

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-081

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receiving the completed application on January 11, 2010.

This final decision, dated December 30, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who at the time of application was a lieutenant junior grade (LTJG/O-2) in the Reserve, asked the Board to remove from his record a form CG-3307 ("Page 7") dated May 26, 2006, which he received as an ensign in the regular active duty Coast Guard assigned to Sector XXXXXXXX in XXXXXXXX, Xx. He also asked that the Board remove a memorandum dated June 30, 2009, regarding his possible discharge from the Reserve on June 30, 2010, if he failed of selection for promotion again in 2009, and to

- place him on active duty in the regular Coast Guard as an LTJG retroactive to July 1, 2007;
- allow him to remain on active duty long enough to be considered for selection for promotion by two active duty promotion list (ADPL) LT selection boards with the Page 7 removed from his record;
- if selected for promotion by the first such board, backdate his LT date of rank to what it would have been had he been selected for promotion in July 2007; and
- if not selected for promotion by either ADPL LT selection board, promote him to LT in the Reserve from the promotion list resulting from the inactive duty promotion list (IDPL) LT selection board, which he was already on.

As an alternative, the applicant asked the Board to return him to active duty as a Reserve officer on an extended active duty contract for enough time to compete twice for promotion to LCDR on the ADPL and, if selected, to apply for integration into the regular Coast Guard.

The applicant alleged that the disputed Page 7 was erroneously prepared in lieu of a special officer evaluation report (OER) pursuant to Article 10.A.3.c. of the Personnel Manual. He stated that his command should have prepared a special OER, instead of the Page 7, and that this error has negatively affected his career. He explained that although he has been selected for promotion to lieutenant (LT) with the Page 7 in his record, it may prevent him from being selected for promotion to lieutenant commander (LCDR) because, whereas LCDR selection boards do not see an officer's OERs as an ensign, they do see all Page 7s in an officer's record. Therefore, LCDR selection boards will not see his good ensign OERs, but they will see the Page 7. He argued that this result is unfair and prejudicial. He submitted a copy of the disputed Page 7, which states the following:

[Applicant], your performance in recent weeks has shown that you are not progressing in your development as an officer. Three specific incidents in the past week have made it apparent to me that you are not progressing adequately in your professional development.

1. At the recent Sector [name redacted] Officer in Charge conference, which was attended by all Sector Officers and Officer's in Charge, you were noticeably over an hour late. Additionally, you were the first to depart. As a commissioned officer all of your actions will be scrutinized by others. Your late arrival and early departure were noticed by all.
2. At the conference, two OIC's voiced their displeasure in not having the Command distribute the three hundred hour club awards. You had been previously tasked with ensuring the CO got to all the units to distribute their awards. You reported to your department head that the CO had made trips to all the units that were receiving the awards and that he had presented them. This was clearly untrue. At this point, I do not believe you intentionally lied; rather I think you failed to stay on top of this project. Either way, your mismanagement of this project embarrassed both your department head and the CO.
3. Upon your return from the OIC conference, you found that the Sector had been directed to conduct a boarding on an HIV [high interest vessel]. Although you did a fine job in ensuring the vessel was boarded, you failed to inform any of the command that an armed HIV boarding was being conducted until after completion of the boarding.

In short, [applicant], occurrences such as these are all too common in your performance and have come to be an expectation, rather than an exception. A key element in leadership is to "learn from the experience" of both your actions and those around you. Thus far you have not demonstrated that you are learning from your own experiences.

Another aspect of a good leader is introspection, so as you depart this weekend for Boarding Officer School, I am directing you to take a hard look at who you are as an officer, and more importantly at who you want to be as an officer. You will have five weeks to explore this question and upon your return, the significant change out in Command Cadre will offer you the perfect opportunity to turn over a new leaf and begin to excel as an officer in the Coast Guard. I am certain that you are capable of accomplishing this.

The applicant also noted that the Deputy Sector Commander who signed the Page 7 in 2006 was then-CDR, now LT Herbert M. Hamilton, who as a captain in 2009 was charged with 31 specifications of adultery, fraternization, disobeying direct orders, and fraud. The applicant argued that these charges are very clear evidence of extremely bad judgment, ethics, and morals and call into question LT Hamilton's "ability to ever attempt to hold others accountable to any standards that he himself was not keeping." He noted that one of the petty officers with whom LT Hamilton had an affair claimed that he routinely discussed disciplinary matters with her. (On

July 1, 2010, in lieu of going to trial and pursuant to a pre-trial agreement, Hamilton was allowed to retire in the rank of lieutenant with a general discharge, a punitive letter of reprimand, and a \$9,577 forfeiture as non-judicial punishment awarded at an Admiral's mast at which he admitted to 27 of the charges against him.)

In support of these claims, the applicant submitted a charge sheet, dated November 3, 2009, showing that then-Captain Hamilton was charged with, *inter alia*, having adulterous affairs with three enlisted members, using his Government telephone for sending sexual messages, downloading sexually explicit material on his Government computer, making false official statements to investigators, committing sodomy, filing a false travel claim for \$160.79, photographing sex acts, calling the command center while engaged in sex, attempting to defame another member by communicating adverse information to an assignment officer and future supervisor, transmitting photographs of his genitalia, asking a petty officer to transmit photographs and video of masturbation to him, asking a petty officer to destroy evidence, discussing the performance of commissioned officers with a petty officer, and discussing the non-judicial punishment of enlisted members with a petty officer. Most of the charges concerned offenses that occurred in 2007, 2008, and 2009 in Alaska, California, Illinois, Louisiana, and Mississippi. However, five charges cite dates in 2004, 2005, and 2006 and one cites Xxxxxxx as the location for his transmission of romantic text messages to a woman not his wife between November 2004 and June 2005. The applicant also submitted copies of news articles about the case and a Coast Guard press release noting that the investigation had revealed that Captain Hamilton "had inappropriate relationship with several women, including officer and enlisted Coast Guard members, and civilians, over a period of more than 13 years."

The applicant stated that his supervisor, CDR X, told him that the disputed Page 7 "was a way to document performance that might otherwise be missed" because his semiannual OER dated March 31, 2006, had already been sent to the Personnel Command and because he would soon have an entirely new rating chain due to transfers among the command cadre.

The applicant alleged that the proper way to document performance that is notably different from an officer's performance in a prior evaluation period is to prepare a special OER. He alleged that the Page 7 is highly prejudicial and that, although he has already been selected for promotion to lieutenant, it will harm his chances for selection for promotion to lieutenant commander. The applicant stated that he was unable to appeal the Page 7 pursuant to Article 14.B.2.a. of the Personnel Manual because he was not told about his right to appeal and because his rating chain transferred to new units while he was away at Boarding Officer School in June 2006. The applicant stated that he did not dispute the Page 7 when he received it "due to my inexperience, only saying that the command was doing what they thought was right, while disagreeing with the premise, and feeling that since we were all about to go our separate ways that there was nothing I could do about it." He asked whether he was supposed to appeal the Page 7 to his new rating chain.

The applicant also noted that, whereas an officer may rebut an OER by submitting an OER Reply for inclusion in his record, there is no way to rebut a Page 7 in one's record. He stated that the only way he can mitigate the damage caused by the Page 7 is to discuss it in his letters to selection boards although he did not do so when he was a candidate for selection for

promotion to LT because “the time between the Page 7 and the LT selection board was significant and I had felt that my record had moved positively beyond the performance indicated.”

Regarding the accusations in paragraph 1 on the Page 7, the applicant stated that he was late to the OIC conference because, LT D (then an ensign), who was giving him a ride, picked him up late. Moreover, he alleged that the first hour of the conference as scheduled was a break-out session he was not supposed to attend, and that he and LT D were “actually less than an hour late from a time when our presence was required, and our presentations were not scheduled until later that afternoon, after lunch. However, unbeknownst to [LT D] and me, at the start of the conference, the CO changed the morning schedule to cancel the break-out session, so when we walked in we appeared over an hour late.” Moreover, the applicant’s own presentation was canceled by the CO so that the attendees could play golf. He alleged that he left the conference at the same time that most of the attendees left to play golf.

Regarding the accusations in paragraph 2 on the Page 7, the applicant alleged that the CO had recently been hospitalized for two weeks following surgery and could not visit the Sector small boat stations to hand out the awards. Therefore, most were delivered to the OICs to distribute themselves. The applicant denied having told CDR X that the CO had delivered all of the units to hand out the awards. He stated that he told CDR X that “the CO had visited all the units that he intended to visit, as per the CO’s direction, and that I had handed out the rest of the awards to the Officers in Charge to distribute themselves, also as per the CO’s direction.” The applicant explained that after he had to tell two OICs who were expecting a visit from the CO that the CO would not be visiting, they “expressed displeasure at not having the CO visit their units. The situation was handled as best it could be considering the CO’s condition and directions to me. If there was any mismanagement on my part, it was in not making it crystal clear to [CDR X] what the CO had directed, as [the applicant] worked with [the CO] directly on the matter. This is particularly galling to me, as when this subject was brought up at the conference, the CO remained mute and let me take the brunt of the two Officers in Charge displeasure.”

Regarding the third paragraph of the Page 7, the applicant stated that upon his return from the OIC conference, he did board an HIV “after very short notice. The Sector Command Center was fully briefed and aware that the boarding was taking place and had communications with the boarding team, of which I was the highest ranking member, although I was not even a Boarding Officer at that point, only a Boarding Team Member.” The applicant admitted that he did not brief the command directly as the highest ranking member of the Response Department present that day until after the boarding, but stated that it was an honest error since he had “relied on the Command Center, which in retrospect had no requirement to brief the boarding.”

The applicant alleged that he was given the Page 7 because the command cadre “wanted to play ‘gotcha’ on their way out the door.” He stated that CDR X gave it to him unsigned at the end of his last day before he departed for a month to attend Boarding Officer School, and that Captain Hamilton, who later signed it, never counseled him about it. In support of his request, the applicant submitted a memorandum signed by CDR X who wrote the following:

1. I am writing the DHS Board for Correction of Military Records (BCMR) on behalf of [the applicant’s] request for relief in removing from his record a CG-3307, dated May 26, 2006, which he received while I was his supervisor at Sector Xxxxxxx.

2. The CG-3307 was initiated by me as his direct supervisor, and while I stand by the remarks therein, I feel that at this point the CG-3307 is wrongly prejudicial to [the applicant's] career. [He] received the CG-3307 as an Ensign; by capturing performance via a CG-3307, it will be seen by LCDR and above promotion boards while as per [COMDTINST 1410.2, Documents Viewed by Coast Guard Officer Promotion and Special Boards], Ensign OERs are masked. In effect, this Ensign CG-3307 will be seen by future promotion boards, while Ensign OERs for performance from the same review period will not be. I feel that this is unfair.
3. Although at the time, I believe the CG-3307 was appropriate, I did not intend for the CG-3307 to remain in his record longer than the OERs that cover the same period. Therefore, I recommend that the BCMR grant [the applicant's] request and remove the CG-3307 from his record.
4. Thank you for consideration of this information.

The applicant also asked the Board to contact LT D for a verbal statement about what he knows about the facts related in paragraphs 1 and 3 of the disputed Page 7. The applicant stated that LT D "is uncomfortable with giving a written statement, despite assurances that the BCMR process is outside Coast Guard control, but he is willing to give a verbal statement." The applicant submitted an email from LT D, who agreed to be contacted by telephone regarding the applicant's case "if the Board sees fit to contact [him]."

The applicant also alleged that his OER for the period ending March 31, 2010, was signed by a LTJG who prepared the OER as "supervisor" but who never actually supervised him in any way since CDR X, who signed the OER as "reporting officer" was his only supervisor. However, the applicant did not ask the Board to remove the OER from his record.

Finally, the applicant argued that the Board should remove his failures of selection from his record and reinstate him because the circumstances of his case meet the *Engels* test in that the erroneous Page 7 prejudiced his record before the selection boards and that it is not unlikely that he would have been promoted had the Page 7 not been reviewed by those boards.

SUMMARY OF THE RECORD

On August 19, 2003, the applicant enlisted in the Coast Guard. On December 15, 2004, after attending Officer Candidate School, he was commissioned an ensign in the Reserve and began serving on an extended active duty (EAD) contract. He was assigned to Sector XXXXXX as an Assistant Response Officer and on his first OER, dated September 30, 2005, he received fifteen marks of 4 and three marks of 5 in the various performance categories,¹ a mark in the third spot on the comparison scale,² and a recommendation for promotion "with peers."

¹ In OERs, officers are evaluated in a variety of performance categories, such as "Professional Competence," "Teamwork," and "Judgment," on a scale of 1 to 7, with 7 being best. An average mark of 4 is the expected level of performance. The supervisor assigns the marks for the first 13 performance categories, and the reporting officer assigns the last 5 marks.

² The reporting officer usually makes a written recommendation about promotion and completes a "comparison scale" on which he compares the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his career. The 7 possible marks on the comparison scale are "unsatisfactory" for the first spot; "a qualified officer" for the second spot; "one of the many competent professionals who form the majority

On his second OER, dated March 31, 2006, the applicant received eleven marks of 4 and seven marks of 5 in the various performance categories, a mark in the third spot on the comparison scale, and his reporting officer's comment that he had been selected for promotion to LTJG and was "[s]teadily progressing towards [a] strong recommendation for LT." This OER is signed by the Assistant Chief of Response as supervisor; CDR X, the Chief of Response, as reporting officer; and the Sector Commander as the reviewer.

On May 26, 2006, the applicant received the disputed Page 7, the text of which appears on page 2, above. On June 15, 2006, he was promoted to LTJG. On July 7, 2006, he completed a five-week Boarding Officer Course.

On his third OER, dated July 31, 2006, the applicant received six marks of 4 and twelve marks of 5, a mark in the fourth spot on the comparison scale, and a recommendation for promotion "with his peers." This OER was signed by the new Assistant Chief of Response, the new Chief of Response, and the new Deputy Sector Commander.

On his fourth OER, dated January 31, 2007, the applicant received three marks of 4 and fifteen marks of 5 in the various performance categories, a mark in the fourth spot on the comparison scale, and a recommendation for promotion "with peers."

On his fifth OER, dated June 15, 2007, the applicant received ten marks of 4 and eight marks of 5 in the performance categories; a mark in the third spot on the comparison scale; and a recommendation for promotion "with peers." The Chief of Response noted that he "remains on course with his development as a dependable junior officer. [He] aggressively pursued and eventually completed his Boat Forces PQS, thus earning the temporary insignia. With additional concentration on communication and professionalism skills, [he] will soon evolve into a more capable junior officer that can work independently and free of command cadre intervention." The applicant was not selected for promotion to lieutenant in 2007.

On July 8, 2007, the applicant reported for law enforcement duty at a District office. On his OER dated January 31, 2008, he received one mark of 4, ten marks of 5, and seven marks of 6 in the various performance categories, a mark in the fifth spot on the comparison scale, and a strong recommendation for promotion. On his OER dated June 30, 2008, he received one mark of 4, five marks of 5, and twelve marks of 6 in the performance categories; a mark in the fifth spot on the comparison scale; and a strong recommendation for promotion "with best of peers." However, he was not selected for promotion in 2008 and was therefore unable to integrate into the regular Coast Guard and slated for discharge on June 30, 2009.

The applicant's last OER is dated February 1, 2009, and marks his release from active duty because he had twice failed of selection for promotion to lieutenant. He received ten marks of 5 and eight marks of 6 in the performance categories, a mark in the fourth spot on the comparison scale, and a strong recommendation for promotion in the Reserve.

of this grade" for the third, fourth, and fifth spots; "an exceptional officer" for the sixth spot; and "a distinguished officer" for the highest, seventh spot.

On June 18, 2009, the Reserve informed the applicant that he would be discharged from the Reserve as of June 30, 2009. On June 29, 2009, the applicant submitted a request to be retained in the Reserve so that he could be considered for promotion by the next IDPL LT selection board. The applicant described his operational experience on active duty and his desire to serve in the Reserve. On June 30, 2009, the applicant's request for retention was approved so that he could compete once more for promotion to LT on the IDPL. The memorandum states that if he was not selected for promotion to LT in 2009, he would be discharged from the Reserve as of June 30, 2010. However, the applicant was selected for promotion to LT as a Reserve officer, and he was promoted on January 16, 2010.

VIEWS OF THE COAST GUARD

On June 3, 2010, the Judge Advocate General (JAG) submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG argued that the applicant "has failed to prove his chain of command committed error or an injustice regarding documentation of substandard performance via [the disputed Page 7]." He stated that the applicant "provided no evidence to refute the validity of the CG-3307 (Page 7) documenting [his] substandard performance."

The JAG also claimed that the preparation of the Page 7 was proper in accordance with Enclosure (6) of the Pay and Personnel Procedures Manual (PPPM) and that the applicant's claim that he should have been counseled on a special OER instead of on a Page 7 is without merit since an officer does not get to dictate how he is counseled. The JAG noted that the Page 7 should have been denoted as a "Performance and Discipline" entry, rather than an "Administrative" entry but that "the slight deviation regarding the Entry Type should be considered harmless error at best." The JAG stated that the applicant's "attempts to highlight CAPT Hamilton's issues are not dispositive of the issues involved in this particular case."

The JAG also adopted the facts and analysis provided by the Personnel Service Center (PSC) in a memorandum attached to the advisory opinion. The PSC also recommended that the Board deny relief. The PSC stated that the fact that adverse performance may be reported on a special OER does not mean that a command cannot document it on a Page 7 instead. The PSC states that Page 7s are used to

capture positive or negative performance or conduct for both enlisted and officers. ... In this instance the CG-3307 was issued to the applicant placing him on notice that he was "not progressing in your development as an officer." The disputed CG-3307 was signed by the Deputy Sector Commander, CDR Hamilton (likely because the Sector Commander was out of the office on convalescent leave as indicated by the Applicant in his supporting documents). The documentation of this sub-par performance was initiated by the applicant's Reporting Officer, [CDR X]. In his current statement to the BCMR, [CDR X] states, "I stand by the remarks therein ..."

The PSC also disagreed with the applicant's claim that his performance should have been documented on a special OER. The PSC stated that a failure to progress as an officer—the subject of the Page 7—does not meet the criteria for a disputed OER. "The CG-3307 does not rise to the level of notably different performance whereby a major personnel decision would be made

(e.g., to remove or re-assign the member to another unit).” The PSC argued that the decision to counsel the applicant on a Page 7, rather than entering a negative special OER in his record, likely benefited him because his subsequent OER from his new rating chain was positive. The PSC stated that had the rating chain provided the information to the new rating chain as OER input, the incidents would likely have been documented in his next regular OER, which would not have been masked from future selection boards because his next OER was an LTJG OER. The PSC also noted that the command had the option of preparing an OER when CDR X, the reporting officer on the applicant’s rating chain, departed the unit in June 2006.

The PSC stated that the decision to mask ensign OERs from consideration by LCDR and higher selection boards was intended to allow ensigns to take “grow and intelligent risks” and was based on a belief that “minor mistakes made during [an officer’s first year and one-half of duty] should not adversely affect officers later in their careers.” The PSC stated that the remarks on the Page 7 were not intended to prejudice him but to place him on notice that he needed “to correct his performance to succeed as an officer and leader of which the applicant’s subsequent OER did show improvement.”

The PSC further stated that although CDR X initiated the Page 7, he was subordinate to the issuer of the OER, Captain H, and “has no authority to override the issuer’s decision whether to issue or retain the document in the member’s record. While the applicant has raised questions ... of integrity regarding the issuer of the Administrative Remarks based on recent events, he has not established that the person failed to execute his duties in this matter diligently.”

The PSC noted that Article 14 of the Personnel Manual allows officers to appeal Page 7s through the chain of command and that the applicant failed to appeal the Page 7.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 2, 2010, the applicant responded to the views of the Coast Guard. He noted that the PSC supported his claim that if his performance had been documented on a special OER, instead of the Page 7, the special OER would not be seen by LCDR selection boards. He also noted that the command could have documented his conduct on either a special OER or an optional OER prepared upon the departure of his reporting officer in June 2006.

The applicant stated that he is not arguing that the command could not counsel him on a Page 7 “but that the way in which it went about using it was wrong. A CG-3307 was used to capture performance that was different from the previous marking period because my rating chain was departing; that is the purpose of a special OER.” He alleged that while issuing a Page 7 “is not against policy, writing a special OER is policy, and the command did not do that. The timing of the CG-3307 effectively prevented its appeal through the chain of command.” The applicant also denied that his supervisor would have been able to pass input for his next OER to his next rating chain.

The applicant stated that he did not appeal the Page 7 because he did not know one could do so and because his entire rating chain left the unit while he was away at Boarding Officer School. He stated that of the entire command cadre, only LCDR B remained when he returned

to the Sector from the school. He alleged that in counseling him about the Page 7, CDR X told him that he could “overcome” it but did not tell him that he could appeal it. Because he was given the Page 7 on the evening of the last day that he and all the members of his rating chain would be present at the unit, he “would have been forced to appeal it to a different chain of command.” Any such appeal would have put his new rating chain in an awkward position and would not have given them a good first impression of him. In support of these allegations, the applicant submitted an email from a chief yeoman who reported that a database showed that the lieutenant who had signed his OER as supervisor left the unit in August 2006; that CDR X who supervised him but signed his OER as reporting officer left the unit in June 2006; that LT (then CDR) Hamilton left the unit in June 2006; and that the CO left the unit in July 2006.

Regarding his claims about LT Hamilton’s integrity, the applicant submitted a 1,400+ page transcript of witnesses’ testimony at LT Hamilton’s Article 32 hearing. He argued that LT Hamilton’s crimes show that he had little integrity and that, had the CO not been bedridden, the CO would have been the one to decide and might not have signed the Page 7.

The applicant argued that the Page 7 should be removed from his record for the same reason that ensign OERs are masked from selection boards. He argued that he is being unduly burdened by having the Page 7 in his record because the text is “a rebuke cloaked in positive language; its issuance virtually guaranteed that I would not be picked up for LT/O-3, at least on the ADPL.” He also argued that CDR X and the Deputy Sector Commander acted inconsistently with the Personnel Manual in preparing the Page 7 and that the timing of the Page 7 unjustly and erroneously prevented him from appealing it.

Regarding paragraph 1 of the Page 7, the applicant submitted statements from other members, which he alleged show that his arrival and departure times from the CIO conference did not warrant written counseling on the matter. LCDR B stated that the applicant was scheduled to give a presentation at 11:00 and although he was not present when the conference began, he “arrived well ahead of his originally scheduled presentation time.” She also stated that the applicant did not leave early but stayed for the communal lunch and left with the other non-golfing conference participants when the CO opted to end the conference early to allow golfing. LCDR B further stated that there was a poor command climate and she “witnessed some spiteful behavior.” She remembers hearing CDR X and then-CDR Hamilton at one point discussing whether to give the applicant a Page 7 but alleged that they concluded in the discussion that a Page 7 “was not the appropriate action.” She alleged that they should have given the applicant an optional OER instead and that the rating chain’s departure from the unit deprived the applicant of the opportunity to appeal the Page 7. She stated that the applicant “is an exemplary officer who was not treated fairly by a command generally known for its unfairness.” BMCS P wrote that the first day of the OIC conference was ended early to allow people to play golf. CWO M stated that the golf that had been planned for the second day of the conference was rescheduled to the first day because of the weather forecast.

Regarding paragraph 2 of the Page 7, the applicant repeated his allegations that the CO had told him he had visited all of the units he intended to and that the applicant should mail out the rest. The applicant stated that although he has contacted the CO for a statement, the CO has not responded to his request. He alleged that the problem was not mismanagement on his part,

but the CO's lack of communication with the other command cadre on the issue. The applicant submitted a statement from an OIC, who wrote that he was displeased when the awards arrived in the mail "with no note or any correspondence or communication that they would not be presented by the Sector XXXXXX Commander or in his absence his representative." He knew that other units had received their awards via the Sector Commander since it was a Sector award. The OIC noted that his unit is only 45 minutes from the Sector. He stated that he could not remember the applicant ever calling him about the awards.

Regarding paragraph 3 of the Page 7, the applicant stated that he was the senior officer on the boarding team that day who "took the risk of quickly gathering up a Boarding Team at the last minute to ensure that the Security Boarding took place." However, he was not the Boarding Officer (BO) because he had not yet attended Boarding Officer School. He stated that it was the BO's duty to contact the Command Center and the command cadre. He submitted the Sector's guidance, which states, "The BO has the responsibility of coordinating the boarding ... The BO will also notify the Sector OPCEN and the Response Dept Head when the boarding team departs for the boarding." The applicant stated that it was the responsibility of the BO and the Command Center to notify the command, but they failed to do so. The applicant submitted a database print-out showing that a boarding took place "on the 24th of May, two days before the CG-3307 was issued to [him]" and that the BO for the boarding was an MST1. The applicant admitted that as the senior commissioned officer on the boarding team, he should have ensured that either the BO or the Command Center notified the command, but he stated, when he realized after the fact that the notifications had not been made, he took responsibility and called CDR X. He asked the Board to note that although "by regulation and law, it was not [his] responsibility," he "stepped up and took action when called for and responsibility for a mistake perhaps not [his] own. The intelligent risk [he] engaged in was ensuring that the security boarding took place at the last minute, and [he's] still glad [he] organized the boarding."

In support of these allegations, the applicant also submitted a copy of the Sector boarding program guidance. Paragraph 5.a. states that a dispatch form must identify the BO and the team members and must be approved by the Captain of the Port. It states that the BO "has the responsibility of coordinating the boarding" and "will also notify the Sector OPCEN and the Response Dept Head when the boarding team departs for the boarding."

The applicant concluded by repeating his claims that because he could not appeal the Page 7 given the departure of his rating chain, that CDR X should have counseled him on an OER instead, and that the principle that requires masking of ensign OERs should also apply to Page 7s, but that since the Page 7 is not masked under Coast Guard policy, the Board should order the Coast Guard to remove it from his record. He alleged that he has "shown conclusively that 1/3 of the allegations in the CG-3307 are false," cast "reasonable doubt about the other 2/3 of the allegations," and proved that the officer who signed the Page 7 "was motivated throughout his career by reasons other than public service and was an unsatisfactory officer in multiple ways."

The applicant submitted an email from someone at the unit who stated that "there was guidance from the top as to the mission we needed to accomplish and even when we met the mission's requirements nothing was enough to overcome the command's judgment if you were

not within the 'in' circle. We received little or no feedback on performance until we received the OER and if you received any feedback it wouldn't be a straight answer that could help you improve or know where you stood." He also stated that CDR X, the Response Department Head, supervised the applicant.

The applicant also submitted an email from the lieutenant who signed his OER as supervisor, who stated that he did not supervise the applicant but he "supervised some of your tasks and provided OER input" to CDR X.

SUMMARY OF APPLICABLE REGULATIONS

Article 10.A.1.c.5. of the Personnel Manual states the following regarding performance feedback during an evaluation period:

No specific form or forum is prescribed for performance feedback except for ensigns and lieutenants (junior grade). Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g. through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If the feedback is not fully understood, it is the Reported-on Officer's responsibility to immediately seek clarification and the rating chain's responsibility to provide it.

Chapter 10.A. of the Personnel and Pay Procedures Manual (PPPM; HRSICINST M1000.2A) states that form "CG-3307 [a Page 7] provides a means of recording miscellaneous entries, which are not recorded elsewhere in a Personnel Data Record (PDR). Administrative Remarks entries are made to document counseling, or to record any other information required by current directives, or considered to be of historical value."

Article 10.A.3.c.1. of the Personnel Manual states the following regarding special OERs:

Special OERs. The Commandant, commanding officers, higher authority within the chain of command and Reporting Officers may direct these reports. The circumstances for the Special OER must relate to one of the situations described in subsections a. through e. The authorizing article listed below should be cited in Section 2 of the OER along with a brief description of the circumstances which prompted the OER's submission. ...

a. A special OER may be completed to document performance notably different from the previous reporting period, if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or reassignment. This report should not normally reflect performance that is reportable under Article 10.A.3.c.1.b. Notably changed performance is that which results in marks and comments substantially different from the previous reporting period and results in a change in the Section 9 comparison or rating scale. This OER counts for continuity.

b. A special OER is required after an officer is found guilty of a criminal offense ...

ALCOAST 214/03, issued on May 9, 2003, announced that "active duty and Reserve promotion boards will no longer view any ensign OER at LCDR and above promotion boards beginning with promotion year 2004. The LTJG and LT selection boards will continue to view entire records including ensign OERs."

Article 14.B.1.a. of the Personnel Manual states the following:

The Coast Guard maintains many types of personnel records, such as ... and Administrative Remarks, CG-3307. Although those who prepare these records strive to ensure that each is accurate, occasional mistakes do occur. Additionally, in some instances, an entry may have been made accurately, but the member disputes the facts or circumstances upon which it is based. This section provides general information about the administrative methods available for seeking correction of Coast Guard personnel records.

Article 14.B.2.a. states the following about appealing Page 7s and other entries:

If a member believes a personnel record entry is unfair, an appeal through the member's chain of command usually is the simplest and fastest means for seeking correction or deletion of the entry. The level in the chain of command to which the appeal should be directed is dependent upon all of the circumstances. As an example, for a member who receives an Administrative Remarks, CG-3307 from his or her division chief documenting purported substandard watchstanding, an appeal through the division chief and the executive officer to the commanding officer should suffice. (This appeal may be in the form of a so-called "Request Mast" pursuant to Article 9-2-3, Coast Guard Regulations, COMDTINST M5000.3 (series).)

Article 14.B.3. authorizes members to apply to the Personnel Records Review Board to seek correction of a military record such as a Page 7 within a year of the date it is entered in a member's record.

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. Although the application was not filed within three years of the applicant's discovery of the alleged error or injustice, it is considered timely because it was filed within three years of the applicant's discharge from active duty.³

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁴

3. The applicant alleged that the disputed Page 7, dated May 26, 2006, should be removed from his record because it was signed by an officer who has since retired in disgrace;

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

⁴ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that "whether to grant such a hearing is a decision entirely within the discretion of the Board"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

because the information should have been documented in an OER instead of on a Page 7; because the timing of the Page 7 prevented him from appealing it; because it contains factual errors; because his supervisor supports his request to remove it; and because, had the same information been documented in an OER instead of on a Page 7, it would not be seen by lieutenant commander and higher selection boards. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁵ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁶

4. The applicant has proved that the Page 7 was signed by an officer who was involved in numerous adulterous affairs, several with subordinates, and who admitted to most of the charges against him at an Admiral's mast in 2010. However, the applicant has not shown any specific connection between the charges against LT Hamilton and the performance documented on the Page 7, and he has not shown that LT Hamilton had any reason to be biased against him. The Board finds that the charges against LT Hamilton do not cast any particular doubt on the validity of the Page 7.

5. The applicant admitted that the command was authorized to document his counseling on a Page 7 but argued that it was unfair to do so since it could have been documented on an OER. The command had recently prepared a regular OER for the applicant, dated March 31, 2006, and his reporting officer, CDR X, assigned him a below-average mark in the third spot on the comparison scale. CDR X presumably counseled the applicant about his performance in giving him the OER but initiated the Page 7 a few weeks later when three incidents occurred in a single week that showed the applicant was "not progressing in [his] development as an officer." The Board finds that, under such circumstances, it was not erroneous or unjust for CDR X and then-CDR Hamilton to document the applicant's lack of progress on a Page 7 rather than an OER. In this regard, the Board notes that a special OER or another OER with a mark in the third spot on the comparison scale would have been just as if not more prejudicial to the applicant's chance of being selected for promotion to lieutenant.

6. The applicant alleged that the Page 7 was unjust because it was given to him just before he left the unit to attend Boarding Officer School and just before his chain of command, through which he could have appealed the Page 7, was transferred to other units. He also alleged that CDR X told him that he could "overcome" the Page 7 but did not tell him he could appeal it. However, the timing of the Page 7 was determined by the applicant's performance during the week before he received it, and given the prevalence of email, the Board is not persuaded that the timing prevented him from appealing it. Nor does the Board believe that the applicant was

⁵ 33 C.F.R. § 52.24(b); *see* 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)).

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

unaware that members of a command may seek rectification of perceived injustices through their COs.

7. The applicant alleged that the three incidents cited on the Page 7 as examples of how he was not progressing as an officer are erroneous. With regard to the first example, he proved that he did not arrive late for his own scheduled presentation and he proved that the afternoon sessions were postponed due to the weather forecast and that he left the hotel with other non-golfers. However, he did not prove that he was not “noticeably over an hour late” in arriving at the conference or that he was not “the first to depart” the conference. With regard to the second example, the applicant alleged that miscommunications caused the OICs’ displeasure and that the CO ignobly failed to support him when the OICs complained about the handling of the awards at the conference. However, the statement of the OIC submitted by the applicant shows that the OIC received the awards in the mail without any communication or explanation from the applicant. With regard to the third example, the applicant has shown that it was the official duty of the first class petty officer who was a certified Boarding Officer to notify the command of the armed boarding before it occurred, but he has not shown that he was not remiss in his own responsibilities as the most senior officer present and as the officer who organized the boarding. Moreover, the Board notes that although CDR X now supports the applicant’s request to remove the Page 7, he does not do so based on any alleged inaccuracies but on the effect the Page 7 might have on the applicant’s career in the future. In his statement on behalf of the applicant, CDR X stated that he “stand[s] by the remarks” in the Page 7. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the comments in the Page 7 are erroneous or unjust.

8. Because the applicant has not proved that the Page 7 contains any erroneous or unjust statement or that the command erred in opting to document the counseling on a Page 7, instead of an OER, there are no grounds for removing any of the applicant’s failures of selection for promotion to LT or for reinstating him on active duty since he was released from active duty due to his non-selection for promotion. He has not proved that his record contained any inaccuracy when it was reviewed by the LT selection boards that did not select him for promotion. The Board notes that even if the command had opted to document the applicant’s performance on an OER, rather than a Page 7, the information in the OER would have been seen by the LT selection boards.

9. The applicant also asked the Board to remove the Page 7 from his record to prevent any possible future harm to his career. Under ALCOAST 214/03, boards selecting officers for promotion to LCDR and higher grades do not see ensign OERs. The applicant argued that, based on the reasoning that justifies the masking of ensign OERs, the performance counseling that he received as an ensign on the Page 7 should also be masked from LCDR and higher selection boards and that the only way to mask a Page 7 is to remove it. CDR X, who initiated the Page 7, supported the applicant’s request to have the Page 7 removed because “it will be seen by LCDR and above promotion boards while ... Ensign OERs are masked. ... I feel that this is unfair. ... Although at the time, I believe the CG-3307 was appropriate, I did not intend for the CG-3307 to remain in his record longer than the OERs that cover the same period.” The Coast Guard noted that CDR X did not sign the Page 7 and that the officer who did sign it is unavailable to comment. More persuasively, the Coast Guard argued that the performance about which

the applicant was counseled did not warrant a special OER under the Personnel Manual and that, if the performance had been included on the applicant's next OER, instead of on a Page 7, it would not be masked from review by any selection board because the applicant was promoted to LTJG on June 15, 2006, and an LTJG's OERs are not masked.

10. The Board agrees that a special OER was not warranted under Article 10.A.3.c.1. of the Personnel Manual since the Page 7 was documenting a lack of progress that was not inconsistent with the mark in the third spot on the comparison scale on the applicant's March 31, 2006, OER. In addition, the Board notes that because the applicant was promoted to LTJG on June 15, 2006, any regular (non-special) OER that documented the problems noted on the Page 7 would have been an LTJG OER and so would not have been masked from any selection boards. In fact, the applicant's next regular OER was dated July 31, 2006, after his promotion to LTJG. Because he had received a regular OER on March 31, 2006, he was not entitled to another one before July 31, 2006, and the command's decision to counsel him on a Page 7 was not improper nor even less proper than counseling him on an OER. The Coast Guard's policy is to mask only ensign OERs, not Page 7s documenting counseling, and the applicant himself decided not to discuss the Page 7 in his communication to the LT selection boards because he believed it was too old to matter. While he failed of selection for LT on the ADPL with the Page 7 in his record, these failures of selection are attributable to his mediocre OERs, especially his OER dated June 15, 2007. In light of all these facts, the Board finds that the applicant has not proved that the Page 7 must be removed to ensure fair competition for promotion to LCDR.

11. The applicant asked the Board to remove a memorandum dated June 30, 2009, regarding his possible discharge from the Reserve on June 30, 2010, if he failed of selection for promotion again in 2009. He has not submitted anything to show that the memorandum is erroneous or unjust.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Julia Andrews

Darren S. Wall

Kenneth Walton