

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2007-031**

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**FINAL DECISION**

**AUTHOR:** Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on November 24, 2006, upon receipt of the completed application.

This final decision, dated August 16, 2007, 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, a lieutenant commander (LCDR) on active duty in the Coast Guard, asked the Board to correct his record by

- removing from his military record his relief for cause from his position as the commanding officer of a Marine Safety Unit (MSU) in Louisiana and all associated documents;
- removing a special officer evaluation report (SOER) documenting his relief for cause;
- removing his two failures of selection for promotion to commander (CDR) so that he will be considered for promotion by the next CDR selection board as an "in the zone" candidate;
- backdating his date of rank if selected for promotion by the first selection board to review his record as corrected by the Board and awarding him any corresponding back pay;
- "directing his reappointment to the Congressional Fellow billet he previously earned as soon as practicable"; and
- "granting such other and further relief as may in the circumstances be just and proper."

The applicant alleged that after taking command of the MSU in June 2002, he transformed it into a "well-oiled machine," as shown in the three highly laudatory regular, annual OERs he received. However, on June 21, 2005, three days before his change-of-command ceremony, the commanding officer (CO) and executive officer (XO) of the MSU's parent unit, a Marine Safety Office (MSO), met him at his office and informed him that he was being relieved

for cause as the commanding officer of the MSU. They told him that an investigation begun on June 8, 2005, showed that he had misused a government vehicle, misused government personnel, and filed a fraudulent travel claim. The applicant alleged that during the investigation, he offered a statement to the preliminary inquiry officer (PIO) but was refused. Therefore, the PIO failed to learn and report the following facts about the allegations against him. The applicant stated that the allegations against him “are unconscionable and wrong” and that his career has been derailed “based on false information, bias and possible prejudice.”

### ***Allegations Concerning the Charge of Filing a False Travel Claim***

The applicant alleged that he was overpaid \$87 for hotel parking fees and \$22 for mileage on his personal vehicle as a result of his attendance at a District COs’ conference in October 2004.<sup>1</sup> The applicant stated that before the conference, he had intended to drive his own vehicle and to bring his wife with him, which was a common occurrence at COs’ conferences. Therefore, he told a yeoman at the MSU, YN2 C—who usually handled his travel claims and to whom the applicant had entrusted his Unit Travel System (UTS) password so that YN2 C could file his travel claims—that he would be driving his own vehicle to the conference. However, two hours before their departure, his wife learned that she had to work and could not attend the entire conference, so the applicant got a ride to the conference from a junior officer at the MSU, LT G. His wife attended an evening event on the second day of the conference and used their personal vehicle to drive there and back home again. The applicant got a ride home from the CO of the MSO.

The applicant stated that after the conference, he gave his receipts to YN2 C to process his travel claim in the UTS and assumed that since he was not submitting a parking receipt, YN2 C would know not to file a claim for that expense. He assumed that YN2 C would also know not to file for mileage reimbursement because she had spoken to his wife about their new travel arrangements for the conference when they discussed getting his wallet to him, which he had left behind. He explained that after arriving at the conference, he discovered that he had left his wallet at home in the family car and so he had called YN2 C to ask for her help in getting the wallet to him. However, YN2 C filed claims on his behalf for mileage on his personal car and for parking even though he submitted no receipt. Therefore, the applicant was unexpectedly overpaid \$109. The applicant noted that after that conference, he had taken three trips to Washington, D.C., to interview for a Congressional Fellowship, and there were no discrepancies in his travel claims for those trips.

The applicant stated that the XO brought the overpayment to his attention about seven months later, and the CO called and asked him to explain. After the applicant explained what had happened, the CO asked him to submit a supplemental travel claim to correct the overpayment. The applicant complied the same day with YN2 C’s assistance. The applicant stated that he never asked YN2 C to lie on his behalf, as YN2 C later told the PIO. The applicant alleged

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<sup>1</sup> The report of the investigation and attached claim forms show that the applicant was accused of filing false claims as follows: \$22.50 for mileage costs on his personal vehicle for his return trip from xxxxxxxxxxxx on June 24, 2004; \$42.00 total for parking fees for three days—October 12, 13, and 14, 2005—while he attended a COs’ Conference in xxxxxxxxxxxx; and \$45.00 for mileage costs on his personal vehicle for that conference.

when they filed the supplemental claim, YN2 C indicated that she was worried she would get in trouble for making a mistake and that he only told her that “the CO knows that I ask you to process, validate and file my claims, so none of this is your fault and if someone asks about it, just tell them it was a miscommunication of information.” The applicant alleged that he had no reason to ask her to lie because at that point he believed that the matter would end once he filed the corrective supplemental claim. Five days after their discussion, however, the applicant was told by the XO after a staff meeting at the MSO that the CO had initiated an investigation into the travel claim. To avoid contact with his staff during the investigation, the applicant stayed at the MSO for the remainder of that day and then took leave for the rest of the week.

### ***Allegations Concerning the Charge of Misusing a Government Vehicle***

The applicant admitted that on one occasion, he “use[d] a government vehicle as a last resort due to mechanical problems with a rental car that left him and his wife and small children stranded on a highway.” The applicant explained that on the way back from a family trip to Georgia in a rental car, “the car experienced mechanical problems forcing them to stop” at a gas station. When he called the rental company, they asked him to return the car to the agency in xxxxxxxx for repair, but the applicant was concerned about whether the car would make it all the way without breaking down. He contacted several friends to see if anyone could meet them at the gas station but no one was available. Therefore, “[a]s a last resort, he called his Port Ops petty officer and asked if anyone was available to help the family get home safely.” The Port Ops petty officer told him that the duty petty officer for that day, PO W, was available. PO W “checked out the MSU government vehicle and met [the applicant] at the gas station, followed him and his family to the [rental company] office in xxxxxxxx, and then drove [them] home ... before returning the government vehicle to [the MSU].”

The applicant stated that this was the only time that his wife or children had ever been in an MSU government vehicle and it involved a round trip of about 70 miles for that vehicle. Because the MSU lacked basic public transportation, he “had an informal policy that the command would assist any crewmember in an emergency – and had authorized the use of government vehicles in several similar emergency situations during his three years” at the MSU. He noted that once when YN2 C had left her keys in the car of an officer who had then driven home to xxxxxxxxxx, he had allowed YN2 C to use a government vehicle to retrieve her keys. Another time, when a petty officer at the MSU was injured while his wife was out of town, he authorized the use of a government vehicle to pick the wife up from the airport.

### ***Allegations Concerning the Charge of Misusing Government Equipment***

The applicant stated that he often asked YN2 C’s assistance on work-related online research but on one occasion, because he had no internet access at home, he asked her “to assist in researching some information on the internet for his son’s school project when she had time.” He stated that he and YN2 C “looked at the information together and printed out what he needed—which took less than five minutes—and [the applicant] took the information home.” The applicant stated that he “normally compensate[d] her with lunch for any tasks completed for me no matter the nature, which I did in this case. ... The requests for assistance were not one-sided, [as] I often helped her with personal issues and tasks that were time consuming for me at

work.” The applicant stated that “[s]uch crewmate assistance, as well as limited personal use of government computers, is common practice throughout the Coast Guard.” The applicant noted that limited personal use of government computers to access the internet is not prohibited under COMDTINST 5375.1B, and that he himself had previously assisted superior officers in this way.

### ***Allegations Concerning the Charge of Misusing Government Personnel***

The applicant denied having misused government personnel by calling a petty officer out of a training session to help him assemble a go-cart for his son. The applicant stated that he had organized leadership training, which he made mandatory for junior personnel at the MSU although it was not mandated by the Coast Guard. One day a few weeks before Christmas, the training session involved watching and discussing the movie “High Noon.” There was to be a short break between the movie and the discussion. During the break, the applicant got a box with a new, unassembled scooter out of his truck and put the box in his office because he intended to assemble it in the office after hours so that his son would not see it before Christmas. PO H helped him carry the box from his truck to his office. Once they reached the applicant’s office, PO H opened the box because he wanted to see what the new scooter looked like. The applicant stated that when he and PO H returned to the training session—perhaps 15 minutes later—the discussion had already ended.

At about 4:30 p.m. that same day, the applicant was in his office reading the instructions for assembling the scooter when PO H “stopped by to say good night” but saw what the applicant was doing and “offered to help adjust some parts on the scooter.” The applicant stated that he did not solicit PO H’s help. After helping the applicant for about 15 minutes, PO H left. The applicant stated that the sort of assistance PO H provided that day is common practice among crewmates, especially in close-knit units such as the MSU, “where everyone pitched in to help with tasks such as moving, installing storm shutters, putting up fences, spreading soil, and automotive repairs.”

The applicant further stated that PO H never spent time on the telephone ordering scooter parts on behalf of the applicant, as alleged in the investigation. Instead, the applicant stated, after he sold his son’s old scooter to PO H, PO H ordered some new parts so that he could repair it. When the parts arrived, PO H assembled the scooter in his own cubicle.

### ***Allegations of Error and Injustice in the Investigation***

The applicant alleged that the administrative investigation was improper and unfair because the XO of the MSO was involved and conducted some of the interviews himself; because the PIO was not a proper investigator under the regulations, was biased against the applicant, and made many errors; and because the applicant was not allowed to provide a statement and evidence during the investigation.

The applicant argued that the XO’s involvement was improper because the “purpose of appointing an independent [investigator] to conduct an investigation is to take the command’s inherent bias out of the equation and allow for an impartial examination of the facts.” The applicant alleged that the command at the MSO had a “general animosity” towards the MSU that

prejudiced the investigation. He also alleged that as a result of the XO's interference, the PIO "relied solely on the email statements of certain witnesses rather than interviewing them personally or on the telephone."

The applicant alleged that the Manual for Courts-Martial (MCM) and the AIM indicated that an investigating officer should be a commissioned officer and preferably one senior to the officer under investigation. Therefore, the PIO, a GS-13 civilian employee, was not a proper choice for an investigating officer. Moreover, the PIO made many mistakes in conducting the investigation. The applicant alleged that on June 6, 2005, he tried to give a statement to the PIO but he refused to accept it in any form, saying that it was "not the right time." The applicant stated that in refusing to accept a statement from him for the investigation, the PIO violated Article 1.A.3.a. of the Administrative Investigations Manual (AIM), which requires an investigating officer to "resolve conflicting evidence and formulate clearly expressed and consistent findings of fact." The applicant argued that if the PIO had done a reasonable job, he would have discovered the conflicting evidence that the applicant's attorney easily acquired several months later. However, he alleged, the PIO limited his investigation to information offered by the XO and so the outcome was preconceived and biased. The applicant also pointed out that because of the nature of the administrative action taken against him, he had no opportunity to defend himself at mast, court-martial, or a board of inquiry, so the PIO should at least have taken his statement.

The applicant argued that the PIO's language in the report of the investigation is grossly inflammatory and shows that the PIO was so biased against him that he could and did not fulfill his obligations. Under Article 4.C.7.e. of the AIM, section 3 of the PIO's report should have contained his recommendations, but instead the PIO made few recommendations and filled it with his own unsupported opinions, such as his opinion that any violation of the Uniform Code of Military Justice (UCMJ) by a commanding officer is a major offense because commanding officers are charged with enforcing the UCMJ and that as a LCDR, the applicant should be "held to a very high standard." The applicant stated that the PIO's opinion that the applicant had given his UTS password to YN2 C to provide himself with a built-in defense against a charge of fraud was "an egregiously irresponsible statement for a supposedly impartial [investigator] to make."

### ***Allegations Concerning the CO's Actions***

The applicant stated that the charges against him were false and overblown but that even if one believed them, the actions taken against him were excessive and unwarranted. He argued that the alleged offenses were so minor that they should have warranted informal counseling at worst, rather than the hurried and unjustified relief for cause performed three days before his change-of-command ceremony and an SOER that has twice prevented his selection for promotion.

The applicant stated that when his CO pointed out the travel claim discrepancy caused by the last-minute change in his plans, he promptly followed the procedures for submitting a supplemental claim to correct the error in the UTS and that the matter should have ended there. He pointed out that his altered plans had involved getting a ride back from the conference with the CO himself. Incredibly, however, the CO initiated an investigation and charged him with fraud. The applicant admitted that regulations prohibited him from giving YN2 C his UTS password

and that the mistake would not have happened had he submitted his own travel claim, but he argued that giving YN2 C his password and having her file all his travel claims was “a minor offense and one that is routinely committed by Coast Guard officers without consequence.” He argued that the CO grossly overreacted by relieving him for cause based on “loss of confidence” just three days before the applicant was due to transfer. In so doing, the CO ignored his obligation under Article 4.F.1.b.3. of the Personnel Manual to carefully consider the options available other than relief for cause and relieved him of command based on one inadvertent discrepancy in a travel claim, one ride in a government vehicle when his rental car had mechanical problems, and “remote instances of accepting the aid of crewmates in personal projects.” The applicant argued that “[e]ven if these allegations are presumed true and taken together, no reasonable command with legitimate intentions could deem it severe enough to ignore options other than relief for cause.”

Because the SOER was based entirely on the PIO’s intemperate, biased, and unfair investigation, the applicant argued, it should be removed from his record along with any evidence of his relief for cause. The applicant also argued that because the hurried and unjustified relief for cause and unfair SOER were in his record when it was reviewed by two CDR selection boards, his failure of selection by those boards should also be removed from his record.

In support of his allegations, the applicant submitted several signed statements:

- The applicant’s attorney wrote that while preparing the BCMR application, she contacted several witnesses to ask for voluntary statements. When she called two witnesses from the MSO, LT M and PO L, LT M told her he would call her back and PO L orally agreed to provide a statement. Shortly thereafter, however, she received an email from the District Legal Office advising her that she could not contact any MSO witnesses directly and would have to make her requests through the District Legal Office. When she called the District Legal Office, she was told that under 6 C.F.R. part 5—which applies only to state or federal litigation, not administrative proceedings—she had to work through the District Legal Office. The attorney wrote that her “subsequent attempts to contact the witnesses after [her] conversation with [the Legal Office]—two of whom had previously indicated a willingness to give a statement—resulted in [her] calls not being returned or the witness informing [her] that [she] had to contact the Eighth District Legal Office.” She submitted with her statement the email from the District Legal Officer, dated February 9, 2006, asking that “requests be forwarded thru this office.”
- The applicant’s wife wrote that in October 2004, although she had planned to attend the COs’ Conference with her husband, at the last minute she was told that she had to work. Therefore, she needed to keep their family’s vehicle. The applicant made other arrangements to get to the conference and called her right after he arrived to say he had left his wallet in their car. YN2 C stopped by their house that afternoon to retrieve the applicant’s wallet and take it to xxxxxxxx. The applicant’s wife stated that she drove the family car to xxxxxxxx and attended the conference only on the evening of the second day.
- CAPT G, who as the former CO of the MSO served as the applicant’s supervisor and reporting officer from July 2002 through July 2004, wrote that he had found the applicant “to be of high moral character, living the Coast Guard’s core values of duty, honor and respect. ... I

believe him to be a person of high integrity. I was very pleased with his performance and the performance of his unit. ... I trust him completely. ... Without any real sense of the facts in his case, I believe more was made out of whatever infractions he may have been accused of than what was really there. In my heart, I believe him to be a good person, and the situation that developed might have had a very different outcome if I had still been his commanding officer.”

- CWO H, a chief warrant officer at the MSO, stated that when he first arrived in xxxxxxxxxx, the applicant picked him up at the airport, offered him a place to live temporarily, and helped him find and move into an apartment. He stated that the applicant constantly went out of his way to help fellow members regardless of their rank. The CWO also stated that at the MSO there was “animosity towards [the MSU]. Maybe it stems from [the MSU’s] ability to deal with so many issues with so few personnel.” The CWO alleged that the investigation of the applicant turned into a “witch hunt.” He stated that in his experience, after an investigating officer is appointed,

the members of the senior command were supposed to be “hands off,” until the assigned Investigating Officer completed the investigation. I did not feel this was the case with regards to the investigation of the charges brought against [the applicant]. On three separate occasions, I personally witnessed and overheard the [MSO’s] Executive Officer discussing details of [the applicant’s] case with [the PIO]. On other occasions, I witnessed and overheard several [of the MSU] witnesses who were to testify against [the applicant] discussing details of this investigation with other members of [the MSO] who had direct access to the Executive and Commanding Officer. I felt this made the investigation neither fair nor impartial.

- LT Q, who served as Chief of the Inspections Department at the MSU, highly praised the applicant’s decision-making skills, morale-building efforts, and teamwork. LT Q stated that he never had “any reason to question [the applicant’s] integrity or believe his decisions were based on anything but what was best of the unit.”

- MST1 A stated that the applicant had helped him move his furniture from one house to another and “always offered to help out anyone at our unit. In turn, when he asked for help, many of us gladly offered our assistance. While I was there [at the MSU], that was the way our unit worked. We looked after each other and helped each other out all the time. If he asked for help, we were not required to do it. I was easy to turn [his] request down because we knew there would be no retribution and he ran a laid back/fun command atmosphere.” He highly praised the applicant’s leadership.

- MST1 B stated that the applicant was an extremely supportive commanding officer who “kept his finger on the pulse of the entire Command and crew.” He stated that the applicant “had integrity of the highest level” and “protect[ed] the reputation and quality of work of the [MSU].”

- A chief warrant officer in the Commandant’s Office of Military Compensation responded to an email from the applicant by stating that “[u]nder Federal law, if any part of a claim is fraudulent, then the entire claim is considered fraudulent and no payment of any kind shall be made for any portion of the claim. ... When errors are discovered, such as erroneous claims for mileage when using government provided transportation, a supplemental claim shall be submitted to correct the error. This is not normally a fraudulent claim. If [the Personnel Service Center] accepts the supplemental claim, then the claim is presumed to be valid.”

- Five officers who supervised or worked with the applicant at his prior units highly praised his integrity, honesty, character, skills, and willingness to mentor and help his subordinates.

## **SUMMARY OF THE RECORD**

The applicant, a direct commissioned officer, was appointed an ensign in the Reserve and began serving on extended active duty on March 7, 1991. From March 1991 to September 1993, he served as a port safety and security assistant and received good OERs. He was promoted to lieutenant junior grade in December 1992. From September 1993 through June 1995, he served as a marine inspector, receiving excellent OERs as an “exceptional officer.” From July 1995 through May 1997, the applicant served as the Chief of Foreign Vessel Boardings Branch at an MSO in Florida. He received very good OERs, was promoted to lieutenant on November 22, 1995, and was integrated from the Reserve into the regular Coast Guard on March 28, 1996. From June 1997 through June 1999, the applicant received excellent OERs as the Chief of the Port Safety and Prevention Branch of the same MSO. From July 1999 to June 2002, the applicant received excellent OERs while serving overseas in a series of positions with increasing responsibility: Assistant Chief, Investigations Department; Chief, Investigations Department; and Executive Officer and Acting Officer-in-Charge, Marine Inspection, Activities/Marine Inspection Office Europe. He was promoted to LCDR on September 1, 2001.

From June 2002 through June 2005, the applicant served as the commanding officer of the MSU in Louisiana. On his first annual OER, the CO of the parent MSO, who served as both the supervisor and reporting officer, assigned the applicant ten marks of 6 and eight marks of 7 (on a scale of 1 to 7, with 7 being best) in the various performance categories and a mark in the sixth spot on the comparison scale, indicating that the CO strongly recommended the applicant for accelerated promotion ahead of his peers. The CO wrote that the applicant was an “extremely effective CO” and “dynamic leader” at an MSU with a highly complex and diverse mission. On his second annual OER as commanding officer of the MSU, the CO of the MSO assigned the applicant eleven marks of 6 and seven marks of 7 in the various performance categories, another mark in the sixth spot on the comparison scale, and similar, highly laudatory written comments about his leadership.

On the applicant’s third annual OER as commanding officer of the MSU, he had a new rating chain. The new CO of the MSO served as his supervisor; the Chief of the District’s Marine Safety Division served as his reporting officer; and the District Commander served as the reviewer. The applicant received two marks of 5, fourteen marks of 6, and two marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale, which describes the applicant as an “excellent performer.” The written comments were very laudatory and the reporting officer wrote that the applicant had earned his “highest recommendation for promotion.” The reporting period for this OER ended on April 30, 2005; the supervisor signed it on May 30, 2005; the reporting officer signed it on June 9, 2005; and the reviewer signed it on June 15, 2005.

The applicant’s change-of-command ceremony was scheduled for June 24, 2005. He had received transfer orders for a congressional fellowship through the Office of Congressional and Governmental Affairs.



On June 6, 2005, a chief warrant officer completed a CG-4910, informing the applicant that he was being charged with violating the following articles of the UCMJ: Article 107 (false official statements); Article 121 (larceny and wrongful appropriation); Article 132 (frauds against the United States); Article 133 (conduct unbecoming an officer and gentleman); Article 134 (obstructing justice); and Article 92 (failure to obey an order or regulation). The second page of the form indicates that the applicant refused non-judicial punishment (NJP) and demanded trial by court-martial.

On June 8, 2005, the XO of the parent MSO sent a letter to the Assistant Chief of the MSO's Investigations Department, a retired Coast Guard LCDR, assigning him to serve "as the preliminary investigating officer [PIO] for the alleged UCMJ offenses that occurred on various dates between July 2004 and May 2005 and are recorded on the enclosed CG Form 4910."

### *Temporary Relief for Cause*

On June 16, 2005, the XO, who was then Acting CO of the MSO, recommended to the District Commander that the applicant be temporarily relieved for cause. The XO stated that in late May he "received a verbal report from a MSU member suggesting that [the applicant] had engaged in various acts of misconduct. The report described some activity in violation of the Uniform Code of Military Justice and several other incidents of behavior unbecoming an officer." The XO stated that an investigation begun on June 8, 2005, had

substantiated enough of the allegations to lead [the CO] and I to conclude that NJP or court-martial action is warranted to resolve this matter. I believe [the applicant] should be temporarily relieved while the proceedings are conducted ... . In any event, the results of the preliminary investigation indicate that [he] has engaged in impermissible activities, which reflect poorly on his integrity, judgment and competence. ... [He] has lost the respect of his officers and crew and is incapable of maintaining good order and discipline at [the MSU]. He has also abused his authority as Commanding Officer. ... After apparently becoming aware of inquiries related to the fraudulent travel claim, [the applicant] approached the unit YN (to whom he had given his UTS password) and asked her to lie, on more than one occasion, about his travel claim if the YN was questioned about it. [He], on several occasions, appears to have directed at least two enlisted personnel to conduct research and other work on a school project for his son, using government property and during regular work hours. On another occasion, [he] appears to have pulled an enlisted member out of training to assemble a go-cart for his son in his office during regular working hours. He also appears to have misused a government vehicle when he ordered a petty officer to transport him and his family from the airport to his home. There are several members of the MSU that are aware of some or all of these incidents.

On June 20, 2005, the District Commander notified the applicant that as a result of "a preliminary investigation of various allegations," he was immediately, temporarily relieved for cause as commanding officer of the MSU and reassigned to the MSO. The District Commander stated that the applicant appeared to have (a) falsified at least one travel claim for parking and mileage; (b) attempted to impede the administrative investigation "by instructing a petty officer at your command to answer questions in a specific manner which you knew to be untruthful"; (c) misused a government vehicle by having the duty driver use a government vehicle to transport him and his family from the xxxxxxxxx International Airport to their home; (d) misused government equipment and personnel by having subordinates conduct internet research for his son's

school projects during work hours; and (e) misused government personnel by removing a subordinate from a training session to build a go-cart for his son. The District Commander advised the applicant that he could submit a letter on his own behalf within five days.

On June 21, 2005, the applicant acknowledged the District Commander's notification in writing and indicated that he understood his right to consult counsel and to submit a statement and would do both.

On June 27, 2005, the applicant submitted a response to the notification of his relief for cause. The applicant stated that the investigation had reached false conclusions. He stated that the filing of the erroneous travel claim was caused by "a breakdown in communication or misinterpretation of information from me to the YN2 who completed the claim" and not by any intent to defraud. He related how his travel plans had changed due to his wife having to work and how he had assumed that because he submitted no receipt for parking the YN2 would not submit a claim for parking. He pointed out that he had often used his own vehicle for work trips without filing claims and that if he had intended to defraud the government, he "would have sought opportunities to do so that didn't involve transportation with my Commanding Officer, would have involved sums greater than 22 or 87 dollars, and would have occurred at some previous point during my 14 years of service."

The applicant stated that he never tried to impede the investigation. He stated that after the CO contacted him about the erroneous claim, he and YN2 C reviewed all his claims together, found only the two discrepancies, and could not figure out how they had happened. At that time, no investigation was pending, and the applicant thought the matter would be dropped when he filed the corrective supplemental claim. He assured YN2 C that she was not at fault and that if someone asked her about it, she should just tell them that it was a miscommunication. The applicant stated that he "did not tell the YN to lie, conceal, or withhold any facts. My discussion with the YN during our review of the claims was simply to find out what caused the communication breakdown that ultimately led to the fraudulent claim. That is exactly what it was, and nothing more or less." He did not learn that the matter would be investigated until five days later, and once he did learn of it, he did not interact with any crewmates.

The applicant stated that he had not misused a government vehicle. He related how he had ended up requesting the help of the duty driver on one occasion when his rental car had mechanical problems. He pointed out that his decision in that situation had been consistent with his policy for the MSU as a whole and that several members had been assisted in emergency situations because of the lack of public transportation to and from xxxxxxxxx. He stated that the policy he had established at the MSU in this regard was the same policy as that set by his prior command in Europe.

The applicant stated that he had not misused government equipment but had asked YN2 C to get information about Georgia off the internet "when she had the time. She called me up front prior to conducting a search and we looked together. It took less than five minutes to find what I was looking for. We printed out several pages and I took it home for my son to read and complete a paper. We do not have internet access at home. I did not see a problem with this since I've done similar things for COs and supervisors in the past. ... Virtually everyone in the

Coast Guard has conducted an internet search on a topic involving a hobby or area of interest, without incident, as long as it did not involve access to illegal material.” He noted that COMDTINST 5375.1B allows up to 30 minutes of personal use of the internet in any 24-hour period on a government computer during non-working hours.

The applicant stated that he had never pulled anyone out of a meeting to assist him with a personal matter. He stated that a few weeks before Christmas 2003, a petty officer had seen him in the office after hours assembling a scooter for his son and had offered help, which the applicant accepted. It took them less than 15 minutes to complete the assembly.

The applicant stated that the charges against him involved “at most ... minor lapses of judgment, but certainly do not amount to intentional misconduct or misuse of equipment or personnel. I would not jeopardize my unblemished career for a total of \$109 in travel claim funds or several pages of copy paper containing a brief history of the State of Georgia.” He argued that the proposed relief for cause was dire when such issues would usually be handled with counseling.

### ***Witnesses’ Written Statements in the Report of the Investigation***

PO H provided the following statement to the PIO:

On 17 December 2003, after the monthly all hands, it was [a chief petty officer’s] turn to conduct leadership training. This training consisted of watching the movie, Twelve O’Clock High. Approx. 1/3 of the way through the movie, [the applicant] pulled me out of the training. He had bought a gas powered scooter for his son as a Christmas present. He had me go down to his Explorer, bring the scooter to his office, and assemble his scooter. I told him I was finished with the scooter and it was ready to go. All he had to do was add the oil and gas mixture. He wasn’t sure what type of oil to use, so he had me walk with him over to the hardware store near the office to get some 2 cycle engine oil. It took approx. an hour and half to two hours to complete this tasking. CWO [H] was walking by the CO’s office and saw me working on the scooter. CWO [H] asked, “Who is the scooter for?” I told him for the CO’s son. Chief [L] was finishing the training up by the time I completed the tasks. LTJG [M] (now LT [M]) approached me after the training and asked, “Why did you leave the training?” I told him that I was putting the scooter together for the CO. LCDR [B] also made a comment to me about leaving the training early. By leaving the leadership training early, I felt like I was setting a bad example for the Petty Officers that worked for me.

On several separate occasions, I was approached by [the applicant] to print out different items for his son’s schoolwork projects. It ranged from looking up and printing pictures from the internet to making borders for poster boards. I spent approx. 2 hours completing these tasks. All of the printing for these tasks [was done] on the color printer located in the Inspections Department, so I caught a lot of flack from the JO’s and CWO’s assigned to the Inspections Department for completing these projects. On the last occasion, CWO [T] told me that I should misspell one of the words to see if [the applicant] would notice. LTJG [O] saw me working on the project as well. LT [J] came into the bull pen and asked what I was doing. I told him that I was working on the CO’s son’s school project. LT [J] left the Inspections [Department] bull pen and went to talk with the CO. Shortly later, LT [J] came back and told me that the CO would not be asking me to do anymore school projects. When I took the printed out border to [the applicant] he told me that LT [J] had come and talked to him about me doing the schoolwork and had told him that he thought it was inappropriate to have personnel doing his son’s schoolwork. He told me something to the effect that he wasn’t worried about what LT [J] thought. I do not remember what the dates were of these incidents. I felt awkward completing these projects in front of my peers. Since it was not

my child's project, I felt as if it was not my responsibility to assist him in this school work. However, [the applicant] was my boss at the time, and I did what I was asked to do.

I did notice that YN2 [C] was also working on these projects by completing research on the specific topics. She did the research by surfing the internet and printing out the information she found. All of this work was completed during working hours on the Coast Guard SWIII.

Prior to YN2 [C's] arrival, [the applicant] had the previous Yeoman, YN2 [W], doing the research, printing pictures, and purchasing Christmas presents, electric scooter, for his son's Christmas present. YN2 [W] completed all of these projects during working hours on the Coast Guard SWIII.

[The applicant] approached me one morning and told me that his son had broken his lawn mower. He told me he was unsure what type of mower to get and asked me to go with him to purchase a new one. We left the office in my personal vehicle and drove to Wal-Mart, where he found and purchased a new push mower. He also noticed a glider swing on sale so he purchased it for his wife. We loaded the items into the back of my truck and took them to his house. I looked at his old mower and told him that I would take it home and see if I could fix it. A few days later after I had fixed the mower, I took it back to the office and put it in the back of his Explorer, so he could take it home. This took about two hours to complete and was done during working hours prior to lunch. This incident took place in the spring or summer of 2004.

On June 29, 2005, the XO emailed the PIO to say that he had spoken to LCDR B, who remembered that PO H did not attend the training session. The PIO emailed LCDR B directly and asked him for a statement. LCDR B then sent the PIO the following email message:

I had known [PO H] when he was assigned to MSO Mobile and knew him to be a dedicated and hard working professional. In December of 03 we had an all hands meeting that included leadership training. The training was conducted by [MSTC L]. It consisted of a lecture, analysis, discussion, and viewing of the movie 12 O'Clock High. [PO H] left the assembly prior to the commencement of the training and did not attend the training session.

Exactly why [PO H] was not in the training was never explained to me, but rumors were rampant that he was assembling a scooter for [the applicant] to give as a Christmas present. I do know for a fact that a motorized scooter requiring assembly was stored in [the applicant's] office for a period of time before Christmas. There had been an issue with the scooter involving one of the wheels and during working hours I observed [PO H] making telephone calls and on line searches in an effort to locate the needed part.

During conversations with [PO H] and general observation it became obvious to me that [PO H] was the command's go to guy to get things done. [PO H] told me that he was constantly being asked to do things of a personal nature for [the applicant] and that he felt it was interfering with his duties.

On June 30, 2005, LT M sent an email to LT J, which LT J forwarded to the PIO and the XO. LT M stated that on December 17, 2003, PO H was pulled out of a leadership training session shortly after it began. LT M stated that he was particularly irritated because PO H needed the training. After the training ended, he asked PO H what was so important, and PO H told him that "he was putting together the CO's kid's scooter (which was the CO's Christmas gift for his own son). Needless to say, I wasn't happy."

On June 30, 2005, LT J sent the PIO an email stating that on April 14, 2005, he saw PO H working on a school project for the applicant's son. When LT J told him to stop, PO H mentioned that YN2 C was also working on the school project. LT J went to the applicant's office

and informed him that he had told PO H to stop working on the project. The applicant replied “that [PO H] said that he would do it for him. I reminded [the applicant] that he was the CO, and an O-4, and that anyone at the unit would likely do whatever he asked whether appropriate or not. I told him that it was inappropriate to use a unit PO for his son’s project. He then looked at me and said, ‘You’re right.’ I then left his office and briefed the XO as to what had transpired.” LT J also forwarded to the PIO emails from LTJG G and CWO Q, who both confirmed that PO H had worked on a school project for the applicant’s son on a stand-alone computer and color printer in the MSU Inspections Department bull pen.

YN2 C stated that on May 26, 2005, after reviewing his unit record, the applicant

came back to my desk and ask[ed] me to come back to his office to take a look at something. He told me that someone from the office mentioned some things to the Captain about some of his travel claims not being right and he needed me to do some supplemental claims for him. He said the Captain asked him what he was going to do about it. He said that he told the Captain it was his fault because he gave me his username and password to UTS and would let me do his claims for him, and send them for approval without him first validating the claims. He said the Captain told him it was okay to have the YN do his travel claims but he should have validated the claims before they were sent off. His words to me were, “If anyone comes up to you, which I don’t think they will, but if they do, just say you assumed that I drove my private auto when you did my travel claims for me.” He repeated it a few times, almost like he was making sure I got it. He came up to my desk with his record in hand and showed me the claims he wanted supplemental claims done on. He showed me what needed to be taken off the claims and had me print them.

May 27<sup>th</sup>—He called me into his office and repeated, “If anyone asks, just say you assumed I drove my private auto when you did my claims, and you’d spoken to my wife the day you went to pick my wallet up from her, while I was in xxxxxxxxxx at the COs’ Conference, and she mentioned meeting/staying with me at the hotel and having dinner with the Admiral and his wife, and when you did the travel claim, you assumed she did follow through with that plan and paid for parking while she was there.” I was to say that I called up the hotel and found out the price of parking and put it on his travel claim. At one point, when he was going over the part where I spoke with his wife and she mentioned meeting him in xxxxxxxxxx, he said to me “which is true anyway.” I remember having a brief conversation with his wife. She might have mentioned it during our conversation, but I can’t say for sure. I can say for sure that I did not call the hotel to find out the price of parking, and whenever I did the CO’s claims for him, I would always go off of instruction notes he’d written up for me. Based on what he kept telling me to say, it seemed like he was trying to put the blame on me, so at one point during his request, I asked if he was trying to put the blame on me, and he replied back by saying, “No, I told the Captain it’s my fault for not validating the claims.”

Later that afternoon, the XO came and spoke with me about the situation. She said if the CO asked me to falsify documents or asked me to lie, I should let her know. I was a little apprehensive at first, and unsure of what to do, but in the end I was honest with her about everything.

May 31<sup>st</sup> or June 1<sup>st</sup> (the day of staff)—The CO got his record from me and went to staff. He returned his record later that afternoon and told [me] he showed the Captain his supplemental claims and everything was fine. The impression I got from him was that I wasn’t going to be approached by anyone, because he had straightened it out with the CO [of the MSO].

On or about June 3<sup>rd</sup>—The CO passed by my desk and greeted me like he normally does. A brief conversation was struck up, then he mentioned again if anyone asked about the travel claim to say that I assumed he drove his private auto when I did his travel claim. I started to tell him I didn’t feel comfortable doing that, but I didn’t. It was the last time that I could remember him bringing it up to me.

On June 30, 2005, in response to an email from the PIO enquiring about the applicant's son's homework, YN2 C stated that she was asked to look up information for the son's homework on February 15, 2005, and on one other date during work hours. She spent "under an hour" on the first occasion and 20 to 30 minutes on the second occasion. YN2 C had already forwarded to the PIO on June 10, 2005, at the XO's request, an email from the applicant with the subject line "NEED A FAVOR" and "High" importance. In his email, dated February 15, 2005, the applicant asked YN2 C to get information off the internet about the State of Georgia, the State's major tourist attractions, and photographs of "tourist attractions and state symbols, i.e., peaches, peanuts, state flower, state bird, etc.," He noted that it was for his son's school project and that he needed the information "by noon if possible." He also wrote, "Thanks. I owe you one, maybe lunch next week or something."

PO W stated that on one occasion, he was called and instructed "to go to the office and empty out the trunk of the [government vehicle] and drive to xxxxxxxxxx to pick up the CO [the applicant]. I was also told to give the CO a call when I was near xxxxxxxxxx so I'd know where to meet him. I met [the applicant's] family at a RaceTrac gas station and followed them to [a car rental company] near the xxxxxxxxxx airport where they returned their rental vehicle and loaded up in our unit's command car, that being a Dodge Stratus. I proceeded to take the family home after which I returned the vehicle to the office."

On July 1, 2005, the PIO emailed PO W saying, "During our 2<sup>nd</sup> interview, you volunteered that you had once picked up the CO from the xxxxx airport when he returned from xxxxxxxxxx. Please send me an email with all the details of that incident." PO W responded saying he could not remember the date, but that the CO's plane was delayed so PO W met him late in the evening "after waiting for over an hour at the airport." They stopped at a restaurant because the applicant was hungry and PO W then drove him home. When the PIO asked PO W to confirm that the applicant was returning from xxxxxxxxxx, PO W stated that he did not know where the applicant was returning from.

On June 30, 2005, the PIO and Mr. G exchanged emails in which Mr. G stated that he had picked up the applicant and dropped him off at a hotel in xxxxxxxxxx for the COs' conference.

On July 1, 2005, the CO of the MSO wrote a memorandum for the investigation stating that he attended the CO's Conference in October 2005 and that his parking fees of \$14 per day for his personal vehicle were included on his hotel receipt. Because the applicant had mentioned that he needed a ride home, the CO offered him a ride home. The CO also wrote that on May 26, 2005, he called the applicant about his travel claim for the CO's Conference because the XO had shown him the claim after receiving complaints from the applicant's subordinates at the MSU. During that telephone call, the applicant stated that he recollected that his wife had dropped him off at the conference and that YN2 C "must have filed for both the parking and the mileage without his knowledge. During this phone conversation he admitted that his YN had his UTS password and that she filed his travel claims and also validated and approved them as approving official." The CO also submitted a copy of an email from the applicant to him dated May 26, 2005, in which the applicant wrote that, "My recollection of the COs' Conference trip is that my wife dropped me off at the hotel and parked for a while and left. I asked you to give me a ride back

... because I didn't want my wife to make that trip if you were going my way. You also remember that you loaned me \$20 to eat that night because I left my wallet in my truck and my wife made arrangements to get it to me later that night.”

### ***Documentary Evidence in the Report of the Investigation***

The PIO included in his report telephone billing logs, travel claims, and the MSO's check-out log for government vehicles. One travel claim shows that the applicant sought reimbursement for a \$22.50 claim for mileage costs on his personal vehicle for his return trip from xxxxxxxxxx on June 24, 2004. The MSU's government vehicle log shows that PO W checked out a government vehicle from 5:40 p.m. to 8:00 p.m. that day. An eTicket shows that the applicant's plane was scheduled to land at 5:50 p.m.

Another travel claim shows that the applicant sought reimbursement for parking fees totaling \$42 for October 12, 13, and 14, 2005, while he attended the COs' Conference in xxxxxxxxxx, as well as mileage costs of \$45. On May 26, 2005, he filed a supplemental claim without the \$42 parking fee charge or the \$45 mileage charge.

### ***Report of the Investigation***

On July 1, 2005, the preliminary investigating officer completed his report on his investigation. The PIO reported the following eight specifications under Article 92 (failure to obey order or regulation):

1. The applicant wrongfully used a subordinate, PO H, to perform duties other than those related to his official duties, by pulling PO H out of a training session shortly after it started to assemble a motorized scooter for the applicant's son.
2. The applicant wrongfully provided his UTS password to YN2 C contrary to regulation.
3. The applicant wrongfully transported himself and his family in a government vehicle while on authorized leave. The PIO noted that the vehicle was in use from 9:25 to 11:45 a.m.
4. The applicant wrongfully directed a subordinate, PO W, to use a government vehicle for a non-governmental function.
5. The applicant wrongfully directed a subordinate, YN2 C, to use government equipment for a non-governmental function—his son's homework—during work hours.
6. The applicant wrongfully used a subordinate, YN2 C, to perform duties other than those related to her official duties—his son's homework—during work hours.
7. The applicant wrongfully directed a subordinate, PO H, to use government equipment for a non-governmental function—his son's homework—during work hours.
8. The applicant wrongfully used a subordinate, PO H, to perform duties other than those related to his official duties—his son's homework—during work hours.

The PIO reported the following two specifications under Article 132 (frauds against the United States):

1. The applicant submitted a travel voucher seeking reimbursement for an expense of \$22.50 on June 24, 2004, which was false because the applicant was picked up at the airport that day and driven home by a subordinate, PO W, in a government vehicle. The PIO reported that when initially interviewed, PO W, without any prompting or mention of xxxxxxxxxxxx by the PIO, volunteered the information that he had once picked the applicant up at the airport following an official trip to xxxxxxxxxxxx. The applicant had filed a claim for \$22.50 for his expense in returning from the airport following his only official trip to xxxxxxxxxxxxxxxxxx, and the MSU's log showed that PO W checked out the government vehicle before the applicant's plane was to land and checked it back in about two hours after the plane landed. However, the PIO alleged, on July 1, 2005, PO W changed his statement by denying that he had picked up the applicant at the airport after the trip to xxxxxxxxxxxx.
2. The applicant submitted a travel voucher on October 18, 2004, seeking reimbursement for an expense of \$87.00, which was false because the applicant did not drive his personal automobile to the COs' conference and so did not pay three days worth of parking fees (\$14 per day for a total of \$42) or incur mileage expenses for a 120-mile round trip (\$45).

The PIO reported the following three specifications under Article 134 (wrongful interference with an administrative investigation):

1. The applicant wrongfully tried to impede an investigation on May 26, 2005, by trying to influence YN2 C by telling her, if asked about the travel claim dated October 18, 2004, to make untrue statements.
2. The applicant wrongfully tried to impede an investigation on May 27, 2005, by trying to influence YN2 C by telling her to make additional untrue statements if asked about the travel claim for parking fees dated October 18, 2004.
3. The applicant wrongfully tried to impede an investigation on June 3, 2005, by trying to influence YN2 C by telling her to make untrue statements if asked about the travel claim dated October 18, 2004.

In section 3 of his report, titled "Recommendation," the PIO wrote that he recommended that the Coast Guard conduct a criminal investigation of the allegations under Article 32 of the UCMJ because as the commanding officer of the MSU was charged with enforcing the UCMJ and any violation of the UCMJ by a commanding officer "is a major violation vice a minor violation"; because as a senior LCDR, the applicant should be "held to a very high standard"; because the applicant's attempt to get YN2 C to lie for him was "abhorrent"; because a formal investigation "assures that the charges have merit and since counsel represents the accused the investigation does much to eliminate any future claims that the accused was railroad; and because the applicant "need[s] to be taught a lesson" and the rest of the Coast Guard "needs to know that this type conduct will not be tolerated by anyone—anywhere in the Coast Guard—no matter how senior or no matter the position held." The PIO also recommended that the Coast Guard conduct a criminal investigation of the allegations because the applicant abused his position as a CO in that no one but a CO could bypass UTS oversight or get subordinates to drive a government vehicle or use government equipment during work hours for his personal needs because others who tried such abuses would be hampered by a CO's oversight. The PIO also



opined that asking YN2 C both to enter and validate his claims in the UTS “is more serious than it appears on its face” because the applicant “created the possibility of mitigating some of his responsibility for the fraudulent travel claims.”

### ***CO's Comments on the Report of the Investigation***

On July 1, 2005, the CO of the MSO forwarded the PIO's report and the applicant's June 27, 2005, statement to the District Commander. The CO stated that after reviewing the report, he recommended that the applicant's relief for cause be made permanent. The CO wrote that “[w]hile some of the allegations against [the applicant] are he said/she said issues, there is no doubt that he has violated CG policy in regards to misuse of government vehicles, personnel and equipment. His implementation of loose command policies combined with poor judgment has violated the Coast Guard's core values of honor, respect and devotion to duty.” The CO found that the applicant's version of events in his statement dated June 27, 2005, was directly refuted by numerous witnesses, who indicated that the applicant had “show[ed] a pattern of taking advantage of junior personnel for personal gain. Although this gain was small in monetary value, it created an uncomfortable and degrading environment at [the MSU] in which personnel avoided [the applicant] in order to avoid being asked to perform his personal work during work hours.”

The CO further wrote that YN2 C's statement about the travel claims “stands on its own” and that the applicant's statement that YN2 C had, on her own initiative, called the hotel to inquire about the daily parking rate and then filed a claim on behalf of the applicant for parking was implausible. The CO stated that the applicant “had implemented a very lax policy that involved him giving his personal UTS password to his YN for validation of his travel claims and allowing her to be the travel approving official, both violations of CG policy. Once he submitted paperwork to her, he never once had the chance to review the claim for accuracy. That shows poor judgment and financial irresponsibility.”

The CO further stated that when he called and asked the applicant about the travel claim on May 26, 2005, the applicant told him that “his wife had given him a ride to the hotel in xxxxxxxx and that she had stayed and then left later on that day.” In a follow-up email, the applicant wrote that his “recollection of the CO's Conference trip is that my wife dropped me off at the hotel and parked for a while and left.” Later, however, he admitted that a lieutenant junior grade had given him a ride to the conference. The CO stated that anyone should be able to remember who had dropped him off at a hotel six months later. Therefore, the CO stated, he had no confidence that the applicant could remember the truth or tell the truth when confronted. The CO further opined that whatever the applicant told YN2 C, “she perceived that he was asking her to conceal information and outright lie about the travel claim. She was put into a very precarious position and approached her XO because she was not at all comfortable with compromising her name and reputation in any capacity. [She] would not have been put into this position had it not been for the direct actions of [the applicant].”

The CO alleged that the applicant had not refuted his misuse of government vehicles or personnel but had “merely attempted to downplay the extent to which it was done. The use of enlisted personnel using a Coast Guard computer to do ANY work for his son's school project is

wrong in all regards. ... YN2 [C] has stated that she spent more time on this project than just 5 minutes. ... I also have statements from [PO H] that he was involved in this project for [the applicant].” The CO noted that a lieutenant at the MSU had stopped YN2 C and PO H from working on the project and had told the applicant it was not correct. The CO noted that witnesses’ statements also contradict the applicant’s claim that the assembly of his son’s scooter was done after hours and voluntarily by PO H.

Regarding the alleged emergency with the rental car, the CO wrote that he would like to subpoena the rental agency’s records because the applicant’s cell phone records indicated that the only three calls he made that day were one to his voicemail, a second to a hair salon, and a third to the MSU. In any case, the CO stated, “transporting your personal dependents in a government vehicle is not allowed in this capacity” and the incident was “in keeping with his propensity to misuse his position and authority.”

The CO concluded that “[d]uring the past few weeks, I have had several instances where I have seen [the applicant] appear to shade the truth both in written and verbal statements. I have lost my confidence in his ability to command his unit because of this loss of trust.”

### ***Special Officer Evaluation Report (SOER)***

On July 19, 2005, the applicant’s rating chain completed the SOER pursuant to Article 10.A.3.c.1.d. of the Personnel Manual “due to discovery of previously unknown behavior of substance, inappropriate use of personnel and government equipment and travel claim processing procedures.” The SOER also includes the following marks and comments:

- A mark of 3 for the category “Using Resources,” with the following supporting comment: “Inappropriately mismanaged subordinates and resources with requests to perform personal research using government equipment during work hours; to complete non-work related tasks during work hours; and use of the duty driver and government vehicle to pick up [him] and dependents when returning from leave.”
- A mark of 3 for “Workplace Climate,” with the comment that he “[f]ailed to consider impact on subordinates when [he] requested subordinates perform supervisor’s personal research or complete non-work related tasks during working hours.”
- Marks of 3 for “Judgment” and “Responsibility,” with the comment that he “[e]xercised poor judgment in the previous mentioned incidents. Incidents also reflected [his] lack of understanding for the need to hold self (as the Commanding Officer) to the highest standard of responsibility.”
- “Notwithstanding the unit’s outstanding performance and the [applicant’s] other accomplishments, the use of subordinates to conduct non-work related tasks, the improper use of a government vehicle and personnel (duty driver), and the failure to properly oversee the travel claims process diminished the [applicant’s] command performance.”

- “The actions highlighted above indicate lapses of judgment. [The applicant] has exhibited technical expertise in the Marine Safety field, is a good performer, and is capable of challenging technical assignments. Did not meet the demanding leadership standards of personal and professional accountability required of Coast Guard Commanding Officers. Not recommended for promotion.”

In a letter to the CDR selection board dated July 21, 2005, the applicant wrote that he did “not entirely agree with the comments” in the SOER. He stated that his

interpretation of the regulations that form the basis for my leadership and personal decisions are practiced across the board, throughout the Coast Guard. Examples include: use of government vehicles in emergency situations; minimum use of government computers for personal use IAW COMDTINST5357, and shipmates assisting other shipmates with specific requests during their spare time, lunch or other breaks, as noted in [the SOER]. The allegations made against me are not consistent with my character or performance of duty during my entire career. ... We are a close-knit unit with family like traits. With that said, rank/position does not necessarily dictate who helps who with problems and issues. Members helping members occurs all the time at my unit, and I can only hope that this philosophy of helping each other out is the model practiced at all units, not just mine. In my particular case, an MK assisted me with the assembly of a scooter—it was my son’s Christmas gift—and took less than ten minutes to put together. Additionally, a Yeoman assisted me with navigating the internet to locate and print out information about the State of Georgia. Both of these petty officers helped me at their convenience and good will, and despite the circumstances, I am still grateful for their help. ...

### ***Permanent Relief for Cause***

On July 20, 2005, the District Commander informed the applicant that he intended to ask the Commandant to relieve the applicant for cause permanently “because you have engaged in misconduct and I have lost confidence in your ability to act in a responsible manner.” He advised the applicant that he had a right to legal counsel and to submit a statement in his own behalf.

On July 29, 2005, the District Commander asked the Commandant to relieve the applicant for cause permanently based on his alleged misconduct and on the District Commander’s loss of confidence in the applicant’s ability to perform his assigned duties. The District Commander wrote the following:

2. I have probable cause to believe that [the applicant] has engaged in misconduct while serving as MSU ... Commanding Officer, behaved in a manner unbecoming an officer, exercised poor judgment and lost the respect of his officers and crew. On multiple occasions [he] misused his subordinates by requesting they perform personal tasks during the workday. For example, [he] removed a petty officer from a mandatory all-hands leadership training session so that the Petty Officer could assemble a motorized scooter for [the applicant’s] son. Further, [he] directed subordinates to conduct personal research using government equipment. This research was the homework of [his] son. Upon returning from leave, [the applicant] inappropriately used [the MSU’s] duty driver and government vehicle to transport him and his family from Kenner to their private residence in ... . [The applicant] falsified a travel voucher claiming parking and POV miles when he in fact did not use his POV. When questioned by the Commanding Officer of MSO ... about this travel voucher, [the applicant] explained that his Petty Officer, to whom he had wrongly given his UTS password, must have made an error when this claim was processed without his oversight. Then in an apparent effort to minimize any further review, [he] instructed his subordinate on how

to answer questions if asked. [The applicant] has exercised poor judgment and lost the respect of unit personnel. I have lost confidence in his ability to exercise good judgment and effectively perform his assigned duties.

3. [The applicant] has submitted a thoughtful response to my letter notifying him that I intended to request a permanent relief for cause. While he is properly remorseful for the misconduct his letter fails to demonstrate that he appreciates why, or how, what he has done was incorrect or failed to uphold the core values of the Coast Guard. Although [he] accepts responsibility for his misconduct it is still not clear that he understands the impact his misconduct has had on those he was responsible for leading. [He] also does not seem to appreciate that the "poor judgment" he exercised constitutes more than just "minor lapses in judgment." Rather, his actions represented lapses of judgment which resulted in disparate, minor acts of misconduct. Thus, I remain convinced that, at this juncture in his career, [he] does not exhibit the leadership qualities required of those we place in command positions.

On September 30, 2005, the Commandant informed the District Commander that his request that the applicant be permanently relieved for cause had been approved and that it was so ordered "by reason of loss of confidence."

The applicant failed of selection for promotion to CDR in August 2005 and 2006. His orders for the congressional fellowship, which was to begin on July 4, 2005, were cancelled and since August 2005, he has been serving at Coast Guard Headquarters, where he has received excellent OERs with recommendations for promotion.

### **VIEWS OF THE COAST GUARD**

On April 19, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief. The JAG adopted the facts and analysis in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). The JAG concluded that the applicant has failed to prove that his relief for cause or SOER were in error or unjust.

CGPC stated that when the applicant rejected non-judicial punishment for the charges against him and demanded trial by court-martial, it was the command's prerogative to choose not to convene a court-martial and instead to initiate relief for cause and the SOER.

CGPC stated that the PIO's preliminary inquiry was "fair, equitable, and carried out in compliance with" the Personnel Manual, the AIM, and the Military Justice Manual. CGPC stated that the applicant's claim that the XO's involvement with the investigation was wrong and prejudicial was erroneous because the XO is the member of a command who is normally "charged with inquiring into, investigating and administering alleged military justice infractions within the command. As such, the Executive Officer is charged with assigning a preliminary inquiry officer and administering the process through its closure." CPGC stated that the XO of the MSO carried out his duties "appropriately and in accordance with all prescribed rules and regulations." CGPC stated that the PIO was appropriately appointed the *preliminary* inquiry officer under Article 1.B.3.c. the Military Justice Manual and that under the Rules for Court-Martial, Rule 405(d)(1), an active duty commissioned officer is required only for an Article 32 criminal investigation, which was not convened in the applicant's case.

CGPC stated that the applicant's actions "caused his chain of command to lose confidence in his ability to exercise his office" as CO of the MSU and that "the chain of command acted appropriately and complied with policy and regulations in exercising their authority to inquire into the allegations regarding the applicant and carry out the temporary then permanent relief for cause," which were "administered in accordance with policy." CGPC stated that the SOER was also completed and submitted in accordance with policy.

CGPC noted that as a lieutenant commander who has failed of selection twice, under 14 U.S.C. § 285, the applicant can continue in service and be considered for promotion until he attains 20 years of active service and is eligible for retirement.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On April 24, 2007, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. The applicant was granted an extension and responded on May 30, 2007.

The applicant argued that he was wrongfully denied the right to submit a statement for the preliminary investigation and that the XO of the MSO was improperly, intimately involved with the investigation even though the PIO was the designated preliminary investigating officer. In support of this argument, he submitted a statement from LCDR J, who is the XO of a unit in California. LCDR J stated that he is a friend and former colleague of the applicant and that the applicant has served as his mentor. LCDR J stated that he has reviewed the documentation that led to the applicant's relief for cause and that he

must say without prejudice that the preliminary investigation was unduly influenced by the convening authority. The primary purpose of a preliminary investigation is to sift fact from fiction. This process has to be unbiased. The executive officer cannot interject what he deems to be relevant during the investigative process. It is the job of the preliminary investigative officer to list all facts and present his/her report for review to the executive officer. The executive officer must then review the report and make recommendations to the commanding officer. In my review of the documentation that was presented to me, this process did not occur. One major inconsistency that I would like to bring to your attention is the fact that [the applicant] was denied the right to submit a written statement on his own behalf. This is a right that should always be afforded to the accused.

The applicant complained that the advisory opinion failed to respond to his allegation that the PIO was biased against him, as proved by his refusal to accept the applicant's statement and his language in his report. Moreover, he alleged, the credibility of the witnesses against him was never tested.

The applicant argued that even if the investigation were deemed fair and proper, the actions taken against him were excessive and unwarranted and the result of a "rush to judgment" by his command. The applicant argued that the allegations against him were mostly old and minor and yet the Coast Guard has failed to prove that his command carefully considered the options other than initiating his relief for cause, as required under Article 4.F.1.b.3. of the Personnel Manual. The applicant stated that the fact that his CO knew about the travel claim discrepancy and yet signed a "glowing annual OER for him four days later" proves that the allegations

against him “were at one point properly considered minor by the command.” The applicant alleged that the impact of not relieving him for cause would have been negligible since his change-of-command ceremony was three days later. He alleged that his relief for cause likely had a “far more negative impact [on the unit’s morale] than any other action short of court-martial could have.”

The applicant submitted with his response a copy of his latest OER, dated April 30, 2007, wherein he received three marks of 5, thirteen marks of 6, and two marks of 7 in the various performance categories; a mark in the fifth spot, denoting an “excellent performer,” on the comparison scale; and a comment that his reporting officer “highly recommended [him] for promotion to CDR with peers.”

## **APPLICABLE REGULATIONS**

### ***Regulations Regarding Discipline and Investigations***

Chapter 4-1-12 of Coast Guard Regulations provides that a unit’s CO “is responsible for maintaining discipline on board the unit” and shall “initiate such inquiry as many be necessary to make a proper disposition of any report[ed] offenses.” Chapter 6-2-1 states that it is the responsibility of an XO to effect all the policies and orders of a CO and to “keep informed of all significant matters pertaining to the command. The executive officer shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command.”

Chapter 8-1-3 of Coast Guard Regulations provides that “[d]iscipline depends in a large degree upon the example set by commanding and other officers in authority, and may be maintained in many cases by their own attention to duty and by their personal influence, tact, and discretion. To this end they shall show in themselves good examples of honor, patriotism, subordination, and fidelity to their oaths of office, be zealous in the performance of the duties entrusted to them, and vigilant respecting the conduct of all persons under their authority.”

Article 1.C.2.a. of the Administrative Investigations Manual (AIM) states that “[i]f there is no basis for investigation other than prospective disciplinary action, a preliminary inquiry under RCM 303, MCM, or a pretrial investigation under article 32, UCMJ and RCM 405, MCM should be conducted without recourse to the proceedings of an administrative investigation under this manual.”

Rule 303 of the Rules for Courts-Martial (RCM) in the Manual for Courts-Martial (MCM) states that “[u]pon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.” The discussion for this rule in the MCM states the following:

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should con-

sider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence ...

Article 1.B.1.a. and c. of the Coast Guard Military Justice Manual (MJM) provide that any member who becomes aware of an offense under the UCMJ may complete and submit an offense report, form CG-4910, to his or her command, and “[a]ny report of misconduct may serve as the basis for initiating a preliminary inquiry.”

Article 1.B.3.a. of the MJM provides that when a member has been charged with violations of the UCMJ, a CG-4910 is normally completed, forwarded to, and “reviewed by the executive officer. ... If the executive officer determines that nonjudicial punishment may be appropriate, he or she should advise the member of the general nature of the offense that he or she is suspected of committing and that the command is considering imposition of nonjudicial punishment. The executive officer should designate a preliminary inquiry officer to conduct a preliminary inquiry. If appropriate, the executive officer may dismiss the matter, if delegated this authority by the commanding officer.”

Article 1.B.3.c. of the MJM states that “[t]he executive officer normally designates a member of the command to conduct a preliminary inquiry. The designation may be made orally or in writing.” Article 1.B.4.a. states that the duties of a PIO include

- reviewing the description of each suspected offense in the Manual for Courts-Martial and addressing each element of each offense during his inquiry;
- conducting a preliminary investigation either remotely or on-site;
- questioning witnesses who have information about an alleged offense and gathering written statements from them;
- preparing summaries of interviews of witnesses who refuse to provide statements;
- collecting documents such as log entries and other evidence of suspected offenses;
- correcting the CG-4910 based on his findings if necessary; and
- completing a preliminary inquiry report, with a summary of events and supporting materials, as well as the PIO’s own findings, opinions, and recommendations and giving the report to the XO.

Article 1.B.4.a.(4) of the MJM specifically states that it “is usually recommended that the PIO not question the suspect until after collecting available evidence and questioning other witnesses. By doing so, the PIO is better prepared to interview the suspect, formulate questions, confront issues in contention and ascertain the suspect's credibility.”

Under Article 1.B.5. of the MJM, an XO shall review a PIO’s report as well as the CG-4910, which the XO may amend as necessary. The XO has authority to dismiss the charges, if such authority is delegated to the XO by the CO, or the XO may refer the matter to the CO with a recommendation that the charges be disposed of at mast or referred for trial by court-martial. If the XO decides that the charges should be disposed of at mast, the XO notifies the member.

Under Article 1.B.5.e. of the MJM, every member has a right to reject mast and demand trial by court-martial unless he is “attached to or embarked in a vessel.” However, Article

1.B.5.g. states that “[a] demand for trial by court-martial in lieu of NJP by a member not assigned to or embarked in a vessel does not require that charges be preferred, transmitted, or forwarded. The determination to refer a matter to courts-martial resides solely with the command and superior commanders despite a member's demand. ... A demand for trial by court-martial does not limit the command's authority to implement administrative measures.”

### ***Regulations Regarding Relief for Cause (RFC)***

Article 4.F.1.a. of the Personnel Manual states that “relief for cause” (RFC) is “the administrative removal of a commanding officer (CO) or officer in charge (OIC) from his or her current duty assignment before the planned rotation date.” It “normally consists of a two-step process: 1. The flag officer in the unit’s chain of command orders a temporary RFC; and 2. Commandant ... orders a permanent RFC after reviewing the case.” Article 4.F.1.b. provides the following regarding the decision to relieve a CO for cause:

1. The need to Relieve for Cause may arise when a CO’s or OIC’s performance or conduct adversely affects his or her unit’s morale, good order and discipline, and/or mission performance. One of the most severe administrative measures taken against a member in command, RFC usually has a significant adverse impact on the member’s future Coast Guard career, particularly on his or her promotion, advancement, duty and special assignments, and selection for schools. Therefore, the relieving officer must carefully consider the circumstances’ gravity and the potential outcome’s total implications before initiating the process.
2. Relieving authorities must perform a temporary RFC and required follow-up actions as expeditiously as possible, so the Commandant can quickly determine if permanent RFC is warranted.
3. It is not mandatory to temporarily relieve a member for cause if he or she is under investigation. The command has three options: maintain the status quo during the investigation, reassign the CO or OIC in a temporary duty status, and/or temporary RFC while the investigation continues. The command should carefully consider and affirmatively exclude the first and second options before exercising the third. Factors to consider in reaching this decision include: the severity of the alleged misconduct or unsatisfactory performance, the allegations’ credibility, and their impact on the unit’s morale, good order and discipline, and mission performance. A CO or OIC subject to a temporary RFC normally does not return to his or her command.

Article 4.F.3. of the Personnel Manual provides that the bases for RFC may be misconduct, unsatisfactory performance, unacceptable relationships, or loss of confidence, as follows:

- a. **Misconduct** Any act of civil or military misconduct may form the basis for RFC. Only in unusual instances will the Commandant approve RFC by reason of misconduct without disciplinary action taken or in progress. ...
- c. **Loss of Confidence** It is imperative his or her immediate superiors have full confidence in a member’s judgment and ability to command due to the unique position of trust and responsibility he or she occupies; his or her role in shaping morale, good order, and discipline in the command; and his or her influence on mission requirements and command readiness. An articulated, fact-supported loss of confidence is a sufficient basis for RFC.

Article 4.F.4. of the Personnel Manual states that after deciding to institute the temporary RFC process, the relieving authority must notify the member in writing of the “RFC action being taken and the reason for it” and of “[h]is or her right to submit a statement in writing on his or



her behalf within five working days.” The member is temporarily reassigned while the permanent RFC action is pending. If grounds for a permanent relief for cause are substantiated, the relieving authority should “recommend the CO’s or OIC’s permanent RFC and send appropriate documentation to the Commandant.”

Article 4.F.6.2. of the Personnel Manual prohibits forwarding a request for permanent RFC to the Commandant until the CO or OIC has had five working days to submit a statement on his own behalf. Article 4.F.6.3. states that “[t]he command must afford the member the advice of counsel within the meaning of UCMJ Article 27(b)(1) during the temporary RFC process and in preparing any statement he or she submits about the permanent RFC request.”

### ***Regulations Regarding Special Officer Evaluation Reports (SOERs)***

Article 10.A.3.c.1.d. of the Personnel Manual states that a commanding officer may initiate preparation of an SOER to “document significant historical performance or behavior of substance and consequence which was unknown when the regular OER was prepared and submitted. ... The Reviewer must be a flag officer. The special OER normally addresses only those performance or behavior dimensions relevant to the special OER since all other dimensions will have been properly evaluated in the regular OER.”

## **FINDINGS AND CONCLUSIONS**

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

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

2. The applicant alleged that his ability to gather witnesses' statements from members working at the parent MSO was illegally hindered by a demand by the District Legal Office that all requests for witnesses' statements be made through that office. The Board agrees with the applicant that the District Legal Office's demand was improper. The BCMR process is non-adversarial,<sup>2</sup> and an applicant's search for voluntary statements from his colleagues to support his claims does not fall under 6 C.F.R. part 5.<sup>3</sup>

3. The applicant's attorney stated that she called two potential witnesses to ask them to provide written statements. One, LT M, said he would call her back. The other, PO L, agreed to provide a statement but then did not do so. The attorney did not state what PO L agreed to say in his statement. The attorney stated that after the District Legal Office intervened and demanded that her requests for statements be made through that office, her “subsequent attempts to contact the witnesses ... resulted in [her] calls not being returned or the witness informing [her] that [she] had to contact the Eighth District Legal Office.” In its advisory opinion, the Coast Guard

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<sup>2</sup> See *Allen v. Card*, 799 F. Supp. 158, 165 (D.D.C. 1992).

<sup>3</sup> 6 C.F.R. part 5 contains the regulations for a party acquiring information during litigation with the Department or through the Freedom of Information Act and the Privacy Act.

did not address or contradict any of the applicant's attorney's allegations about the interference of the District Legal Office. The statement by the applicant's attorney and the District Legal Office's email indicate that on February 9, 2006, the District Legal Office inappropriately interfered with the applicant's attempts to collect statements from LT M and PO L by telling his attorney to direct his requests for statements through that office.<sup>4</sup>

4. The applicant, however, has failed to explain what LT M and PO L could have testified to about the charges against him or about how his RFC and SOER were handled. Did they witness his travel to or from the CO's Conference or xxxxxxxxxxxx? Did they witness the processing of his travel claims or his subordinates' work on his son's school projects or scooter? The applicant did not say. Nor does the record suggest that PO L or LT M could have provided any probative, exculpatory statements for the applicant. PO L is not mentioned in the investigation or anywhere in the record apart from the attorney's statement. LT M provided the PIO only with redundant evidence about how PO H was removed from a training session to put together a scooter for the applicant's son. Because the applicant has failed to proffer that LT M or PO L could have provided probative, exculpatory statements on his behalf and in light of the ample evidence supporting the charges against him, the Board will not grant the requested relief based solely on the District Legal Office's inappropriate requirement.

5. The applicant alleged that the investigation was prejudiced because the XO of the MSO was involved in gathering evidence. He submitted a statement from LCDR J, who wrote that although he has no first-hand knowledge of this case, his review of the PIO's report leads him to believe that the investigation "was unduly influenced by the convening authority. ... The executive officer cannot interject what he deems to be relevant during the investigative process." However, the record shows that the XO of the MSO was the person to whom the applicant's subordinates complained about his improper behavior. Therefore, when the CO ordered an investigation, the XO would have to forward any complaints and information he received to the PIO and/or ask witnesses to forward their complaints and evidence to the PIO. The report of the investigation and the attached evidence show that the XO received complaints about the applicant and asked YN2 C about the applicant's travel claims before the investigation was convened; asked YN2 C on or before June 10, 2005, to forward to the PIO a probative email in which the applicant asked her to do research for his son's school project; advised the PIO in an email dated June 29, 2005, that LCDR B had told the XO that he was a witness to the applicant's removal of PO H from the training session; and was cc'ed several emails that witnesses sent to the PIO about the applicant's conduct. Given an XO's duties under Chapter 6-2-1 of Coast Guard Regulations and Chapter 1.B. of the Military Justice Manual, the Board finds that the XO's actions concerning the preliminary investigation into the applicant's conduct were neither excessive nor improper. The record shows that the XO made reasonable inquiries, given an XO's job description under Chapter 6-2-1 of Coast Guard Regulations, before the preliminary investigation was convened and, after it was convened, properly referred whatever information he received to the PIO. Moreover, under Rule 303 of the Rules for Courts-Martial, a commanding officer may conduct a preliminary inquiry himself, rather than appoint a PIO. The Board is not persuaded that the XO acted improperly or wrongfully influenced the PIO's work or findings.

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<sup>4</sup> The Board notes that it is not clear from the record whether the applicant made any attempt to work within the District Legal Office's requirement—wrongful though it was—to gather statements or to challenge the incorrect legal opinion of the lieutenant in that office with whom she first communicated.

6. The applicant alleged that the Assistant Chief of the MSO's Investigations Department was not a proper person to be designated a PIO because the AIM requires an investigating officer to be a commissioned officer. However, Article 1.C.2.a. of the AIM states that "[i]f there is no basis for investigation other than prospective disciplinary action, a preliminary inquiry under RCM 303, MCM, ... should be conducted without recourse to the proceedings of an administrative investigation under this manual." Rule 303 does not stipulate that a PIO must be a commissioned officer, and Article 1.B.3.c. of the MJM states only that the XO "normally designates a member of the command to conduct a preliminary inquiry." Therefore, the Board finds that the applicant has not proved that the civilian Assistant Chief of the MSO's Investigations Department, who was also a retired Coast Guard LCDR, was an improper choice for a PIO.

7. The applicant alleged that the PIO improperly refused to accept his statement when he offered one on June 6, 2005, and told him that it was "not the right time." Article 1.B.4.a.(4) of the MJM specifically states that it "is usually recommended that the PIO not question the suspect until after collecting available evidence and questioning other witnesses. By doing so, the PIO is better prepared to interview the suspect, formulate questions, confront issues in contention and ascertain the suspect's credibility." Accordingly, while not barred from taking the applicant's statement, the PIO was not supposed to take a statement from him until he had finished collecting evidence and questioning other witnesses. The record shows that the PIO was still collecting evidence and questioning witnesses on June 30, 2005, and issued his report on July 1, 2005, by which time the CO and XO had initiated the applicant's RFC based on information the PIO had already collected. The record shows that the applicant's statement was solicited on June 21, 2005, as part of the RFC process; submitted by the applicant on June 27, 2005; and forwarded along with the PIO's report to the District Commander when the CO recommended that the applicant be permanently relieved for cause. Therefore, although the applicant's statement was solicited as part of the RFC process rather than the preliminary investigation, the Board finds that he was allowed to submit a statement on his own behalf before his permanent RFC.

8. The applicant's command initiated a temporary RFC on June 16, 2005, based on information the PIO had gathered, although the PIO had not yet completed his report and the applicant had not yet submitted his written statement. The RFC regulations in Article 4.F. of the Personnel Manual did not require the command to get a written statement from the applicant or to wait for the PIO to issue his report before recommending the applicant's temporary RFC. The regulations give an officer an opportunity to submit a statement after being notified of a proposed permanent RFC by the relieving authority, who was the District Commander. Although the applicant argued that he should have been allowed to submit a statement early in the investigation when he offered to provide one, he has not shown that his CO was unaware of his point of view or that his CO would not have initiated his temporary relief for cause if he had seen the applicant's written statement before June 16, 2005. In fact, the CO initiated the applicant's permanent RFC after seeing the applicant's statement, and his July 1, 2005, letter to the District Commander shows that the CO was not persuaded by the applicant's version of events.

9. The applicant alleged that the PIO's refusal to take his statement and certain language in the report prove that the PIO was biased against him. As stated above, the PIO acted in

accordance with Article 1.B.4.a.(4) of the MJM in refusing to accept the applicant's statement when it was offered before the PIO had finished his other work. Therefore, the PIO's refusal to take the applicant's statement before his other work was completed cannot be considered evidence of bias. The applicant alleged that the opinions in the PIO's report—especially the opinion that, as a CO and senior LCDR, the applicant should be “held to a very high standard”—prove his bias. However, Article 1.B.4.a. of the MJM requires a PIO to include his opinions and a recommendation. The PIO stated his opinions and recommended that his report lead to a formal investigation under Article 32 of the UCMJ. The PIO's opinions are neither inflammatory nor unfounded based on the volume of evidence of significant wrongdoing that he gathered. Under Chapter 4-1-12 of Coast Guard Regulations, COs do bear a special responsibility for maintaining discipline, which, as Chapter 8-1-3 notes, “depends in a large degree upon the example set by commanding and other officers in authority.” The Board is not persuaded that the PIO was biased against the applicant.

10. The applicant alleged that the PIO did not conduct a thorough investigation by interviewing the witnesses in person and by gathering the conflicting evidence that the applicant's attorney gathered several months later. Nothing in the MJM, however, prevents a PIO from questioning witnesses and gathering their statements by email, and Article 1.B.4.a. expressly allows preliminary inquiries to be conducted either remotely or on-site. Moreover, the evidence gathered by the applicant's attorney consists primarily of general character references, and except for the applicant's own version of events, none of it contradicts any of the alleged facts underlying the charges against him, such as his misuse of Government personnel, vehicles, and equipment. The applicant's own wife's statement does not even support his allegation that she discussed their travel arrangement changes with YN2 C, who therefore should have known not to file mileage and parking fee claims for him. The Board finds that the applicant has not proved that the PIO failed to conduct a reasonably thorough preliminary investigation into the allegations against him.

11. The applicant alleged that his RFC should be removed because his chain of command had no true basis for losing confidence in his leadership since he never intentionally submitted a false travel claim or asked YN2 C to lie for him and did not misuse Government personnel, vehicles, or equipment except in common, insignificant ways. YN2 C, however, stated that she always filed and validated the applicant's travel claims based upon written “instruction notes” he gave her and that, on May 26 and 27 and on or about June 3, 2005, he repeatedly suggested that she respond to any inquiries about his erroneous travel claims with false statements about why she filed those claims. The applicant's claims of having asked his subordinates to do personal work for him on Government equipment for only a few minutes on breaks during the workday are thoroughly contradicted by many subordinates' statements of how he removed PO H very early from a leadership training to assemble a scooter for his son and of how he had PO H and YN2 C spend significant work time preparing his son's school projects on Government equipment. The Board finds that the applicant has not proved by a preponderance of the evidence that the PIO's findings were untrue or unjust or that his chain of command lacked sufficient valid reasons for losing confidence in his leadership and therefore initiating his temporary and permanent RFC pursuant to Article 4.F. of the Personnel Manual.

12. The applicant argued that his RFC was excessive and that his inappropriate behavior should have been handled through counseling alone, especially since his tour of duty was ending and his chain-of-command ceremony had already been planned. He argued that the speed with which his temporary RFC was initiated proves that his command failed to carefully consider its options before initiating his RFC, as required by Article 4.F.1.b. of the Personnel Manual. However, the allegations against the applicant became known to the XO, and presumably therefore, the CO, in May and the first week of June 2005. The PIO was appointed and began gathering evidence concerning the allegations from the applicant's subordinates on June 8, 2005. Although it is unclear exactly how much of the evidence the PIO had gathered by June 16, 2005, when the XO recommended that the applicant be temporarily relieved for cause, or by June 21, 2005, when the CO informed the applicant that he was being temporarily relieved for cause, the Board is not persuaded merely by the timing of the command's actions that the command did not carefully consider its options as required by Article 4.F.1.b. or that the command overreacted to the evidence of the applicant's inappropriate behavior as the commanding officer of an MSU. The Board is not persuaded that the CO abused his discretion in determining that the applicant's conduct justified the CO's loss of confidence in his leadership and especially in his "role in shaping morale, good order, and discipline" at the MSU, pursuant to Article 4.F.3.c. of the Personnel Manual.

13. The applicant asked the Board to remove the SOER documenting his RFC from his record. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."<sup>5</sup> The applicant has not proved by a preponderance of the evidence that there is any factual error in the SOER, that it was affected by bias or any other inappropriate factor, or that it was prepared in violation of any statute or regulation. The Board finds no grounds for removing the SOER from the applicant's record.

14. The applicant also argued that his RFC and SOER were the result of general bias and prejudice against himself and the MSU at the MSO. He supported this claim with one statement by a CWO who alleged that the applicant's chain of command conducted a "witch hunt" and had animosity toward the MSU because of the MSU's superior performance with fewer personnel. The Board finds that the applicant's and the CWO's claims are insufficient to overcome the presumption that the applicant's command acted "correctly, lawfully, and in good faith"<sup>6</sup> in investigating the allegations against him, initiating his RFC, and preparing the SOER. The applicant has not proved his allegations of bias and prejudice.

15. The applicant made numerous allegations concerning the actions and attitudes of various personnel in his chain of command and at the MSO. Those allegations not specifically addressed above are considered to be not dispositive of the case.

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<sup>5</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

<sup>6</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); 33 C.F.R. § 52.24(b).

16. Because the applicant has not proved that his RFC and the SOER are erroneous or unjust, there are no grounds for removing them or his failures of selection, backdating any promotion, directing his reappointment to a congressional fellowship, or granting other relief.

17. Accordingly, the applicant's request should be denied. However, the Board remains troubled by the District Legal Office's interference with the applicant's attempt to gather statements from potential witnesses, as discussed in Findings 2, 3, and 4, above. Therefore, the Board may reconsider the applicant's request under 33 C.F.R. § 52.67 if he submits probative evidence that could result in a different determination by the Board and can demonstrate that he exercised reasonable diligence in attempting to obtain that evidence before filing his original application.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

**ORDER**

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

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George J. Jordan

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Charles P. Kielkopf

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Kenneth Walton