

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-160

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 docketed the case on July 20, 2007, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 30, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, who resigned his commission as a lieutenant junior grade (LTJG) in the Coast Guard on August 1, 2004, asked the Board to correct his record by

- (a) removing two officer evaluation reports (OERs) covering his service aboard a cutter as a deck watch officer from October 1, 2002, to January 31, 2003, and from February 1, 2003, to July 13, 2003;
- (b) removing all documentation of an investigation of his conduct aboard the cutter, as well as any documents regarding and references to alleged offenses, such as having an inappropriate relationship;
- (c) removing all documentation of his non-judicial punishment (NJP) at mast aboard the cutter;
- (d) invalidating and expunging any administrative actions taken in whole or in part because of the NJP and disputed OERs;
- (e) either removing an April 11, 2003, referral to a Naval hospital for alcohol screening or, in the alternative, inserting the hospital's response to the command, which states that he did not have an alcohol problem and admonishes the command for wasting the hospital's time;
- (f) rescinding and removing his letter of resignation;
- (g) removing all documentation of and references to administrative actions to revoke his commission or otherwise terminate his Coast Guard career;
- (h) allowing him an opportunity "to return to active duty and rejoin his year group, without loss of numbers or precedence" and, if he accepts the opportunity, to be awarded all back pay and allowances from August 1, 2004, to the date of his return to active duty; and

(i) removing his DD 214.

In the alternative, the applicant asked the Board to correct his DD 214 to change his narrative reason for separation from “Substandard Performance” to “Miscellaneous/General Reasons” and his separation code from BHK, which means “resignation allowed in lieu of further administrative separation proceedings or board actions when a member’s performance is below acceptable standards,” to FND, which means that the resignation was allowed for “miscellaneous/general reasons.”

APPLICANT’S ALLEGATIONS

The applicant alleged that on January 3, 2003, while stationed aboard the cutter, he was wrongly accused of having an inappropriate relationship with a female officer, LTJG X. The applicant stated that the woman had been his classmate at the Coast Guard Academy and that they had been friends for some time, which is not a violation of Coast Guard policy. After accusing him, the commanding officer (CO) of the cutter illegally confined him to his stateroom and deprived him of access to a telephone or email. The applicant submitted copies of the Rules for Courts-Martial concerning pre-trial restraint and pre-trial confinement but failed to cite exactly the rule that his CO violated. However, he alleged that he could only talk to personnel sent by the CO and was not allowed to contact counsel. Although he repeatedly asked to speak to counsel, he was repeatedly and illegally questioned by senior officers on the cutter, and he was threatened with additional charges if he did not sign a false statement confessing to the alleged offenses. The applicant alleged that his confinement constituted unlawful detention.

On January 7, 2003, the applicant alleged, the CO took him to mast but denied him legal assistance or representation as well as the right to speak or present evidence and witnesses in his own defense or in mitigation or extenuation. The CO imposed NJP under Article 15 of the Uniform Code of Military Justice (UCMJ), including thirty days of restriction to be served at the nearby xxxxxxxxxxxxxxxx. The CO failed to inform him of his right to appeal, and when the applicant asked about a right to appeal, the CO threatened him with additional punishment if he exercised that right. The applicant alleged that the CO also forced him to sign an illegal document waiving his right to appeal the NJP. Immediately after the mast, the CO had the applicant removed from the cutter to the Xxxxx by helicopter, which the CO had arranged in advance of the mast since the cutter was underway. While in restriction at the Xxxxx, the applicant alleged, the XXX of the Xxxxx continued to deny him access to a telephone or email, so he could not contact his family or an attorney.

The applicant stated that after his father, a retired Coast Guard captain, heard about what was happening through a third party, his father threatened the officer who ultimately served as the Reviewer for the first disputed OER with legal action and was allowed to telephone him at the Xxxxx. After learning about his rights from his father, the applicant appealed the NJP on January 27, 2003. When the CO received the appeal, he called the applicant and again threatened him with additional punishment if he did not withdraw the appeal. The CO “tried to leverage a retraction from [the applicant] by threatening to write an inaccurate and derogatory OER that was due on his performance aboard the vessel.”

On February 2, 2003, the applicant submitted a request for his punishment to be suspended, but the CO denied the request even though the law requires such requests to be approved if an NJP appeal is not adjudicated within five days of filing. Therefore, the applicant remained unlawfully incarcerated at the Xxxxx for thirty days. In fact, he was incarcerated for thirty-three days because the CO failed to include transit time in the calculation of his thirty-day sentence, as required by the Military Justice Manual. On March 24, 2003, the Area Commander, a vice admiral, nullified the NJP, “rescinded the punishment, ordered all trace of the proceedings to be removed from [his] record, and verbally reprimanded the CO.”

Allegations about the Page 7

On April 11, 2003, the CO of the cutter, which was still the applicant’s permanent duty station, referred him to a Naval hospital for alcohol dependence screening. Hospital personnel determined that he was not alcohol dependent and sent the CO a letter admonishing him for wasting their time. The applicant stated that because the screening referral is in his record but the hospital’s response is not, his record falsely indicates that he had an alcohol problem, which is false. Therefore, he argued, either the referral should be removed from his record or the hospital’s reply should be added to his record.

Allegations about the Disputed OERs

After his release from confinement, the applicant was assigned to the Xxxxx on a temporary basis as a Planning Officer. Within days of his release, he learned that his rating chain aboard the cutter—which included the Operations Officer, the Executive Officer (XO), and the CO—was preparing a derogatory OER for him. The applicant concluded that this rating chain was biased against him, and so on April 9, 2003, he asked that they be disqualified so that his OER for the evaluation period October 1, 2002, through January 31, 2003, would be prepared by other officers. The applicant alleged that although his request was granted, his substitute rating chain prepared a derogatory OER based on information that the Area Commander had already ordered stricken from his record. The applicant alleged that the substitute rating chain should have marked all of the performance categories on the first disputed OER as “not observed” because none of them observed his actual performance. Instead, they created a derogatory OER based on information from the biased rating chain and from the NJP documents. The applicant alleged that the Reporting Officer and Reviewer who prepared the first disputed OER were biased against him because his father had threatened the Reviewer with legal action and had reported both officers to Headquarters officials in 2001 for “manipulating Xxxxxx Area Cutter Performance Records to show better performance than actual.” However, the Area Command refused to remove the derogatory information from the first disputed OER, and the Coast Guard Personnel Command (CGPC) refused to allow him to submit an effective response to the OER. The applicant stated that upon receipt of the first disputed OER, he submitted an OER Reply to respond to the OER. However, CGPC rejected it because of its content and he was required to revise it twice and was not allowed to address the most important issues in his Reply.

Regarding the second disputed OER, the applicant stated that it was simply an attempt by the substitute rating chain to insert negative information in his record. The applicant stated that throughout the evaluation period from February 1 to July 13, 2003, he never worked aboard the cutter. He stated that because his performance during that period is adequately described on the

concurrent OER prepared by his chain of command at his temporary duty station, the second disputed OER “serves no useful purpose and should be removed.”

Allegations about the Proposed Revocation Board

The applicant stated that even though the Area Commander overturned his NJP and ordered its removal from his records, CGPC added insult to injury by threatening to convene a panel of senior officers under Article 12.A.11. of the Personnel Manual (hereinafter “Revocation Board”) to determine whether his commission should be revoked. The applicant was informed that he would not be granted a hearing or allowed to question his accusers. He would only be allowed to submit a written statement on his own behalf. When he was provided a copy of the documents to be considered by the Revocation Board, he discovered that the report of investigation was wrongfully included even though the Area Commander had already ordered the documentation of the NJP to be removed from his record. Although he asked for the report to be removed from consideration by the Revocation Board, CGPC refused to do so, thereby violating his right to due process. The applicant argued that the reporting of the investigation was part of the mast proceedings and not a part of his record so the report should not have been among the documents to be considered by the Revocation Board. He alleged that Coast Guard regulations state that only an officer’s record can be considered by a Revocation Board. He noted that on the letter forwarding him the documents to be reviewed by the board, his Headquarters Personal Data Record (PDR) is listed separately from the report of the investigation and that Coast Guard’s regulations prohibit filing such a report in a member’s PDR. Therefore, he argued, the report was not a proper part of his record and should not have been included for consideration by the Revocation Board. The applicant further argued that the report was part of the mast proceedings and so should have been removed from his record as documentation of the mast pursuant to the Area Commander’s order. He also argued that it was completely unjust for CGPC to include the report of the investigation or parts thereof in the record before the Revocation Board without also including the fact that his NJP had been overturned due to insufficient evidence.

The applicant stated that when CGPC illegally refused to remove the report of the investigation from the documents to be considered by the Revocation Board, he realized that the outcome of the board was a “foregone conclusion.” He noted that LTJG X, with whom he was wrongly accused of having an inappropriate relationship, ultimately had her commission revoked pursuant to a Revocation Board, and therefore concluded that his assumption about the outcome was correct. In addition, he realized that the board’s proceedings would become a part of his record and therefore reintroduce into his record the negative information that the Area Commander had ordered removed, which might adversely affect his ability to obtain highly skilled or clearance-sensitive employment. Therefore, the Coast Guard’s illegal actions coerced him into resigning his commission, which was the only way he could avoid the reintroduction of false, negative information into his record via the proceedings of the Revocation Board.

Allegations about the DD 214

Regarding the separation code and narrative reason for separation on his DD 214, the applicant stated that they were based on the erroneous information in the first disputed OER. All his other OERs are excellent. Therefore, the notation "Substandard Performance" is clearly erroneous. The applicant also alleged that the DD 214 was based on an inaccurate database entry by CGPC. He submitted a "Case Status" printout from a database concerning CGPC's special boards. The printout, dated May 20, 2004, shows as the status of the case that the applicant's resignation had been approved in lieu of board action. However, the database entry concerning the issue that would have been before the Revocation Board is described as "8-H [which means inappropriate relationship] with [LTJG X] at [name of applicant's last duty station]." He submitted an affidavit from the CO of his last unit attesting to the fact that the applicant "was not involved in any 8-H incident [inappropriate relationship], while under my command." The applicant further alleged that the DD 214 is unjust because it has caused him to be denied employment by the Federal Bureau of Investigation.

Allegations about the DRB Testimony, Recommendation, and Decision

Finally, the applicant alleged that although the Discharge Review Board (DRB) found that the Coast Guard had committed serious errors resulting in great injustice to him and recommended the rescission of his resignation and restoration of his commission, the Commandant disapproved the DRB's recommendation without explanation.

The applicant alleged that during his DRB hearing, he and his father, who represented him, persuasively argued that his command scrutinized his conduct and wrongly accused him of having an inappropriate relationship after he "observed a situation during a migrant interdiction which resulted in deaths" and subsequently reported it, which caused his chain of command to be reprimanded by a three-star admiral. The applicant stated that in December 2002, the cutter was preparing to unload Haitian immigrants from an overloaded sailboat when the sailboat capsized and quite a few people drowned, but the CO reported that only three had drowned. Moreover, the applicant alleged, he told the DRB that at the cutter's next stop, he heard an investigator ask the CO why the ship's log did not show that they had searched the sea for survivors and searched the sailboat for hideaways before sinking it. When the CO stated that they had not done either of those things, the investigator advised him to change the log so that it would look as if they had or they would be in a lot of trouble. The CO then changed the ship's log accordingly. The applicant alleged that he told the DRB that he had informed his father of these events in an email and asked if he should report the matter. He also told them that he believes his email may have been seen by the CO because the XO and the Operations Officer periodically checked the crew's outgoing emails for security purposes. Within a week, he was unjustly accused of having an inappropriate relationship.

As further evidence of bias, the applicant alleged, he told the DRB that in January 2003, another female officer, LTJG Y, was caught sharing a hotel room with two enlisted men, but she was never placed on report, reprimanded, or counseled on a Page 7. He argued that it was unfair that he and his friend were "cashiered for doing nothing," while an officer on the same cutter who clearly violated the UCMJ by fraternizing with enlisted members was not punished at all.

The applicant alleged that he also argued at the hearing that his receipt of one poor OER, written by officers who never observed his performance and got their information from biased sources, was not an adequate basis for CGPC to threaten to revoke his commission and that CGPC had acted arbitrarily and capriciously in initiating the board. In addition, the applicant stated that his relationship with the LTJG X was not romantic and that even if it had been romantic, it would not have been an “inappropriate relationship” under Article 8.H. because they were both officers and they were of the same rank, seniority, and level within the cutter’s command structure. He stated that if the CO had considered it an “unauthorized relationship,” he need only have transferred one or both of them without prejudice. The applicant told the DRB that during his pre-mast confinement, the command took away his cell phone and terminated his email privilege. The XO told him that if he admitted to one count of violating Article 92 of the UCMJ, he was get light punishment, such as a non-punitive letter. At the mast, he and LTJG X were not allowed to speak in their own defense, and the CO refused to conduct the extenuation and mitigation phase because a helicopter that the CO has previously ordered to take them to confinement at the Xxxxx had already arrived. Yet the CO gave them the maximum punishment. Instead of informing them of their right to appeal, the CO “warned us that if we tried to appeal, it would not be approved and we would only get more punishment.” The applicant further alleged that he told the DRB that the many mistakes the CO made in conducting the mast should be considered signs of bias because the CO was an experienced captain/O-6 who must have known how to conduct a mast properly but may have thought he was untouchable and could get away with anything because his own chain of command had reason to dislike the applicant’s father.

The applicant also told the DRB that after his appeal was upheld, the Area Commander was “furious” with the CO and “gave him a major league dressing down.” The CO relieved the XO and the OPS, who left the ship, and the CO himself was relieved of command shortly thereafter. The applicant’s father testified to the DRB that the officers who served on the applicant’s substitute rating chain may also have been criticized because they presumably approved the mast. The father stated that these officers had good reason to dislike him and that when they saw that his son might get NJP, “their desire for some form of revenge overcame their common sense.” He noted that the Area Commander also overturned LTJG X’s NJP and she did not even file an appeal. Yet in planning the Revocation Board, CGPC intended to show the board the NJP package without his appeal or the Area Commander’s letter overturning the NJP.

SUMMARY OF THE RECORD

On May 8, 2001, the applicant was commissioned an ensign upon graduating from the Coast Guard Academy. Thereafter, he was assigned to a cutter as a deck watch officer. On his first OER, for the period May 21, 2001, to March 31, 2002, he received primarily marks of 4 (on a scale of 1 to 7, with 7 being best) in the various performance categories and a mark in the fourth spot on the comparison scale, denoting him as “one of the many competent professionals who form the majority of this grade.” The XO of the cutter, who served as the Reporting Officer for the OER, noted that the applicant was “on track” for promotion with his peers. On his second OER, for the period April 1, 2002, to September 30, 2002, the applicant received marks of 4 and 5 in the various performance categories and a mark in the fourth spot on the comparison scale. The Reporting Officer again recommended him for promotion. The applicant was promoted to lieutenant junior grade on November 23, 2002.

Report of the Investigating Officer¹

The record indicates that in late December 2002 or early January 2003, the CO of the cutter appointed a lieutenant commander who was not a member of the applicant's rating chain to conduct an investigation of allegations that the applicant and a female LTJG were involved in an unacceptable relationship. The CO's letter and the written findings and recommendations of the investigating officer (IO) are not in the record before the Board, but CGPC submitted copies of many statements gathered by the IO and attached to his report with the advisory opinion.

The IO's attachments show that on January 3, 2003, he informed the applicant in writing that he was suspected of violating Article 92 of the UCMJ twice (failure to obey an order or regulation) and Article 133 (conduct unbecoming an officer and gentleman). On the written acknowledgement of his rights, the applicant acknowledged the right to remain silent and not to answer questions; the right to consult with a lawyer before deciding whether to answer questions or make a statement; and the right to stop answering questions at any time. He also acknowledged that any statement he made could be used against him in any court-martial, NJP, or administrative proceeding. The applicant checked boxes on this form indicating that he did not desire to consult a lawyer but did desire to make a statement and to answer the IO's questions. LTJG X, who was also accused, signed the same acknowledgement and also indicated that she did not desire to consult a lawyer but desired to make a statement and answer questions. The applicant ultimately signed four statements for the IO:

1. On January 5, 2003, the applicant signed and submitted a statement for the investigation "to give amplifying information to the questions answered for [the IO] on 3 JAN 03." His statement began with the following claim: "With full understanding of my rights, I make the following statement freely, voluntarily, and without any promises or threats made to me." He claimed that he had been friends with LTJG X for five years, "since being in the same company together at the Academy" and he had grown very close to her while stationed on the cutter. However, their kiss at the Xxx Bar had "caught [him] completely off guard." He admitted that he relished her attention and began "not to care how other people looked at it, and ... to pay more attention to her as well," even though he "realized the perception was negative."

2. On January 6, 2003, after answering more questions posed by the IO, the applicant signed the IO's summary of his answers as "true and accurate." He admitted to having kissed LTJG X and LTJG Y at the Xxx Bar on December 18, 2002, in the presence of many people, including several petty officers. He admitted to drinking shots of tequila and becoming ill due to his alcohol consumption. The next day, his Supervisor, LT L, who was the Operations Officer, counseled him about the improper perceptions of their conduct. LT L told him that although the kissing may have been done in jest, it was the perception that mattered, and that a rumor had started. LT L told him that he did not care as long as it stayed off the boat. The applicant also told the IO that on December 28, 2002, they rented a three-bedroom hotel suite. He and LTJG C were to share one bedroom, LTJG X and LTJG Y the second bedroom, and the BMC and BM1 the third bedroom. When the applicant and LTJG X returned to the hotel after the wetting down party, he could not find the key for his own room and LTJG C was not there. They found LTJG Y asleep in the petty officers' room and tried to wake her but were unsuccessful. The applicant

¹ The documents summarized in this section were submitted by CGPC as attachments to the advisory opinion.

and LTJG X went to LTJG X's room, chatted for a while, and then slept in the single beds that were already arranged pushed together. The applicant had lost his shirt at the party but otherwise did not disrobe. The applicant told the IO that he did not have sex with LTJG X and has never had sex with her aboard the cutter. He knew she was married and denied having a romantic relationship with her.

3. Three hours later, the applicant went to the IO's stateroom and said he thought he could save LTJG X's marriage but that, after learning what LTJG Y had related, he "needed to come clean morally and professionally." Although LTJG Y and LTJG X had been ordered not to discuss any issue in the case with the applicant, LTJG Y had told him to "tell the truth and do the right thing." The applicant then told the IO that he and LTJG X had done "everything other than vaginal intercourse," including oral sex. He signed this addendum to his prior statements on January 6, 2003, and agreed to sign a fourth, more formal statement.

4. On January 6, 2003, the applicant signed a fourth statement for the IO, beginning with the following: "With full understanding of my rights, I make the following statement freely, voluntarily, and without any promises or threats made to me." He stated that after the wetting down party, he and LTJG X found LTJG Y asleep in the petty officers' room. She went with them to her and LTJG X's room but later insisted on going back to the petty officers' room for the night. Since he could not find the key to his own room, he "opted to stay with" LTJG X in her room. They kissed and "performed oral sex on each other."

LTJG X admitted to the IO that she kissed the applicant in front of several petty officers after they drank shots of tequila at the Xxx Bar on December 18, 2002. The applicant got sick, vomited, and had to be helped back to his rack. The next day, LT L counseled her about her inappropriate conduct and the problem of perception. LT L said that they could be together as long as they were in a group with other junior officers or petty officers. Then on December 28, 2002, they rented a hotel "villa," including a "main house" with one main bedroom with a lock and two other, separate bedrooms with locks. She and the applicant were the last to leave the wetting down party and had been drinking most of the evening. At the villa, they found LTJG Y asleep in the petty officers' bedroom, woke her, and told her to come to her own room, but LTJG Y would not leave. Because the applicant could not find the key to his room, they slept in the adjoining beds in her room. She wore pajamas and the applicant wore gym shorts. LTJG X stated that their relationship was "purely platonic" and denied ever having had oral or vaginal sex with him. She also stated that she had never held hands with the applicant but that he sometimes covered her hands with his to make her stop picking at her nails. She recalled that he did this on December 29, 2002, as they returned to the cutter in the van.

LT L, the Operations Officer of the cutter and the applicant's supervisor, told the IO that he counseled the applicant after hearing that he and LTJG X had kissed in a bar in front of many crewmates, some of whom believed they were involved in an inappropriate relationship. Since the applicant and LTJG X were both in other long-term relationships, he thought they were merely friends who had drunk too much alcohol and behaved improperly. He told the applicant about the crew's perception of impropriety and about how they could remain friends without creating the perception of an inappropriate relationship. LT L stated that had seen them holding hands once before when the applicant got drunk and LTJG X helped him back to the cutter. On that occasion, he had told them it was not a good idea to behave like that before him.

LTJG Y told the IO that at the Xxx Bar on December 18, 2002, she and LTJG X drank shots of tequila and kissed each other. After they drank more shots, LTJG X grabbed the applicant by the ears and kissed him. Later, the applicant got ill and vomited twice. Regarding the incident on December 28, 2002, LTJG Y stated that she left the party with the BMC and BM1 to show them the way to the villa. She waited in the petty officers' room for LTJG X to return because she did not have the key to the room she was sharing with LTJG X. The applicant and LTJG X arrived shortly thereafter, and the three of them went to the women's bedroom. As she prepared for bed, the applicant and LTJG X went out onto the balcony and LTJG X put her head on the applicant's shoulder. LTJG Y "did not feel right" so she went back to the petty officers' room. The applicant and LTJG X came looking for her, but she told them that she did not want to go back to her own room with them. They left and she fell asleep in the petty officers' room. Early the next morning, LTJG X let her into their room when she knocked. LTJG X and the applicant were both in pajamas. LTJG Y took a shower and was getting ready to leave when the BMC walked "through the house to see the layout that was in it. As he walked thru the kitchen, towards the bedroom, he noticed [the applicant and LTJG X] lying in bed. He decided not to go any further." Later, LTJG Y saw the applicant and LTJG X holding hands together in the van.

BMC M told the IO that at the wetting down party, the applicant and LTJG X danced close together for most of the evening. BMC M stated that he is "not entirely sure why [LTJG Y] stayed in the room he shared with the BM1 but "can only speculate that she felt a little uncomfortable given the obvious 'couple nature' of the two; 'a third wheel.'" The next morning, he walked around the villa with LTJG Y and heard her speaking with the applicant and LTJG X. As he walked toward their bedroom, he saw a woman's undergarment or bathing suit bottom on the floor and so decided to leave. On his way back to his room, he noticed that no one had used the bedroom that the applicant and LTJG C were supposed to share because the beds were still made.

BM1 B told the IO that he saw LTJG X kiss the applicant at the Xxx Bar when they were all "impaired." After the party on December 28, 2002, he walked to the hotel with LTJG Y and BMC M. LTJG Y had the key to one of the three bedrooms so they waited there for the others. All three of them "racked out and attempted to get some sleep." He recalled speaking to the applicant and LTJG X when they returned to the hotel but did not see them the next morning.

LTJG C told the IO that he did not witness the kiss in the Xxx Bar but found LTJG X sitting on the edge of the applicant's rack later that night when the applicant was lying in the rack. On the night of the wetting down party, he left the party and went to a club. Later, instead of going to the hotel room he was supposed to share with the applicant, he went back to his rack on the cutter because it was closer. He never saw the hotel villa.

The IO also gathered signed statements from several other crewmembers and one contractor serving aboard the cutter. Some had witnessed or heard about the kissing incident at the Xxx Bar; some reported having seen the applicant and LTJG X holding hands, dancing closely, and acting like a couple; and some had heard that they had shared a hotel room. Other crewmembers told the IO that they did not observe any inappropriate behavior between the applicant and LTJG X but had heard rumors of such.

Non-Judicial Punishment

On January 7, 2003, the applicant was taken to mast and awarded NJP by his CO, which included restriction for 30 days and a letter of reprimand. The Court Memorandum that would have documented the mast and the letter of reprimand that he was awarded at mast are not in his record because his appeal of the NJP was approved by the Area Commander. The Area Commander's letter dated March 24, 2003, upholding the appeal and overturning the NJP states the following in pertinent part (the full text of letter was received from CGPC with the advisory opinion after the applicant submitted a copy of it with his application but redacted the parts that are shaded below):

1. ... Your appeal is granted and the punishment accordingly overturned. ...
3. On January 7, 2003, the Commanding Officer of the USCGC ... conducted Captain's Mast and found that you violated UCMJ Article 92 (two counts), Article 125, Article 133 and Article 134. Your commanding officer awarded a written reprimand and restriction to the Coast Guard Xxxx for 30 days. In your appeal, you assert that you were: denied a representative, coerced into making a statement, not permitted to offer matters in extenuation or mitigation, and placed in confinement prior to mast. You also claim that the elements of Articles 92 (both counts), 133 and 134 were not met, and that the elements of Article 125 were not explained to you.
4. After a thorough review of the record, I find that there is insufficient evidence to establish the reported misconduct for both the orders violations under Article 92 and the adultery charge in Article 134. Therefore, I am dismissing those charges.
5. I am convinced from the record before me that you committed the misconduct as charged in Article 133 and Article 125. However, I am deeply concerned about the way this matter was handled by your command. Specifically, I am concerned about the restrictions that were place on you before the mast, your inability to obtain a mast representative, and the circumstances that led to you providing an incriminating statement to the investigating officer. As a result, I believe it would at least *appear* to be unjust to let this mast stand. I am therefore dismissing the remaining charges against you and your appeal is granted.
6. I am directing the withdrawal of the letter of reprimand and all references to the nonjudicial punishment from your record. [The cutter's command] shall take the administrative action necessary to effect these changes.
7. Finally, I want you to understand clearly that my decision to grant your appeal does NOT mean I believe you did not commit any offenses under the UCMJ. As I stated above, I am convinced that you violated both Articles 125 and 133, UCMJ. I am deeply concerned about your actions and expect your Officer Evaluation Report to document your misconduct.

Page 7 Regarding Alcohol-Related Situation

On April 11, 2003, the XO of the cutter entered a Page 7 in the applicant's record stated that he had been referred to a Naval hospital for alcohol screening. The Page 7 further states that "[a]lthough no alcohol incident was documented, your behavior during the XXXXXXXXX port call in December 2002 indicated that you may have a problem with alcohol abuse. this is not considered an alcohol incident, but is entered for documentation purposes only as an alcohol situation as outlined in Chapter 20 of the Personnel Manual ... any further alcohol incidents may result in your separation from the U.S. Coast Guard."

First Disputed OER

The applicant's first disputed OER in this case covers his performance from October 1, 2002, through January 31, 2003. The rating chain included the Assistant Chief for Major Cutter

Forces as the Supervisor, the Chief for Major Cutter Forces as Reporting Officer, and the Chief of Operational Forces as the Reviewer. The Supervisor marked most of the performance categories as “not observed,” rather than assigning a numerical mark. The “not observed” marks are explained in block 3 with the following comment: “Not Observed marks reflect Reported On Officer’s approved request to disqualify the regular shipboard rating chain.” However, the Supervisor assigned the applicant one low mark of 2 for the category “Workplace Climate” and supported the mark with the following comment: “Failed to support or enforce Coast Guard human resources policies. Despite prior counseling about his conduct, [the applicant’s] actions during two separate port calls created the perception of an inappropriate relationship and were detrimental to unit good order and discipline.” Moreover, the Reporting Officer assigned the applicant marks of 2 in four categories: “Judgment,” “Responsibility,” “Professional Presence,” and “Health and Well-Being.” He supported these marks with the following comments:

Displayed flawed judgment during two separate port calls; misuse of alcohol contributed to participation in an inappropriate relationship. Failed to heed command warnings/advice about personal conduct. Failed to hold self accountable for inappropriate conduct and failed to demonstrate personal courage; submitted OSF [Officer Support Form] materials that did not discuss known port call incidents or inappropriate relationship. Misuse of alcohol conveyed poor self image. Actions served to undermine respect for officers and undercut wardroom cohesiveness.

The Reporting Officer did not assign the applicant a mark on the comparison scale in the first disputed OER. He wrote that he was “[u]nable to comment on overall performance and comparison to other officers due to majority of actions not being observed. However, the two separate incidents of inappropriate conduct indicate a serious lapse in judgment and a complete disregard for core values of honor, respect and devotion to duty.”

The first disputed OER was prepared in November 2003 and validated by CGPC in December 2003. In February and March 2004, the applicant submitted two OER Replies that were rejected by CGPC for not complying with the regulations for such replies. In letters dated March 2 and April 28, 2004, CGPC informed the applicant that many of his comments in the Reply were not authorized because they were not performance related and concerned his personal opinions of the raters. (In particular, he accused the cutter’s command of having provided false information to the substitute rating chain.) On May 7, 2004, he submitted a revised OER Reply that was entered in his record. In this Reply, the applicant wrote that the OER was based on incorrect information. He alleged that there was no “inappropriate relationship” between him and another junior officer. He stated that the comments about alcohol abuse were improper since he had never been counseled about alcohol abuse or charged with any violation of Coast Guard policy regarding the use of alcohol. He stated that the comment about “counseling” was false because what the Operations Officer said to him following their port call in Xxxxxxxx was, “my policy is, and I realize this is not in line with Commandant, is to simply keep it off the ship.” The applicant stated that there was not wrongdoing during the port call and he had no idea what the Operations Officer was trying to tell him. The applicant also objected to the Reporting Officer’s comment that he lacked personal courage for not discussing the port calls on his OSF. He argued that he was not required to discuss port calls on his OSF. The Area Commander forwarded the Reply to CGPC with an endorsement stating that the OER “is accurate as submitted.”

Second Disputed OER

The second disputed OER, covering the period February 1 to July 13, 2003, was also prepared by the substitute rating chain. All the performance categories are marked “not observed” and block 3 contains the following comment: “Not observed marks reflect Reported On Officer’s approved request to disqualify the regular shipboard rating chain. Mbr TAD to Coast Guard Xxxxxxx for duration of period.”

The applicant’s record also contains a “concurrent OER” covering the period February 1 to June 30, 2003. This concurrent OER, which was prepared by his chain of command while TAD at the Xxxxxxx, contains primarily marks of 5 in the various performance categories, a few marks of “not observed,” and a mark in the fourth spot on the comparison scale. All of the written comments are quite positive and the Reporting Officer recommended the applicant for promotion with his peers.

The applicant received two more OERs based on his performance as the Officer in Charge of a xxxxxxxxxxxxxxxxxxxxxxxn with nine subordinates before he was separated from the Coast Guard. On these OERs, he received primarily marks of 5 in the performance categories, marks in the fifth spot on the comparison scale, and strong recommendations for promotion to lieutenant.

Initiation of Revocation Board

On January 20, 2004, CGPC informed the applicant that it had initiated action under Article 12.A.11. of the Personnel Manual “to convene a board to recommend whether or not [his] commission should be revoked.” CGPC stated that it was authorized to “initiate such action when information of an adverse nature is discovered.” CGPC cited the first disputed OER as the adverse information that triggered the initiation of the board. CGPC informed the applicant that he had a right to submit comments on his own behalf within twenty-one days.

On January 29, 2004, the applicant acknowledged receipt of CGPC’s notification and stated that he would submit a statement on his own behalf.

On February 17, 2004, CGPC forwarded to the applicant the documents to be considered by the proposed Revocation Board. CGPC stated that the board would review the applicant’s PDR and the complete report of the POI dated January 6, 2003, with its enclosures.

On March 2, 2004, the applicant submitted an objection to the IO’s report being considered by the proposed Revocation Board. He claimed that in overturning the applicant’s NJP, the Area Commander had ordered the removal of all paperwork associated with the NJP, which included the IO’s report. On March 5, 2004, CGPC responded, stating that after reviewing the Area Commander’s order overturning the NJP and consulting with legal counsel, CGPC would remove from consideration by the Revocation Board the IO’s memorandum with its recommendations, as well as enclosures 1, 2, 3, 4, and 35 of the IO’s report, but that enclosures 5 through 34 would be considered by the board. On March 18, 2004, the applicant objected again through his counsel, stating that because the IO’s report could not be entered into the applicant’s PDR, it could not be considered by the Revocation Board and that the IO’s report in its entirety was part

of the NJP proceedings and so were ordered removed from the applicant's record by the Area Commander. On March 30, 2004, CGPC responded, stating that upon further review, enclosures 1 and 2 as well as 5 through 34 would be submitted to the Revocation Board for consideration because enclosures 1 and 2 were official records. On April 19, 2004, the applicant's counsel submitted a third objection to the enclosures to be reviewed by the board, emphasizing that under Article 12.A.11.b.3. of the Personnel Manual, only the applicant's record could be reviewed by the Revocation Board and the IO's report could not be entered in his PDR and so should not be reviewed by that board. On May 6, 2004, Commander, CGPC responded to the third objection, stating that Article 12.A.11. does not specify that only the documents in an officer's PDR can be considered by a Revocation Board. He stated that what is considered an officer's "record" varies depending upon the purpose for which it is being used. He noted that an officer's "record" is defined one way for the purposes of promotion boards but may include other documents and information for the purposes of making billet assignments or separation decisions. He stated that because "the purpose of a revocation panel is to determine whether one should continue to serve as an officer, an officer's record for this purpose may contain information relevant to that decision that does not appear in the PDR, provided the information is otherwise trustworthy and reliable." He also noted that the Area Commander's letter dated March 24, 2003, required the removal of only the letter of reprimand and references to the NJP. Therefore, enclosures 1, 2, and 5 through 34 to the IO's report could properly be included as relevant information because they did not mention the letter of reprimand or the NJP.

Resignation and DD 214

On May 18, 2004, the applicant submitted a "Request for Unqualified Resignation" to resign his commission as of August 1, 2004, which would negate the need for the Revocation Board, which was slated to convene on May 25, 2004. He wrote that the "difficulty in correcting misinformation contained in an OER, and a disagreement over what material is appropriate to be presented to the [Revocation Board] has prompted this request for resignation." On May 19, 2004, CGPC approved his request as a resignation in lieu of special board action for reason of substandard performance.

The applicant's DD 214, dated August 1, 2004, indicates that he was honorably discharged under Article 12.1.15. of the Personnel Manual. (There is no such article.) The separation code is BHK and the narrative reason for separation is "Substandard Performance." On August 22, 2006, the Coast Guard issued a DD 215 to correct the citation on the DD 214 to Article 12.B.15. of the Personnel Manual. However, Article 12.B.15. concerns only the disability discharges of enlisted members.²

Discharge Review Board

On June 26, 2006, the President of the DRB forwarded the recommendation of the DRB to the Commandant. The DRB based its recommendation on the documents in an applicant's PDR, a letter from the applicant, the applicant's testimony at a hearing, and documentation of his

² It appears that the Coast Guard intended to correct the separation authority to Article 12.A.15., which concerns the separation of officers "for cause." However, because the applicant has not requested correction of the DD 215 or the separation authority on the DD 214 and such a correction is not clearly in his interest, the Board will not address the matter unless a correction of the separation authority is necessitated by other corrections to the DD 214.

dismissed mast and the disqualification of his rating chain, which he showed the DRB at the hearing. Based on these records, the DRB found no basis for the negative OER in the case file and concluded that the substitute rating chain must have based the disputed OER on information from the disqualified rating chain, which was biased. The DRB found that the applicant's discharge was both improper and inequitable. It recommended that the separation code and narrative reason for separation on the applicant's DD 214 be changed to reflect a discharge for "miscellaneous/general reasons." The DRB also recommended that the disputed OER be replaced with a continuity OER and that the applicant be offered reinstatement on active duty or in the Reserve without loss of precedence. The DRB argued that "all actions were based on a Captain's Mast that was found to be improper and was eventually removed from the record, all negative actions as a result of that improper action, including the OER mentioned above, should be remedied."

The President of the DRB advised the Commandant that he agreed with the recommended changes to the separation code and narrative reason for separation on the applicant's DD 214 but that he did not concur with the DRB's conclusions about the propriety and equity of the applicant's discharge. He stated that the issues the DRB raised about the applicant's OER "do not mitigate the fact that [he] requested, and was subsequently granted, a voluntary resignation in lieu of a Revocation Board. Since he received the separation he requested, I believe that the discharge was both proper and equitable."

On July 27, 2006, the Commandant disapproved the proceedings and recommendation of the DRB and ordered that his DD 214 and other records remain as they are.

VIEWS OF THE COAST GUARD

On December 18, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant's requests. In so doing, the JAG adopted the findings and analysis of the case provided in a memorandum prepared by CGPC.

With respect to the first disputed OER, CGPC stated that it granted the applicant's request for a substitute rating chain after the applicant's NJP was overturned due to procedural defects. CGPC stated that although the substitute rating chain members did not directly observe the applicant's performance, they were able to evaluate aspects of his performance based on "credible information from an administrative investigation ... that showed [he] engaged in an inappropriate relationship with a fellow officer." CGPC stated that the substitute rating chain was entitled to rely on the enclosures to the IO's report as long as they did not rely on the flawed NJP proceedings. CGPC noted that the Area Commander's letter overturning the NJP showed that he expected the applicant's misconduct to be documented on an OER. CGPC stated that the rating chain properly avoided any mention of the NJP in preparing the two disputed OERs "and relied on the facts as supported by the enclosures." CGPC concluded that the disputed OERs were prepared in accordance with Coast Guard regulation and policy.

CGPC alleged that it acted reasonably, justifiably, and fairly in initiating action to convene a Revocation Board based on the adverse information in enclosures 1, 2, and 5 through 34 to the IO's report. CGPC stated that regulations do not restrict either CGPC or a Revocation

Board to only those documents filed in an officer's PDR. CGPC stated that a Revocation Board may review "available and factual matters of record, such as sworn statements in an administrative investigation," in addition to the records kept in a PDR. CGPC noted that in BCMR Docket No. 1999-171, the BCMR upheld the use of material from an investigation by Coast Guard Investigative Service by a special board "as long as the applicant was afforded the essential requirements of due process." CGPC stated that the applicant was afforded due process in that he was allowed to view and comment on the evidence that would be considered by the Revocation Board.

CGPC concluded that the applicant was properly discharged based on his approved voluntary request and that the separation code BHK and narrative reason for separation are appropriate under the Separation Program Designator Handbook. In support of its findings, CGPC submitted copies of some of the enclosures to the IO's report, which are summarized above, and affidavits from the substitute rating chain, as summarized below.

Declaration of the Supervisor for the Disputed OERs, Dated October 31, 2007

The Supervisor stated that as the Assistant Chief for Major Cutter Forces he routinely spoke with the XO of the applicant's cutter during the evaluation periods for both disputed OERs. He stated that he assigned the applicant a mark of 2 for Workplace Climate in the Supervisor's section of the first disputed OER based on information in the IO's report, which his office received before the Area Commander overturned the NJP. He alleged that he completed the OER "fairly, properly and without bias" based on the information in the IO's report about the applicant's unacceptable relationship with a fellow officer aboard his cutter, which is a violation of Coast Guard policy on interpersonal relationships. He noted that Article 8.H.2.d. of the Personnel Manual states that unacceptable relationships are "inappropriate and not allowed under service policy." The Supervisor further alleged that nothing prohibits the report of an investigation convened under the Military Justice Manual from being used for administrative purposes, such as documenting an officer's performance in an OER.

Declaration of the Reporting Officers for the Disputed OERs, Dated October 24, 2007

The Reporting Officer stated that as Chief of the Xxxxxx Area's Major Cutter forces in 2002 and 2003, he was responsible for programmatic oversight and fleet management of the cutters, including the applicant's cutter. He was also the first-line supervisor of the CO of that cutter and therefore had routine contact with him about shipboard matters, including personnel. The Reporting Officer stated that his office became aware of the NJP proceedings during the legal review after the mast. He stated that because of the number of NJP proceedings on the cutters, his office only reviewed NJP cases that were appealed. During his office's review of the applicant's NJP, he spoke with the CO of the cutter several times and the Supervisor spoke with the XO several times to collect facts.

When CGPC informed him that he would have to serve as the applicant's Reporting Office because the applicant had requested a substitute rating chain, he queried the decision because of his lack of observation of the applicant's performance. Both CGPC and the Area's legal office told him that the administrative investigation and the evidence therein "would be appropriate information for my consideration" in evaluating the applicant's performance, but that

he could not mention the NJP or the appeal of the NJP. In addition, he was told that he could mark “‘not observed’ in most categories while still commenting in those areas where I had sufficient information to make an informed opinion.” Therefore, he based his marks in the disputed OER on the statements in the IO’s report, the applicant’s OER input (the OSF), and his own perception of the applicant’s behavior. The Reporting Officer stated that he “did not discuss the OER with either the CO or XO of the [cutter].”

The Reporting Officer denied the applicant’s allegations that he was biased because of his prior interaction with the applicant’s father. He stated that his office had no role in conducting the investigation or the mast and only served as a conduit of information between the cutter’s command and the Area Commander during the review upon appeal. The Reporting Officer denied having ever been negatively counseled about the NJP or the appeal. He alleged that he was actually “‘praised for [his] programmatic handling of this sensitive and complex matter.” He stated that he had never met the applicant and had no reason to be biased against him. Moreover, he can recall meeting the applicant’s father

only briefly at a meeting of several of his fellow contractors, representatives of xxxxxxxxxxxx, and members of the Operational Forces staff. ... I do not recall any awkwardness at the meeting, which I recall as cordially professional. [The applicant’s father] and his co-workers were contracted to look at cutter casualty data and how to present it in terms of overall operational readiness. Their work was neither controversial nor critical. If they ever filed a final report, I am not aware of it. There was not resulting negative pressure or even follow-on discussions related to their particular efforts. A single 1-2 hour meeting certainly did not form the basis for any personal bias.

The Reporting Officer stated that in preparing the first disputed OER, he “‘felt duty-bound to comment on [the applicant’s] inappropriate behavior on two separate occasions, particularly how those lapses, fueled by alcohol, reflected on his judgment, responsibility and general adherence to CG core values. I stand by those original marks and comments.”

Declaration of the Reporting Officers for the Disputed OERs, Dated October 16, 2007

The Reviewer of the disputed OERs, who was the Chief of the Operational Forces Branch for the Area, is now retired. He stated that as the CO’s reporting officer, he was the first person to review the applicant’s mast appeal and he discovered “‘the fatal flaws in the NJP administrative proceedings by the [cutter’s command]. I personally recommended to [the Area Commander] that the 5-day period for submission of the appeal be waived and that the mast be overturned. This was done in consultation with [the Area legal advisor].” The Area Commander agreed with his assessment and overturned the NJP based upon the procedural errors but directed that the applicant’s underlying conduct be documented on his OER. The Reviewer alleged that but for the procedural errors, which he listed as “‘no mast rep[resentative], circumstances leading [the applicant] to [make] an incriminating statement, and pre-mast restrictions,” the NJP would not have been overturned. The Reviewer stated that he personally reprimanded the CO of the cutter for his performance with respect to the applicant’s mast.

The Reviewer stated that because the applicant decided to have his regular rating chain disqualified, officers who did not personally observe his performance during the evaluation period were required to prepare the OER. However, the Reviewer argued, “‘OERs are routinely written by supervisors and reporting officers on personnel with whom they do not have routine

personal observation” when the facts are otherwise “well known and documented.” He alleged that ignoring the applicant’s misconduct during the evaluation period “was not an option,” especially given the Area Commander’s direction in the March 24, 2003, letter. He also alleged that “[a]ll personnel in the rating chain for this OER had personal knowledge of the [applicant’s] negative performance.”

Regarding the allegation that he was biased because of his prior interaction with the applicant’s father, the Reviewer stated that he

always had the utmost respect [for the applicant’s father] while we served together as Officers in the Coast Guard. Although he was always senior to me with respect to linear numbers, I have never worked for, [or] worked with [him], nor did he work for me. We were simply members of the same community, the Surface Operations community ... a tight-knit group that always had shown respect and admiration for each other. Although I am somewhat offended by these [allegations of grudge and bias], I still have the utmost respect for [the applicant’s father], and will dismiss them as comments made by a concerned father wanting the best for their child.

2. [The applicant’s father] references a project that we worked together after his retirement that may have led to this bias. To my recollection, he was working as a civilian contractor on a CG funded project and he conducted one interview with myself and the Operational Forces Branch. This survey was conducted in my office and as far as I remember ended amicably. I honestly cannot even remember the subject of the study.

3. [The applicant’s father] also states that I purposely withheld information about his son, including his whereabouts after the [cutter] issue. The only conversation I can recall was one in which I told [him] that I was not at liberty to discuss his son’s case with respect to the incident, the NJP case, and the subsequent performance evaluations. [The applicant] is an adult and information concerning him, other than Health and Well being, is protected even from a parent under the Privacy Act. I informed [the applicant’s father] that any information concerning his son’s performance needed to be obtained directly from his son. I even referred him to xxxxxx legal if he had additional questions.

4. ... I believe the [disputed OER] was correct and administratively appropriate. The [Supervisor and Reporting Officer] had personal knowledge/observation of the negative performance dimensions outside of the NJP case. To my knowledge no mention of the NJP was included in [the applicant’s] record by Xxxxxx Area, and there is no personal bias by me held against [him] or his father and, in fact, I was first and his strongest advocate for granting his mast appeal.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 21, 2007, the Chair sent the applicant’s counsel a copy of the views of the Coast Guard and invited him to respond within thirty days. The applicant was granted an extension and responded on February 29, 2008.

The applicant alleged that the JAG’s recommendation constitutes a reversal of its prior recommendation that the Commandant approve the recommendation of the DRB to grant relief. He argued that his resignation cannot be considered voluntary because CGPC refused to remove all the enclosures to the IO’s report from consideration by the proposed Revocation Board. Therefore, his resignation was coerced, not voluntary.

The applicant alleged that the investigation into his relationship with LTJG X was not an informal administrative investigation but a pre-disciplinary investigation governed by the Mili-

tary Justice Manual. Therefore, the entire IO's report with all of its enclosures is "an integral part of the NJP proceedings," which were ordered removed from his record by the Area Commander. However, instead of fully removing them, CGPC threatened to use them for the Revocation Board and is now submitting them for consideration by the BCMR. He argued that when the Area Commander ordered the removal of the NJP proceedings, including the IO's report, from his record, CGPC should have destroyed them or, at least, made it impossible for them to be used against him in any subsequent forum.

The applicant stated that the substitute rating chain must have relied on information from the applicant's XO and CO in preparing the OER and on information in the IO's report, which the Area Commander had ordered removed from his record, because they never personally observed his performance and had no direct knowledge of it. The applicant further alleged that it was unfair for the substitute rating chain to assign him so many marks of "not observed" and then to assign him very low marks in certain categories based up "a single set of circumstances" rather than his overall performance in those categories as documented in his OSF.

The applicant argued that Article 8.H. of the Personnel Manual does not prohibit the conduct of which he was accused. He also alleged that under Articles 8.H.6.c. and e., "allegations of violations cannot be used against personnel in their formal evaluations (such as OERs), until they are counseled and an administrative entry made in their personnel record," which his command failed to do.

The applicant again disputed CGPC's decision to allow the Revocation Board to see any record pertaining to the applicant except those filed in his PDR. He argued that the Coast Guard is bound by its own regulations and that it should have written Article 12.A.11.b.3. differently if documents outside the PDR were to be considered. The applicant argued that the "clear and obvious meaning" of the phrase "officer's record" in Article 12.A.11.b.3. is an officer's PDR and does not include any other documents, such as the report of an IO.

The applicant argued that the IO's report should have been removed from consideration by the Revocation Board because he was not provided due process. He alleged that he was denied due process because his statements were coerced by threat, he was denied legal counsel, and he was illegally detained. The applicant further argued that in the case cited by the Coast Guard, BCMR Docket No. 1999-171, the investigation had not been ordered removed from that applicant's record.

APPLICABLE LAW

Regulations about Personal Relationships

Article 8.H. of the Personnel Manual in effect in 2002 concerns personal relationships among Coast Guard personnel. Article 8.H.1.c. states that "interpersonal relationships which raise even a perception of unfairness undermine good leadership and military discipline." Article 8.H.2.d.3. provides the following descriptions of types of relationships:

- a. Personal relationship: Non-intimate, non-romantic association between two or more people (of the same gender or not), such as occasional attendance at recreational or entertainment events

(movies, ball games, concerts, etc.) or meals. (Does not involve conduct which violates the UCMJ.)

b. Romantic relationship: Cross-gender sexual or amorous relationship. (Does not involve conduct which violates the UCMJ.)

c. Unacceptable relationship: Inappropriate and not allowed under Service policy. Resolution normally administrative. Relationship must be terminated or otherwise resolved once recognized.

d. Prohibited relationship: Violates the UCMJ. Resolution may be either administrative, punitive, or both as circumstances warrant.

Article 8.H.2.e. states that a relationship does not violate Service policy unless “the relationship or the members' conduct fails to meet the standards set by this section, standards of conduct set by the Uniform Code of Military Justice (UCMJ), or other regulations.”

Article 8.H.2.f. states that a romantic relationship between any two members assigned to the same cutter constitutes an “unacceptable romantic relationship” that violates Service policy. The article explains that “[t]he nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position.”

Article 8.H.6.c. states that when a command has “potential concerns about the characteristics of a relationship,” the members may be informally or formally counseled and may be ordered to terminate a relationship. Article 8.H.6.d. states that “[m]embers may request or a command may recommend reassignment of a member involved in a questionable relationship. However, reassignment is not a preferred option. The Coast Guard is not obligated to reassign personnel due to members' desires or based solely on a relationship. When reassignment is not an option, members may be directed to end a relationship.” Article 8.H.6.e. states that “[w]hen members do not respond favorably to counseling, comments and marks in officer and enlisted evaluations may be appropriate.” Under Articles 8.H.6.f. and 8.H.6.g., commands may award NJP, prefer charges for court-martial, or recommend separation.

Regulations about Investigations

Article 1.C.2.a. of the Administrative Investigations Manual (AIM) in effect in January 2003 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 consider

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's 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 [PIO] 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. 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 about whether should convene a mast to dispose of the offenses, refer the charges for court-martial, and/or take administrative actions, such as preparing OERs or initiating separation.

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.

Laws and Regulations about Restraints and Confinement

Chapter 1.B.2. of the MJM states that “[p]re-mast confinement or restriction is not authorized. A member may be placed in pretrial restraint only if the command is considering referring the charges against the member for trial by special or general court-martial. A command may not automatically place a member in restraint solely because he or she has been placed on report. Pretrial restraint, including pretrial restriction or confinement, may be imposed only in very limited circumstances [see, RCM 304 and 305]. Generally, pretrial restraint may be imposed only if necessary to ensure an accused's presence at trial or to prevent the commission of additional serious offenses. The member must be immediately released from restraint if the command decides to dispose of the offense(s) other than at court-martial.”

Under Rule 304 of the Rules for Courts-Martial, a CO may impose pre-trial restraints, such as orders prohibiting communications with potential witnesses if there is probable cause to do so, which requires a reasonable belief that (a) an offense triable by court-martial (against the UCMJ) has been committed; (b) the person restrained committed it; and (c) the restraint ordered is required by the circumstances. The discussion to the rule requires restraints to permit pretrial preparations.

Under Rule 305 of the Rules for Courts-Martial, a CO may physically confine a member if there is probable cause to do so, which requires a reasonable belief that (a) an offense triable by court-martial (against the UCMJ) has been committed; (b) the person restrained committed it; and (c) the confinement is required by the circumstances. However, a member so confined is entitled to be informed of his rights and of the procedures by which his confinement will be reviewed. Within 72 hours of the confinement order, the CO must release the member from confinement unless the CO also finds, in addition to the above criteria for probable cause, (d) that the confinement is necessary either to ensure the member's presence for a trial, pre-trial hearing, or investigation or to prevent “serious criminal misconduct,” such as intimidation of witnesses and obstruction of justice, and (e) that less severe forms of restraint are inadequate.

Laws and Regulations about the Applicant's NJP

Article 92 of the UCMJ concerns a member's failure to obey a lawful order or regulation. Article 125 concerns sodomy, the definition of which includes oral sex. Article 133 concerns conduct unbecoming an officer and gentleman. Article 134 concerns adultery, the definition of which requires “sexual intercourse” between two people while at least one of them is married to a third person.

Under Article 15 of the UCMJ, commanding officers, at their discretion, may impose NJP for minor violations of the UCMJ to maintain good order and discipline when administrative corrective measures seem inadequate and court-martial seems excessive. Manual for Courts-Martial (MCM), Part V, Para. 1.d.(1). Only members who are not “attached to or embarked in a vessel” may refuse NJP by demanding trial by court-martial. 10 U.S.C. § 815(a); MCM, Part V, Para. 3. Under MCM, Part V, Para. 4.a., “[i]f, after a preliminary inquiry (*see* R.C.M. 303, the [NJP] authority determines that disposition by [NJP] is appropriate ..., the [NJP] authority” must provide the member with notification of the pending mast proceeding and the alleged offenses, a

brief summary of the information upon which the allegations are based, and a statement of his rights at mast.” The member is entitled, *inter alia*, to appear before the officer imposing NJP; to examine documents to be considered by the NJP authority; to be accompanied by a spokesperson to speak on his behalf (but not to question witnesses) unless the punishment is significantly limited and unless the mast would have to be delayed to permit the presence of a selected spokesperson; to present matters in defense, extenuation, and mitigation orally, or in writing, or both; and to present witnesses. MCM, Part V, Para. 4.c.

“Failure to comply with any of the procedural provisions of Part V of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed.” MCM, Part V, Para. 1.h.

Article 15 and Part V of the Manual for Courts-Martial “do not apply to include, or limit use of administrative corrective measures that promote efficiency and good order and discipline. ... Administrative corrective measures are not punishment, and they may be used for acts or omissions which are not offenses under the code or for acts or omissions which are offenses under the code.” MCM, Part V, Para.1.g.

Chapter 1.C.2.b. of the MJM states that a “member attached to or embarked in a vessel has no right to demand trial by court-martial in lieu of NJP or, consequently, to consult with a military or civilian attorney prior to NJP regarding the option to demand trial by court-martial.”

Under Chapters 1.C.3.a. and 1.B.3.b. of the MJM, the XO should appoint an officer of the unit to serve as the “mast representative” for the accused. Chapter 1.C.1. states that because a mast is not an adversarial proceeding, a member “has no right to be represented by an attorney at mast.” However, “the member may obtain the services of an attorney or any other person, at no expense to the government, to appear as his or her spokesperson.” Chapter 1.C.4.c. states that the CO “may not exclude the spokesperson from the mast solely because he or she is an attorney.”

Under Chapter 1.C.3.a., the role of the mast representative is to “assist the member in preparing for and presenting his or her side of the matter and to speak for the member, if the member desires. It is Coast Guard policy that the mast representative may question witnesses, submit questions to be asked of witnesses, present evidence, and make statements inviting the commanding officer’s attention to those matters he or she feels are important or essential to an appropriate disposition of the matter.”

Chapter 1.C.4.b. states that the role of a spokesperson is to speak for the member “at those times during the mast when the member’s responses are invited by the commanding officer. A spokesperson may be anyone, including an attorney retained by the member.” Chapter 1.C.4.e. provides that a “spokesperson is not permitted to examine or cross-examine witnesses,” except at the discretion of the CO, but “is always permitted to speak for a member when the member is otherwise entitled to speak.”

Chapter 1.E. provides that the maximum punishment a captain (O-6) may impose on a subordinate officer at mast is an admonition or reprimand and 30 days of restriction. Chapter

1.F.1. provides that a member may appeal an NJP “if he or she considers the punishment imposed ‘unjust’ or ‘disproportionate’ to the acts of misconduct for which punished ... in writing within 5 calendar days of the imposition of the punishment.” Chapter 1.F.1.a. defines “unjust” to include various kinds of illegality and denial of rights.

Regulations about OERs

Under Article 10.A.2. of the Personnel Manual, an officer’s rating chain usually consists of his direct supervisor who observes and directs his work on a daily basis; his reporting officer, who is usually the supervisor’s supervisor; and the reviewer, who is usually the reporting officer’s supervisor. Under Article 10.A.2.g., an officer may ask that one or more members of his rating chain be “disqualified,” which includes “any situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.” Rating chain officials may base their evaluations on direction observation of an officer’s performance, the officer’s own OER input, and other reliable records and reports about his performance.

Article 10.A.4.f.1. prohibits a rating chain from mentioning that an “officer’s conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, ... except as provided in Article 10.A.3.c. ... These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself.”

Article 10.A.3.c.2., which concerns “Concurrent OERs,” states that a “concurrent OER is an OER submitted in addition to a regular or special OER. The permanent unit’s OER is never considered a concurrent report and should not be so identified. A concurrent report is always in addition to a regular or special OER, and thus does not count for continuity. The unit to which the Reported-on Officer is permanently attached is always responsible for ensuring that continuity is maintained with either regular or special OERs. Concurrent reports may be submitted only when the officer is: ... e. Performing temporary assigned duty (TAD) away from a permanent station for a period of at least 60 consecutive days while being observed by a senior other than the regular Reporting Officer.”

Under Article 10.A.4.g., an officer may submit a Reply to any OER for entry in his record with the OER. Article 10.A.4.g.1. states that “[r]eplies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. Article 10.A.4.g.2. states that “[c]omments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 10.A.4.f. apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted.”

Regulations about the Documentation of Alcohol Abuse

Article 20.B.2.d. of the Personnel Manual states the following about “Alcohol-Related Situations”:

An alcohol-related situation is defined as any situation in which alcohol was involved or present but was not considered a causative factor for a member's undesirable behavior or performance. A member does not have to consume alcohol to meet this criterion, e.g., purchasing alcohol for minors. Commands shall not use the term "alcohol related situations" when a member's behavior clearly meets the criteria of an "alcohol incident." Members involved in alcohol related situations shall be counseled on their use of alcohol and informed of the conduct expected of Coast Guard members. Commanding officers are strongly encouraged to consider whether screening and/or alcohol awareness training such as IMPACT is appropriate. Commanding officers shall document such occurrences with an appropriate Administrative Remarks (CG-3307) entry in the member's Personnel Data Record (PDR). Documentation of alcohol related situations provides commands with significant background information for determining whether any administrative or medical action is necessary.

Article 20.A.2.d.1. defines an "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice, Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." Article 20.B.2.h.1. states that "[o]fficers will be processed for separation following a second alcohol incident." There is no corresponding regulation requiring the separation of officers involved in more than one "alcohol-related situation."

Regulations about Revoking a Commission

Article 12.A.11. of the Personnel Manual concerns "Revoking Officers' Commissions in Their First Three Years of Service." Article 12.A.11.a.1. states the following:

The Service considers the first three years of an officer's career a probationary period during which he or she demonstrates ability to adapt to the requirements of Coast Guard life and shows capability for future development. Some officers either are unable to adapt to service life or their performance indicates it is doubtful whether the time and effort required will form them into effective officers.

Article 12.A.11.b. provides the following procedures for revocation:

1. A commanding officer or a superior in the chain of command may recommend revoking the commission of an officer who has fewer than three years of continuous service as a Coast Guard commissioned officer. Commander (CGPC-opm) also may initiate board action to revoke an officer's regular commission based on knowledge of adverse information about the officer. A commanding officer or superior in the chain of command shall recommend revocation in the form of a letter to Commander (CGPC-opm) containing the following information.

- a. Officer's name;
- b. Length of service;
- c. Period of time officer was observed;
- d. Reason for recommendation;
- e. Specific facts or circumstances relating to performance;
- f. Medical reports or opinions, if applicable;
- g. Nature of counseling and other steps taken to correct deficiencies;
- h. Officer's response to counseling;
- i. Special Officer Evaluation Report, if applicable.

2. The recommending officer shall grant the officer concerned an opportunity to review the recommendation and permit him or her to comment as desired by letter endorsement.

3. A panel of senior officers, normally consisting of the Coast Guard Personnel Command's Chief, Administration Division; Chief, Officer Personnel Management Division; and a senior officer representative from the Headquarters division ... with cognizance of the officer's specialty shall review the recommendation. After thoroughly reviewing the officer's record, the panel recommends to the Commandant either executing the revocation proceedings under this Article or closing the case. ...

4. Commander (CGPC-opm) sends the panel's recommendations to the Commandant for approval, modification, or disapproval (14 U.S.C. 281).

FINDINGS AND CONCLUSIONS

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

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

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

3. The applicant asked the Board to remove from his record (a) two OERs; (b) all documents relating to an informal investigation, to an alleged inappropriate relationship, and to his NJP on January 7, 2003; (c) a Page 7 dated April 11, 2003, concerning his referral for alcohol screening; (d) any administrative action taken in whole or in part on the basis of the OERs and NJP; and (e) the potential revocation of his commission, his resignation, and his discharge papers. He also asked the Board to offer him the opportunity to return to active duty with back pay and allowances. In the alternative, he asked the Board to correct his DD 214 to show that he was discharged for "Miscellaneous/General Reasons" with separation code FND.

4. Regarding the first disputed OER, which covers his performance from October 1, 2002, to January 31, 2003, the applicant alleged that it is erroneous and unjust and asked the Board to replace it with one prepared "for continuity purposes only" with all performance categories marked "not observed." To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by (a) a "misstatement of significant hard fact," (b) a "clear and prejudicial violation of a statute or regulation," or (c) factors that "had no business being in the rating process."³ The Board begins its analysis in every case by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁴ Absent evidence to the contrary, the

³ *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.

⁴ 33 C.F.R. § 52.24(b).

Board presumes that the applicant's rating chain prepared the disputed OER "correctly, lawfully, and in good faith."⁵

5. The first disputed OER contains primarily marks of "not observed," no positive marks or comments, and several low marks supported by comments about his behavior during two port calls in December 2002 "creat[ing] the perception of an inappropriate relationship" and his misuse of alcohol causing him "to participat[e] in an inappropriate relationship." The applicant alleged that the OER should be removed (a) because he did not have an inappropriate relationship, misuse alcohol, or lack courage during the reporting period, (b) because the substitute rating chain failed to include positive comments and marks based upon his OSF, and his OER Reply was rejected twice, (c) because the substitute rating chain relied on information from members of his original rating chain who were biased, (d) because the substitute rating chain was biased against the applicant's father and took revenge on him through his son's OER, (e) because the substitute rating chain relied on the IO's report, which the Area Commander had ordered removed from his record, and (f) because he did not receive due process during the investigation and so his self-incriminating statements to the IO should not have been considered. The Board will address these allegations in order:

(a) The record before the Board shows that during one port call, the applicant and a female crewmate—LTJG X—kissed after drinking one or more shots of tequila at the Xxx Bar in the presence of several other crewmembers. The applicant drank alcohol to excess that night and vomited in the bar twice. The record further shows that a day or two later the applicant was counseled by his supervisor, the Operations Officer, about the kiss and the fact that he was creating a perception of an "unacceptable relationship"⁶ with LTJG X as there was a rumor about them among the crew. Despite this counseling, during another port call about ten days later, the applicant was observed acting like a couple with LTJG X at a crew party and then slept alone in a bedroom with her the rest of the night and much of the next morning when he could have slept elsewhere in the "villa" they had rented, sought another key to his own room from a hotel employee or caretaker, or gone back to the cutter like his roommate LTJG C did. Given these facts, the Board finds that the applicant has not proved that the comments in the first disputed OER about his misuse of alcohol and participation in an "inappropriate relationship"⁷ are erroneous or unjust. In addition, whether the applicant's failure to address his conduct during the port calls in his OSF shows a lack of courage is a matter of opinion that under these circumstances cannot be considered a misstatement of hard fact. Nor has he proved that his decision not to address these matters in his OSF was made after the reporting period ended.

(b) When the applicant decided to request disqualification of his entire rating chain because he thought they would prepare a biased OER after his NJP was overturned, CGPC granted his request and disqualified the Operations Officer, the XO, and CO the of the cutter,

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ Article 8.H.2.f. of the Personnel Manual states that a "romantic relationship" between any two members assigned to the same cutter constitutes an "unacceptable romantic relationship" that violates Service policy. Article 8.H.2.d.3.b. defines a "romantic relationship" as a "cross-gender sexual or amorous relationship."

⁷ This phrase is not defined in the Personnel Manual, but Article 4.F.3.d. notes that "inappropriate relationships" that "adversely affect a unit's morale, good order and discipline, and its mission performance" may result in a CO's relief for cause.

who had observed his performance throughout the evaluation period. The applicant alleged that his substitute rating chain should have assigned him positive performance marks and comments in the OER based on his own input for the OER on an OSF. However, while an OSF should be reviewed by the rating chain, an officer's own claims about his performance should not be the sole basis for evaluation marks as an officer is not entitled to write his own OER. The substitute rating chain in this case could not seek opinions from the disqualified rating chain members, who might have confirmed the applicant's claims on his OSF. In the alternative, the applicant argued, the substitute rating chain should have marked all performance categories as "not observed" because they did not personally observe the conduct that was the basis for the negative marks and comments in the OER. However, under Article 10.A.2. of the Personnel Manual, rating chain members are allowed to rely on "reliable reports" in preparing OERs, and the substitute rating chain has stated that they relied on information in the IO's report. Therefore, the fact that no member of the substitute rating chain had personally observed his performance during the evaluation period does not render their marks and comments unjust or improper under the Personnel Manual. Moreover, the Board notes that when the Area Commander overturned the NJP, he specifically stated that the applicant's underlying conduct should be documented in his OER. Regarding the applicant's OER Reply, he has not shown that CGPC erred in requiring him to remove comments that presumably failed to meet the requirements of Article 10.A.4.g. of the Personnel Manual.

(c) In light of the declarations of the substitute rating chain affirming that they relied upon the evidence in the IO's report to prepare the first disputed OER and given the lack of any contrary evidence, the Board finds that the applicant has not proved that the substitute rating chain based their marks and comments in the OER upon the opinions of the disqualified rating chain.

(d) The allegations of the applicant and his father about bias on the part of the substitute rating chain because of their prior interactions with his father are strongly contradicted in the declarations of the substitute rating chain. The applicant has failed to overcome the presumption that they prepared the OER in good faith⁸ or to prove by a preponderance of the evidence that any of the members of the substitute rating chain were biased against him or his father.

(e) The applicant alleged that the substitute rating chain's reliance on information in the IO's report was improper because the Area Commander had ordered all references to his NJP to be removed from his record. However, in the same letter that the Area Commander ordered all "references to the nonjudicial punishment" to be removed from the applicant's record, he also stated that the applicant's misconduct, which was revealed in the IO's report, should be documented in applicant's OER. In addition, the Area Commander did not order the expungement of the investigation. Therefore, it is clear that the intention and action of the Area Commander was not to remove all evidence of the applicant's misconduct from his records, and the only documentary evidence of his misconduct other than the NJP itself was the information in the IO's report.

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

Moreover, while the Coast Guard may have responded to the Area Commander's order by removing all *references* to NJP from the applicant's record—even the IO's recommendation about NJP—rather than just the documentation of the NJP (the Court Memorandum and the letter of reprimand), the Board disagrees with the applicant's claim that the Area Commander's language required the IO's report to be thrown out in its entirety as if it were only a part of the NJP. The applicant argued that the purpose of the investigation was purely disciplinary and so the IO's report should not exist apart from the NJP and must be thrown out with the NJP. However, there is insufficient evidence in the record to show exactly what kind of investigation was ordered and what sort of report the IO submitted. Coast Guard regulations permit COs to convene informal investigations, which may ultimately result in no action at all; any number of purely administrative actions, such as transfers, bad OERs, "alcohol incident" documentation, or psychiatric screening; mast/NJP; court-martial; or various combinations thereof. The fact that one result of the investigation convened by the CO of the cutter was a mast proceeding for the applicant does not mean that the investigation ceased to exist apart from the mast, had to be thrown out in its entirety as part of the NJP, and could not be used as a basis for administrative actions. The Area Commander's letter required the Coast Guard to remove "all references to the nonjudicial punishment from your [the applicant's] record," and the applicant has not proved that the substitute rating chain relied on the NJP in preparing the OER.

Article 10.A.4.f.1. prohibits a rating chain from mentioning that an "officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings under the Uniform Code of Military Justice, ... except as provided in Article 10.A.3.c. ... These restrictions do not preclude comments on the conduct that is the subject of the proceeding. They only prohibit reference to the proceeding itself." The applicant has not proved that the comments in the first disputed OER concerning his conduct that was the subject of the IO's investigation are erroneous or unfair or contrary to any law, regulation, or order of the Area Commander. The substitute rating chain was entitled to base marks and comments in the OER on the information discovered in the investigation whether or not the NJP occurred or was overturned.⁹

(f) The applicant alleged that the substitute rating chain's reliance on information in the IO's report was improper because his self-incriminating statement to the IO was coerced through threats and illegal confinement. The applicant was very vague about the timing and duration of the confinement and the nature of the alleged threats. Was he confined from the onset of the investigation, was he confined for more than 72 hours without a review while his CO considered court-martial, or was he confined the day before the mast when the command discovered that he and LTJG Y had communicated about the case in violation of the CO's order, as indicated in his third statement to the IO? Was he threatened with ridiculous charges and punishment, or did someone simply remind him that signing a sworn, false statement for an investigation and violating an order not to communicate with LTJG Y about the case were also punishable offenses? The Area Commander wrote in his letter overturning the NJP that he was "concerned about the restrictions that were place on you [the applicant] before the mast, ... and the circumstances that led to you providing an incriminating statement to the investigating officer." On the other hand, the applicant, a well educated officer, was advised of his rights on January 3, 2003, including his right to remain silent, and indicated by his signature that he did not desire to

⁹ Coast Guard Personnel Manual (COMDTINST M1000.6A), Arts. 10.A.4.c.4.d., 10.A.4.c.7.d., 10.A.4.f.1.

consult an attorney and wanted to answer questions and make a statement. He began each of his formal statements for the IO with the following sentence: “With full understanding of my rights, I make the following statement freely, voluntarily, and without any promises or threats made to me.” Moreover, three hours after signing a summary of his answers to some of the IO’s questions, the applicant went to the IO’s stateroom and said he thought he could save LTJG X’s marriage but that, after learning what LTJG Y had related, he “needed to come clean morally and professionally.” This addendum, which the applicant also signed, shows that his confession of January 6, 2003, was motivated not by illegal threats but by his realization that LTJG Y had told the IO a much more complete story of his behavior with LTJG X than he had confessed to; by his desire to save LTJG X’s marriage; and by his desire “to come clean.” It also indicates that the applicant was not confined for much of the duration of the investigation because he was able to talk to LTJG Y about the case, contrary to orders, and to visit the IO’s room to make his third statement. In light of these facts, the Board finds that the applicant has failed to prove by a preponderance of the evidence that his confession to the IO was coerced or that it should be considered unreliable or improper as a source of information for the substitute rating chain. However, even if one assumes that his self-incriminating statements to the IO were coerced and so ignores them, the other witnesses’ statements to the IO provided a sufficient basis for the substitute rating chain to conclude that the applicant had misused alcohol and had an inappropriate relationship with LTJG X.

The Board finds that the applicant has failed to prove by a preponderance of the evidence that the first disputed OER was adversely affected by a “misstatement of significant hard fact,” a “clear and prejudicial violation of a statute or regulation,” or factors that “had no business being in the rating process.”¹⁰

6. Regarding the second disputed OER, which covers the period February 1 to July 13, 2003, the applicant argued that it should be removed because he was assigned on temporary orders to another unit throughout the evaluation period, and the command at his temporary unit provided a substantive concurrent OER for his record. The regular OER is signed by the substitute rating chain and appears much the same as a continuity OER, with all performance categories marked “not observed,” except that block 3 contains the following explanation for the substitute rating chain and the marks of “not observed”: “Not observed marks reflect Reported On Officer’s approved request to disqualify the regular shipboard rating chain. Mbr TAD to Coast Guard Xxxxxxx for duration of period.” The regular and concurrent OERs in the applicant’s record for this period conform to the applicable requirements of the Personnel Manual. Article 10.A.3.c.2. provides that a concurrent OER may be prepared by a different command when an officer is temporarily assigned away from his permanent duty station for at least sixty days, but a regular (or special) OER must still be prepared by the rating chain at the permanent duty station. Since the applicant’s rating chain at his permanent duty station (the cutter) had been disqualified, the substitute rating chain prepared the regular OER. While the applicant’s record might appear better if he had been issued permanent transfer orders upon his release from restriction at the Xxxxx so that he would have one regular substantive OER for the evaluation period instead of a non-substantive regular OER and a substantive concurrent OER, the fact is that, February being off-season for assignments, he was issued temporary rather than permanent transfer orders and so

¹⁰ *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.

the combination of regular and concurrent OERs in his record is correct under the Personnel Manual. Nor is the Board persuaded that the combination is unjust simply because it explains the signatures of the form by stating that the regular rating chain was disqualified.¹¹ Therefore, the applicant has failed to prove by a preponderance of the evidence that either disputed OER was adversely affected by a “misstatement of significant hard fact,” a “clear and prejudicial violation of a statute or regulation,” or factors that “had no business being in the rating process.”¹²

7. The applicant asked the Board to remove all documentation of his NJP from his record. The Area Commander ordered that all *references* to the NJP be removed from his record. The Coast Guard appears to have followed this instruction by removing not only the usual documentation of the NJP itself—the Court Memorandum and letter of reprimand—but also the parts of the IO’s report that mentioned NJP. Although the applicant argues that the NJP proceedings include the IO’s investigation in its entirety so that the entire investigation should be thrown away, the Board disagrees. While the IO’s report certainly resulted in the NJP and was presumably used as evidence at the mast, as stated in Finding 5(e) above, the investigation was a proceeding unto itself with due process rights and procedures very different from those at mast. As the applicant himself pointed out, investigative reports are not even filed in an officer’s PDR with the Court Memorandum of an NJP.

Although the electronic copy of the applicant’s PDR received by the Board contains no references to his mast or NJP, the paper copy contains his memorandum requesting disqualification of his rating chain as well as the Area Commander’s memorandum in response disqualifying his rating chain. Both of these documents contain references to the applicant’s mast of January 7, 2003. Since on March 24, 2003, the Area Commander ordered the removal of all references to the mast/NJP from the applicant’s records, the Board finds that these two memorandum should be removed from his record even though they post-date the Area Commander’s order.

The Board notes that the record before the Board also contains the Area Commander’s letter overturning the NJP. This letter does not appear in either the imaged electronic or hard copies of the PDR received by the Board. However, since CGPC was able to submit an unredacted version of the letter in response to the applicant’s submission of a redacted version, the Coast Guard or perhaps the Area Commander himself clearly retains a copy of the letter. The applicant has not proved that the letter is filed in any part of his own records, but CGPC did not state where the letter is now filed. The Board, therefore, will remind the Coast Guard that the Area Commander’s order requiring the removal of references to the NJP from the applicant’s records clearly pertains to his letter containing the order, which therefore may not be retained in any part of the applicant’s military records—records filed under or accessible by his name. In addition, the Board will order the Coast Guard not to enter a copy of this decision in the applicant’s military record.

¹¹ See *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), *rev’d on other grounds*, 930 F.2d 1577 (citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (finding that for purposes of the BCMRs under 10 U.S.C. § 1552, “injustice” is treatment by military authorities that “shocks the sense of justice”).

¹² *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.

8. The applicant asked the Board either to remove from his record the Page 7 dated April 11, 2003, concerning his referral to a Naval hospital for alcohol screening or to add the hospital's written response to his record because he alleged that it states that he does not have a problem and indicates that the screening was a waste of time. The applicant did not submit a copy of this letter, however, and there is none in the record so its suitability for inclusion in his record cannot be determined. He alleged that the Page 7, standing by itself, falsely indicates that he has an "alcohol problem." However, the record shows that the applicant got sufficiently intoxicated on tequila during one port call to vomit twice in a public bar and risk his career by kissing a married female LTJG in front of several other crewmembers and then ten days later, despite counseling, risked his career again after drinking alcohol by unnecessarily sharing a bedroom alone with the same married LTJG. Therefore, the Board is not persuaded that the command erred or acted out of bias when it referred him for alcohol screening on April 11, 2003. Either incident could have been documented as an "alcohol incident" by his command under Article 20.A.2.d.1. of the Personnel Manual, and any two such incidents in an officer's record result in administrative separation from the Coast Guard under Article 20.B.2.h.1. Instead, the command documented his misconduct as merely an "alcohol-related situation" under Article 20.B.2.d. of the Personnel Manual, wisely referred him for alcohol abuse screening (the Board doubts that the hospital staff knew the full story of his alcohol abuse if, as he alleged, they concluded that his screening was a waste of time), and prepared the required Page 7. The only error the Board finds with respect to the Page 7 in the applicant's record is that it incorrectly indicates that a subsequent alcohol incident might result in his separation, which would only be the case if he already had one alcohol incident in his record. Since he did not, the Board finds that the text of the Page 7 should be corrected by removing the phrase "any further alcohol incidents may result in your separation from the U.S. Coast Guard."

9. The applicant asked the Board to expunge any administrative actions taken in whole or in part because of the NJP and the disputed OERs, such as the planned Revocation Board; to rescind his resignation; and to offer him reinstatement on active duty. He alleged that he is entitled to the rescission of his resignation and reinstatement on active duty because his resignation was coerced and involuntary since CGPC illegally intended to show several enclosures to the IO's report to the Revocation Board. He argued that CGPC's intention in this regard violated the Area Commander's order to expunge the NJP from his records and Article 12.A.11.b. of the Personnel Manual, which (he alleged) limits the documents to be considered by a Revocation Board to the officer's PDR. The applicant has not proved that the Coast Guard intended to provide the Revocation Board with any documents noting that he had been taken to mast and awarded NJP by his CO. For the reasons stated in Findings 5 and 7, above, the Board finds that CGPC's stated intention to reveal to the Revocation Board the disputed OERs and parts of the IO's report that did not mention that the applicant was taken to mast or awarded NJP did not violate the Area Commander's order overturning the NJP and expunging all references to the NJP from his records.

10. In addition, the Board strongly disagrees with the applicant's argument that Article 12.A.11.b. of the Personnel Manual limits the documents that a Revocation Board may review to the officer's PDR. That Article does not specify the "PDR," as many other provisions in the Personnel Manual do. A search of the Personnel Manual reveals many specific references to an officer's PDR and many other references referring more generally to an "officer's record." In particular, the Board notes that under regulations for "show cause" proceedings for officers

more senior than the applicant, Article 12.A.15.f. states that “[a]t any time and place Commander, (CGPC) may convene a board of officers to review any Regular Coast Guard *officer’s record* to decide whether the officer should be required to show cause for retention on active duty. Article 12.A.15.f.2. states that “[a] board of officers convened to review an *officer’s records* (a “determination board”) shall consist of at least three officers” Then Article 12.A.15.f.3. more explicitly states that such a board will review “the officer’s PDR, the initiating officer’s recommendation, and all other available information relevant to the reasons for separation to determine whether it should require the officer to show cause for retention.” When the Determination Board decides that the officer must “show cause” for retention, the case is forwarded to a Board of Inquiry, which is required, under Article 12.A.15.h.6.b.(4), to “consider an *officer’s record* as a whole and make its recommendation based on a preponderance of evidence.” Therefore, the Board is not persuaded that whenever the Personnel Manual refers to an “officer’s record,” it means only the officer’s PDR, or that such a limiting interpretation of Article 12.A.11.b.3. is reasonable.

Moreover, the Board notes that Article 12.A.11.b.1. requires the authority recommending the revocation to prepare and submit to CGPC a recommendation containing a variety of information, including the reason for the recommendation and specific facts or circumstances relating to the officer’s performance. Nothing prohibits the recommending authority from including investigations or witnesses’ statements as part of his recommendation package, which is also reviewed by the Revocation Board.

Finally, the Coast Guard files a wide variety of significant documents about its members in a variety of files and databases for a variety of purposes. To suggest that Revocation Boards cannot consider evidence from reports of investigations into officers’ misconduct because the Coast Guard has decided that it is not appropriate to retain such evidence (e.g., witnesses’ statements) in officers’ PDRs and instead retains these reports in other filing systems is absurd. The Board concludes that CGPC did not err or commit injustice when it advised the applicant that the Revocation Board would be entitled to see certain enclosures to the IO’s report. He has not shown that he was subject to any illegal coercion by CGPC when he submitted his request to resign.¹³

11. Even assuming *arguendo* that CGPC’s intention to submit the applicant’s and/or other witnesses’ statements to the Revocation Board was erroneous, the applicant’s resignation would not be rendered involuntary even though he resigned to avoid the Revocation Board and its possible consequences. In *Wright v. United States*, 2008 U.S. Claims LEXIS 96 *1 (April 7, 2008), the plaintiff had appealed his NJP for sending pornography in emails from his Coast Guard computer on the basis that his punishment was too harsh. While awaiting a delayed resolution of his appeal, Wright submitted a request to retire because his enlistment was ending and if his appeal were resolved unfavorably he might not have been allowed to reenlist or extend his enlistment for the four more months of service he needed to attain a twenty-year retirement.¹⁴ The applicant’s request to retire was approved, and he was retired about one month after his NJP

¹³ See *Christie v. United States*, 207 Ct. Cl. 333, 337-8 (1975) (holding that a request to resign is not involuntary unless it is shown “(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the results of coercive acts of the opposite party”).

¹⁴ See Final Decision in BCMR Docket No. 2007-050.

was overturned. The BCMR had denied Wright's request for constructive service credit because his "choice to request retirement rather than to wait for the outcome of his NJP appeal does not render his retirement involuntary."¹⁵ In upholding the BCMR's decision, the U.S. Court of Federal Claims stated, "a decision to retire is not rendered involuntary merely because the service-member is faced with an undesirable choice."¹⁶ In *Christie v. United States*, 207 Ct. Cl. 333, 337-8 (1975), the court held the following:

This court has enunciated a principle, now firmly established, for determining whether a resignation is voluntarily tendered. The element of voluntariness is vitiated only when the resignation is submitted under duress brought on by Government action. ... The tripart test for such duress is: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the results of coercive acts of the opposite party." [Citations and indentation omitted.]

• • •

... Duress is not measured by the employee's subjective evaluation of a situation. Rather, the test is an objective one. ... While it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports CSC's finding that plaintiff chose to resign and accept discontinued service retirement rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation. [Citations omitted.]

This court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause. ... Of course, the threatened termination must be for good cause in order to precipitate a binding, voluntary resignation. ... But this "good cause" requirement is met as long as plaintiff fails to show that the agency knew or believed that the proposed termination could not be substantiated. [Citations omitted.]

The "tripart test" in *Christie* for an involuntary resignation is still used,¹⁷ and the applicant has not shown that he had no alternative but to resign or that CGPC's intention to convene a Revocation Board was a coercive act without "good cause." In *Tippett v. United States*, 185 F.3d 1250, 1255 (Fed. Cir. 1999), the court held that "[a]n otherwise voluntary resignation or request for discharge is rendered involuntary if it is submitted under duress or coercion, or results from misrepresentation or deception on the part of government officers." The Board finds that the applicant has not shown that his resignation was submitted under duress or coercion or that it resulted from misrepresentation or deception on the part of the Coast Guard. Therefore, he has not proved by a preponderance of the evidence that his resignation was involuntary and so he is not entitled to have his discharge voided or to be offered reinstatement on active duty.

12. As alternative relief, the applicant asked the Board to correct his DD 214 to show that he was separated for "Miscellaneous/General Reasons" with separation code FND rather than for "Substandard Performance" with separation code BHK. He argued that he is entitled to this relief because the Commandant overturned the recommendation of the DRB on this issue

¹⁵ *Id.*

¹⁶ *Wright v. United States*, 2008 U.S. Claims LEXIS 96 *19 (April 7, 2008), citing *Cruz v. Dep't of Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991) ("This court has repeatedly held that the imminence of a less desirable alternative does not render involuntary the choice made."). See also *Scarseth v. United States*, 52 Fed. Cl. 458, 468 (2002) (citing *Christie v. United States*, 207 Ct. Cl. 333, 338 (1975), for its determination that "the exercise of an option to retire is not rendered involuntary by the impending prospect of a less desirable alternative").

¹⁷ See *Scarseth v. United States*, 52 Fed. Cl. 458, 468 (2002).

without explanation. However, the DRB panel apparently did not see any of the evidence gathered by the IO. Moreover, the BCMR is not an appellate board above the DRB and does not overturn DRB decisions based upon whether the DRB provided or denied due process. Instead, the BCMR conducts *de novo* reviews of the record and issues its own independent decisions. The applicant argued that his narrative reason for separation is erroneous and unjust because most of the OERs in his record contain excellent performance marks and comments. The Board notes that CGPC could have chosen other notations, such as “Unacceptable Conduct” (BNC), when he resigned in lieu of further administrative separation proceedings. The BHK denotes a resignation in lieu of further proceedings “when a member’s performance is below accepted standards.” To find that the entries on the applicant’s DD 214 are erroneous or unjust, the Board would have to determine that the applicant’s performance as an officer met the Coast Guard’s accepted standards of performance for an officer. Given the applicant’s behavior as revealed by the investigation, the Board will not do so.

13. The Board has considered all of the applicant’s requests for relief and found that he is entitled only to the limited relief described in Findings 7 and 8 above. The applicant made numerous allegations with respect to the actions of various Coast Guard officers. Those allegations not specifically addressed above are considered to be not dispositive of the case. While the CO apparently conducted the mast improperly by not providing the applicant with a mast representative and by not conducting the mitigation and extenuation phase of the mast, these errors were cured when the Area Commander overturned the NJP.

14. Accordingly, most of the applicant’s requests should be denied but partial relief should be granted by removing the phrase “any further alcohol incidents may result in your separation from the U.S. Coast Guard” from the Page 7 in his record dated April 11, 2003. The Coast Guard should also remove from his record his memorandum requesting disqualification of his rating chain and the xxxxxxxxxx Commander’s memorandum dated April 29, 2003, disqualifying his rating chain because both contain references to his mast. In addition, the Board should remind the Coast Guard that the Area Commander’s letter with the order to remove all references to the NJP from the applicant’s record clearly pertains to the letter itself, which therefore may not be retained in any part of the applicant’s military records—i.e., records filed under or accessible by his name, employee identification number, or social security number.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former xxx, USCG, for correction of his military record is granted in part as follows:

The Coast Guard shall correct the Page 7 (CG-3307) dated April 11, 2003, in his record by removing the phrase “any further alcohol incidents may result in your separation from the U.S. Coast Guard.”

The Coast Guard shall remove from his record his memorandum requesting disqualification of his rating chain and the xxxxxxxx Commander’s memorandum dated April 29, 2003, disqualifying his rating chain because both contain references to his mast.

The Board also reminds the Coast Guard that the Area Commander’s letter dated March 24, 2003, overturning the applicant’s NJP also orders the removal of “all references to the NJP from [the applicant’s] record” and so clearly requires the removal of the letter itself from his military records—i.e., records filed under or accessible by his name, employee identification number, or social security number. The Board orders the Coast Guard to remove the Area Commander’s March 24, 2003, letter from the applicant’s military records if it has not already done so.

No copy of this decision shall be placed in his record.

Bruce D. Burkley

Randall J. Kaplan

James E. McLeod