of command first makes CGPC aware of “adverse information” that casts doubt on the officer’s qualification and before the decision to convene a special board is made, CGPC-opm must gather the adverse information in the applicant’s record in accordance with regulation. In this case, under Articles 10.A.3.c.1 and 10.A.4.h. of the Personnel Manual, the applicant’s NJP and RFC required preparation of two special OERs—OER1 and OER2—and on May 21, 2007, OER2 was not yet complete because the

¹¹ BLACK’S LAW DICTIONARY 1291 (4th ed. 1968).

¹² PERSONNEL MANUAL, *supra* note 6, Art. 5.A.13.f. states, “1. Each officer in the chain of command or Commander, (CGPC-opm) is responsible for delaying a promotion if he or she knows the appointee has disqualified him or herself after being placed on a promotion list. Disqualification here means any circumstance which casts doubt on the moral or professional qualifications of the officer concerned, including pending action by a board of officers, courts-martial, or investigative proceedings (14 U.S.C. 271(f)). . . . 3. If Commander (CGPC-opm) initiates delaying a promotion, he or she shall advise the officer concerned in writing of the reasons for so doing and require acknowledgment of receipt. 4. The Commandant shall refer the case to a board of officers to recommend to the President whether to remove the selectee from the promotion list.”

applicant had not yet submitted his addendum. Moreover, CGPC had not finished reviewing his record. Therefore, the Board finds that on May 21, 2007, the record was incomplete, and CGPC-opm was still gathering the information about the applicant needed to complete the record so that it could be fairly and properly reviewed to determine whether a special board was needed. Thus, he was still under investigation for the purposes of 14 U.S.C. § 271(f) and Article 5.A.13.f. of the Personnel Manual on May 21, 2007. Moreover, the applicant had been notified of this fact on May 2, 2007.

7. The applicant argued that it is nonsense to consider CGPC's collection of special OERs from the applicant's chain of command and "record read" an investigation of the applicant for the purposes of 14 U.S.C. § 271(1) and that the JAG is defending procedures that are not compliant with that statute. The Board finds, however, that the applicant's proposed interpretation of the statute is not reasonable. According to the applicant's interpretation, if the investigation that resulted in his NJP had ended on May 20, 2007, the Coast Guard would have had to promote him the next day as scheduled unless Commander, CGPC had immediately authorized and initiated a special board or convened one of the types of investigation authorized under the Administrative Investigations Manual. The fact that CGPC's procedure of gathering properly documented information (special OERs) and conducting a "record read" is not one of the types of investigations authorized under the Administrative Investigations Manual does not persuade the Board that CGPC's procedure is not, in fact, a type of investigation of an officer regularly conducted whenever a chain of command informs CGPC that there is adverse information that casts doubt on that officer's qualification for promotion, in accordance with Article 5.A.13.f.1. of the Personnel Manual. Therefore, the Board finds that the applicant has not proved that the Coast Guard violated 14 U.S.C. § 271(f) by not promoting him to LT on May 21, 2007.

8. The applicant asked the Board to expunge OER1 and OER2 from his record because they contain misstatements of fact and were not prepared by his designated rating chain. He also argued that the written comments in OER1 are insufficiently specific under Article 10.A.4.c.4.e. of the Personnel Manual. Absent specific evidence to the contrary, the Board presumes that the members of an applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations.¹³ Once an applicant has rebutted the presumption of regularity¹⁴ by presenting at least some evidence that "specifically and convincingly contradicts his rating officials' marks and comments,"¹⁵ the Board weighs the evidence in the record to determine whether the applicant has met her burden of proof—the preponderance of the evidence—with respect to the challenged OER.¹⁶ To be entitled to relief, the applicant must prove

¹³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁴ 33 C.F.R. § 52.24(b); see Final Decision, BCMR Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the "clear and convincing" evidence standard recommended by the Coast Guard and adopting the "preponderance of the evidence" standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

¹⁵ Final Decision, BCMR Docket No. 2000-194, at 40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002).

¹⁶ 33 C.F.R. § 52.24(b). In determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain's assessment even though the presumption of regularity has been rebutted. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

by a preponderance of the evidence that the disputed OERs were adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.¹⁷ Moreover, as stated in BCMR Docket No. 151-87, the Board will not order an OER to be expunged in its entirety “unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.”

9. With respect to the comments in OER1 and the attached Punitive Letter of Admonition, the Board finds that the comments therein are sufficiently specific to provide the reader with a good understanding of how the applicant’s conduct violated the UCMJ and resulted in NJP. OER1 states that the applicant was derelict in his duty, in violation of Article 92 of the UCMJ, by failing to leave the XXXX in command of a qualified individual. OER1 further states that he failed to obey an order, in violation of Article 92, by delaying his return to the XXXX for more than 28 hours after being ordered to return. The Board finds that these comments are sufficiently specific to comply with Articles 10.A.4.c. and 10.A.3.c.1.b(1) of the Personnel Manual in that they succinctly explain to the reader how the applicant was derelict in his duty—by leaving his patrol boat without leaving a qualified member in command—and how he disobeyed an order—by failing to return to his patrol boat timely when ordered to return. The Punitive Letter of Admonition provides substantially the same information about the applicant’s dereliction of duty and failure to obey an order and conforms to the requirements for such letters shown in Enclosure 6 of the Military Justice Manual. Therefore, the Board finds that the applicant has not proved that either OER1 or the attached Punitive Letter of Admonition violates any applicable regulation or is unfair because of an alleged lack of specificity.

10. The applicant alleged that the disputed OERs contain many misstatements of fact, but he failed to submit substantial evidence to support his allegations. For example, with respect to the comments in OER2, he did not prove that his chain of command was unreasonable in expecting him to have renewed his DWO certification during the approximately six weeks between his return stateside and his assumption of command of the XXXX; that he failed to take his superiors’ advice regarding the fuel level of the XXXX; that he failed to show “prudent seamanship in near miss with commercial [vessel]”; that he improperly invited media aboard the XXXX for a mission; or that he did not send argumentative or insubordinate emails to his chain of command. The Board finds that the applicant has not proved that either disputed OER contains any “significant misstatement of hard fact.”¹⁸

11. The applicant alleged that the disputed OERs should be expunged because they were not prepared by his published, designated rating chain. Article 10.A.2.b.2.b. of the Personnel Manual requires that the designated rating chain of each officer be published. The applicant submitted SECXXXINST 1611.1, dated February 8, 2006, which designates the rating chain of the CO of the XXXX (the applicant) as follows: Supervisor: the Chief of the Sector Response Department; Reporting Officer: the Sector Commander; and Reviewer: the xxxxxx District Chief of Response. The disputed OERs, however, are signed by the Chief of the Sector Response

¹⁷ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

¹⁸ *Id.*

Department as Supervisor, the Deputy Sector Commander as Reporting Officer, and the Sector Commander as Reviewer. Roughly speaking, instead of the first, third, and fourth officers in the applicant's chain of command preparing the OERs as designated in SECXXXINST 1611.1, the first, second, and third officers in his chain of command prepared the OERs. The signature blocks on the OERs indicate that the Deputy Sector Commander served as the Reporting Officer for both OERs even though he was not a designated member of the applicant's rating chain. In addition, the Sector Commander, who was the applicant's CO, served as the OER Reviewer, even though in SECXXXINST 1611.1, he was designated as the Reporting Officer. The Coast Guard did not deny that the rating chain published in the SECXXXINST 1611.1 dated February 8, 2006, was the applicant's designated rating chain in 2007. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that the Coast Guard violated Article 10.A.2.b.2.b. of the Personnel Manual when CGPC entered two special OERs in his record prepared at least in part by an unpublished rating chain.

12. In the advisory opinion for this case, the JAG argued that “[a]ssuming *arguendo* that failure to follow the Sector Instruction is a violation of regulation, the applicant fails to show prejudice.” In so arguing, the JAG contradicts findings made in several advisory opinions that the JAG has submitted in prior BCMR cases. In the past, when applicants have proved that they were evaluated by the wrong rating chain or an improperly designated rating chain, the Coast Guard has consistently admitted that the failure to use a published rating chain was a violation of the Personnel Manual,¹⁹ though not necessarily a prejudicial one.

13. Only *prejudicial* violations of the regulations justify correction of an OER.²⁰ The applicant alleged that the insertion of the Deputy Sector Commander into his rating chain was prejudicial but submitted nothing to show that the Deputy Sector Commander was prejudiced against him or that the disputed OERs would have been better had they been prepared by the published rating chain. Both special OERs were required by the Personnel Manual because of the applicant's NJP and RFC. Therefore, their existence and the negative comments therein do not prove that the erroneous composition of the rating chain *per se* prejudiced the applicant's record. No matter which officers in the applicant's chain of command prepared them, under Articles 10.A.3.c.1.b. and 10.A.4.h. of the Personnel Manual, two special OERs with low marks and negative comments reflecting and explaining his NJP and RFC had to be entered in his personnel record.

14. The Supervisor's section of each disputed OER was properly prepared and signed by the designated Supervisor—the Chief of the Sector's Response Department. However, the Reporting Officer's section of each disputed OER was prepared by the wrong officer, as was the “Reviewer Comments” page of OER2, since the Sector Commander who signed that page was supposed to serve as the Reporting Officer. Therefore, the Board must determine whether the applicant's record was prejudiced by these errors in the rating chain, especially whether either or both of the disputed OERs would likely have been less critical of the applicant's conduct, performance, and leadership had the Sector Commander served correctly as the Reporting Officer, instead of the Reviewer. In this regard, the Board notes that the Sector Commander, as the appli-

¹⁹ See *e.g.*, Final Decisions, BCMR Docket Nos. 2006-085; 2006-036; 2003-011; and 2002-101.

²⁰ *Hary*, 618 F.2d at 708.

cant's commanding officer, punished the applicant at mast and recommended to the District Commander that the applicant be relieved for cause. In addition, the Sector Commander signed both disputed OERs as the Reviewer, which indicates that he found no "errors, omissions, or inconsistencies between the numerical evaluation and written comments," as required by Article 10.A.2.f.2.c. of the Personnel Manual. Moreover, because OER2 was a derogatory OER prepared under Article 10.A.4.h., in signing OER2 as the Reviewer, the Sector Commander had to find that the derogatory information in the Supervisor's and Reporting Officer's sections of the OER was "substantiated."²¹

15. The Sector Commander's signature as Reviewer does not prove that he would have assigned exactly the same low marks and comments that were provided by the Deputy Sector Commander. However, because the Sector Commander took the applicant to mast; signed the Punitive Letter of Admonition; recommended the applicant's relief for cause; served as Reviewer for both disputed OERs; and found that the derogatory information entered by the Supervisor and Deputy Sector Commander in OER2 was substantiated even after reading the applicant's addendum, the Board is not persuaded that the Sector Commander would have assigned the applicant better marks and comments in the disputed OERs than those signed by the Deputy Sector Commander. The Board notes that on the "Reviewer Comments" page for OER2, the Sector Commander attempted to explain some of the applicant's poor performance, or put it in perspective, by describing not only his "short-comings" but also the unusual operational requirements of his prior position as the Executive Officer of patrol boat in a combat zone and the unusually unforgiving requirements of a CO. The Sector Commander noted that the applicant's short-comings "could have been overcome in almost any other O2 [LTJG] position that allowed more leeway for professional growth." Moreover, he wrote that the applicant "should be given every chance to continue CG career, and to be promoted to O3."

16. Given the Sector Commander's comments on the "Reviewer Comments" page, the Board is not persuaded that he actually disagreed with any of the marks or comments assigned by the Supervisor or by the Deputy Sector Commander in the Reporting Officer's sections of the disputed OERs, which the Sector Commander should have signed as the designated Reporting Officer. In this regard, the Board notes that the Sector Commander added the "Reviewer Comments" knowing that the Reporting Officer's marks and comments were highly critical of the applicant's performance and leadership, and yet he did not actually disagree with or contradict any of those marks and comments. Under Article 10.A.2.f.2. of the Personnel Manual, the purpose of a "Reviewer Comments" page is to "[a]dd[] comments as necessary ... that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer." If the Sector Commander had disagreed with the Deputy Sector Commander's marks and comments, the Board is persuaded that the Sector Commander would have done so on a "Reviewer Comments" page or, with respect to OER2, would have found that the derogatory information was not substantiated and returned the OER for revision to the Supervisor and Deputy Sector Commander, as required under Article 10.A.4.h. of the Personnel Manual. Instead, he summarized the applicant's short-comings and

²¹ PERSONNEL MANUAL, *supra* note 6, Art. 10.A.4.h.2.d. ("The Reviewer shall ensure that the evaluation of the Reported-on Officer is consistent and that the derogatory information is substantiated. If the Reviewer finds otherwise, he or she shall return the report to the Reporting Officer for additional information and/or clarifying comments.").

added comments that put the applicant's poor performance and RFC in perspective by highlighting the tremendous challenge faced by any LTJG appointed to command afloat and the "low tolerance for failure and associated high career risk that comes with assignment as CO." In light of the fact that it was the Sector command that initiated the delay of the applicant's promotion under Article 5.A.13.f. of the Personnel Manual, the Sector Commander's comment that the applicant should have "every chance" to be promoted does not persuade the Board that the Sector Commander actually disagreed with any of the marks or comments in the disputed OERs. The Board finds insufficient evidence in the record to conclude that the alteration of the applicant's rating chain prejudiced the content of either disputed OER or the content of his record when it was reviewed by CGPC and by the special board of officers, which resulted in his removal from the promotion list.

17. Although the applicant has proved that the Coast Guard committed an error with regard to the composition of his rating chain, he has not proved that the violation of Article 10.A.2.b.2.b. of the Personnel Manual was prejudicial to his record. As stated above, the command was required to prepare a special OER because of the applicant's violations of the UCMJ and NJP and another special, derogatory OER because of his RFC. The applicant has not proved that his command committed any error or injustice with regards to the NJP or RFC. Nor has the applicant proved that any of the comments in the special OERs are misstatements of fact. The Board is not persuaded that the marks and comments in either special OER would have been significantly better had all of the officers on the applicant's designated rating chain served in their designated capacities. Therefore, the Board finds that under the circumstances of this case, the use of a rating chain in 2007 different from that which was designated in writing in 2006 was a harmless error.²² In addition, because on May 21, 2007, CGPC was still conducting its own investigation by gathering information to complete the applicant's record in preparation for the "record read" and in light of the NJP and RFC in his record, the Board finds that the Coast Guard committed no error or injustice in refusing to promote the applicant. The Board finds no basis in the record for removing or altering either disputed OER, for disturbing the decision of CGPC or the outcome of the special board proceedings, or for promoting the applicant to LT.

18. Accordingly, the applicant's requests should be denied.

²² See FED. R. CIV. P. 61 ("Harmless Error: ... At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief"); *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005) (finding that harmlessness requires that there be "no substantial nexus or connection" between the proven error and the prejudicial record that the applicant wants the Board to remove or correct); *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error in an officer's military record is harmless unless the error is "causally linked with" the record the officer wants corrected); *Hary*, 618 F.2d at 707-09 (finding that the plaintiff had to show that the proven error "substantially affected the decision to separate him" because "harmless error ... will not warrant judicial relief.").

ORDER

The application of former LTJG xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Vicki J. Ray

George A. Weller

Janice Williams-Jones