

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2005-166**

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**FINAL DECISION**

**AUTHOR:** Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair received the application on July 5, 2005, and docketed the case on September 16, 2005, upon receipt of the applicant's military records.

This final decision, dated July 13, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to correct his record by changing his retirement date from July 31, 2003, to October 1, 2004, which, he alleged, was the date he originally requested. He asked the Board to award him corresponding back pay and allowances. In addition, he asked the Board to remove from his record all adverse Administrative Remarks ("Page 7s"), which he alleged would be in accordance with findings by the Inspector General (IG) of the Department of Transportation (DOT) in March 2003.

**APPLICANT'S ALLEGATIONS**

The applicant alleged that while on active duty at his last unit, Group Xxxxx, he was "treated with cruelty, slander, harassment, [and] discrimination and coerced into early retirement." He alleged that this treatment resulted from his reporting certain misconduct by his supervisor. After he filed a complaint of retaliation, he alleged, the DOT IG made findings in his favor, but the Coast Guard failed to take appropriate remedial action.

In support of his allegations, the applicant submitted copies of many of the documents summarized below. In addition, he submitted many letters of recommendation from officers and enlisted members he had worked with at prior commands. A retired captain who was the Executive Officer at Group Xxxxx when the applicant served there in the early 1990s stated that the applicant's "performance of all of his professional duties was excellent in every respect. He was thorough, meticulous, and successful in the management of the command's communications activities and its classified materials. He ran a 'tight ship,' insisted on adherence to procedures, and expected a lot from himself and his crew." The applicant's supervisor at another command from September 1998 through May 2000 highly praised the applicant's work and stated that the applicant had "capably supervised the Comms Center and personally managed the classified accounts for approximately four months while no TCC was assigned to the command."

### **SUMMARY OF THE RECORD**

On September 23, 1980, the applicant enlisted in the Coast Guard. After advancing to radioman, third class, he was discharged on March 19, 1987. He reenlisted on February 1, 1988. By 1991, the applicant had advanced to radioman, second class. From 1991 through 1997, he was assigned to the Marine Safety Office (MSO) at Group Xxxxx, where he served as the Telecommunications Specialist in Charge (TCIC). By 1997, the applicant had advanced to telecommunications specialist, first class (TC1).

From 1997 through June 2001, the applicant served at an MSO in Xxxxxxx. On his performance evaluation for the period ending November 30, 1997, the applicant was assigned a mark of "progressing," rather than being recommended for advancement, on his performance evaluation. The Chief of Group Operations prepared a Page 7 (form CG-3307) dated November 17, 1997, to document the mark. The Page 7 states that before the applicant could be recommended for advancement to chief petty officer (TCC), he needed to better prioritize his work, to "be a better role model by making better decisions and recommendations to his supervisors," and to exhibit more leadership skills.

On January 21, 1998, the applicant's supervisor, TCC P, counseled him on a page 7 about leaving open the door of a safe containing classified materials while he attended a "mid-day function" in the conference room. The applicant was the alternate custodian of classified materials. The applicant refused to sign the Page 7 in acknowledgment.

On March 13, 1998, the Chief of Group Operations counseled the applicant on a Page 7 about an incident that happened on January 16, 1998, when the applicant, who was delivering documents to the commanding officer (CO), allegedly stood in the door of his CO's office while the CO was in a meeting, even though the CO told him and signaled to him several times to leave and return later. The applicant refused to sign the Page 7 in acknowledgment.

On his performance evaluation for the period ending May 31, 1998, the applicant was again assigned a mark of "progressing," rather than being recommended for advancement. On the Page 7 documenting the mark, the applicant's TCC P wrote that in addition to the incidents on January 16 and 21, 1998, the applicant had inappropriately sought letters of recommendation from subordinates and officers "after numerous attempts through the chain of command to compete in the Servicewide examination for E-7." The Page 7 also stated the following:

[The applicant] has an overwhelming competitive attitude which leads to exaggerated statements and reckless guesses which he exhibits in day-to-day situations at the unit. [His] continued exaggeration has been so intense that his subordinates question his veracity in the most mundane issues. Such a reputation does not breed respect and diminishes his credibility. [He] does not always express his thoughts clearly and logically and this has been evident through his dealings with his chain of command. [He] never takes any responsibility for his actions and seems to have a hard time adjusting and supporting decisions of his seniors. At times [he] demonstrates fine technical skills but has not exhibited the leadership skills necessary for advancement to Chief Petty Officer.

On his performance evaluation for the period ending May 31, 1999, the applicant received the highest possible mark (7) for "Stamina." The Page 7 documenting the mark notes that, after TCC P was transferred, the applicant took on the extra work and "effectively managed his time and resources to enable him to complete all reports and audits by the appropriate deadlines. He willingly worked overtime to assist departments with computer/phone problems when the previous ADPSSO retired without a replacement. In addition, he never failed to maintain a positive attitude toward all tasks." While the applicant was stationed at this MSO, he also received marks of 7, with supporting positive Page 7s, for the performance category "Health and Well-Being" on five of his performance evaluations.

On July 16, 2001, the applicant transferred back to the Communications Center at the MSO at Group Xxxxx. His original rating chain included CWO X, his supervisor; LCDR X, the Group Operations Officer, who served as his marking official; and CAPT Y, the Group Commander, who served as his approving official. On August 14, 2001, the applicant was referred for a mental health evaluation (MHE) because a review of his local personal data record, which was required before the command could grant him access to classified material, showed that after a command-directed MHE in 1998, the applicant did not return for a follow-up appointment as directed. During the MHE on August 14, 2001, the applicant was found fit for full duty.

On January 17, 2002, the applicant was designated as the Telecommunications Specialist in Charge (TCIC). On May 1, 2002, he advanced from TC1 to TCC. However, on June 7, 2002, CAPT Y suspended the applicant's access to classified materials. The reason for the suspension was not documented at the time. As the applicant could not work in the Communications Center without such access, he was transferred to the Investigations Division.

No final E-6 performance evaluation was ever entered in the applicant's official record, although one was required and a subsequent investigation revealed that two such forms were prepared. The first form was signed by CWO X, LCDR X, and CAPT Y, prior to CAPT Y's retirement on June 30, 2002. CWO X and LCDR X did not recommend the applicant for advancement to E-7 although the issue was moot since the applicant had already advanced. However, CAPT Y did recommend him for advancement to E-7.

Following CAPT Y's retirement, a second E-6 performance evaluation was prepared and signed by CWO X and LCDR X and by the new Group Commander, CAPT Z. On this form, all members of the rating chain marked the applicant as not recommended for advancement. In addition, the applicant was assigned a low mark of 2 for "Integrity," several marks of 3, and a "satisfactory" conduct mark. The applicant was shown and counseled about this evaluation on October 8, 2002, but it was apparently never submitted to the Coast Guard Personnel Command (CGPC).

On July 24, 2002, the applicant was found fit for duty during another MHE. His command apparently directed him to visit a doctor and that doctor, who was outside the chain of command, referred him for the MHE. Although the psychiatrist's report is not in the record before the Board, the DOT IG later reported that the applicant had protested the MHE and that the psychiatrist noted the following:

I would advise command that 3 referrals for the same problem in 5 years may seem excessive to any outside review agency. The challenges posed by this service-member are administrative in nature. Further referral for the same interpersonal difficulties are not warranted.

On October 4, 2002, a lieutenant in the Investigations Division prepared a positive Page 7 complimenting the applicant's willingness to assist the division's work as an Assistant Investigating Officer.

### *Negative Page 7s*

On October 7, 2002, LCDR X, the Group Operations Officer, prepared a negative Page 7 concerning the applicant's removal as TCIC on June 7, 2002. The applicant refused to sign it in acknowledgment. This Page 7 was later removed from the applicant's record because of inaccuracies:

1. On 07 JUN02 your security clearance was administratively suspended and you were relieved of duties as TCIC due to loss of confidence. Subsequent to your relief, it was discovered you had been derelict in your duties as TCIC to wit:

- a. The TCIC office was found in an extreme state of disarray.

- b. Several personnel security packages were separated and scattered among several different piles of unrelated paper as well as in the backs of desk drawers.
- c. A Central Facility Key Inventory letter postmarked 01MAR02 requiring a response within 45 days of receipt was found in a stack of unrelated paperwork.
- d. Six months of unopened phone bills were located in various piles of unrelated material.
- e. A series of superseded classified CD-ROMs that should have been shipped to National Security Agency for Destruction were found in safe number 2.
- f. TCIC CAMSPAC called to query why their e-mail requesting a listing of classified message delivery methods to outlying units was never responded to.
- g. The 30-day classified message file had 45 days traffic posted.
- h. Arrangements to return three RAS Tokens were made in April of 2002. Inventory of safe 4 revealed you had not sent back the tokens as arranged, which continued to incur costs of \$125.00 per month to the unit.

2. In addition to the non-performance of TCIC duties, leadership deficiencies have contributed to Command loss of confidence. Specifically, you have continually displayed a self-serving leadership style marked by poor conduct towards department personnel despite repeated counseling by the Assistant Surface Operations Officer. You have routinely used various excuses to leave early, or get out of work requiring you to stay beyond normal working hours. Examples include:

- a. When the classified message delivery system had been inoperative from the night before you failed to get it back on-line. Instead you went home leaving the communications watchstander to deal with [it]. In the middle of trouble shooting the problem with CAMSPAC you handed the watchstander the phone with no explanation and left. ...
- b. The reserve communications watchstanders consisting of two TC1s and two TC3s approached the Assistant Operations Officer informing him they intended to request transfer to the IRR. They cited that you were "manipulating" their watch augmentation to your advantage so you would not have to stand night or weekend duty. The reserve component is a valuable asset to the TCOW watch and your actions jeopardized their continuing participation. Further, when reserves were scheduled to "cover" active duty personnel other than yourself, the active duty watchstander was not notified. This became so routine the reserve assigned to drill would personally call the active duty watchstander to inform them of the schedule change.
- c. One active duty TC3 declined to re-enlist citing "he'd had enough" and did not want to stay and finish out his Xxxx tour. When pressed he stated your selfishness, lying, and bragging made him not want to come to work.
- d. Continued shortfalls in veracity and honesty. During a very busy [festifal] event, you informed the Operations Officer that you were taking a compensatory day because you had worked eleven days straight. When the Operations Officer questioned [CWO X] as to why you were working so much, he stated that you were not. In fact, you had taken the previous Friday off, stood watch on Saturday, taken Sunday/Monday off, left early on Tuesday and worked Wednesday.
- e. Continued abuse of Command approved 90 minute sports lunch program.

[3]. A further distraction to your ability to fulfill your roll as TCIC manifested itself in your constant need to embellish your accomplishments to your subordinates. Your per-

sistence in this has been so aggressive, that you choose to tell exaggerated stories about yourself and family. Several examples follow:

- a. Unsolicited, you engaged in a conversation of a sexually explicit nature with a junior petty officer. This conversation concerned the sexual habits between you and your wife. This constituted a violation of Commandant policy.
  - b. Frequently leaving copies of your personal positive page 7's and other flattering documents where your subordinates would find them, occasionally with paperwork required to be reviewed and shredded.
  - c. Claiming that you once sat down in a conversation with President Clinton. The President was so impressed with your knowledge and abilities that he asked your opinion on a speech he was going to give. You made what you felt were appropriate changes and gave it back to him.
  - d. The local community contacted you before your household goods were unpacked to "beg" you to coach soccer. This claim was further embellished when you claimed that you couldn't leave the state without notifying the Olympic Committee because your daughter had been selected as an Olympic hopeful.
  - e. After your dismissal from TCIC duties and assign[ment] to another branch, you bragged to the local CGIC Agent that you had worked for a State Agency on a sting operation involving an unlicensed charter vessel operator. To complete the "sting," you held up your uniform shirt as identification.
4. Your propensity of inattention to duties, embellished bragging, and lack of personal veracity has undermined your ability to lead as TCIC. Your behavior has had serious negative impacts to unit morale and has led to a loss in confidence in your ability to hold a position of leadership.
5. You have been medically evaluated to have no underlying physiological causes for your behavior. You will be provided an opportunity to re-establish yourself within the Group Operations Department. I encourage you to take advantage of this opportunity.

Also on October 7, 2002, LCDR prepared another Page 7 to document the command's decision to return the applicant to the Communications Center, albeit with no supervisory duties and on performance probation. The applicant signed in acknowledgment on October 8, 2002. This Page 7 was also later removed from his record because of inaccuracies:

07JUN02 your security clearance was administratively suspended as described in a prior CG-3307. As of today, your security clearance has been reinstated to allow you to work in Group/MSO Xxxxx's COMMCEN. Additionally, because of the items identified in that CG-3307 you are being placed on a three-month performance probation period to commence this date. During this period, you will perform the following steps:

1. You shall assist [QMC X] in the performance of his duties. You will not have supervisory contact with COMMCEN personnel other than what is necessary in the performance of your duties.
2. Carry out assigned tasks to the best of your ability ... Any delegation of tasking to subordinates will be accomplished by [QMC X].

3. You will stand a proper military communications watch when assigned and will also be expected to complete your assigned tasks in a manner commensurate to your rank.
4. Any exchanged watches will be approved by [QMC X] ...
5. You will be expected to arrive to work on time and depart only when authorized ...
6. You may participate in a "Sports lunch" program only when not on scheduled watch. The length of the activity is 90 minutes. You will be expected back on time and in proper uniform of the day at the end of that period.
7. You will refrain from lying, fabricating or embellishing stories of any kind. You will not engage any conversations of a sexual nature.
8. You will not depart from the COMMCEN without first checking out with [QMC X] ...
9. You will at all times maintain a professional appearance and attitude and will not engage in conversations which undermine the good order and discipline of the OPCEN/COMMCEN.
10. You will observe the chain of command at all times.
11. You will demonstrate your knowledge and proficiency in your rate and rank by:
  - a. Resolving all outstanding items on your CG-3307 of 07 Oct 02.
  - b. Complete all work assigned to you ... thoroughly and completely.
  - c. Demonstrate good leadership and show serious effort learning leadership skills ...
  - d. Display a professional attitude and behavior at all times.
  - e. Observe the chain of command at all times.
12. Once the above items have been successfully accomplished you will gradually be given supervisory responsibilities.
13. You have been counseled on each one of these items. Failure to comply with any one of the steps outlined here may lead to reduction proceedings and possible further administrative action.

Although the applicant was reassigned to the Communications Center following this counseling, his access to classified material was withdrawn again a few weeks later by CAPT Z.

### *Applicant's Rebuttal of the Page 7s*

On October 10 and November 6, 2002, the applicant submitted two letters to the Group Commander to rebut the information in the Page 7s. He alleged that they had been prepared in retaliation because in October 2001 he had reported LCDR X for compromising classified information. He alleged that LCDR X had given CWO X misinformation about the applicant leaving early on June 7, 2002. He alleged that both LCDR X and CWO X could "not handle [his] personality style." He alleged that there was some resentment due to the fact that he was an overachiever who set high standards for

himself and did not smoke, drink, or use profane language. The applicant alleged that he had not previously been counseled on any of the accusations in the Page 7s. He pointed out that his security clearance had never been suspended—only his access. He alleged that CWO X had told him that he wanted the applicant to be successful but then said, “I hold the knife that can cut your throat.” (In an undated “timeline” describing the same conversation, the applicant stated that QMC X, who was present when CWO X counseled him on the Page 7s, accused him of smirking while he was listening to CWO X and told him that he did not deserve his “anchors.”)

Regarding the specific accusations in the first Page 7, the applicant alleged that the TCIC office was not in an “extreme state of disarray” but that he was suddenly removed without an opportunity to tie up loose ends or to inform anyone of the status of various work. He stated that he was working on two security packages at the time of his removal. He alleged that CWO X told him not to take any action on the key inventory letter. He alleged that there were only three months’ worth of phone bills and that it was a low priority compared to the Noble Eagle operations. He stated that returning the CD-ROMs was the assigned duty of the Comtac Publications Officer, TC2 B, who knew to ask the applicant if he needed help with anything. Regarding the CAMSPAC email, the applicant stated, “I have responded to Camspac more than once with lists for who we guard for on the SWS.” He further alleged that he “purged the 30 day classified board every day I was here, and made a note on any messages that were required to be retained longer than 30 days. Every TCOW that was in the Commcen at the time should be able to verify this.” He stated that only two old tokens were in the safe and that he had deactivated them both on April 17, 2002, and so they were not costing the command anything and just had to be mailed back.

Regarding his alleged “self-serving” leadership, the applicant recounted his conduct on one of his off days when he spent several hours making sure a watchstander could get to the office despite heavy snow. The applicant alleged that the watchstander to whom he handed over the CAMSPAC repairs was “the assistant administrator who is equally responsible for the maintenance of the system. It was also good timing for him to take a little more responsibility. I did not hand the problem over with no explanation. I told the individual what the problem was and that I wanted him to work with Camspac to resolve it.” He stated that once when the system failed, he had come to the office at 1:00 a.m. to fix it and stayed through the workday.

Regarding the reservists, the applicant stated that one was under pressure to resolve medical issues or transfer to the IRR, one had a new baby and a new job and was considering transferring to the IRR to have more free time, and one worked for 911 emergency services so he could not work according to a planned schedule and “would sometimes have to call the watchstanders to pass on when he could come in.” Furthermore, the applicant stated, when he first arrived at the office, both TC3s were already planning to leave the Coast Guard.

Regarding his work schedule, the applicant stated that everyone at the Group, including the CO, XO, and Group Operations Officer, had played Ultimate Frisbee on their lunch hour and had exceeded the given 90 minutes. During [festival], he stated, he had told the LCDR X, the Group Operations Officer the truth—that he had worked eleven days with only one day off in the middle—but LCDR X intentionally misinformed CWO X that he had claimed to work eleven straight days. CWO X then called him back to work, asked him “who do you think you are,” blamed him for a TC3’s departure, accused him of regularly leaving work an hour or half-hour early, and told him that he would be denied access to the Communications Center and sent for an MHE.

The applicant alleged that the accusation about the sexually explicit conversation is “just plain sick and ridiculous” as he had “continually asked some of the personnel working within the Communications Center to abstain from sexual conversations and to not cuss in front of [him].” He alleged that he had told someone that he had been married for seventeen years and had “saved [him]self for the one [he] married.”

Regarding his personal documents, the applicant stated that he had left some in a blue folder on the chart table and that, if anyone looked at them, his privacy was violated. The applicant further alleged that at a conference attended by the President, he was actually asked his opinion and it was “one of the brightest spots of [his] career.” The applicant alleged that statements he had made about coaching soccer and about his daughter had been twisted around to make him look bad when he was really just a proud father of a great soccer player. He denied ever claiming to have been part of a “sting.”

Finally, the applicant alleged that he had only been brought back to the Communications Center because that was where his billet was and because they wanted him to install the new SIPRNET system. He stated that after he did so, his chain of command would try to force him out again “due to personal vendettas and personality conflicts.”

On October 17, 2002, the applicant met with CAPT Z, the Group Commander; CDR Y, the Executive Officer; and the Command Enlisted Advisor to discuss his rebuttal of the Page 7s. The applicant later alleged that CAPT Z had prepared a written response to his rebuttal but then withdrew it after the applicant gave him some further documentation.

On October 23, 2002, the applicant submitted a letter requesting “retirement on 1 October 2004, or as soon thereafter as possible.”

On November 18, 2002, the applicant submitted a letter requesting retirement as of June 1, 2003. He specified that he wanted to be retired as a TCC. CAPT Z forwarded the letter recommending that CGPC retire the applicant as a TCC effective March 1,

2003. The Group Commander stated that the requirement that a member serve two years in grade before retiring should be waived because the applicant's record

is littered with negative entries; several of them dealing with issues indicating a deficiency in leadership qualities and abilities. In regard to performance, [his] career has been one marked with extreme peaks and valleys instead of one typical of the Coast Guard's more effective senior enlisted leaders. Unfortunately, [his] recent performance has been such that I've felt it necessary to withdraw his access to classified information, remove him from any space containing classified material, and remove him from any position of leadership or bona fide responsibility.

Though [the applicant] has been counseled for reasons shown in the enclosed page sevens and has been given the opportunity to correct the deficiencies noted, his actions continue to be a valid source of concern and his performance is below that expected of one of the Coast Guard's senior enlisted members. ... I feel that it is in the Coast Guard's best interests that he retire as soon as possible. ... A 1 March 2003 retirement date would allow him to utilize the regular earned leave he had accumulated [and cannot sell].

On November 22, 2002, the applicant sent an email to a Work-Life counselor complaining about his command's actions. He stated that the recent Page 7s were "based off of false accusations, conjecture, speculation, and [hearsay] and were based on events that supposedly happened prior to 7 June 02. I was able to come up with documented evidence to disprove some of the accusations contained within these page 7's." He also alleged that the Page 7 his prior command had prepared on March 3, 1998, was also false as it was based on "an inaccurate perception."

Also on November 22, 2002, CDR Y, the Group XO, sent an email to several members of the command regarding the applicant's retirement. He wrote, "Hopefully, I will have [the applicant's] marks & new pg 7's to discuss with him early Monday. EPM's stance is that he's being fired; that 1 Feb is the latest they will support. If he doesn't take the offer we've made, I plan to pursue reduction in grade action."

On November 25, 2002, the applicant was shown his first E-7 performance evaluation, for the period ending September 30, 2002. He received many low marks of 2 and 3 and an "unsatisfactory" conduct mark. He was not recommended for advancement to E-8. The written comments supporting the low marks all concerned his performance of duty as TCIC rather than his performance in the Investigations Division. Most of the criticisms in these comments were summarized on the Page 7 prepared by the applicant's chain of command at the Communications Center on October 7, 2002. The comment on the applicant's mark of 2 for "Integrity" stated that "[w]hen challenged on the truthfulness of these stories, he routinely would deflect responsibility by claiming miscommunication, misunderstanding or claim the person doubting him to be lying. This continued behavior has led to a total loss of confidence in his credibility and resulted in an administrative suspension of his security clearance. There is no convincing psychological cause for this behavior and many counseling sessions have been conducted with [him] in an attempt to improve his performance."

Also on November 25, 2002, the applicant submitted a letter requesting retirement as of February 1, 2003, as a TCC.

On December 7, 2002, the applicant wrote to a U.S. Senator to complain about his treatment by his command at MSO Xxxxx. He wrote that at his prior unit, he had held several highly responsible positions and had received four personal awards. However, on August 14, 2001, within a month of returning to MSO Xxxxx, he was referred for a mental health evaluation even though he told his supervisor, CWO X, that it was unnecessary and that he was a "God fearing Christian man, who does not need to drink or cuss." CWO X later told him that he did not "trust anyone who doesn't drink or cuss." The applicant alleged that the command at MSO Xxxxx "have used my personality against me in an attempt to smear my character and undermine my abilities." He alleged that the command had "come up with false and twisted allegations to persecute" him and had treated him "with personal bias, prejudice, and discrimination all based on my personality and not my abilities." He alleged that he was "set up for failure" during his first month at the unit and that his command was trying to force him out of the Coast Guard. The applicant stated that under tremendous pressure from his command, he had agreed to retire on June 1, 2003, but then the XO told him that if he wanted to retire as an E-7, he had to retire on February 1, 2003, because otherwise the command would seek to reduce his rate. The applicant stated that he had wanted to continue working at the Investigations Division through October 1, 2004, but that the command would not allow this because his billet was for Group Operations, rather than the Investigations Division. The applicant asked that his retirement date as an E-7 be extended to June 1, 2003, so that his family would not "end[] up on the street." He also asked that he receive a letter of apology from everyone in his command who had harassed him and tried to "assassinate [his] character."

On December 10, 2002, CGPC issued orders approving the applicant's request to retire on February 1, 2003.

On December 30, 2002, the DOT IG initiated an investigation into the applicant's complaint that he was being forced to retire in reprisal because he was a whistleblower and that his command had illegally referred him for MHEs. On January 17, 2003, CGPC issued orders amending the applicant's retirement date from February 1, 2003, to April 1, 2003, due to the pending investigation.

### *Report of the DOT IG*

On March 14, 2003, the DOT IG forwarded to the Coast Guard a report of its incomplete investigation into the applicant's allegations with recommendations for further investigation. The DOT IG denied further jurisdiction over the case because the Coast Guard was transferred to the Department of Homeland Security (DHS) on March

1, 2003. The DOT IG reported that after conducting twenty-four interviews and reviewing numerous documents from the applicant and his command,

although we did not find any substantiation that the command's actions were in reprisal for a protected communication by [the applicant], we did find there was a concerted effort within the command—based solely on [the applicant's] eccentricities—to prematurely force him into retirement from the Coast Guard. Further, we found that—in furtherance of this effort—the command violated administrative procedures and documented adverse behavior—supported solely by rumor and innuendo—in [the applicant's] permanent record. Additionally, we found attempts by senior officers to cover up the efforts to produce this documentation.

Specifically, we found that senior Coast Guard members of MSO/Group Xxxx—attempting to document [the applicant's] alleged performance deficiencies—solicited and subsequently cited unverified examples of [the applicant's] “weird” behavior and poor performance from junior Petty Officers. Moreover, we found that—five months after his promotion to Chief—[the applicant's] seniors attempted to produce and submit an E-6 performance evaluation that would remove a recommendation for advancement to Chief Petty Officer made by the previous Commanding Officer.

Furthermore, we found numerous efforts by personnel at the command to negatively impact the reputation of [the applicant] through MHEs [mental health evaluations], derogatory statements made by supervisors to junior enlisted personnel, and his removal from his position in the Operations Department.

While there are outstanding issues concerning the command's treatment of [the applicant], in our opinion the facts uncovered by this investigation to date suggest the need for a strong response by Coast Guard Headquarters. Specifically, the Coast Guard should consider appropriate disciplinary action against members of [the applicant's] command for their actions in attempting to cover-up the facts and circumstances surrounding the E-6 evaluation, as well as their coercion of [the applicant] into early retirement.

Further, we feel that—in their zealotry to force [the applicant] from the Coast Guard—responsible members of [the applicant's] command engaged in a series of egregious actions by making false adverse comments on [the applicant's] page 7, subsequently included pieces of this false information on his E-7 evaluation, and, after placing [him] on performance probation status—through negative comments and instructions to junior members of the command—ensured that [the applicant] would fail his probation.

Accordingly, we recommend that all negative page 7 entries issued by the command, and the E-7 performance evaluation be removed from [the applicant's] records. In addition, we recommend that [he] be allowed to remain on active duty until October 2004, his originally requested retirement date.

Regarding the applicant's allegation that he had been removed as TCIC in June 2002 in reprisal for reporting in October 2001 that LCDR X had taken classified material home to work on without proper authority, the DOT IG reported that “we did not find a nexus between the adverse personnel action and the protected disclosure. Additionally, information obtained from the interviews, the length of time between the protected communication and the first adverse personnel action, and the fact that [the applicant] was promoted during this time, resulted in our determination that his removal as TCIC

and the actions taken by the command to force him to request retirement were not in reprisal for his involvement in reporting the security violation.”

Regarding the applicant’s complaint about being referred for mental health evaluations, the DOT IG wrote that “during the screening of [the applicant’s] local records—required prior to issuing security access—it was noted that [he] had a MHE at his previous command but had apparently failed to return for a directed follow-up visit. Accordingly, [the applicant] was referred by the command for a MHE on August 14, 2001, and was found fit for full duty. ... Pursuant to this evaluation he was granted his security access which enabled him to work in the Operations Department.” Regarding the second referral in July 2002, the DOT IG stated that following the applicant’s removal as TCIC, someone at the command referred him to a physician, who recommended that the applicant have an MHE. The DOT IG stated that the applicant was not entitled to a written referral or rights statement prior to either of these MHEs because the first was conducted in association with a security clearance and the second was by a doctor who was not part of the applicant’s chain of command.

Regarding the applicant’s removal as TCIC and transfer from Operations to the Investigations Division, the DOT IG stated that it occurred “after a confrontation between him and [CWO X] over the number of days [the applicant] had worked without a day off” and that there may have been “significant miscommunication surrounding the issue.” CWO X stated that the incident was “the straw that broke the camel’s back” and “stressed that [he] had verbally counseled [the applicant] on numerous occasions, but [he] could not provide any dates or the specific issues discussed with [the applicant].” CAPT Y told the DOT IG that, after LCDR X, the Group Operations Officer, told him that he could no longer deal with having the applicant serve in the Communications Center as a supervisor, CAPT Y decided to transfer the applicant to the Investigations Division “to give him a second chance.”

Regarding the first Page 7 dated October 7, 2002, the DOT IG stated that it was based in part on input solicited from petty officers in the Communications Center about the applicant’s performance prior to his removal as TCIC in June 2002. The DOT IG stated that all of these junior petty officers either disliked or distrusted the applicant, that the information was never verified, and that some of it was false or misleading. For example, the DOT IG stated that an interview revealed that the accusation about the applicant’s alleged sexual discussion was based on a comment by him that “he and his wife did not have sex because she only wanted him for his paycheck.” Moreover, the DOT IG stated, the applicant’s rebuttals, which appeared to fully explain many of the issues on the Page 7, were never examined by his command.

Regarding the applicant’s two final E-6 evaluations, the DOT IG stated that CAPT Z completed the form and marked the applicant as not recommended for advancement without knowing about the first evaluation. CWO X claimed that the XO, CDR Y, had told him to prepare the second form. However, CDR Y claimed not to have

told CWO X to redo the evaluation and contradicted himself several times. Ultimately, neither evaluation form was submitted to CGPC. The DOT IG stated that both CAPT Y and CAPT Z also made statements that contradicted those by CDR Y.

The DOT IG stated that another Page 7, which is not in the record, was prepared after CWO X told a second class petty officer serving as an instructor at the firing range that the applicant "was not capable of handling a weapon and should not be around them" even though the applicant had recently scored 149 out of a possible 150 on the pistol range. This finding was based in part on an undated letter from the applicant, who alleged that on June 25, 2002, CWO X called the firing range and told the instructor that he was "not stable enough to handle a weapon." When the applicant asked the instructor to sign a statement for him to document the tactics that were being used against him, the applicant's request was used as the basis for an adverse Page 7, which was "then used to document his failure to perform while on performance probation."

The DOT IG agreed with the applicant's claim that he was "set up for failure" upon his return to the Communications Center in October 2002 because he was denied supervisory duties and his subordinates were told that they were not required to follow any of his orders. One subordinate was told that "if [the applicant] tells you to empty the trash, you don't have to do it." The DOT IG concluded that the solicitation of adverse comments from subordinates and the failure to reassign the applicant to a senior enlisted billet "created an environment where it would be impossible for [him] to successfully perform duties assigned to him. Accordingly we found that [his] return to the Operations Office was an attempt to build more documentation to use against him and not an opportunity for him to succeed."

Regarding the applicant's E-7 performance evaluation for the period ending September 30, 2002, the DOT IG noted that the applicant had spent four of the five months of the evaluation period working in the Investigations Division, and his supervisors in that division provided laudatory comments on a Page 7. Therefore, the DOT IG concluded that their input must not have been considered in the preparation for the performance evaluation, which was instead based on performance that predated the evaluation period.

The DOT IG stated that although the applicant's past performance evaluations showed mostly average marks, he appeared to have poor leadership skills. However, the command never offered to send the applicant to a leadership course. One commander stated that the applicant's prior command told him that the applicant "could only focus on one task at a time and should not be given a long list of tasks to accomplish. [The commander] felt that [MSO Xxxxx] placed a lot of command and control responsibilities on [the applicant] and expected the same results as achieved by the former TCIC, who was an outstanding supervisor."

The DOT IG stated that several interviewees claimed that the applicant's problems were due to personality conflicts between him and his chain of command. The applicant was noted as having eccentric mannerisms and methods of engaging people in conversation. The DOT IG also stated that "[o]ne personality trait of [the applicant], which was mentioned by every person interviewed, was his tendency to embellish stories, many of which were considered as lies by the people who heard them. ... Some people interviewed stated that they did not give much credence to [the applicant] when he was telling his boastful stories. Other people told us that they were really bothered by the stories and stated that—because of the stories—they considered [him] a liar and untrustworthy."

The DOT IG concluded that although they did not substantiate the applicant's original two allegations, the following issues were identified:

- continued efforts to have the applicant found mentally unfit for duty;
- unverified information on the Page 7s dated October 7, 2002;
- his removal as TCIC in June 2002 "with no documented counseling, no attempts to assist him in his leadership deficiencies, and no Negative Page 7s or a Performance Evaluation to document poor performance";
  - "The actions to set him up for failure when he was returned to the Operations Center to 'give him a chance to succeed'";
  - his rating chain's failure to consider the positive input from the Investigations Division in the preparation of his performance evaluation for the period ending on September 30, 2002; and
  - the pressure placed upon him to request retirement.

The DOT IG noted that the Enlisted Personnel Management Division at CGPC had not yet been interviewed. CDR Y had claimed that CGPC-epm told him that the command had only two choices: to convince the applicant to request a retirement date of February 1, 2003, or to "take appropriate actions to reduce him to E-6."

The Coast Guard forwarded the DOT IG's report to the Thirteenth District Commander for further investigation.

On March 26, 2003, CGPC issued orders amending the applicant's retirement date from April 1, 2003, to June 1, 2003, due to the pending investigation. On May 23, 2003, the District command asked CGPC to extend the applicant's retirement date again to July 1, 2003, "to accommodate the resolution of a current IG investigation." On May 27, 2003, CGPC issued orders amending the applicant's retirement dated from June 1, 2003, to July 1, 2003.

On June 9, 2003, the District Commander appointed a captain to serve as the Investigating Officer (IO) and complete the investigation into the applicant's allegations. On June 12, 2003, the District Commander asked CGPC to extend the applicant's

scheduled retirement date from July 1, 2003, to August 1, 2003, because the investigation would not be complete before the end of June.

On June 17, 2003, CGPC issued orders to retire the applicant on August 1, 2003, instead of July 1, 2003.

On June 23, 2003, the applicant asked that his retirement date be changed to October 1, 2004. He stated that when he submitted his requests for an earlier retirement date he "felt overt pressure and coerc[ion] from members in my command to 'voluntarily' retire earlier than I had planned." The Group Commander forwarded the request to the District Commander with a note that the alleged coercion was still under investigation.

### *Report of the Coast Guard's Administrative Investigation*

On July 7, 2003, the IO completed his investigation and forwarded his report to the District Commander for review. The IO noted that the DOT IG had "found no validity to [the applicant's] charge that his performance eval[uation]s were lowered and/or retirement negotiated in retaliation for a whistle blowing incident. There was no connection between his marks and [LCDR X's] mishandling of classified material." In addition, the IO noted that the DOT IG found that the command's decisions to refer the applicant for mental health evaluations "were proper and followed USCG procedures." The IO also noted that the applicant had been diagnosed with narcissistic and obsessive-compulsive personality traits.

Regarding the applicant's final E-6 performance evaluation, the IO stated that because the applicant advanced from TC1 to TCC on May 1, 2002, his command was required to prepare a final E-6 performance evaluation. CAPT Y, the prior Group Commander, signed one evaluation form on July 12, 2002, and marked the applicant as recommended for advancement. This evaluation was never shown to the applicant. The Group's Chief Yeoman and the Executive Officer, CDR Y, told the IO that they did not believe that CGPC would accept the first evaluation and so had the rating chain prepare a second form. CAPT Z signed the second form without knowing about the first. Ultimately, neither final E-6 evaluation was submitted to CGPC or entered in the applicant's record. The IO noted, however, that missing evaluations "are common in the USCG Enlisted record and rarely negatively impact the member" and that the Group's failure to submit the evaluation to CGPC benefited the applicant as it would have lowered his average marks. He also noted that the applicant had not appealed the second evaluation form, which he was shown. The IO recommended that CGPC waive the applicant's final E-6 evaluation so that neither of the two prepared by the Group could be submitted.

Regarding the applicant's E-7 evaluation dated September 30, 2002, the IO stated that its preparation was optional since the applicant had been evaluated less than 184

days before. He recommended that the applicant's appeal of the low marks be denied. Regarding the Page 7s dated October 7, 2002, the IO stated that the first, which documented the applicant's removal as TCIC on June 7, 2002, was not invalid simply because it was late. However, he stated that both Page 7s were "sloppy" and recommended that the rating chain be required to prepare Page 7s that "are more precise and delineate the negative impact of [the applicant's] documented performance." The IO noted several problems with the Page 7 dated October 7, 2002, including the following:

- The phrase "'extreme state of disarray' ... is too vague/open to personal interpretation ... "
- Responsibility for the classified CD ROMs should be clarified as it was apparently delegated to one of the applicant's subordinates.
- The unit was not incurring debt for the RAS tokens.
- The dates that the applicant worked should be clarified or deleted as there were conflicting accounts.
- The comment about the applicant's extended lunches should be deleted or expanded to show how they negatively affected his performance of duties as "[m]any Group Xxxxx personnel extend the liberal sports lunch program without impacting job performance."
- Paragraph 3a., regarding an alleged sexually explicit conversation should be deleted "due to conflicting statements and apparent minimal importance of comments."

The IO stated the second Page 7 dated October 7, 2002, regarding the applicant's performance probation, should be corrected and resubmitted to CGPC because the opening paragraph was inaccurate since the Group Commander could only suspend the applicant's security access and could not suspend his actual security clearance.

Regarding the applicant's retirement, the IO stated that the applicant initially discussed retirement with his command in June 2002 and then submitted his first request in October 2002. In response, CGPC authorized the Group to retire the applicant as of February 1, 2003, as an E-7, thereby waiving the requirement that a member serve in grade for two full years before being retired in that grade. The IO stated that CGPC "was working with several retiring E-7's during the late 2002 period; [the applicant] received the exact same 'negotiated settlement' date as the other E-7's." He noted that because of the "High-3" retirement program, additional months as an E-7 would significantly raise the applicant's retired pay.

The IO stated that "[e]very single member of [the applicant's] Operations Division chain of command stated that they no longer trusted [him] and he was not an effective leader." In addition, "[a]ll interviewed junior TC's stated that [the applicant] was an ineffective leader, and some stated that he abused his TCIC role for personal advantage." The applicant's supervisors in the Investigations Division, where he had been

transferred after being denied access to classified materials, stated that his work was satisfactory but that he was not performing at an E-7 level.

The IO stated that the Group had denied the applicant access to classified materials, as allowed by regulation, and that the applicant could not perform as a TCC at the Group without such access. He stated that the applicant was "presently not supervising any personnel, not filling an E-7 billet, nor performing at the expected level of an E-7." The IO also noted that the applicant "demonstrated excellent attention to detail and an orientation towards task completion."

### *Applicant's Retirement*

On July 9, 2003, the District Commander forwarded the applicant's request regarding a retirement date of October 1, 2004, to CGPC "for consideration based on service needs." He stated that the investigation had not substantiated the applicant's claim of coercion. He requested that, if CGPC decided to grant the applicant's request, the applicant be transferred because "he is out of billet. More importantly, his continued presence would not be conducive to MSO/Group Xxxxx's unit effectiveness."

On July 15, 2003, CGPC instructed the Group to inform the applicant that his request to change his retirement date from August 1, 2003, to October 1, 2004, "has been considered and must be disapp[roved] due to no Service needs." (The applicant alleged that there was Service need. He submitted a CGPC message dated May 2, 2003, showing that there were thirty vacancies in his rating.)

On July 28, 2003, the new District Commander took final action on the administrative investigation triggered by the DOT IG's report dated March 14, 2003. He noted that due to the Coast Guard's transfer from DOT to DHS in March 2003, the DOT IG was unable to complete its investigation and had forwarded the case to Coast Guard Investigative Services, which forwarded the case to the District for further investigation. The District Commander stated the following:

a. Handling of E-6 Evaluations: It is my opinion that there were some anomalies in the handling of [the applicant's] E-6 evaluation by Group ... in general and specifically by [the XO, CDR Y]. However, I do not believe [CDR Y] or any other members of Group ... committed any criminal acts. ... In addition, Group ... shall request approval from CGPC-epm to waive [the applicant's] final E-6 evaluation. Upon receipt of approval by CGPC-epm to waive this final evaluation, Group ... shall destroy the "missing" E-6 evaluations and related page 7's.

b. Voluntary or Coerced Retirement: CGPC-epm made the final decision regarding [the applicant's] retirement and waived the required two years in grade to allow [him] to retire as an E-7. I concur with [the IO's] conclusion that [the applicant's] retirement was voluntary and that no disciplinary or administrative action is necessary.

• • •

d. E-7 Marks Appeal: I concur with [the IO's] conclusions that the page 7's prepared to support [the applicant's] evaluation are inadequate and need to be corrected. Group ...

shall correct these page 7's and forward them to [a District office] for review. Upon receipt of corrected page 7's, [a District office] shall review [the applicant's] marks appeal and provide me with a recommendation regarding whether or not I should uphold the appeal. I note that the unsatisfactory conduct mark is unsupported by the record. Accordingly, I will change this mark to satisfactory and Group ... shall take appropriate action to determine whether [the applicant] is otherwise eligible for a Good Conduct Medal. In addition, Group ... shall also document with a page 7 the end of [the applicant's] probationary period following the recommendations made by [the IO].

e. Other Recommendations by the IO: [The IO] recommended negotiating a retirement settlement for [the applicant] to take into account the loss of retired pay he will suffer as a result of retiring before October 2004. Federal law establishes how retired pay is calculated. Retired pay cannot otherwise be negotiated by CGPC. Hence, action on this recommendation is not possible. CGPC-epm has directed a 1 August 2003 retirement date; [the applicant] shall retire on this date.

On August 1, 2003, the applicant was retired from the Coast Guard.

On August 7, 2003, the District directed the Group to take action in accordance with the District Commander's memorandum dated July 28, 2003.

On August 8, 2003, the applicant submitted a letter requesting that his retirement date be changed to October 1, 2004, based upon the following:

On August 14<sup>th</sup> 2001, I was forced against my will to go to ... Army Behavioral Clinic even after being found Fit for Full Duty by Naval Hospital ... . I also believe that members of my previous command prior to my forced retirement manipulated my medical records. I was never given any referrals nor was I ever offered the opportunity to meet with an attorney prior to any of the medical mental health evaluations.

On June 7<sup>th</sup> 2002, I was unjustly removed from the communications center and my local security access withdrawn with no supporting documentation to justify my removal by my previous command prior to my forced retirement.

On July 24<sup>th</sup> 2002, I was again forced against my will to go to ... Army Behavioral Clinic by my previous command even though I was found Fit for Full Duty previously by ... Army Behavioral Clinic. This took place while I was working in the Investigations Department which did not require a security clearance in the performance of my duties. Once again I did not receive any mental health referrals nor was I afforded the opportunity to meet with an attorney.

Based on my treatment at my last command, I am requesting full restitution.

The Group Commander forwarded the applicant's request to the District Commander and recommended disapproval. He stated that, although he was not privy to the results of the investigation, he understood that it was completed and that "no further action is warranted." He noted that the applicant's letter of August 8, 2003, did not present any new information. He stated that he did not understand how the applicant's medical records were relevant to the request since the applicant was fit for duty.

The District Commander forwarded the request to CGPC and recommended disapproval. He wrote that the “circumstances of [the applicant’s] retirement date were investigated by both the DOT IG and by the ... District and appropriate administrative action was taken. The DOT IG investigated his allegations regarding the referrals to [the Army Behavioral Clinic]. His letter raises no new issues.”

On September 15, 2003, CGPC responded to the applicant’s letter dated August 8, 2003, as follows:

... You base your request on the decision on July 28, 2003, by [the District Commander] to change your enlisted employee review conduct mark for the period ending September 30, 2002, to “satisfactory.” You also assert you were coerced into requesting voluntary retirement earlier than you desired. However, I note that your original retirement date was delayed until August 1, 2003, so this allegation could be investigated. The investigation, completed prior to your retirement, did not substantiate your allegation. I also find no basis to consider changing your retirement date based on the decision to change your conduct mark to satisfactory. Your August 1, 2003, retirement date will remain unchanged. ... If you still feel that you have suffered an injustice or that there is an error in your record, you may apply to the Board for Correction of Military Records. ...

### *Applicant’s Civil Rights Complaint*

Following his retirement, the applicant filed a complaint with the DHS Office of Civil Rights and Civil Liberties (CRCL) alleging that he had been discriminated against sexually and because of his religion (Christianity). He raised the issues of coercion and illegal MHEs. He stated that some people were jealous of him because of his athletic success and his successful career, as he had worked “directly for the White House Staff and a President.” He stated that some people discriminated against him because he did not smoke, drink, or use profane language and because he did a lot of volunteer work. He stated that some of his subordinates frequently questioned him and challenged him about his religious beliefs. He complained that his command had solicited false comments about his performance from his subordinates and then, when he returned to the Communications Center, set him up to fail by instructing them not to listen to him. He also complained that the Coast Guard tried to “connect him” to his stepfather, who was not a blood relative and who was diagnosed with schizophrenia after he killed the applicant’s mother in 1990.

The applicant alleged that LCDR X had told him he was “too nice,” which meant homosexual. The applicant submitted photocopies of notes that he found on a male officer’s desk in July 2003, which he believes were written by LCDR X. He alleged that the notes, which were purportedly from the applicant himself to the male officer, constituted sexual harassment and discrimination. The handwritten notes read as follows:

- “[officer’s first name], I came by but you weren’t here. [frowning face] Maybe next time. Love, [applicant’s first name]”
- “I love you [officer’s first name] [heart] XXXOOO [applicant’s first name]”

- "I miss you. [heart] [applicant's initials] XXXOOO"

On May 17, 2005, CRCL informed the applicant that the evidence was insufficient to support his claim that he had been discriminated against on the basis of his religion when he was offered early retirement or that he had been sexually harassed in July 2003. CRCL stated that the applicant "failed to provide any direct evidence or testimony to prove that his religion or his sex were factors in any of management's decisions." CRCL reported that both members involved with the forged "love notes" were reprimanded. CRCL alleged that "the record indicated that Complainant had a history of attitudinal and performance problems, which resulted in his being offered an opportunity to retire at a higher grade than normal, in order to avoid demotion." CRCL noted that CAPT Z, the second Group Commander, had reported the following:

- When CAPT Z met with the applicant, the applicant "brought a suitcase full of documents and kept saying everyone was out to get him over the last ten years of his career."
- When CAPT Z and others were at the Communications Center, the applicant claimed to have heard a mayday call on the radio that no one else heard, and a careful review of the tapes indicated there was no such call.
  - The Investigations Division did not want to retain the applicant.
  - When CAPT Z tried to move the applicant back to the Communications Center, the applicant sat on the floor with his arms folded and refused to move.
  - When CAPT Z later sent the applicant to work on a regional coalition, without providing that command with any background, the command sent the applicant back stating that they could not use him.
  - CAPT Z stated that he had stopped trusting the applicant because of how much the applicant "embellished everything." The applicant "cited a variety of stories that were so fantastic that it got to the point that [CAPT Z] did not believe virtually anything [the applicant] said." Therefore, he did not trust the applicant to work as the Communications Chief with classified materials, and the applicant "did not have the aptitude for any other job he was given."
  - CAPT Z stated that because the applicant "did not want to work where he was assigned and did not want to work anywhere else," he thought the best solution was to allow the applicant to retire as a chief without the required two years in grade, and that he believed that the applicant took the offer willingly.

CRCL reported that LCDR X had stated that the applicant "was, in essence, forced to retire" since his access to classified material had been withdrawn first by CAPT Y and then by CAPT Z "because of performance problems, his inability to function as a Chief Petty Officer, and continued personality conflicts across the board with the chain of command." LCDR X reported that the applicant "was displaying inappropriate behavior for his position, and that he was not succeeding in any attempted re-assignments."

CRCL concluded that “[e]ven assuming the events took place as relayed by [the applicant], they fail to rise to the level of hostile work environment” and that “a finding of no discrimination has been rendered.” CRCL also concluded that the applicant had not been constructively discharged. CRCL stated that under *Fritsch v. United States Postal Service*, EEOC Appeal No. 01840292 (1985), a constructive discharge is determined by “(1) whether a reasonable person in the complainant’s position would have found the working conditions intolerable; (2) whether the alleged conduct against the complainant created the intolerable working conditions; and (3) whether the complainant’s resignation resulted from the intolerable working conditions.” CRCL further stated that the applicant

failed to show that a reasonable person would have found his working conditions intolerable. Management’s actions were in response to Complainant’s performance difficulties and inappropriate behavior as corroborated in the record. The Command’s offer to Complainant to receive the benefit of a waiver of the two-year in grade retirement requirement rather than face demotion for performance issues was an offer advantageous to Complainant. The record indicates that Complainant understood the offer and that he accepted this benefit by submitting his retirement request.

As a result of Complainant’s inappropriate behavior, i.e., fantastic stories, obsession with documentation of past wrongs, unprofessional actions (sitting on the floor and refusing to leave) and even dangerous actions (hearing a non-existent mayday call), both the previous command and the current command requested psychological evaluation. It was appropriate, even incumbent upon Command Management, to remove security access to such an individual.

Second, as discussed above, Complainant failed to show that the working conditions were intolerable. He did not show that he was discriminated against or that he was subjected to an environment that was so hostile that he had no choice but to resign; rather Complainant took advantage of an offer to retire at a higher pension rather than be demoted due to performance problems.

... Complainant’s retirement is considered to be voluntary, and he has not shown that he was a victim of discrimination.

## **VIEWS OF THE COAST GUARD**

On February 1, 2006, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. In so doing, he adopted the facts and analysis in a memorandum provided by CGPC.

CGPC alleged that three investigations have been conducted into the applicant's allegation that he was coerced into retirement and that all three concluded that there was insufficient evidence to support his claim. CGPC noted that the applicant's retirement date was delayed from February 1 to August 1, 2003, while investigations were conducted. CGPC also noted that to retire the applicant in paygrade E-7, the Coast Guard waived the requirement that a member serve successfully in that paygrade for two years.

Regarding the applicant's request that the adverse Page 7s be removed from his record, CGPC stated that checks of the applicant's electronic and paper record "revealed no negative CG-3307 entries during the time period in question" and that the Personnel Service Center had no E-7 performance evaluations for the applicant showing that he was not recommended for advancement. CGPC stated that the negative Page 7s had already been removed from the applicant's record and that the "unsatisfactory" conduct mark on his performance evaluation had already been changed. CGPC concluded that no further relief should be granted.

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

On February 9, 2006, the BCMR received the applicant's response to the Coast Guard's advisory opinion. The applicant alleged that the absence of the Page 7s from his record shows that the Coast Guard is "attempting to cover up the actions from my last command." He alleged that those Page 7s "were used as a weapon of coercion to force me against my will" to alter his requested date of retirement.

The applicant alleged that the email by CDR Y dated November 22, 2002, is "clear evidence of the coercion that took place based on false and misleading information." He alleged that CDR Y also verbally threatened him with reduction in rate based on the false and misleading information in the Page 7s signed by LCDR X unless he agreed to the February 1, 2003, retirement date.

The applicant stated that although he is thankful that the Page 7s are not now in his record, their absence "does not change the actions that occurred at [his] last command and how the negative CG-3307's were used against [him]. It also does not change the severe impact of the command's actions upon [his] family."

## **FINDINGS AND CONCLUSIONS**

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

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

2. The applicant asked the Board to correct his retirement date from August 1, 2003, to October 1, 2004; to award him back pay and allowances; and to remove all negative Page 7s from his record. The applicant's record does not contain any negative Page 7s from his last unit, where he served from July 16, 2001, until his retirement on August 1, 2003. Although his record does contain negative Page 7s from prior units, he has not presented any evidence to prove that those older Page 7s are erroneous. Therefore, the only issue before the Board is whether the applicant's retirement date is erroneous or unjust.

3. Absent evidence to the contrary, the Board presumes that government officials, including members of the applicant's chain of command, have carried out their duties "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). To be entitled to relief, the applicant must submit sufficient evidence to overcome this presumption and prove the alleged error or injustice in his record by a preponderance of the evidence. 33 C.F.R. § 52.24(b).

4. On November 25, 2002, the applicant submitted a request for retirement as a TCC/E-7 as of February 1, 2003. His request was approved by CGPC even though he had not yet performed the required two years of service in grade. Previously, he had requested retirement as of October 1, 2004, and then June 1, 2003, and his command had recommended March 1, 2003. According to CGPC, however, it was at that time offering several members the opportunity to be retired without two years of service in grade and all were assigned a retirement date of February 1, 2003. Therefore, it appears that if the applicant was to retire early as an E-7—i.e., without two years in grade—CGPC would agree only to a retirement date of February 1, 2003, for administrative reasons that had nothing to do with the applicant's situation at Group Xxxxx.

5. On December 7, 2002, the applicant wrote to a U.S. Senator, asking that his retirement date be extended to June 1, 2003. He alleged that he had wanted to retire on October 1, 2004, but had been coerced into submitting a request to retire on February 1, 2003, because his command was threatening to seek a reduction in rate. As a result of this letter, the DOT IG began an investigation into the applicant's allegations, and the applicant was not retired until August 1, 2003.

6. Under Article 5.C.38.c.2. of the Personnel Manual, "[o]nly the Commandant may reduce a chief petty officer in rate for incompetence and then only if a fact-

finding board finds the member unqualified.” Therefore, the command at Group Xxxxx could not have unilaterally reduced the applicant’s rate without due process but could only have asked CGPC to consider convening a fact-finding board to determine whether the applicant was unqualified to serve as a TCC.

7. The DOT IG concluded that the applicant was “coerced” into requesting a retirement date prior to October 1, 2004, not because he had reported that LCDR X was taking home classified materials to work on, but because the applicant’s command was entering negative information about his performance in his record and threatened to seek a reduction in grade. “Coercion” is being constrained or compelled to do something one would not otherwise do, and is not the same thing as “duress,” which is illegal constraint. *Black’s Law Dictionary*, Rev. 4<sup>th</sup> Ed., pp. 324 and 594. The Board agrees with the DOT IG that there is insufficient evidence in the record to prove a nexus between the applicant’s “whistleblowing” in October 2001 and his allegedly “coerced” retirement.

8. The DOT IG recommended that the Coast Guard retain the applicant on active duty until October 1, 2004. The DOT IG appears to have based this recommendation on a conclusion that the applicant’s chain of command was not fairly and reasonably assessing the quality of his work and aptitude for leadership. The DOT IG found that the command had negligently failed to document the applicant’s alleged poor performance until October 7, 2002, and then prepared Page 7s with inaccuracies. The DOT IG also found that the applicant’s command bungled their efforts to document the applicant’s poor performance and leadership and employed dubious tactics, such as preparing a second final E-6 performance evaluation, soliciting negative input from the applicant’s subordinates, basing his E-7 evaluation on conduct that presumably occurred at least in part during the prior evaluation period, and preparing Page 7s based on “unverified” information. The DOT IG also suggested that the command should have sent the applicant to a leadership course before removing him from the Communications Center and negatively evaluating his performance.

9. The record before the Board indicates that the command’s primary complaint about the applicant’s performance—and the cause for the removal of his access to classified material first on June 7, 2002, by CAPT Y and later by CAPT Z—was a lack of credibility on the part of the applicant. The applicant apparently told many “tall tales” about himself that caused both superiors and subordinates to distrust him and to doubt his veracity. Moreover, the alleged lack of veracity carried over into the applicant’s communications about official work matters. On June 7, 2002, CWO X stated, the “straw that broke the camel’s back” was an inaccurate claim by the applicant to LCDR X that he had worked eleven days in a row and so deserved a day off. The applicant later denied having made this claim and accused LCDR X of deliberately misinforming CWO X. The DOT IG did not support the applicant’s allegation that LCDR X had lied but noted that there could have been some miscommunication about what the applicant claimed. However, in supporting a mark of 2 for the performance category “Integrity”

on the applicant's E-7 performance evaluation, CWO X wrote that when the applicant was challenged on the truthfulness of his claims, "he routinely would deflect responsibility by claiming miscommunication, misunderstanding or claim the person doubting him to be lying. This continued behavior has led to a total loss of confidence in his credibility and resulted in an administrative suspension of his security clearance."

10. The DOT IG unaccountably dismissed the applicant's "tendency to embellish stories," which "was mentioned by every person interviewed," as an "eccentricity" of his personality and "method[] of engaging people in conversation." Therefore, the DOT IG essentially ignored claims by the applicant's chain of command that this "tendency" carried over into the applicant's communications about official work matters and concluded that the command's actions against the applicant were due primarily to "personality conflicts" rather than to a critical lack of credibility on the part of the applicant. Although the applicant's command negligently delayed documenting the applicant's "tendency" in his record and later, as the DOT IG and the Coast Guard's IO found, employed some dubious tactics to document his performance, the delay and the tactics do not actually disprove the command's claims about the applicant's lack of veracity, integrity, and leadership in the performance of his duties. CAPT Z stated to CRCL that the applicant once falsely reported having heard a "mayday" call on the radio. The Board notes that Group Xxxxx's problems with the applicant's lack of trustworthiness echoed the complaints of the applicant's prior command in Xxxxxxx, which entered a Page 7 in his record with the following assessment:

[The applicant] has an overwhelming competitive attitude which leads to exaggerated statements and reckless guesses which he exhibits in day-to-day situations at the unit. [His] continued exaggeration has been so intense that his subordinates question his veracity in the most mundane issues. Such a reputation does not breed respect and diminishes his credibility. [He] does not always express his thoughts clearly and logically and this has been evident through his dealings with his chain of command. [He] never takes any responsibility for his actions and seems to have a hard time adjusting and supporting decisions of his seniors. At times [he] demonstrates fine technical skills but has not exhibited the leadership skills necessary for advancement to Chief Petty Officer.

11. Therefore, the Board finds that although the applicant's command delayed documentation of his deficiencies and may have employed dubious tactics when finally preparing such documentation, the preponderance of the evidence in the record strongly supports the command's assessment of the applicant's credibility and CAPT Y's and CAPT Z's separate decisions to remove his access to classified materials.

12. Without access to classified materials and the trust of his chain of command, the applicant could not perform the duties of a TCC and TCIC. Therefore, the Board finds that it was not unreasonable for the command to inform the applicant in the second Page 7 dated October 7, 2002, that they might seek a reduction in rate if he remained on active duty without improving. Although the DOT IG opined that leadership training might have helped the applicant, this possibility does not persuade the

Board that the command committed an error or injustice in denying the applicant access to classified materials.

13. The DOT IG found that when the applicant was returned to the Communications Center for a few weeks in October 2002, he was "set up to fail" because his subordinates were told they did not have to follow his orders. However, the second Page 7 dated October 7, 2002, states that the applicant was not being returned to the Communications Center in a supervisory position. In that Page 7, the applicant was told that he would not have "supervisory contact" with subordinates in the Communications Center and that he would be assessed on his performance of assigned tasks, veracity, and professionalism. Therefore, since the applicant was not supposed to be exercising authority over any staff members at the Communications Center, the Board does not agree that, by informing that staff of this fact, the chain of command was setting him up to fail while on probation. The Page 7 advised the applicant that if he properly performed his assigned tasks and displayed veracity and professionalism while on probation, he would later be given supervisory responsibilities. Informing the staff of his status while on probation could not and should not have stopped the applicant from properly performing his assigned tasks and displaying veracity and professionalism. Therefore, the Board disagrees with the DOT IG's assessment that in October 2002 the applicant was "set up to fail" his probation.

14. The applicant made numerous allegations with respect to the actions and attitudes of various members of his chain of command. Those allegations not specifically addressed above are considered to be not dispositive of the case.

15. Given the possibility that his command might decide to seek a reduction in rate, the applicant may certainly have felt coerced to submit his requests for earlier retirement dates. However, he has not shown that the command committed any error or injustice by informing him of the likelihood of such an event. The record before the Board indicates that his command had very sound reasons for doing so even though the documentation of those reasons was not entirely accurate or properly prepared.

16. The Board notes that the DHS Office of Civil Rights and Civil Liberties concluded that the command did not create a "hostile work environment" for him; that the command's actions were not the result of unlawful discrimination; and that the applicant was not constructively involuntarily discharged. The Board also notes that CGPC delayed the applicant's retirement date from February 1, 2003, until August 1, 2003, so that the investigation of his allegations could be completed.

17. The Board finds that the applicant has not proved by a preponderance of the evidence that his retirement on August 1, 2003, was an error or injustice. Although the investigations revealed a few inaccuracies in the Page 7s dated October 7, 2002, the great preponderance of the negative information in those Page 7s has not been disproved. The applicant has not proved that his command's decisions to remove his

access to classified material and to inform him of the likelihood that they would seek a reduction in rate if he did not retire were unreasonable, unfounded, or unfair.

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

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

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is denied.

No copy of this decision shall be retained in his personal data records.

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Philip B. Busch

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Dorothy J. Ulmer

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Richard Walter