DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-160

FINAL DECISION

ANDREWS, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was received on July 29, 1999, and docketed on October 12, 1999, upon the BCMR's receipt of the applicant's military records.

This final decision, dated November 9, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, who retired from the Coast Guard as xxxxxxxx on August 1, 199x, because of a physical disability, asked the Board to remove from his military record his failures of selection for promotion to xxxxx by the selection boards that met in 1994 and 1995. He also asked the Board to promote him to xxx directly; to order the Coast Guard to convene a special selection board to consider him for promotion; or to have him considered for promotion by the next regular selection board as if he were "within the zone."

The applicant stated that if he is granted relief and considered for promotion by another selection board, he wants the selection board to consider only the documents that were or should have been in his record when it was reviewed by the previous boards and not to consider any "OERs or other documents that did not exist when he was earlier considered." He also asked that if he is promoted as a result of the Board's order or a subsequent selection board, he be retired in the rank to which he is promoted, with back pay and the date of rank and precedence he would have had if he had been promoted by the selection board that met in 1994.

SUMMARY OF THE APPLICANT'S ALLEGATIONS

The applicant was the executive officer of the *Xxxxx*, a Coast Guard cutter that xxxxxxx on xxxxx, 19xx, resulting in the death of x members. Because he was not on the bridge when the *Xxxxx* xxx (the xxx and an ensign were at the helm), he was not made a party to the subsequent investigation and did not have a right to counsel or other party rights. Although no negative entries were made in his record as a result of the accident, certain documents pertaining to the investigation included criticisms of his performance, suggesting that he could have prevented the accident. The applicant alleged that the critical comments and conclusions were unfair because he was never made a party to the investigation and had no right to counsel.

The applicant alleged that the members of the xxx selection boards that met in 1994 and 1995 may have been aware of the negative conclusions about his performance in the report of the investigation into the xxxx of the *Xxxxx*. He alleged that the selection board members may have been biased against him because of those negative conclusions and that such bias would have been unfair because he was never made a party to the investigation. He alleged that the selection board members would not have forgotten about the *Xxxxx* because xxxxxxxx are held and publicized.

As evidence of the selection board members' alleged bias, the applicant stated that he wrote each of the 1994 and 1995 board members a letter asking detailed questions regarding their awareness of the accident and their knowledge of the investigation's conclusions as to who was at fault. Because few of the board members responded and those who did respond provided little relevant information, the applicant argued that the BCMR should draw negative inferences and assume that the selection boards were biased against him because of the *Xxxxx* investigation.

The applicant also alleged that his record was incomplete when it was considered by the xxx selection board that met on xxxx 1994. In support of this allegation, he submitted a letter he signed on July 1, 1994, which stated that, as required by Article 10-A-2.c.(2)(g) of the Personnel Manual, he was informing the Military Personnel Command (MPC) that he had not received an official copy of his OER within 90 days of the end of the reporting period (xxxxx 1994). In addition, he submitted a letter dated February 24, 1995, in which he asked MPC to include copies of two Special Operations Service awards he received in 1989 for participating in the cleanup of two oil spills. He alleged that this request was necessary because the awards were not in his record before the 1994 selection board. The applicant also alleged that when he visited the office where the candidates' records were being assembled the day before the selection board met, the OER and a Special Operations Service Award were missing from his record. Therefore, he alleged, his failure of selection "in the zone" may have been caused by the incompleteness of his record. He alleged that a Report of the Senior Officer Service

School for the Academic Year 1993-1994 stated that nearly 10 percent of the most recent OERs were missing from the records of the candidates for the school.

The applicant also alleged that the Coast Guard has wrongfully withheld documents created for and used by the selection boards in their decisionmaking, which he has requested under the Freedom of Information Act (FOIA) and the Privacy Act. He alleged that the documents used by the selection boards to compare candidates' OER scores and performance would prove that he should have been selected for promotion to xxx. He alleged that the Coast Guard's destruction of selection board documents and refusal to recreate the comparative analyses for him is illegal and unjust. He alleged that some of the statistical analyses of marks considered by the selection boards may have contained errors that are now undiscoverable because the documents were so quickly destroyed. To prove the potential for such errors, he submitted a copy of a summary of comparison marks he himself had assigned, which shows no comparison marks of 1 (the worst possible), and a copy of a "special" disciplinary OER he prepared when a subordinate officer was found to have sexually harassed several enlisted members, which includes a comparison mark of 1.

The applicant alleged that his record was good enough that he should have been promoted. However, he alleged, in 1995, the selection board was biased against officers (like himself) who were "above the zone" (those who had already failed of selection once). He alleged that this bias is proved by the fact that 8 of the 24 "above the zone" officers (33 percent) were selected for promotion in 1994, while only 4 of 39 "above the zone" officers (9.75 percent) were selected for promotion in 1995. He alleged that the selection rate for "in the zone" officers was six times the rate for "above the zone" officers in 1995. He also alleged that he may have been prejudiced in competing for promotion in 1995, when he was "above the zone," because of systemic grade inflation, which, he alleged, increased the scores of those candidates who were "in the zone" (one year behind him) over those who were "above the zone."

The applicant also alleged that he may have been denied promotion because he is not female or a member of a minority. He alleged that the 1994 and 1995 selection boards illegally focused on promoting officers to increase diversity in the upper ranks because of diversity language in the boards' precept and instructions they received in preparatory briefings. He alleged that the 1994 board was impermissibly briefed by seven members of the Personnel Command staff, whose briefings may have threatened the board members' independence and neutrality. Personnel Manual, Article 14.A.4.c. He submitted copies of the selection boards' precepts, reports, and briefs (see below). He also submitted a copy of the report of the results of the 1994 panel for selecting officers to attend senior service schools. The report states that the panel consider applications from all officers in year groups 1973 through 1976 and from female and minority officers in year groups 1973 through 1980 "to accelerate the increased representation of women and minorities in senior leadership." The applicant also described two incidents

in which, he alleged, a minority officer and a female officer were given unusually advanced leadership opportunities.

The applicant also alleged that in 1995 the xxx selection board, which selects officers who are "best qualified" for promotion, was briefed along with another selection board tasked with selecting officers who are merely "fully qualified" for promotion. This dual briefing, he argued, may have caused confusion among the board members and prejudiced his chance for promotion.

The applicant also alleged that the selection board members were provided with copies of a proposed amendment to the Personnel Manual, Change 22, that was not yet in force. The amendment was the product of a committee convened to ensure that "best qualified" was defined in the Personnel Manual for the selection boards to mean best meeting the needs of the service. He alleged that he and the other candidates should have been told that the selection board would be given copies of this amendment, which was not signed until a month after the board met. He alleged that not informing him of this new provision "prejudiced me by precluding me from having the opportunity to effectively communicate to the selection board to specifically address the new expanded guidance on the 'best qualified' process."

The applicant argued that, in light of the illegal precept and instructions, the Coast Guard's refusal to provide documents under FOIA, the illegal and confusing briefings, and the selection board members' refusal to answer his questions, the BCMR should not grant the Coast Guard the presumption of regularity. Instead, he argued, the BCMR should require the Coast Guard to prove that the selection boards acted fairly in denying him promotion.

SUMMARY OF THE RECORD

Applicant's Personnel Record

The applicant graduated from the Coast Guard Academy and was commissioned as an ensign in 19xx. He served as a deck watch officer on the cutter xxxxx from June 19xx to March 19xx and was promoted to xxxx. He served as a deck watch officer on the cutter xxxxxx from March 19xx to August 19xx. From August 19xx to July 19xx, he served as the commanding officer of a xxxxxx station in xxxxx. From July 19xx to December 19xx, he served as the chief of the Personnel Branch at the xxxxxx, where he was promoted to xxxxxxx.

In December 19xx, the applicant began serving as the executive officer of the *Xxxxx*. The marks on the OERs he received for his service on the *Xxxxx*, are all "excellent" or "outstanding" (the highest mark). After the *Xxxxx* xxxxx on xxxx, 19xx, he was assigned to xxxxxx team as the command representative, supervising security

forces, identifying xxxxxx from the cutter, responding to press inquiries, and providing testimony for the investigation. None of his OERs indicate that he contributed to the accident, and the OER he received for this work on the xxxxxx contains only positive comments regarding his performance in the aftermath of the xxxxxx.

From May 19xx to April 19xx, the applicant served as an administrative and operations duty officer at the air station in xxxxx. He quickly qualified as a navigator for xxxx aircraft and continued to receive "excellent" and "outstanding" marks on his OERs. The applicant attended the University of xxxxx, where he earned a master's degree in xxxxxx, from April 19xx to May 19xx. In June 19xx, he was promoted to xxxxxxx. From June 19xx to June 19xx, he served as a xxxxxxx in the xxxxx Branch at Headquarters. In the OERs he received for this service, his marks rose from being mostly 4s (average on a scale of 1 to 7) to mostly 5s and 6s. His reporting officers rated him (and most of the other xxxxxx they supervised) to be an "exceptional officer."

From June 19xx through March 19xx, the applicant served as chief of the xxxxx Branch of the xxxx District. The last three of the four OERs he received for this service appear as OER1 through OER3 in the table below. In 19xx, he was promoted to xxx and participated in two major oil spill cleanups, for which he received Special Operations Service awards. On June 18, 19xx, the Commandant acknowledged entry of these two awards in the applicant's record. From April 1, 19xx, to September 1, 19xx, he served as the deputy chief of the xxxx Division of the xxxx District. His OER for this service is OER4 in the table below.

In September 19xx, the applicant was assigned to the Marine Safety Office in xxxxxxx as the chief of xxxxx Department, for which he received the marks shown in OER5 in the table below. In March 19xx, he began serving as the executive officer of the same office. The OERs he received for this work appear as OER6 through OER9 in the table below. OER7, which the applicant alleged was not in his record when the 1994 selection board convened on xxxx, 1994, was approved by MPC on xxxxx, 1994. A copy of the OER was mailed to the applicant on xxxxxx, 1994.

The applicant was recommended for promotion to xxx by his reporting officers in OER4 through OER9. In addition, his record contains two citations for the award of commendation medals, several letters of appreciation, and a December 19, 19xx, nomination for an xxxxxxx Award for promoting the professional growth of his subordinates, including women and minorities. However, he was not selected for promotion to xxx by the selection boards that met in July 1994 and July 1995. OER8 was the last evaluation he received prior to the 1995 board.

In August 199x, the applicant began serving as an assistant xxxxxxxx at Headquarters. OER10, which he received for this service, appears to be a perfunctory OER, not necessarily reflective of his actual performance, since six of the spaces for

comments were left entirely blank. OER10 and OER9 (the last he received as executive officer of the xxxxx Office) are the evaluations that he has asked the Board to omit from his record if it grants relief by ordering him to be reconsidered for promotion by a selection board.

Because he had twice failed of selection, the applicant was scheduled for retirement on July 1, 19xx. However, he was retired by reason of physical disability on August 1, 19xx.

APPLICANT'S MARKS IN 10 OERs FROM 5/1/88 THROUGH 7/31/96

CATEGORY[a]	OER 1	OER 2	OER 3	OER 4	OER 5	OER 6	OER 7	OER 8	AVE[c]	OER 9[b]	OER 10[b]
Being Prepared/Planning	6	6	6	6	5	6	6	6	**5.9**	6	5
Using Resources	6	6	6	5	6	6	7	7	**6.1**	6	5
Getting Results	6	6	6	6	6	6	6	6	**6.0**	7	5
Responsiveness	6	6	6	6	5	6	6	7	**6.0**	7	5
Work-Life Sensitivity[d]						6	7	7	**6.7**	6	5
Specialty Expertise	6	6	6	5	6	6	6	6	**5.9**	6	5
Collateral Duty	6	6	5	5	5	6	7	7	**5.9**	6	4
Warfare Expertise[d]	6	5	5	NO[e]	NO				**5.3**		
Working with Others	6	6	6	6	6	6	6	6	**6.0**	6	4
Human Relations	5	5	4	5	5	5	6	7	**5.2**	6	4
Looking Out for Others	6	6	6	6	6	6	7	7	**6.2**	7	4
Developing Subordinates	5	6	6	6	6	6	6	6	**5.9**	6	4
Directing Others	6	6	6	5	5	5	5	6	**5.5**	6	4
Evaluations	6	6	5	5	5	5	6	7	**5.6**	5	4
Speaking & Listening	6	6	6	6	6	6	6	6	**6.0**	6	4
Writing	6	6	6	5	5	5	6	6	**5.6**	6	4
Initiative	6	6	6	6	5	6	6	7	**6.0**	7	4
Judgment	6	5	6	6	6	6	6	7	**6.0**	6	4
Responsibility	5	5	5	5	6	6	6	6	**5.5**	6	4
Stamina	5	5	5	5	5	5	6	6	**5.2**	6	4
Health & Well-Being	4	4	4	5	4	5	5	6	**4.6**	5	4
Military Bearing	4	4	4	5	4	6	6	6	**4.9**	6	4
Professionalism	5	5	5	5	6	6	6	7	**5.6**	6	4
Dealing with the Public	5	5	6	6	5	5	6	6	**5.5**	6	4
Average for OER	5.56	5.52	5.48	5.45	5.36	5.70	6.09	6.43	**5.7**	6.09	4.26[b]
Comparison Scale[f]	5	4	5	5	5	5	5	6	**5.0**	5	5

[a] Some categories' names have changed slightly over the years.

[b] OERs were received after the applicant twice failed of selection for promotion to xxx. OER10 appears to be a perfunctory OER prepared after the applicant retired. Therefore, the marks in OER10 are not necessarily reflective of his service.
[c] Rounded average score for category in OER1 through OER8.
[d] Category discontinued or nonexistent until later years.
[e] Score given was "NO," which means there was no opportunity to observe this trait.
[f] The Comparison Scale is not actually numbered. In this row, "6" means the applicant was "strongly recommended for accelerated promotion." A "5" means the applicant was rated to be a "distinguished performer; give tough, challenging, visible leadership assignments." A "4" means the applicant was an "exceptional performer; very competent, highly respected professional."

Documents Concerning Inflation of Marks

On September 8, 1992, a panel convened for the purpose of selecting officers for senior service schools for the academic year 1993-94 issued its final report. The selectees were all officers who had received their commissions between 1971 and 1974. Paragraph 9 of the report states the following:

> The panel was disturbed that nearly ten percent of the most recent OER's of those candidates being considered were missing from the records. The panel noted that the Distinguished mark in Block 21 [a comparison mark of 5] was used for a preponderance of the O-5 corps considered and was consequently not a useful discriminator. … OER's in general contained high number marks that were not necessarily supported by comments. This was especially notable in OER's for year group '74.

ALCGOFF 031/95 reported on a statistical study of OERs completed in 1994. The study found no significant inflation of numerical marks and no significant differences in the evaluations of minority, female, and non-minority male officers.

1994 Selection Board Documents

On xxxx, 1994, the Commander of the Military Personnel Command (MPC) issued the precept for the 1994 (promotion year 1995) xxx selection board. The board was directed to select the 66 "best qualified" xxxs for promotion from among the 109 "in the zone" xxxs, 24 "above the zone" xxxs, and 142 "below the zone" xxxs.[1] To be selected, an officer had to be considered "best qualified" by at least two-thirds of the eight selection board members. The precept ordered the selection boards members to perform their evaluations "without prejudice or partiality" and also "not to divulge any information related to the proceedings of the Board." Paragraph 8 of the precept stated the following:

> The Coast Guard is firmly committed to equality of treatment and opportunity for all personnel without regard to race, creed, color, gender, national origin, or occupational specialty. To the extent that minorities and women are significantly underrepresented at practically all levels of our work force, we must be especially concerned about and aware of their progress. Selection boards have a responsibility to select officers who share this

[1] Of the 66 chosen, a maximum of 6 selectees could be "below the zone" officers.

commitment. Prior to adjournment, the Board shall review the selection rates of minority and women officers.

The applicant submitted a copy of the brief used by the acting chief of the MPC to orally instruct the selection board. The brief contained the following statements.

> You are to make your decisions based on both the qualifications of the officers and the needs of the Service. In regard to the needs of the Service, I invite your attention to specific portions of the precept.
>
> We are making a concerted effort in all areas to improve the representation of minority and women officers and enlisted personnel in the Coast Guard. These efforts must include the fair and impartial consideration of minority and women officers being considered by the board.
>
> • • •
>
> I will not give you guidelines on the specialty needs of the Service. The decision of which officers are best-qualified for selection for promotion is yours to make based on the records provided to you.
>
> • • •
>
> The proceedings and deliberations of this board are ***confidential***. … Deliberations of the Board process are never to be discussed with any one other than members of the Board. …

The applicant also submitted a copy of the brief used by the head of the Officer Personnel Management (OPM) Division to orally instruct the selection board. He first had the board members take the oath of office, which included an oath not to disclose any information about the board to anyone. The brief shows that the board was introduced to six OPM staff members, who would be available to assist the board. The brief indicates that the board was instructed to consider the candidates' OERs during the most recent seven years the most significant, but that the board could consider the candidates' entire records. It also shows that the precept was not read aloud and that the board was cautioned to base its decisions on the candidates' records, rather than on hearsay or rumor. In addition, the brief contained the following information:

> While the total numbers of minority and women officers in the Coast Guard have grown over the last 5 years, this growth-rate has been minimal. As of 14 July 1994, the percentage of minority officers on active duty in the Coast Guard is 8.6%, or 525 officers in a corps of 6093. Of this 8.6%: [179 are Black, 165 are Hispanic, 35 are American Indian/Alaskan Native, and 146 are Asian/Pacific Islander.]
>
> The percentage of women officers is 7.8% with 476 officers in a corps of 6093.
>
> The Coast Guard is last of 5 [military] services in percentage of minority officers and next to last for women.
>
> Upward mobility of these officers is also an area of concern. For example, of the officers serving on active duty at the O-6 level, there are only 8 minority officers and 1 woman officer.

> It has been estimated that, in the next decade, 75% of the net growth of those entering the work force will be minorities or women.
>
> Included in the officers before you, there are [1 minority officer "above the zone," 3 minority officers "in the zone," 4 minority officers "below the zone," no female officers "above the zone," 3 female officers "in the zone," and 1 female officer "below the zone."] The SSN list of officers under consideration has been annotated, for your use, to include ethnic and gender codes.
>
> The Coast Guard has a need to retain and advance qualified minority and women officers. They will serve as the role models for the recruits of the future.
>
> Prior to adjournment you must review the selection rates of the minority and women officers considered. We will assist you in developing this information.
>
> You have a difficult job before you this week. Keeping the needs of the Service in mind, you are tasked with selecting those xxxs who are best qualified for promotion to xxx.
>
> • • •
>
> Remember the oath you have taken. You will be approached. You must not divulge anything regarding the deliberations of the Board or the specifics of any record or officer.

On xxxxx, 1994, the selection board issued a report on its proceedings and selections. Paragraph 5 of the report stated that at the beginning of the proceedings the president of the board "summarized the Precept dated xxxx 1994, since all members were provided a copy and indicated they had read it." The applicant's name was not among the xx selected for promotion to xxx. Findings 3 and 4 stated the following:

> 3. Prior to completion of our deliberations, the Board reviewed the selection rates of minority and women officers as directed in the Precept. The Board was advised upon convening that, after producing its list of selections but before adjourning, statistics on the selection rate of women and minorities wold be provided to the Board by the MPC. These statistics are easily determined by the Board itself before deliberations are complete, using the basic information on the officers being considered.
>
> 4. The Board is concerned about the quality control of OERs. Present efforts to ensure that number ratings are properly supported by comments seem inadequate, as a large proportion of OERs contained high numbers unjustified by supporting comments. This problem of "inflation" not only jeopardizes the usefulness of OERs in discriminating among officers, but it also magnifies the danger of unfairness from differences in inflation between one rater and another.

On xxxxxx, 1994, the Commandant released a report indicating that of 24 candidates for promotion to xxx "above the zone," 8 of 23 white males were chosen, the only minority candidate was not chosen, and there were no female "above the zone" candidates. Of xx total "in the zone" candidates, 55 of 103 white males were chosen, 3

of 3 minority males were chosen, and 3 of 3 female officers were chosen.[2] No "below the zone" officers were selected.

1995 Selection Board Documents

On xxxx, 1995, the Commander of the MPC issued a very similar precept for the 1995 xxx selection board. The board was directed to choose the 76 "best qualified" xxxs for promotion to xxx from among xxx "in the zone" xxxs, 39 "above the zone" xxxs, and 142 "below the zone" xxxs.[3] Paragraph 6 of this precept was identical to Paragraph 8 of the 1994 precept, except that the second and third sentences appeared in reverse order. The precept stated that "[e]xcept for the report of this Board, the proceedings of the Board shall not be disclosed to any person not a member of the Board."

The MPC brief for the 1995 selection board contained the following statements:

> You are to make your decisions based on both the qualifications of the officers and the needs of the Service. In regard to the needs of the Service, I invite your attention to specific portions of the precept.
>
> We are making a concerted effort in all areas to improve the representation of minority and women officers and enlisted personnel in the Coast Guard. I would like to bring your attention [to] the Commandant's direction [COMDTINST 16010.12] in this area. [Here, some of the text of the Commandant's instruction is reproduced in the brief. The instruction states that the Commandant is committed to having a diverse workforce and that diversity is critical to attracting "the best and brightest of this country's diverse workforce."]
>
> While the total numbers of minority and women officers in the Coast Guard have grown over the last 5 years, this growth-rate has been minimal. As of 12 July 1995, the percentage of minority officers on active duty in the Coast Guard is 9.2%, or 529 officers in a corps of 5,777. Of this 9.2%: [177 are Black, 166 are Hispanic, 35 are American Indian/Alaskan Native, and 151 are Asian/Pacific Islander.]
>
> The percentage of women officer is 8.6% with 497 officers in a corps of 5,777.
>
> The Coast Guard is last of 5 [military] services in percentage of minority officers and next to last for women.
>
> Upward mobility of these officers is also an area of concern. For example, of the officers serving on active duty at the O-6 level, there are only 8 minorities and 1 woman.

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[2] This interpretation of the report assumes that none of the minority officers were also female, but this cannot be determined from the report itself. The report also shows that of "in the zone" candidates for promotion to xxx, 67% of men were chosen, 83% of women were chosen (5 of 6), and 70% of minority officers were chosen (7 of 10). Of "in the zone" candidates for promotion to xxxxxx, 74% of men were chosen, 88% of women were chosen (15 of 17), and 53% of minority officers were chosen (8 of 15). Of "in the zone" candidates for promotion to xxxx, 82% of men were chosen, 69% of women were chosen (33 of 48), and 72% of minority officers were chosen (51 of 71).

[3] Of the xx chosen, a maximum of 7 selectees could be "below the zone" officers.

> It has been estimated that, in the next decade, 75% <u>of the net growth</u> of those entering the work force will be minorities or women.
>
> Included in the officers before you, there are [no minority officers "above the zone," 5 minority officers "in the zone," 5 minority officers "below the zone," no female officers "above the zone," 1 female officer "in the zone," and 4 female officers "below the zone."] … The SSN list of officers under consideration has been annotated, for your use, to include ethnic and gender codes.

The applicant also submitted a copy of the brief used by the head of the Officer Personnel Management (OPM) Division in 1995 to orally instruct the selection board. The brief indicates that this board also took an oath not to disclose any information about the board to anyone. The brief shows that the board was introduced to six OPM staff members, who would be available to assist the board. The brief indicates that the board was instructed to consider the candidates' OERs during the most recent seven years the most significant, but that the board could consider the candidates' entire records. It also shows that the precept was not read aloud and that the board was cautioned to base its decisions on the candidates' records, rather than on hearsay or rumor. In addition, the brief indicated that a new amendment to Article 14-A of the Personnel Manual (Change 22) was provided to the board.

On xxxxx, 1996, the Commandant released a report indicating that of xx candidates for promotion to xxx "above the zone," 4 of 39 white males were chosen and there were no minority or female "above the zone" candidates. Of xx total "in the zone" candidates, 70 of 120 white males were chosen, 2 of 5 minority males were chosen, and the only female candidate was not chosen.[4] No "below the zone" officers were selected.

Documents Concerning the xxxxxx of the* Xxxx *onxxxxxx

The applicant submitted a copy of a xxxx magazine article concerning a xxxxxxxx for the xxxxxx of the *Xxxxx*. It states that the xxxxxx because it xxxxxxxxxxxxxxxxxx.

The ensign who was on watch as the officer of the deck when the *Xxxxx* xxxxxx was awarded non-judicial punishment for his negligent actions. He appealed the punishment and his appeal was granted based on the fact that he had only 30 days of experience as an underway officer of the deck at the time of the collision and based on

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[4] This interpretation of the report assumes that none of the minority officers were also female, but this cannot be determined from the report itself. The report also shows that of "in the zone" candidates for promotion to xxx, 60% of men were chosen, 73% of women were chosen (11 of 15), and 82% of minority officers were chosen (9 of 11). Of "in the zone" candidates for promotion to xxxxx, 71% of men were chosen, 71% of women were chosen (12 of 17), and 68% of minority officers were chosen (13 of 19). Of "in the zone" candidates for promotion to xxxxxx, 79% of men were chosen, 80% of women were chosen (33 of 41), and 64% of minority officers were chosen (32 of 50).

the fact that his punishment was disproportionate to that of higher ranking officer. Instead, a punitive letter of admonition was entered in his record that stated the following, in part:

> You should have known that the Commanding Officer was on the bridge of the XXXXX and you should have notified him of the presence of the XXXXX, which you would meet in a restricted, complex channel. … [I]t should be noted that the degree of your dereliction was mitigated by the following factors: (1) the Executive Officer of XXXXX knew of the presence of XXXXX; (2) he had agreed to assist you in arranging a passing agreement with XXXXX via radiotelephone; (3) he did not inform you that he had been unable to do so; and (4) from his silence, you concluded that he concurred with your conning actions. I have concluded that the deficiencies in your performance on xxxx consisted mainly of errors in judgment caused by your limited experience and your misunderstanding concerning the amount of assistance and supervision the Executive Officer was providing.

The letter granting the ensign's appeal also stated the following:

> The Executive Officer, [the applicant], was not subjected to disciplinary procedures in this matter. I am convinced this apparent anomaly exists solely due to a potential legal bar resulting from erroneous decisions reached by the Marine Board at the outset of their investigation. I am certain there has been no affirmative Coast Guard decision or pronouncement that [the applicant] was without fault. Indeed, I concur fully with the investigating officer's remarks that [he], as Executive Officer, could have, and should have taken affirmative action to insure the safe navigation of the vessel. I purposely mention this here so that those who must review your file in the future are cognizant of my opinions and conclusions.

A few members of the selection board responded to the applicants' inquiries regarding their knowledge of the xxxxxx of the *Xxxxx*. In their written responses, they denied having been privy to investigative reports about the xxxxx, and they denied having any specific perception of fault by anyone except the xxx, who was considered to be "ultimately responsible" as commanding officer.

Documents Concerning the Applicant's Information Requests

The applicant submitted a copy of his FOIA request dated October 3, 1995. He requested copies of OER marks summaries for each of the candidates selected for promotion to xxx by the 1994 and 1995 boards for the seven years prior to the board. He also asked for "sanitized" copies of the OERs for the prior seven years of those candidates selected for promotion by the 1994 and 1995 boards who were "above the zone"; who were female or a member of a minority; whose supervisor, reporting officer, or reviewer during the previous seven years was a member of the selection board; or who had any disciplinary entries in their records.

On November 3, 1995, the Commander of MPC, responding to a previous FOIA request by the applicant, wrote him a letter stating that records of the reporting officers'

distribution of comparison marks were not produced for entry in officers' records after June 1987. He also stated that under exemption 6 of FOIA, he could not reveal the names of any other officers who submitted letters to the 1995 selection board.

On December 21, 1995, the Commander of the MPC denied the applicant's FOIA request. He stated that the OER marks summaries prepared for selection boards are destroyed immediately after the boards adjourn since they are intended for use only by the boards, and the information is retained in the officers' own OERs. In addition, the Commander explained that "[a]ll records containing information that can be used to determine an average of OER marks for a group of officers are being withheld under FOIA exemption 2. This exemption protects information that is related solely to the internal personnel rules and practices of an agency." The Commander further explained that retention of the summaries of marks could "adversely impact the evaluation system" by influencing raters to assign officers marks in comparison to known average marks, rather than in comparison to the written performance descriptions provided on the OERs. In addition, he stated that officers' identities could be revealed by scrutiny of redacted or sanitized OERs. Therefore, the applicant's request for copies of actual OERs also had to be denied under FOIA exemption 6.

On November 28, 1995, the applicant submitted a request for information under the Privacy Act. He asked for copies of summaries of his past reporting officers' comparison scale marks. Such summaries would reveal what comparison scale marks his reporting officers assigned to the other officers they evaluated, though not by name.

On February 13, 1996, the Commander of the Personnel Command denied the applicant's request stating that the documents he requested were not retrievable from any record using his name or other personal identifier. In addition the Commander stated that such records are withheld under exemptions 2 and 5 of FOIA. The reasons given for withholding the information under exemption 2 were the same as those given in his letter dated December 21, 1995. The Commander stated that the information he requested was also withheld under exemption 5, the "deliberative process privilege," because the summaries would reflect officers' opinions and recommendations used in deciding promotions and assignments. He stated that release of the information "would inhibit similar input in future decision-making processes by hindering honest evaluations of officers."

VIEWS OF THE COAST GUARD

On June 30, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's request.

The Chief Counsel stated that the Board should deny relief because the applicant "has not overcome, by clear and convincing evidence, the strong presumption that the

members of the two Xxx Selection Boards involved in his case discharged their duties correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); *Muse v. United States*, 21 Cl. Ct. 592, 601 (1990). He also argued that, in the absence of clear and convincing evidence of wrongdoing, the Board should defer to the Coast Guard's interpretation of the purpose and effect of its policies and precept.

The Chief Counsel alleged that the applicant has failed to prove that the selection boards illegally focused on increasing diversity in selecting officers for promotion or that the precept and instructions they received illegally imposed numerical quotas or preferences for promoting women and minorities. He alleged that the applicant has failed to prove that the selection boards were coerced to select officers other than himself or that, but for the diversity instructions, he would have been selected for promotion. The Chief Counsel also argued that the combination of the diversity language in the precept and the diversity reporting requirement was similar to that used by an Air Force retirement board, which was recently upheld by the Federal Circuit in *Baker v. United States*, 34 Fed. Cl. 645 (1995), *vacated on other grounds*, 127 F.3d 1081 (Fed. Cir. 1997). In *Baker*, the Chief Counsel argued, the court found that the precept was "nothing more than a hortative comment, advice, or reminder" and did not mandate consideration of candidates' race or gender. *Id.* at 656. The Chief Counsel also argued that the court found that the language in the precept and the reporting requirement did not establish any quotas and did not overcome the presumption of regularity afforded the government.

The Chief Counsel opined that the Coast Guard's precept and reporting requirement are similar to those upheld in *Baker* and not like those of the Army retirement board that were held in *Christian v. United States*, 46 Fed. Cl. 793 (2000), to violate the Due Process Clause of the Fifth Amendment by denying equal protection to white male candidates. The Army precept, he alleged, established as a goal that the percentages of women and minorities chosen for mandatory retirement would not exceed the overall percentage. If this goal was not met, a re-evaluation would be required. The Army precept also instructed retirement board members to conduct a special evaluation of minority and female members, taking into account past discrimination. The court found that the Army precept established impermissible goals and contained impermissible procedures for ensuring consideration of special factors. The Chief Counsel argued that, unlike the precept used by the Army in *Christian*, the Coast Guard's precept was not coercive.

The Chief Counsel also alleged that the briefings by Personnel Command staff did not violate Article 14.A.4.c. of the Personnel Manual. Moreover, he argued, even if the Board were somehow to decide that the briefings were impermissible, the applicant has not proved that the briefings influenced the selection board members so as to cause him to fail of selection. He stated that the applicant's allegations are mere conjecture.

The Chief Counsel also argued that the applicant failed to prove that the selection boards "acted improperly or irregularly in respect to his association with the [xxxxx of the *Xxxxx*]." He stated that the applicant's evidence amounts to speculation on the part of a few officers about what might have caused him to fail of selection, which does not overcome the presumption of regularity afforded the members of the selection boards. The Chief Counsel stated that the selection board members' silence should not give rise to a negative inference by the Board, especially since those who did respond to the applicant's letters did not indicate that the xxxxxx of the *Xxxxx* was material to their selection. The Chief Counsel noted that the applicant had been promoted twice, from xxx to xxx and then to xxx, since the *Xxxxx* xx, and there is no reason why potential prejudice against him because of the incident would have increased over time rather than decreased.

Regarding the investigation of the xxxxx, the Chief Counsel argued that the designation of parties is "a matter within the sole discretion of the officer convening or conducting the investigation" and the applicant had no right to be designated as a party. Administrative Investigations Manual, Articles 1.D.3.e. and 2.B.3. Moreover, he argued, the applicant failed to prove that any error or injustice resulted from the fact that he was not designated a party to the investigation. No negative entries were made in his record as a result of the xxxxxx. Therefore, the Chief Counsel argued, even assuming *arguendo* that the applicant was wrongfully denied party rights, he has not proved that he failed of selection because of that denial.

The Chief Counsel also argued that the applicant failed to prove that grade inflation caused his failure of selection. He stated that the comments of the xxx of the 1994 selection board and senior officer school selection panel do not overcome the presumption that over the years, the candidates' rating chains have evaluated them properly and fairly in accordance with the Personnel Manual. Moreover, he argued, OER scores are only one factor considered by selection boards, which must also consider candidates' professionalism, leadership, and education. Personnel Manual, Article 14.A.3.a. Therefore, even assuming *arguendo* that other candidates' grades were inflated, the applicant has not proved that he failed of selection because of this factor. Furthermore, the Chief Counsel argued, the applicant failed to prove that any of the OERs in his own record are unjust.

The Chief Counsel stated that the applicant's requests for information under the Privacy Act and FOIA were denied, and he appealed them in 1996. The appeals are still pending because of the backlog, although the Coast Guard is working diligently to comply with the time requirements in the acts, as required under *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976). Because the applicant has not proved that the Coast Guard intentionally frustrated the spirit of the acts in its han-

dling of his informational requests, the Chief Counsel argued, his allegation of error is without merit.

The Chief Counsel also alleged that the applicant has not proved that his record before the 1994 selection board was incomplete. He argued that the applicant's unsubstantiated allegations do not overcome the presumption that the Personnel Command acted correctly and presented a complete copy of his record to the 1994 selection board. He alleged that officers' records are checked for completeness prior to each selection board. Moreover, he argued, even if the xxxxxx Award was missing from his file as presented to the selection board, it is "a group award, not a personal award, and not consequential even if missing."

Finally, the Chief Counsel argued that even if the Board were to find that the Coast Guard had committed some error or injustice in this case, the applicant has retired from the service with a medical disability and is therefore precluded from returning to active duty to compete for promotion to xxx.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 30, 2000, the Chairman forwarded a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond within fifteen days. The applicant was granted two extensions totaling 90 days and submitted his response to the advisory opinion on October 12, 2000.

The applicant argued that, in his advisory opinion, the Chief Counsel repeatedly misstated the burden of proof borne by the applicant. He argued that the "clear and convincing" standard applies to claims of fraud in federal court but not to BCMR applications. He alleged that courts set aside "[a]gency action predicated on too exacting a standard of proof." *Pitzer v. Sullivan*, 908 F.2d 502, 505-06 (9th Cir. 1990); *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1186 n.78 (D.C. Cir. 1981); *Allen v. Bowen*, 657 F. Supp. 148, 152 (N.D. Ill. 1987). He invited the Board to address this point in its decision in this case.

The applicant also argued that the Coast Guard is not entitled to *Chevron* deference from the Board with respect to the advisory opinion's defense of the diversity language in the precept and the reporting requirement. First, he argued, the Office of Military Justice, which prepares advisory opinions for the Board, is not the office in charge of administering selection boards or civil rights policy. Second, the Coast Guard is bound by the Board's orders, not vice versa, under 10 U.S.C. § 1552. Third, *Chevron* deference is applicable to a court's review of agency decisions, not to an agency's review of its own decisions. Fourth, even courts do not apply *Chevron* deference in cases that raise serious constitutional issues. *Williams v. Babbitt*, 115 F.3d 657, 661-63 (9th Cir. 1997), *cert. denied*, 523 U.S. 117 (1998); *see also U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1231

(10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000). Courts review constitutional claims *de novo*, and such claims receive strict scrutiny. *See, e.g., Gonzalez-Julio v. I.N.S.*, 34 F.3d 820, 823 (9th Cir. 1994); *Christian v. United States*, 46 Fed. Cl. 793, 806 (2000).

The applicant elaborated on his argument that the selection board members were impermissibly instructed to help increase diversity in the Coast Guard by promoting women and minorities rather than white males, in violation of the equal protection component of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). He stated that the wording of the precept was not as significant as the briefings the members received because the reading of the precept was dispensed with. He argued that the instructions received by the selection board were coercive, like those struck down in *Christian v. United States*, 46 Fed. Cl. 793 (2000). He stated that the instructions to the selection board were contrary to Sections 1-B-3, 1-C-7, and 1-C-9 of the Military Civil Rights Manual. He alleged that the members were told that the Coast Guard "compared unfavorably with most other branches of the military with respect to representation of minority personnel." He also alleged that the members were told that the Coast Guard needed to retain and advance minority and female officer and that upward mobility of minority and female officers was a "concern." He suggested that these statements and the briefing as a whole were coercive because the members may have felt obliged to do something about the "concern." He argued that the fact that the selection board was provided a list of the members' social security numbers annotated with gender and ethnic codes proves that the board was not "race-neutral." He alleged that the reporting requirement was also coercive because, if it was not intended to influence their selection, the tabulation could have been done by administrative staff after the board had adjourned. He alleged that the selection board members received a pellucid message that they were supposed to give special consideration to female and minority officers at the expense of non-minority, male officers.

The applicant also alleged that, by providing the selection board with a copy of Change 22, the Coast Guard improperly caused the board to apply a regulation not yet in force. In addition, it prejudiced his communication with the selection board because his letter to the board could not intelligently be framed since the regulatory framework had secretly been changed. He alleged that this error should persuade the Board to remove his failures of selection even if all of the candidates were kept equally in the dark.

The applicant also argued that the Board should remove his failures of selection because the Chief Counsel did not present any evidence to refute his sworn statement that his record was missing his most recent OER and an award when it was presented to the 1994 selection board for review. He pointed out that the Chief Counsel did not outright deny his allegation that his record was incomplete. He also disagreed with the Chief Counsel's statement that the absence of a xxxxx Award would have been inconsequential to his chance of promotion. He argued that because his record was incomplete

before the 1994 selection board, "the burden shifts to the Coast Guard to prove that he would have been passed over in any event." *Frizelle v. Slater*, 111 F.3d 172 (D.C. Cir. 1997). He argued that the Chief Counsel has not proved that the error was harmless.

The applicant also stated that the Chief Counsel's arguments with respect to his being denied party rights during the *Xxxxx* investigation are erroneous because the Administrative Investigations Manual relied upon by the Chief Counsel was not even promulgated until November 8, 1987, nearly xxxxxx after the xxxxxxxx xxxxx.

Finally, the applicant argued that the Coast Guard's undue delay in processing his FOIA appeal has effectively thwarted his right to review by the Board because "the Coast Guard takes longer to decide FOIA appeals than the period employed for destruction of pertinent records." He argued that, although he has the right to sue the Coast Guard in federal court under FOIA and the Privacy Act, the Board has a duty "to get to the bottom of the issues so that it can frame suitable make-whole relief in accordance with the remedial purposes of the record-correction statute." Therefore, he asked the Board to direct the Coast Guard to produce and furnish him the documents he previously requested.

APPLICABLE LAW

Selection Board Procedure

According to 14 U.S.C. § 254, every member of a selection board must swear an oath that "he will, without prejudice or partiality, … perform the duties imposed upon him." Under 14 U.S.C. § 261(d), "[e]xcept as required by this section, the proceedings of a selection board shall not be disclosed to any person not a member of the board."

According to 14 U.S.C. § 260, each selection board must submit a written report, signed by all members, containing the names of the officers recommended for promotion. The report also must certify that the officers recommended for promotion are the best qualified.

Article 14.A.4.i. of the Personnel Manual prescribes: "Except for its Report of the Board, the board members shall not disclose proceedings or deliberations to any person not a member of the board (14 U.S.C. 261)."

Article 14.A.4.c. of the Personnel Manual states that "[i]n order that the actions of successive personnel boards may be consistent, Commandant (G-P) and/or such member of his/her staff as he/she may designate shall be called as a witness before each personnel board, and shall brief the members on applicable laws, regulations, and the needs of the Service. Since the board is convened solely to obtain the opinion of the

members, the board must act according to its own judgment and is bound only by existing law, and the oath taken by its members."

Criteria for Selection for Promotion

The criteria for selection to be used by selection boards appear in Article 14.A.3. of the Personnel Manual. Prior to August 29, 1995, Article 14.A.3. grouped the criteria under the headings "Performance Evaluations" in Article 14.A.3.b.(1) and "Education" in Article 14.A.3.b.(2). Under "Performance Evaluations," paragraph (a) of Article 14.A.3.b.(1) discusses the difficulty in selecting among officers with a wide diversity of assignment histories. It states that each officer should have "true professional competence" in at least one occupational field and experience in other fields, including general administration. Paragraph (b) states that "executive ability should be considered of primary significance in the grades of xxx and above" because the need for managerial ability rises with grade level. Paragraph (c) states that, because opportunities for serving command afloat assignments are very limited, "[t]he lack of qualification for command at sea should not be given greater significance than the lack of qualification for an assignment in any other occupational field." Paragraphs (d) and (e) indicate that the board may determine an officer's performance and readiness for greater responsibility by reviewing marks for performance dimensions on the OERs and that the significance of each performance dimension may vary depending upon the grade level of the selection board.

Under "Education," Article 14.A.3.b.(2) states that while maintaining a high level of expertise in science, engineering, operations, and administration is important, opportunities for post-graduate study are limited. Therefore, a lack of post-graduate training should not be given "disproportionate significance." It states that boards should consider whether officers have pursued educational opportunities appropriate to their experience and what grades and degrees they have earned.

Change 22

Change 22, issued on August 29, 1995, amended these criteria for selection. Instead of just "Performance Evaluations" and "Education," Change 22 organized the criteria under four headings, adding "Professionalism" and "Leadership." Article 14.A.3.b.(1) included only paragraphs (d) and (e) from the previous regulation. The information in paragraphs (a), (b), and (c) was modified slightly and moved under the heading "Professionalism" in Article 14.A.3.b.(2). The only significant change of language under "Professionalism" is the addition of these two sentences: "Professionalism is an essential element in selecting officers for advancement. Coast Guard officers must provide quality service to the public while promoting a positive image of the Coast Guard." Change 22 did not alter the language under "Education" at all but renumbered

it as 14.A.3.b.(4), due to the reorganization of the Article. Under the new criterion "Leadership," the new Article 14.A.3.b.(3) stated the following:

> Selected officers demonstrate those leadership traits and values that allow them to serve in a series of assignments with increasing responsibility in the grade to which promoted. Officers must exemplify the highest levels of honor, respect and devotion to duty, our core values.
>
> (a) A leader influences people to accomplish a purpose. Coast Guard leaders concentrate on "doing right things right," integrating a leader's focus on effectiveness with a manager's focus on efficiency.
>
> (b) A successful leader inspires others by:
> (1) convincing them that they have the solution and acting decisively and confidently;
> (2) sharing a vision of service, excellence and achievement;
> (3) demonstrating a commitment to innovation and quality team work; and
> (4) modeling strength of character in word and action.

FOIA Exemptions

Under 5 U.S.C. § 552(b), agencies may withhold documents from the public that are "(1) [exempt for reasons of national security]; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) [exempt as trade secrets]; (5) inter-agency or intra-agency memorandums [sic] or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; … ."

Military Civil Rights Manual (COMDTINST M5350.11B)

Chapter 1.B.3. of the Military Civil Rights Manual provides that "[t]he appointment, enlistment, promotion, advancement, assignment, and treatment of military personnel will be accomplished without discrimination on the basis of race, sex, religion, color, or national origin."

Chapter 1.C.7. defines "discrimination" as "[a]ny action, omission or use of language that deprives an individual or group of their rights because of race, color, religion, national origin, or sex … ."

Chapter 1.C.9. defines "equal treatment" as "[t]he instance of being treated in a manner commensurate with one's stature, experience, ability, demonstrated potential and strength."

Chapter 3.C.4. provides that "[r]egulations or practices which directly or indirectly impede equal opportunity for all personnel must be eliminated. This requires continued application of dynamic programs which aim to assist personnel in improving skills or acquiring new ones to that they can advance in rank or rate." No program of preferential treatment for minorities or women is included in the list of such programs provided in the chapter.

***Baker v. United States*, 34 Fed. Cl. 645 (1995), *vacated on other grounds*, 127 F.3d 1081 (Fed. Cir. 1997).**

In *Baker*, the plaintiff was an Air Force officer who had been chosen for mandatory early retirement by a Selective Early Retirement Board (SERB). To make their selections, board members were advised to "consider such factors as job performance, professional qualities, leadership, depth and breath of experience, job responsibility, academic and professional education, specific achievements, and future utilization of the member." *Id.* at 651. In addition, the "Charge" to the members stated the following:

> Your evaluation of minority and women officers must clearly afford them fair and equitable consideration. Equal opportunity for all officers is an essential element of our selection system. In your evaluation of the records of minority officers and women officers, you should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization policies or practices, may have placed these officers at a disadvantage from a total career perspective. The board shall prepare for review by the Secretary and the Chief of Staff, a report of minority and female officer selections as compared to the selection rates for all officers considered by the board.

Id.

The SERB selected 610 out of 2,086 (29.2 percent) eligible colonels for early retirement. *Id.* Of the 93 eligible colonels who were women or members of a minority, 28 (30.1 percent) were selected for early retirement, but none of the 28 were female. *Id.* at 652. The final report of the SERB president to the Secretary stated the following:

> With your guidance concerning minorities and women specifically in mind, the board thoroughly reviewed the records of all minority and woman officers eligible for selective early retirement. The retention rates for blacks and women were better than the overall board average. The retention rate for Hispanic officers was below the board average. To ensure each minority and woman officer received fair and equitable consideration, the board president carefully reviewed their records and the scoring results. Where there was any doubt as to the competiveness [sic] of an officer, he caused the record to be rescored to resolve the doubt. It is the judgement of the board president and the members of the board that those officers recommended for retention are the best qualified officers.

Id.

Later, however, the SERB president stated that he did not actually receive any guidance concerning minorities and women other than that in the Charge. *Id.* He also stated that he "did not construe the charge to require that the SERB produce any particular outcome with regard to the ultimate selection rates of women and minority officers." *Id.* In addition, he said that, prior to finalizing the report, administrative staff provided him with statistics concerning the selection rates of women and minority officers, but he did not provide the statistics to the other board members. *Id.* He stated that the statistics did not affect the outcome of the board and that no records were rescored as a result of the statistics. *Id.*

The plaintiffs alleged that the language in the Charge, coupled with a requirement that the SERB report selection rates for minority and female officers, "created a de facto race/gender quota requiring that the percentage of minority/ female officers involuntarily retired be no more than the overall selection rate of the SERB." *Id.* at 654. The court found that if the Charge created a race-based classification, under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), it had to "be narrowly tailored to serve a compelling government interest." *Baker* at 655. The court also noted that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy[,]" when it leads to "imposing discriminatory legal remedies that work against innocent people." *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). In addition, the court stated that "an outright numerical quota 'cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.'" *Id.* (quoting *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 507 (1989).

The court found that although the Charge referred to race and reminded members that "past individual or societal attitudes, and in some instances utilization policies and practices, may have placed these officers at a disadvantage from a total career perspective," the Charge "did not mandate that members of the SERB consider race in discharge decisions." *Baker* at 656. "The Charge did not establish any quota or goal for the percentage of minorities to be discharged. The Charge did not include race in its list of factors that SERB members should consider in making separation decisions. The Charge merely cautioned members of the SERB to be aware that some minority officers may have experienced different career opportunities or may have been affected, in some way, by discrimination." *Id.* Citing the Supreme Court's decisions in *Adarand*, *Croson*, *Wygant*, and *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), the court stated that, "[w]hen the Supreme Court has applied strict scrutiny to racial classifications, the cases have included far more explicit and stringent requirements to focus upon race." *Id.*

Regarding the reporting requirement, the court stated that the Charge "simply required reporting statistics on the discharge rates for minorities consistent with its command that minority officers must be afforded 'fair and equitable consideration.' Absent evidence of some ulterior motive served by the reporting requirement, the court cannot imply that it demonstrates a desire to achieve racial balancing. 'The presumption is that government officials have acted in good faith in making their decisions. It takes almost irrefragable proof to overcome the presumption.'" *Id.* at 656-57 (quoting *Gaskins v. United States*, 227 Ct. Cl. 563, 566 (1981)).

The court concluded that, "[i]f the Charge had required a consideration of race, or if it had established racial goals and quotas, or if the Air Force was unable to explain the misleading passage in the SERB's January 13, 1992 report to the Secretary, the outcome in this case may well have been different. In the absence of such requirements, the Charge approaches the dividing line between the mere mention of race and a racial classification, but fails to cross that line. As a consequence, the Charge and the conduct of the SERB are not subject to strict scrutiny and do not violate the equal protection guarantee incorporated into the Fifth Amendment." *Id.* at 657. Finally, the court found that for the same reasons, the Charge did not contain a gender-based classification. *Id.* at 658.

***Christian v. United States*, 46 Fed. Cl. 793 (2000).**

In *Christian*, the plaintiff was an officer in the Army who had been chosen for mandatory early retirement by a SERB. The plaintiff alleged that the SERB's race- and gender-based retention goals and selection procedures violated constitutional guarantees. The Army SERB worked in four phases. In Phase I, all of the eligible officers were scored in accordance with specified standards provided in a "Guidance" and were ranked on a merit list. *Id.* at 797. The Guidance stated the following:

> a. The Army is firmly committed to providing equal opportunity for minority and female officers in all facets of their career development, utilization, and progression. The goal for this board is to achieve a percent of minority and female officers recommended for early retirement not greater than the rate for all officers in the zone of consideration. This goal is important because, to the extent that each board achieves it, the Army at large will have a clear perception of equal opportunity and the officers not recommended for early retirement will enjoy the opportunity for continued career progression to the benefit of the Army. This goal is not intended as guidance for you to meet any "quota."
>
> b. In evaluating the records of minority and female officers, the board should consider that past personal and institutional discrimination may have disadvantaged minority and female officers. Such discrimination may include, but certainly is not limited to, disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and lack of opportunity to attend career building military schools. Take these factors into consideration in evaluating these officers' potential to make continued significant contribution to the Army.

> c. Prior to recess, the board (in the report of officers recommended for early retirement) must review and report the extent to which minority and female officers were recommended at a rate greater than males and non- minority officers. Although the board may have met the overall goals for minorities and women, it will identify any situation in which minority and female selections were not comparable to the overall population in specific branches or where a particular minority-gender grouping did not fare well in comparison to the overall population. Explain such situations fully in the board's after-action report.

Id. at 803.

In Phase II, after a cut-off point for those selected for mandatory retirement was established, the SERB compared the selection rates of women and minorities with the rate for other officers. *Id.* at 798. If the comparisons were unfavorable, the records of minority and female officers were rescored and voted upon, changing their position on the merit list. *Id*. The SERB's report indicated that the revoting procedure was used for minority officers but not for female officers because their selection during Phase I comported with the proportionality goals. *Id.* at 809. The report indicated that "[o]f those [minorities] revalidated for early retirement, their overall manner of performance and potential was clearly below that of their contemporaries." *Id.* Phases III and IV concerned adjusting the merit list to reflect the Army's needs for officers in certain career fields. *Id.* at 798.

The court found that "[i]t is clear on its face that the MOI created a race and gender-based goal and that it required consideration of different factors in evaluating minority and female officers than when evaluating white male officers." *Id.* at 803. The court contrasted the language and goal in the Guidance with that used by the Air Force in *Baker*. It found that the Guidance created a race-based classification that required strict scrutiny because of the selection rate goals and because "the SERB had to apply different standards when evaluating minority officers than nonminority officers." *Id*. at 805.

The court also dismissed the government's argument that the Guidance was not coercive because there were no negative repercussions for the SERB members if they failed to meet the female and minority retention goals. *Id.* It found the requirement to "fully explain" such failures, coupled with the reporting requirement, to be "plainly designed as a coercive accountability measure, not an innocuous statistical compilation." *Id*. In addition, citing *Hopwood v. Texas*, 78 F.3d 932, 937 (5th Cir. 1996), the court held that "[e]ven if there were no numerical goal or preordained outcome, the mere existence of special procedures and invocation of special factors for evaluating minorities confirms a suspect racial classification." *Christian* at 805.

The court concluded by finding that the government had not proved that the race-based classification created in the Guidance was narrowly tailored to serve a compelling government interest. *Id*. at 806. The court found insufficient evidence of past

discrimination by the SERB, which it considered the relevant government entity, rather than the whole Army. *Id.* at 808. It also found insufficient evidence of present effects of any past discrimination. *Id.* at 810. Through the Guidance, the court stated, the Army "magically transformed the 1992 LTC SERB into a super-prosecutor and a super-judge of racial discrimination practices in other Army units and boards, encumbered neither by scope, nor time, nor, apparently, evidence." *Id.* at 809. It stated that the reference to "past personal discrimination" was illegal because "[i]t is well-settled that the government may never assert private racially intolerant attitudes as a pretext for the government's own racial classification." *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429 (1984)). Private personal discrimination does not supply a compelling interest for a racial classification. If allowed, it would make all racial classifications permissible upon a subjective showing that a person had been discriminated against somehow, somewhere, or by someone, without more. *Christian* at 809. The court held that "to the extent the remedy for 'actual past discrimination' includes the remedy for 'societal discrimination,' … no compelling interest existed for this purpose." *Id.* at 810. The court also held that the statistics presented by the government concerning the different promotion rates of minority and white officers did not prove the need for the broad remedy in the Guidance because only the statistics for African American officers were significantly lower than those for white officers; promotion rates for Hispanic and Asian officers and for women exceeded the rate for white officers in some years. *Id.* at 811 n.4.

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 submission, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that his record was incomplete when it was reviewed by the xxx selection board on xxxxx, 1994. He presented evidence indicating that his then most recent OER was not validated at Headquarters until xxxx, 1994, and that a copy of it was not mailed to him until xxxxxx, 1994. He also provided a copy of a request by him dated February 24, 1995, to have copies of his xxxxxxxxxxxx Awards included in his record, although his record indicates that the Commandant acknowledged entry of these awards in his record on June 18, 199x. In addition, he pointed out that the report of a panel convened in 1992 to choose officers to attend senior service schools indicated that 10 percent of the records it reviewed were incomplete.

However, absent strong evidence to the contrary, the Board presumes that Coast Guard officers performed their duties properly in compiling the applicant's record for the selection boards. *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). The applicant has not presented sufficient evidence to overcome the presumption that his record was complete before the selection board. The validation and postmark dates do not prove that the Coast Guard failed to include his 1994 OER in his record or that, if the selection board discovered the OER was missing, it would not have asked the Personnel Command to provide it. Nor does his February 24, 1995, request prove that the awards were not in his record in xx 1994. The report of the 1992 panel regarding the records of candidates for senior service school is not probative of the state of the applicant's own record in 1994.

4. The applicant alleged that he failed of selection in 1994 and 1995 because the board members knew of negative conclusions drawn about his performance in certain documents relating to the xxxxx of the *Xxxxx* in xxxx. He alleged that such knowledge would have prejudiced them against him and that such prejudice would have been unjust because he was not made a party to the investigation of the xxx due to an erroneous initial finding about the level of his involvement by the Marine Board that began the inquiry. In support of his allegations, he presented xxxx indicating that the xxxxx of xxxxxx are periodically xxxxxx and letters from some selection board members indicating nonspecific knowledge of the incident. He asked the Board to draw negative inferences from some of the selection board members' silence in response to his letters asking about their knowledge of the incident.

5. The applicant has not proved by a preponderance of the evidence that any selection board members knew of or unfairly considered his alleged role in the xxxxx of the *Xxxxx* when they failed to select him for promotion to xxx. The xxxxxxx may have reminded officers of the xxxxxx but did not in any way implicate the applicant. Moreover, the applicant's letters, though carefully worded, were clearly aimed at discovering whether his alleged role in the xxxxxx was considered by the selection boards in their deliberations. However, the deliberations of selection boards are strictly confidential under 14 U.S.C. § 261(d) and Article 14.A.4.i. of the Personnel Manual, and the board members took oaths not to reveal their deliberations. Therefore, the Board will draw no negative inference from some selection board members' silence in response to his letters. Because the applicant has not proved by a preponderance of the evidence that any selection board members were prejudiced against him because of specific knowledge of his alleged culpability in the xxx of the *Xxxxx*, the Board need make no finding with respect to whether such prejudice would have been unfair in light of the Coast Guard's failure to make him a party to the investigation.

6. The applicant alleged that the Coast Guard violated his right to equal protection under the Due Process Clause of the Fifth Amendment and provisions of the Military Civil Rights Manual by causing the 1994 and 1995 xxx selection boards to give

special consideration to minorities and women and to meet a goal with respect to their selection rates for women and minorities. The precepts and the briefings received by the selection boards (a) strongly affirmed the Coast Guard's commitment to equal opportunity, (b) urged them to select officers who shared this commitment, (c) exhorted them to be "fair and impartial" in their selections, (d) provided them with statistics showing a lack of racial and gender diversity in the Service's officer corps, (e) indicated that this lack of diversity was a "concern" because 75% of net growth in the workforce would be minority or female workers and the Coast Guard needed to attract these workers, and (f) required them to report their selection rates for women and minorities.

7. The Board finds that the applicant has failed to prove by a preponderance of the evidence that the Coast Guard violated his constitutional right to equal protection or the provisions of the Military Civil Rights Manual in the written and oral instructions it provided the 1994 and 1995 selection boards. Unlike the board instructions at issue in *Baker v. Unites States*, 34 Fed. Cl. 645 (1995), and *Christian v. United States*, 46 Fed. Cl. 793 (2000), no mention was made of past societal or personal discrimination in the Coast Guard's precepts or briefings. Unlike the Army's Guidance in *Christian*, the Coast Guard established no special procedures for the consideration of minority and female officers or any sort of goals or quotas for the promotion of minority or female officers, which would be impermissible under *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996). None of the effects of the precepts and briefings, as enumerated in Finding 6, above, is impermissible under *Baker*, *Christian*, *Hopwood*, the Constitution (as interpreted by the Supreme Court), or the Military Civil Rights Manual. Although the applicant alleged that, in emphasizing the Coast Guard's "concern" about its lack of diversity in the higher ranks, the briefings may have made the board members feel obliged to select minority and female officers for promotion, the Board is not persuaded that the expression of this "concern" and the provision of the statistics showing the lack of diversity could have or would have coerced the selection board members to evaluate the records of minority or female officers any differently than they evaluated the records of white male officers. No part of the precepts or briefings mandated or even urged preferential treatment of minorities and women in the selection for promotion. In this respect, the Coast Guard's instructions were even more impartial than those upheld by the Federal Circuit Court of Appeals in *Baker*. In addition, like the court in *Baker*, the Board finds that there is no evidence that the purpose or effect of the reporting requirement was to coerce the selection boards to promote women and minorities ahead of more qualified white male officers.

8. The applicant alleged that the Coast Guard violated Article 14.A.4.c. of the Personnel Manual by having too many staff members brief the selection boards. Although the article states that "Commandant (G-P) and/or such member of his/her staff as he/she may designate" shall brief each selection board, the Board finds that this language does not limit the number of permissible briefers to one. Moreover, any influence briefing has on the selection process is created by the content of the brief, not by

the number of briefers. Furthermore, the record before the Board indicates that each selection board was briefed by only two staff members, who in turn introduced the selection boards to other staff members who would be at their disposal to assist them in the work of the board. However, even assuming that all the staff who were introduced also addressed the selection boards, such briefings would not prove that the selection boards' independence was abrogated or eroded. The applicant has not proved by a preponderance of the evidence that the Coast Guard violated Article 14.A.4.c. or wrongfully affected the independent decisionmaking of the selection boards by either the number or content of the briefings.

9. The applicant alleged that he failed of selection when he was "above the zone" in 1995 because officers from the year group after him, who were "in the zone," had inflated grades. He alleged that this grade inflation was proved by the report of the 1992 panel for choosing officers to attend senior service schools, which stated that "OER's in general contained high number marks that were not necessarily supported by comments. This was especially notable in OER's for year group '74." This comment can be interpreted either as an allegation of grade inflation or as an allegation that rating chains are providing insufficient comments. Even assuming the first interpretation is proper, however, the Board finds that the opinion expressed in the report, derived from a comparison of selected officers' records conducted for another purpose, is insufficient to overcome the presumption that the applicant was evaluated fairly by his rating chains over the years in accordance with the written standards provided in the OERs and in comparison with how Coast Guard rating chains generally rated other officers. He has not proved either that his own performance over the years was graded differentially harshly than that of other officers or that grade inflation in general caused the selection boards to fail to select the best qualified officers for promotion.

10. The applicant alleged that the Coast Guard wrongfully prevented him from providing evidence to the Board by denying his requests for information under FOIA and the Privacy Act. He requested "sanitized" copies of other officers' OERs, the names of officers who sent letters to the selection boards, summaries of reporting officers' distribution marks, and statistical analyses of their OER marks. The BCMR is not the proper venue for adjudicating a complaint under FOIA or the Privacy Act. This does not mean that the Board would remain impassive if it found that the Coast Guard was improperly withholding information to which an applicant was entitled. Under 33 C.F.R. § 52.82(b), the Board may itself request information from the Coast Guard that it believes to be necessary to decide a case. In BCMR Docket No. 1999-083, for example, the Board sought confirmation from the Coast Guard that the applicant's record, which contained significantly higher marks than those received by the applicant in this case, was actually reviewed by the 1998 selection board that passed him over for promotion to xxx. In this case, neither the applicant's good record nor the allegations he has made require the Board to see any of the documents he has requested under FOIA and the Privacy Act to reach a decision. Moreover, the Board agrees with the Chief Counsel

that the information requested by the applicant is not subject to disclosure, in accordance with FOIA exemptions 2, 5, and 6 in 5 U.S.C. § 552(b). In addition, the Board finds that some of the information requested by the applicant might fall under exemption 3 because under 14 U.S.C. § 261(d), selection board proceedings cannot be disclosed to anyone not on the board.

11. It is apparent from the applicant's record that he was a very able and experienced officer. Nothing in his record, however, proves that he was more fit for promotion than the other xxxs who were chosen for promotion to xxx. Moreover, there is no evidence that the selection board members were biased against him because of the negative allegations about his role in the xxxxxx of the *Xxxxx* or selected less qualified officers to promote instead of him because of their race or gender.

12. The applicant made numerous allegations with respect to the Coast Guard's handling of the *Xxxxx* investigation, of his information requests, and of officer evaluations and selection for promotion. Those allegations not specifically addressed above are considered to be either without merit or not relevant to the Board's disposition of the case.

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

ORDER

The application of retired XXXXXXXXX, USCG, for correction of his military record is hereby denied.

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James K. Augustine

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Angel Collaku

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Gareth W. Rosenau