DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-190

[redacted]
[redacted]LCDR

FINAL DECISION

This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on July 31, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 2, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

SUMMARY OF APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, a lieutenant commander (LCDR/O-4) on active duty, asked the Board to correct his Coast Guard record as follows:

- Void and remove a CG-3307 ("Page 7") dated August 19, 2015, which states that he had incurred an "alcohol incident" on July 7, 2015;
- Void and remove records of his removal from his primary duties as the Executive Officer (XO) of a large cutter on August 19, 2015, as a result of the alcohol incident;
- Remove from his record a Special Officer Evaluation Report (SOER) for the period May 1 to August 19, 2015, which documents his removal from his primary duties;
- Backdate the start date of his next OER, dated April 30, 2016, to cover the period currently covered by the SOER;
- Void and remove the Commandant's endorsement of a Special Board report and recommendation to discharge the applicant;
- Void and remove the applicant's removal from the promotion year (PY) 2016 Commander selection list by the Secretary of Homeland Security;
- Restore the applicant's name to that list for Senate confirmation and appointment; and
- Backdate his date of rank to what it would have been had his name not been removed from the list and award him back pay and allowances.

Allegations about the Incident

The applicant stated that at about 1500 hours on July 6, 2015, while visiting a port overseas, he and the CO took a water taxi from the cutter to town, where some of the crew and the cutter's aviation detachment were enjoying liberty. The applicant and the CO had dinner together, and both drank alcohol. Later, he exchanged some texts with a female LCDR, who was the aircraft commander of the aircrew temporarily assigned to the cutter. He repeatedly asked if she was "coming out" to a bar, and the LCDR replied that she was with her "boys" in her hotel room. When the applicant texted "We're coming over," she responded "Sounds good." Then she told him what kinds of alcohol they had in the hotel room and offered to get more. He stated that these texts show that he did not actually want to go to her hotel room that evening but was inviting her and the crew to go out, that she was not afraid of him or avoiding him, that she invited him to her hotel room to socialize, and that they had an amiable relationship.

The applicant described the LCDR's hotel room as "party central" for the aircrew, where he, the LCDR, and the other aircrew were drinking alcohol—enlisted members and officers together—and they were coming and going from the room without knocking on the door. Later, he went out on the town with others, but about a half-hour after midnight, torrential rains started. The applicant stated that he left at about 0200 and waited for a water taxi back to the cutter for about an hour, but the water taxi service had been stopped for safety. By 0345 hours, he was soaking wet and cold and went "to the only hotel room he knew was occupied by a fellow Coast Guard member, that of the LCDR."

The applicant stated that when he knocked on the hotel room door, the LCDR invited him in. He told her that the water taxi service had stopped and asked if he could share her room "since all hotels in the small town were full." She offered to let him sleep on the couch and went to get extra sheets from the front desk. When she returned, he was laying on the couch in his wet clothes, and she "voiced concern that his wet clothes may ruin the couch." She made up the couch with the sheets, and the applicant "removed his wet clothing down to his boxer shorts and got under the sheet. The two engaged in pleasant chat until approximately 0530," and the LCDR never indicated his presence was unwelcome. The applicant noted that the copilot, LT C, later claimed that the LCDR had told him that the applicant entered her hotel room intoxicated and uninvited but that is not what her texts to the lieutenant had said. The applicant stated that he

> was cold and shivering from the rain and the room temperature with no blanket. He asked [her] if they could turn off the air conditioning, but she was unable to locate the control. After declining the seemingly sarcastic offer to warm up by opening the balcony sliding door while the rain persisted, [the applicant] jokingly asked her if it "would be weird if I just got into your bed?" She responded, "yes, [it would be weird]" and [he] agreed. He slept on the couch for roughly five hours until approximately 1000, at which time he was awakened and joined two of [the LCDR's] crewmembers on the balcony, one of whom was consuming alcohol. [He] made small talk with them, and shortly thereafter with [the LCDR] in the hotel lobby. Nothing seemed unusual. [The LCDR] appeared normal and chatted with and was courteous to [him].

The applicant stated that after leaving the LCDR's hotel room, he ate lunch in town and returned to the cutter at about 1400 hours. At 0800 the next morning, the CO called him into his office, said he had been up all night communicating with HITRON (the aircrew's permanent command), and had already interviewed members of the aircrew. An AMT1 (who was the aircrew captain) had apparently complained about the applicant's conduct on liberty to HITRON.

The CO did not read him his rights but asked him to "explain in detail the events of the previous day." The applicant stated that under Article 31(b) of the UCMJ, his CO could not question him if he suspected him of having committed an offense without first informing him of his rights and securing a waiver. He argued that after the contact with HITRON and based on his interviews with others, the CO clearly suspected the applicant of having committed UCMJ violations or at least excessive alcohol consumption. However, on July 8, 2015, the CO questioned him about he the events "with an eye toward disciplinary action" and yet did not inform him of his rights. The CO told him that the female LCDR "did not want to sail with him, and that he was inclined to assign [the applicant] TDY duties until the detachment had cleared the cutter at the next port call." He alleged that the CO actually took disciplinary action against the applicant the next day by sending him away from the cutter on TDY. Therefore, the applicant left the cutter on July 8, 2015, and did not return until July 17, 2015.

The applicant stated that he resumed his duties as XO of the cutter on July 17, 2015, and on July 20, 2015, the commander selection board convened and selected him for promotion to commander. However, on August 19, 2015, based on an inadequate and deficient investigation, the CO removed him from his duties and told him that the "alcohol incident"[1] had "significantly undermined [his] ability to perform [his] leadership responsibilities as Executive Officer," which was false. The CO then gave him a Page 7 documenting the alcohol incident and an SOER documenting his removal from primary duties, both of which contains significant errors. The applicant admitted that he "erred by not returning to the cutter before the deluge, and by misjudging his familiarity with a fellow O-4, [the female LCDR], when he jokingly asked if he could share her king-size bed." He argued that the CO should have reacted simply by "clarifying the misunderstanding and fostering reconciliation between two officers of equal rank," but instead "chose the path of maximum damage."

Although the applicant had been selected for promotion before the Page 7 and SOER were entered in his record, because of those erroneous documents, he was "required to contest his promotion to Commander before a Special Board." On the recommendation of the Special Board and the Commandant, the Secretary removed his name from the promotion list that was being forwarded to the President and Senate in 2016. The applicant stated that the decisions of the Special Board, the Commandant, and the Secretary were all based on false information that the CO provided in the Page 7 documenting the alleged "alcohol incident" and the SOER documenting his removal from primary duties. He alleged that "[b]y the time the matter had made its way to the Commandant, the facts had been so grossly distorted that one could be forgiven for concluding a sexual assault by [the applicant] was narrowly averted."

Allegations about the PIO's Investigation

The applicant alleged that on or about July 12, 2015, the commanding officer (CO) appointed another officer to conduct a "standard investigation," which was "incompetent, if not

[1] Article 1.A.2.d.(1) of COMDTINST M1000.10 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. … (2) The member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident."

corrupted by improper command influence." The applicant argued that the officer should have followed the procedures for a Standard Investigation in the Administrative Investigations Manual (AIM), COMDTINST M5830.1A,[2] and issued a report in accordance with Chapter 5 of the AIM. Instead, the officer identified himself as a Preliminary Inquiry Officer (PIO) and issued a report on a "preliminary inquiry."[3]) The applicant argued that even if the investigation was done as a preliminary inquiry, the rules for Standard Investigations should apply.[4]

Lack of Cleansing Warning: Before interviewing him on July 15, 2015, the applicant alleged, the PIO read him his rights but failed to give him a "cleansing warning" regarding his earlier statements to the CO. Therefore, the PIO did not inform him that any statements he had made to the CO could not be used against him in a trial by court-martial so that he could avail himself of his right to not make a statement or incriminate himself to the PIO. In addition, the PIO himself witnessed the applicant's signature on the rights statement, contrary to regulation. The applicant argued that these failures "provide the Board more than ample legal authority to grant this application in full."

Unsworn Statements: The applicant argued that the PIO failed to meet the requirements for a Standard Investigation because he took unsworn statements from the applicant, the LCDR, and three other members of the aircrew, some of which were not signed, and did nothing to verify or have them verify the accuracy of those statements. The applicant argued that some of the claims in the interview notes were incongruous or contradicted by the evidence and so the PIO should have asked the witnesses to verify them. He stated that the PIO's report contains only an unsworn, unsigned by the LCDR and no notes of their interview or a list of the questions he asked her. He also complained that the PIO did not record his interview with the applicant or have him review and sign the PIO's note, even though the applicant's subsequent written statement contradicted the PIO's note about what was said in the interview.

Un-interviewed Witnesses: The applicant alleged that the PIO failed to interview all of the witnesses, including the CO, three lieutenants, an MKC, one or two AETs, and the Executive Officer of the HITRON, who had called the CO to complain about what AMT1 had reported. He addressed the PIO's failure to interview the CO separately (see below) but said that the MKC and the three lieutenants should have been interviewed because they had worked with the applicant "for some time and therefore had knowledge of his character and leadership style and abilities" and each was with the applicant at some point on July 6, 2015, when alcohol was consumed. Because these witnesses saw him drink alcohol at some point in the evening, their testimony was

---

[2] The AIM provides procedures for Standard Investigations, Formal Investigations, and Courts of Inquiry.

[3] Chapter 1.F.4. of the AIM states that if a command does not initially have sufficient information "to make informed decisions about whether to investigate an incident, what type of investigation is necessary for a particular incident, or the specific matters that need to be investigated," the CO "may direct a preliminary inquiry to answer these initial matters. However, the initiation or conduct of a preliminary inquiry is prohibited in matters related to actual, suspected, or alleged incidents of rape or sexual assault in accordance with Mandatory Reporting Incidents to Coast Guard Investigative Service and Requesting Investigative Assistance, COMDTINST 5520.5 (series) and Reporting and Responding to Rape and Sexual Assault Allegation, COMDTINST 1754.10 (series). There is no mandatory procedure, or form of report required to initiate or report the results of this inquiry."

[4] Chapter 2.B. of the AIM states that incidents requiring investigation conducted pursuant to the manual are (1) fires, explosions, material deficiencies, ship collisions, and groundings; (2) Class A and B mishaps; (3) Environmental violations; (4) death or injury of a member or employee; or (5) when significant damage or loss occurs to government housing; when someone complains that members have willfully damaged or wrongfully taken personal property; or when there is a credible report of a violation of the Anti-Deficiency Act.

highly material and could have affected the outcome of the investigation. The applicant stated that the testimony of the Executive Officer of the HITRON was also highly relevant, and the PIO's failure to interview him inexcusable, because that officer had received AMT1's initial report and contacted the CO. The applicant complained that he was therefore never informed of what HITRON told the CO—except that the CO described it as "unbefitting" behavior by the applicant—and "[s]uch obfuscation is unacceptable even in an informal investigation."

Deficient Interviews: The applicant stated that the PIO's interviews were deficient in many ways because the PIO failed to ask follow-up questions that could have provided exonerating information. The PIO never determined exactly how much alcohol the applicant had consumed and failed to address contradictory evidence about how much he had drunk. The PIO asked him how much he weighed but never determined what his blood alcohol content would have been. The PIO also failed to try to get witnesses to corroborate the applicant's claim that after going to a bar at about 2330 hours, he "was mostly drinking ice waters and cokes because [he] was starting to get tired." The PIO also failed to ask the applicant whether he had a romantic interest in the LCDR and to ask the LCDR whether the applicant had ever indicated that he had a romantic or physical interest in her or whether she perceived the applicant's behavior that evening "as constituting sexual interest, overture, or harassment."

Deficient Evidence: The applicant stated that the PIO performed a deficient investigation because he failed to investigate numerous factual matters, such as how much rain fell; whether water taxis continued to run; whether it would have been safe to take a water taxi; what his blood alcohol content (BAC) was; whether the hotel room was as cold as he had described; whether the LCDR verbalized her discomfort to him at the time; whether she interpreted his comment "as a romantic advance" and, if so, why; why she interpreted his comment as being sexually charged; and whether she said that his presence on the cutter would make it difficult to perform her duties —as stated in the SOER.

No Legal Review: The applicant noted that pursuant to Chapter 4 of the AIM, a report of a Standard Investigation must undergo legal review, and the "there is no evidence that the required legal review was obtained" by the CO in this case.

The applicant stated that the PIO wrote a report that supported the CO's predetermined narrative about what he had done and then recommended that he be charged with violating Article 92 of the Uniform Code of Military Justice (UCMJ), for violating an order or regulation, and Article 133 of the UCMJ, for conduct unbecoming an officer and gentleman and that the charges be disposed of at mast with non-judicial punishment (NJP). He also recommended that the applicant receive an "alcohol incident" and be removed as XO of the cutter. However, the applicant stated, neither the CO nor the PIO ever identified "any cutter liberty policy [he] had violated" and did not give him a chance to rebut the PIO's report. He stated that they "removed opportunities for [his] voice to be heard" by, for example, not taking him to mast, where he "could have sought legal advice, questioned witnesses, had a mast representative, and had an option to appeal." Instead, the CO gave him an "alcohol incident" and removed him from his primary duties, which do not have specified appeal procedures.

Arguments about the CO as a Material Witness

The applicant argued that the inquiry was flawed because the CO was "a material witness" and "profoundly conflicted," so the CO should have recused himself and should not have directed, approved, or acted on the PIO's report. By doing so, the applicant argued, the CO "served as investigator, witness, judge, and jury" and the applicant "never had a chance" since the investigation "was not more than a *pro forma* exercise designed to lay the foundation for adverse actions [the CO] already had decided on." He stated that the CO was a witness not only because they had dinner together on July 6, 2015, and drank alcohol but because the CO was then contacted by the LCDR's permanent command, HITRON, to address the complaint and spoke to the LCDR and other members of the aircrew before deciding to send the applicant away on temporary duty. The applicant stated that the fact that the CO temporarily removed the applicant from the cutter even before the PIO completed his inquiry shows that the CO had already made up his mind. The CO also interviewed the applicant and so "investigated, developed, and possessed information highly relevant to the investigation he subsequently ordered."

The applicant stated that if the CO had been interviewed as a witness, the PIO could have asked the CO about when and what HITRON told him; did he interview the LCDR alone and did he take notes; did he interview the members of the aircrew together or separately; what explanation did the LCDR give for being unwilling to continue the deployment with the applicant aboard; when she felt the applicant had a romantic interest in her; whether and how much she and the others had been drinking; whether she had been drinking with subordinate enlisted members; whether they thought the applicant was intoxicated; whether the CO told the LCDR that he would address the matter with the applicant; whether the CO told the crew he would take action; whether the CO apologized to the LCDR for the applicant's behavior and tell the LCDR that the applicant would be removed; whether the CO had questioned the applicant without reading him his rights; and whether the CO suspected that the applicant had violated the UCMJ when he interviewed him. The applicant stated that if the PIO had asked the CO these questions the PIO would have had a better understanding of what HITRON and the CO discussed and he would have been better able "to assess the credibility of his witnesses by carefully evaluating the record for inconsistent statements," to formulate questions for the witnesses better, and to determine whether the CO had made "legal violations" that should be referred for investigation. He stated that the PIO likely knew about the CO's contacts with HITRON, the LCDR, and other witnesses and yet failed to mention them in his report. He stated that the PIO's failure to interview the CO constituted "a serious breach of his duties." And the argued that these failures by the CO and PIO meant that the CO "was not an impartial adjudicator"; "based his decisions, at least in part, on information he obtained as a witness, and to which [the applicant] was not privy"; and resulted in adverse actions against the applicant "based on evidence that was not made part of the record, and to which [he] has had no opportunity to respond."

Allegations about Intoxication and "Alcohol Incident" Determination

The applicant alleged that the statements in the PIO's report, the Page 7 documenting the alcohol incident, and the SOER claiming that he was inebriated "are incorrect as matters of fact and law: the record evidence simply does not support the claim that [the applicant] was intoxicated." The applicant stated that by the time he reentered the LCDR's hotel room, he "would have been perfectly safe driving an automobile." The applicant pointed out that the PIO stated, "None of the witnesses who responded to my inquiries can confirm how much alcohol [the appli-

cant] consumed with the exception of [the LCDR] who stated he drank one-third to one-half of her bottle of rum, of which she is unsure of the size, "maybe standard size." The applicant stated that a standard bottle of rum is 750 milliliters, but because the PIO failed to find out exactly how much rum the applicant drank, even the LCDR could not say how much alcohol the applicant drank and the applicant claimed that he had "a single rum and coke" in her hotel room the first time he was there. He pointed out that the LCDR never said that the applicant was intoxicated, and the PIO never asked her how much alcohol she herself had consumed.

According to the evidence, the applicant claimed, he was in the LCDR's hotel room the first time for 30 to 90 minutes before leaving to go to a bar, and if he had actually consumed one-third to one-half a bottle of rum "in no more than 90 minutes, the witnesses unquestionably would have noted it. It also would have been perfectly evident to everyone present because he would have been staggering drunk," especially since he had drunk approximately six drinks before he entered the LCDR's hotel room. However, only LT C, the copilot, described the applicant as being intoxicated at that time, "and he did so erroneously." The applicant noted that the lieutenant had erroneously reported the content of the LCDR's texts as having reported the applicant being intoxicated, even though the LCDR did not say that in her texts.

The applicant also made numerous observations of what his blood alcohol content might have been depending on how much he drank over how much time, pointed out that the LCDR did not say the applicant was intoxicated, and so argued that the PIO's conclusion that the applicant was inebriated is "factually indefensible." The applicant argued that the record shows that he consumed "around 9 – 10 alcoholic drinks … over a 12-hour period or more" from the time he had dinner with the CO until he returned to the LCDR's room at about 0345 hours. Therefore, the applicant argued, according to the Cleveland Clinic BAC calculator, his BAC would have been 0.02 or lower, and the "[t]ypical effects at this BAC level [0.02] might include some loss of judgment, relaxation, slight body warmth, or altered mood." This level is "far below the 0.08 legal limit," and the applicant vehemently denied having told the PIO that he was over the legal limit to drive that night. Instead, he alleged, he told the PIO that he "would not have driven" out of an abundance of caution because he "would not have risked driving since he had consumed alcohol over several hours."

The applicant argued that "the evidence does not permit the conclusion that he was under the influence of alcohol when he visited [the LCDR's] room the second time. Nor does the record evidence permit the conclusion that alcohol was a significant or causative factor in the visit." Therefore, he alleged, the criteria for an alcohol incident were not met. He argued that the evidence of record precludes a finding that the applicant was intoxicated and behaved as he did due to alcohol consumption. He argued that the criteria for an alcohol incident were also not met because his conduct did not result in his loss of ability to perform his assigned duties, bring discredit upon the Service, or violate a law.

Allegations about Removal from Primary Duties and SOER

The applicant stated that the CO erred in removing him from his primary duties on August 19, 2015. First, he noted that the CO used the word "relief" in his memorandum as if the applicant were being "relieved for cause," like a CO, under Article 1.F.1. of COMDTINST M1000.8A, "Relief for Cause," whereas other members, including XOs, are "removed" from their primary duties pursuant to Article 1.F.2. More importantly, the applicant alleged that the

CO failed to submit the action to the Personnel Service Center (PSC) "for review and final decision." He noted that the CO did not use the word "temporary" in his memorandum, and that the CO's authority is limited to temporarily removing the applicant, not permanently removing him. He complained that the CO's memorandum also did not inform the applicant about the removal procedure, the "way forward," or who would make the final decision on the applicant's removal. Nor was the applicant officially transferred by PSC to another permanent duty station until July 2016. Therefore, the applicant argued, his removal from his position as the XO was contrary to regulation and must be voided, and the resulting SOER must be removed from his record.

The applicant argued that the SOER was also prepared incorrectly because the CO failed to assign the applicant substantive marks in all of the performance categories and instead marked only those categories of performance that the CO decided had been affected by the applicant's performance on July 6 and 7, 2015. All other performance categories were marks "not observed" even though the reporting period for the SOER is 111 days, during almost 60 of which the CO observed the applicant's performance daily, and it "counts for continuity." He stated that the CO erroneously prepared the SOER as if it were a disciplinary report, instead of one documenting his removal from primary duties, because the instructions for disciplinary reports require the evaluation to be "limited to those areas affected by such conduct." The applicant stated that because the disputed SOER counts for continuity, he was left without an OER evaluating his performance in all of the categories that the CO erroneously marked "not observed." The applicant admitted that he did not provide any input for the SOER, as it states, but noted that input from a reported-on officer is not a prerequisite to assigning marks in the performance categories on an SOER.

The applicant stated that the CO did not contact the applicant's prior supervisor for input and did not "follow up" with the applicant to request input for the SOER after he first solicited it and so signed the SOER on September 4, 2015, without re-requesting the input. He also complained that the comment in the SOER about him not providing input for it is prohibited by the OER Manual because it is conduct that occurred after the end of the reporting period. The applicant noted that there was no time within the reporting period for him to provide input for the SOER because he learned that he was going to be removed from the cutter on the last day of the reporting period.

The applicant alleged that the SOER is factually inaccurate and unjust—"largely a work of fiction, one premised on a grossly deficient and misleading investigation." He argued that the LCDR's statement to the PIO shows that she

> was embarrassed and frightened about personal repercussions of having [the applicant] being seen in her room. And that, the evidence shows, is what led to [the applicant's] relief, his special OER, and the loss of his promotion. This case simply is not about [the applicant] getting drunk, barging uninvited into [her] room, stripping down to his boxer shorts, and asking if he could sleep with her. Yet that is the way it was constructed and later presented to the Commandant and subsequently to the Secretary, DHS.

The applicant pointed out that the LCDR stated that the applicant came to her hotel room at about 0345 and that, except for the time she spent getting sheets for him from the front desk and making up the couch for him, they engaged in "chit chat" until 0530, an hour and forty-five minutes later. He stated that at no point during that period did she appear uncomfortable with him and she "laughed at various points and fully engaged in the conversation. [He] did not sense

that she was bothered by his presence in any manner. She did not exhibit any discomfort with his presence and she expressed no concern to him about his presence." If she had not wanted him to stay in her room, she only had to tell him so, but she did not. Their prior texts showed that they had an amiable relationship and she was not afraid of him. The applicant also claimed that the LCDR knew where the other members were staying, while he did not, and she could have contacted a male lieutenant to ask if he could sleep on the couch in their room, but she did not.

The applicant stated that the LCDR's statement to the PIO provided "enough innuendo … to permit the inference that [he] desired a physical encounter," but she did not actually say that she feared him or that she thought he was sexually interested in her. The applicant claimed that his statement about joining her in the bed was clearly a joke, especially because he made it after more than an hour of "chit chat." The applicant argued that if the LCDR had actually feared the applicant or interpreted his statement as a request for a sexual encounter, she would have said so in her statement to the PIO, but she did not, and the PIO did not ask her. Moreover, he noted, in her statement to the PIO, the LCDR did not say that she could not concentrate with him aboard, and he believed that being sent home for a week until the aircrew left was just "a precautionary measure until the whole event could be investigated."

The applicant pointed out that it was AMT1 who reported the incident to HITRON, and the LCDR had even asked a lieutenant in a text not to report the incident as she had already told the applicant that she would not tell anyone. The applicant alleged that her desire for no one to report the incident shows that she was acting out of concern for her own career and not because the applicant had traumatized her. The applicant stated that while he had erred by not returning to the cutter before the heavy rain started and erred by putting the LCDR "in a potentially compromising position," those errors were not due to alcohol. Moreover, the LCDR

> erred by not turning him away, or by not arranging for him to stay with [a lieutenant] or one of the other male crewmembers. She realized her error in the morning, and feared being perceived as having engaged in a physical relationship with [the applicant]. She also may have feared being investigated for consuming alcohol with her enlisted crewmembers, a potential violation of the UCMJ and standing HITRON orders for deployed pilots. She certain feared for her own career and panicked. At that point, to cover herself, she had to appear the victim, and one who was guided by the best of intentions.

The applicant stated that the SOER is also erroneous because it states that he was intoxicated, when he was not. He alleged that no witness accused him of being intoxicated and that only a lieutenant who was not present when the applicant returned to the hotel room accused him of being intoxicated. The applicant noted that he weighs 225 pounds and so if he had consumed one alcoholic beverage per hour for the twelve hours he was ashore before returning to the LCDR's hotel room, his BAC would have been just 0.06.

The applicant stated that the SOER erroneously accuses him of having violated the cutter's liberty policies, but no one identified which policy he is supposed to have violated. The applicant stated that there is "no liberty policy against entering another crewmember's hotel room at 0345, especially after knocking, an introduction, and an invitation to enter." Likewise, he stated, there is no cutter liberty policy against removing one's wet clothing down to boxer shorts to avoid damaging a hotel sofa, and no cutter policy against consuming alcohol without getting intoxicated. He stated that there is also no policy about making a joke about sharing a bed, and they could have shared a bed without being subject to disciplinary action as long as no sexual

activity had occurred. He stated that "cutter policy did not prohibit consuming alcohol over a 12-hour period, where such consumption did not result in inebriation."

The applicant contested the SOER comment that he had breached core values[5] by failing to report his own unsuitable action since, he argued, his actions had not been unsuitable because he was not intoxicated. He argued that his not reporting anything to the CO should not have been held against him because "[i]t defies logic that [he] would have intentionally ignored this whole situation without talking to the member or any of the aircrew and then knowingly allow[ed] for my CO to first hear the report from the HITRON XO." He also argued that this comment about him neglecting to tell the CO what had happened shows that the CO penalized him for exercising his right not to self-incriminate and that such an exercise of constitutional rights cannot be considered a breach of core values.

The applicant stated that the SOER comment that he had asked to share the bed and then approached the bed after the LCDR refused to engage in small talk is also false because the LCDR admitted that she had engaged in "chit chat" for one hour and forty-five minutes and continued to do so until 0530. Nor did the LCDR claim that she had not participated in the chit chat or that the applicant had approached her bed after sarcastically asking if he could share it. He also claimed that he stood up to look for the thermostat and for blankets in the closet and "never directly approached [the LCDR] while she was in bed."

The applicant also challenged the SOER comment that his behavior had "irreparably damaged the … crew's respect for [his] authority." He noted that the officer who served as Acting XO while he was on TDY reported that the CO told the crew only that the applicant had left for "personal reasons" and that none of the crew had approached him about a rumor or speculation about why the applicant had left the cutter. The officer stated that the crew's respect for the applicant had not diminished in any way. And the Acting XO noticed no degradation in the performance of the aircrew or in the working relationship between the aircrew and the cutter crew. The applicant noted that after returning to the cutter on July 17, 2015, he continued to perform his duties as the XO "with no evidence of lack of respect from the cutter crew or any adverse effect on operations," and if there had been, the CO would not have allowed him to return or resume his duties.

The applicant alleged that the comment stating that his actions had required "challenging and immediate personnel planning between to major operation commands and [the Area Command]" is exaggerated because the outgoing Operations Officer was still on board the cutter and the incoming Operations Officer had already reported aboard, so the outgoing Operations Officer served as the Acting XO while the applicant was off the cutter. Therefore, the "challenging and immediate personnel planning involved only flying [the applicant] home for a week until the aircrew departed."

Arguments about the Special Board and Denial of Promotion

The applicant stated the disputed Page 7 documenting the alleged "alcohol incident" and the SOER were in his record when it was reviewed by the Special Board that the Coast Guard convened to decide whether his name should be removed from a promotion list. He argued that

[5] The Coast Guard's Core Values are honor, respect, and devotion to duty.

but for the erroneous information in the Page 7 and the SOER, the Special Board would not have recommended that his name be removed from that list. He noted that he had submitted extensive information to the Special Board, but that board apparently assumed that the CO had given proper and thorough consideration to the evidence gathered by the PIO, which was not in the record before the Special Board. The CO, however, was a witness and "highly conflicted" and he had relied on the inadequate and deficient report of the PIO and on statements made by HITRON, which were never entered in the record, in writing the Page 7 and SOER. Therefore, the applicant argued, the decision of the Special Board "cannot stand." The applicant also noted that in its decision, the Special Board did not state that the applicant was intoxicated, and so argued that the board must have accepted his claims about that issue.

Furthermore, the applicant stated, when the Commandant forwarded the matter to the Secretary on April 15, 2016, and recommended that the Secretary remove his name from the promotion list, the Commandant advised the Secretary that, "[w]hile on liberty during a port call, the officer became inebriated and entered the hotel room of a female crewmember, disrobed down to his boxer shorts, and remained overnight." The applicant stated that this sentence is unfair and slanderous because he did not become inebriated or walk into the hotel room, disrobe, and remain overnight uninvited. Instead, she opened the door, invited him in, and never asked him to leave, and no witness claimed that he was inebriated.

The applicant also argued that the Commandant's summary of the incident has a "clear sexual overtone" and portrays him "in a rather predatory light," even though "the record contains no evidence of sexual intent or interest." He claimed that "[n]o reasonable construction of the evidence of record can support the Commandant's summarization."

The applicant alleged that the Commandant's summary erroneously states that the applicant's "misconduct" was "discovered" after he was selected for promotion to commander even though the incident was reported to HITRON and his CO on July 7, 2015, and the commander selection board convened on July 20, 2015. He also argued that because the selection board's promotion list was issued on September 22, 2015; received by the Senate on November 19, 2015; and confirmed by the Senate on December 10, 2015, his alleged misconduct was clearly discovered well before he was selected to promote to commander.

Therefore, the applicant argued, the decision of the Secretary to remove his name from the promotion list "was premised on a foundation of false and inaccurate statements, starting with the [PIO's] report, and then the Page 7 and [S]OER prepared by [the CO], who should have had no involvement in the matter because he was a material witness." He argued that it was obviously unjust "to premise such a consequential personnel decision on patently false and inaccurate information," especially because he was deprived of the right to address hearsay statements made by AMT1 to the Executive Officer of HITRON, by the Executive Officer of HITRON to the CO, by the CO to HITRON, and by the LCDR and the aircrew to the CO when he asked them about the incident.

Unjustifiable Windfall

The applicant stated that on January 19, 2016, he was selected to service in an O-5 billet, and this selection was repeated on January 19, 2018. Therefore, he has been performing the duties of an O-5 with great success, as shown by his OERs, without the commensurate rank and

pay. Therefore, the Coast Guard has received an unjust windfall by depriving him of a commander's ranks and pay while having him serve in an O-5 billet. He argued that it is "fundamentally unfair for the Coast Guard to enjoy the services of an O-5 for multiple years at the pay grade of an O-4" when he was fully qualified to advance to commander.

The applicant asked the Board to consider both the evidence he has submitted and his past and current performance. He stated that he has embodied the Coast Guard's core values for sixteen years, including throughout July and August 2015, and although he "displayed an uncharacteristic lapse in judgment that was exacerbated by circumstances outside of [his] control, [he held himself] accountable for [his] decisions from that night and harbored no ill-will towards anyone else involved." He concluded that the "punishment did not fit the crime" in his case and that the actions taken against him "were excessive and unjust."

Applicant's Evidence

To support his allegations, the applicant submitted many Coast Guard records and emails, which are included in the summary below, and the following documents:

- The applicant submitted several calculations of what his BAC might have been at relevant times based on the statements in the PIO's report about how many alcoholic drinks he had imbibed.
- He submitted a print-out listing the "typical effects" of various BAC levels as follows:

0.02%	Some loss of judgment; relaxation; slight body warmth; altered mood
0.05%	Exaggerated behavior; may have loss of small-muscle control; impaired judgment; usually good feeling; lowered alertness; release of inhibition
0.08%	Muscle coordination becomes poor; harder to detect danger; judgment, self-control, reasoning, and memory are impaired
0.10%	Clear deterioration of reaction time and control; slurred speech, poor coordination, and slowed thinking
0.15%	Far less muscle control than normal; vomiting may occur; major loss of balance

- Internet print-outs show photographs of the water taxis and the covered narrow entrance to the water taxi station with two tourists' comments stating that water taxis are normally available "24/7."
- Two photographs of the hotel room show a bed with a bed scarf and comforter in the foreground, a kitchenette behind the bed, part of a couch on the opposite wall of the room, and a balcony with chairs overlooking the sea in the background.
- Information about flooding risks in New York City from the National Weather Service.
- A print-out from the Smithsonian Institution's website of the rainfall where the ship was anchored from 0115 to 0345 hours on the morning of July 7, 2015, shows that during that period, the rain totaled 4.74 inches in 2.5 hours, which averages to 1.9 inches of rain per hour. This website's spreadsheet also shows that it had rained very hard the night before (over an inch per hour from 0200 to 0400 on July 6, 2015) while the cutter was in port and that the hardest rate of rain on the morning of July 7, 2015—17.53 millimeters in 15

minutes—is the 187th highest rainfall per 15-minute period that the location received between June 2002 and April 2019.[6] The spreadsheet shows that the rain began at about 2030 on July 6, 2015, and, except for three periods of at least 15 minutes each, did not end until 0900 on July 7, 2015:

Rainfall July 6, 2015		
Time	Rain in mm	Rain in inches
2030	0	0
2045	0.25	0.01
2100	0.25	0.01
2115	0.51	0.02
2130	0.25	0.01
2145	1.78	0.07
2200	5.84	0.23
2215	9.65	0.38
2230	1.78	0.07
2245	1.78	0.07
2300	1.78	0.07
2315	0.51	0.02
2330	0	0
2345	0.25	0.01
2400/0000	0	0

Rainfall on July 7, 2015		
Time	Rain in mm	Rain in inches
0015	1.52	0.06
0030	0	0
0045	1.52	0.06
0100	2.29	0.09
0115	4.83	0.19
0130	15.49	0.61
0145	14.48	0.57
0200	17.53	0.69
0215	8.89	0.35
0230	14.48	0.57
0245	16.76	0.66
0300	9.91	0.39
0315	8.89	0.35
0330	6.86	0.27
0345	7.11	0.28

- A lieutenant who had been the Operations Officer of the cutter and who served as the Acting XO during the applicant's one-week absence wrote that he never observed any behavior by the applicant that was inconsistent with the Coast Guard's core values either on or off duty; that he had had "extensive conversations" with both pilots on the aircrew and did not observe any strain in working relationships or any degradation in their performance; that the CO told the crew that the XO's short departure was for "personal reasons"; that as Acting XO, he had meetings with the command chief and no one told him of any rumors or speculation about why the applicant had left the cutter; that he heard only "concern for [the applicant] that everything was ok personally"; and that he detected no diminishment in the crew's respect for the applicant or his authority during that time.
- In a memorandum dated March 9, 2016, a captain wrote that since reporting for duty at his division in August 2015, the applicant had "demonstrated the judgment, initiative, responsibility, and understanding of the strategic environment [the captain] normally observe[s] in the most high-performing and seasoned Commanders." The captain highly praised the applicant's performance, including his "diligent research and insightful analy-

[6] The highest amount per 15 minutes shown on the spreadsheet is 81.28 millimeters, which is 3.2 inches.

sis," resourcefulness, "proactive approach," "understanding of the big picture, the ability to grasp the nuances of difficult operational decisions …, and initiative and ingenuity when examining and resolving complex issues."

- In a memorandum dated March 11, 2016, the Deputy Chief of the applicant's unit highly recommended to the Special Board that the applicant be retained on the commander promotion list based on his unique skills and expertise. He stated that the Coast Guard had been having trouble retaining members with those skills because of their value in the civilian sector. He stated that the applicant was "an officer of high integrity and a team player with outstanding interpersonal skills" who had been designated the chief of a division in their unit at a time when the division would be experiencing "noteworthy policy changes," a new structure, and a new system, requiring significant coordination, credibility, and leadership.

- A female lieutenant who served aboard a cutter when the applicant was the XO from 2007 to 2008 stated that he was a "great mentor" with whom she had had "an excellent professional relationship." She stated that the applicant had "always acted respectfully toward [her] and the other females aboard the ship or during liberty, and we always felt comfortable around him. That is just who he is. He is a fun-loving and caring person. ... He is the consummate people-person. He goes out of his way to be inclusive and to form relationships that undoubtedly benefit those around him. He is also of high emotional intelligence and very good at sensing how a person is feeling. He treats women with respect and care, and I can best describe his demeanor with his female peers as that of a brother. He will joke with you, spend time with you, stand up for you and watch out for you."

- In a statement dated March 16, 2016, a female chief warrant officer (CWO3) who was "the only female member of the cutter's wardroom until [her] departure in June 2015" stated that as the XO, the applicant "always made the wardroom an inclusive environment and treated [her] with the utmost respect." As the most senior female aboard, she "often fielded concerns or issues from more junior female crew members and brought them to the XO's attention as necessary," including an allegation of sexual assault. The CWO3 stated that the applicant "was sensitive to every personnel issue [she] ever discussed with him and he always handled them fairly and with care. The crew of the [cutter] had the highest level of respect for [him], and he was just a very likeable XO and boss." She stated that she never saw the applicant abuse alcohol or consume it excessively and "he always treated both men and women respectfully. [She] never once felt uncomfortable in his presence." She stated that she is "confident that whatever has been alleged has been a result of a misunderstanding" and recommended that he be retained on the promotion list.

- In a statement dated March 15, 2016, a commander, CDR K, who worked with and supervised the applicant on a daily basis from 2010 to 2013, wrote that he had "never encountered an officer more willing to work tirelessly to execute" his duties or "to get to the truth … based on principle." CDR K stated that the applicant was also "exceptionally and genuinely concerned with the well-being of all the people around him, and equally as dedicated to the Coast Guard's Core Values." He stated that the applicant showed "unimpeachable integrity" and "without fail, he pursued the 'hard right' over the 'easy wrong'." CDR K stated that he does not believe that the applicant's actions on July 7, 2015, "had to be characterized as an alcohol incident." He stated that the applicant "is in

this position not for trying to sleep on the hotel couch of a fellow LCDR, but for asking to sleep in the bed of a female officer." CDR K stated that for the applicant, having an inappropriate relationship "would have been out of the question, ridiculous even. When it comes to intent, I believe in the innocence of his words and actions combined, and believe that the rest of his conduct demonstrates that he was not attempting to take advantage of a LCDR female who, as a concerned colleague and shipmate, had allowed him to sleep in her hotel room." CDR K stated that he is convinced that the applicant's comment to the LCDR was either a joke or "possibly, [he] may have thought that she might actually let him sleep on the same bed," but "he did not mean to suggest to her anything more than that."

- In an email dated January 25, 2018, the applicant's attorney asked the LCDR to speak with him. He stated that he was concerned that "as the matter moved up the chain, inferences and conclusions were drawn that are not supported by your statement or the other statements given to the preliminary inquiry officer." The LCDR replied on February 15, 2018, that she did "not wish to provide anything further."
- In an email dated May 10, 2018, the applicant's attorney asked the PIO whether he was aware that the CO had spoken to the LCDR and other members of the crew before the PIO began his investigation; whether he had received a copy of the cutter's liberty policies and, if so, which policy the applicant had violated; whether he had used an online tool to estimate the applicant's BAC; and whether the LCDR had indicated that she thought the applicant had a sexual interest in her. The PIO apparently forwarded this inquiry to the legal office, and on May 11, 2018, the Staff Judge Advocate replied, "on behalf of [the PIO]. At this point, he respectfully declines to provide any answers to your questions."
- The 2013 edition of the JAG's "Commander's Quick Legal Reference Guide" states that members suspected of an offense under the UCMJ or state law may not be questioned unless they are informed of the nature of the offense, of the fact that any statement they make could be used as evidence, and of their right to counsel and to not make any statement. It states that commands and supervisors are presumed to be acting in a disciplinary capacity when questioning subordinates. It also states that if members have been previously questioned without being advised of their rights, they should be advised of their rights and also receive a "cleansing warning" to notify them that their prior statements cannot be used against them and that they can still choose to remain silent. It states that members of a command cadre should not question members about a potential offense or harassment and should assign an investigating officer to do so. In addition, a command may not question a member accused of rape but must contact CGIS immediately.

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned an ensign in May 2000. He received good OER marks and his first Achievement Medal for his first tour of duty as a deck watch officer from May 2000 to June 2002 and was promoted to lieutenant junior grade in November 2001. He also received good OER marks and an Achievement Medal for his next tour of duty as the Operations Officer of a buoy tender from June 2002 to July 2004 and was promoted to lieutenant in May 2004.

As a lieutenant, the applicant served as a training liaison officer from July 2004 to May 2006, and he received strong OERs and a Navy and Marine Corps Commendation Medal for this work.

From May 2006 to August 2008, the applicant served as the XO of a buoy tender and received increasingly fine OERs and his third Achievement Medal for this tour of duty.

From August 2008 to May 2010 the applicant performed duty under instruction and finished with a Master's Degree and a 3.47 final grade point average. He was also promoted to lieutenant commander in 2010.

Following graduation, the applicant worked for four years in billets in the same field in which he had received his Master's Degree. He received excellent annual OERs in 2011, 2012, 2013, and 2014 with increasingly high numerical marks in the performance categories and marks in the sixth of seven spots on the comparison scale, indicating that he was "strongly recommended for accelerated promotion" to commander. The applicant was awarded a Meritorious Service Medal for this tour of duty from June 2010 to June 2014.

On June 24, 2014, the applicant reported for duty aboard a large cutter as the XO. His duties included being the CO's representative, organizing the crew, coordinating the crew's efforts, and overseeing good order and discipline and the performance of the crew. On his first OER as the XO, dated April 30, 2015, the applicant received primarily high marks of 6 and 7 (out of 7) in the performance categories and a mark in the sixth spot on the officer comparison scale, indicating that he was "[s]trongly recommended for accelerated promotion."

From July 5 to 8, 2015, the applicant's cutter was at anchor in a foreign port. Liberty was to expire at noon on July 8. According to the "Executive Officer's Morning Orders," which the applicant submitted, a "2-person buddy system" remained in effect at all times while on liberty. The cutter contracted with a service with two water taxis to run between the cutter and shore from 0700 to 0200 each day. The Officer of the Deck would "be up until the last water taxi of the night delivers shipmates to the cutter" and "[a]t all times (even after the last water taxi), there will be a shipmate on the fantail with a radio and life jacket. When they see a water taxi approaching, they should call another watchstander … to the fantail to help shipmates embark or disembark the cutter."

CO Initiates Investigation

On June 11, 2015, a new CO took command of the cutter. On July 12, 2015, the CO appointed an officer to investigate "the circumstances surrounding [the applicant] on the evening and early morning of 6 – 7 July 2015. Specifically, you should investigate how much alcohol [he] consumed that evening/early morning while on liberty in …, and the circumstances surrounding knocking on the hotel room of [the LCDR], and the actions that transpired after their interaction." The CO told him to conduct a "single-officer standard investigation" in accordance with the AIM and designated legal counsel for the officer to consult. The CO told him that he was not authorized to conduct a hearing and was not required to take testimony under oath, unless his legal counsel told him to obtain sworn statements. The CO asked him to submit a report by August 1, 2015, and told him he could "recommend appropriate administrative or disciplinary action." The CO also told him to comply with Article 31(b) of the UCMJ—regarding

the reading of rights—if he suspected anyone of violating the UCMJ. The CO asked the officer to contact him if the legal counsel raised any issues.

Applicant Selected for Promotion

On July 20, 2015, the promotion year (PY) 2016 commander selection board convened at Coast Guard Headquarters, and the applicant was one of those selected for promotion. The selection board results—the PY 2016 commander selection list—which included the applicant, was later published on September 22, 2015.

Investigative Report

On July 31, 2015, the officer submitted his report to the CO and identified himself as a "Preliminary Inquiry Officer" (PIO), instead of an Investigating Officer (IO). The subject line of the PIO's report is, "Preliminary Inquiry into Circumstances Surrounding the Actions of [the applicant] on the Evening and Early Morning of 6-7 July 2015 [capitalization altered]." The PIO's report lists the following attachments:

- **Text Messages between Applicant and the LCDR on July 6, 2015** (According to the PIO, these texts are timed one hour later than they were actually sent because the members' phones did not update to local time. The times below have been corrected.):

1929	Applicant: Where you guys at?
	LCDR: Eating dinner. Will be back in 30. Where are you?
1933	Applicant: [names bar]
1940	LCDR: Do you want me to text you when we're back?
1942	Applicant: Sure … where you having dinner?
1944	LCDR: Some ghetto place that [LT C] picked … I don't know the name.
1944	Applicant: Ha!
1956	Applicant: I'm with your boys
2046	LCDR: Room 1. We're here.
2053	Applicant: Coming out?
2053	LCDR: What's your location?
2058	Applicant: Still [bar name]
2114	Applicant: On way?
2135	Applicant: Did you fall asleep?
2137	LCDR: Still at room 1.
2137	Applicant: So … you coming out?
2142	Applicant: We're coming over, ok?
2144	LCDR: Sounds good.
2146	LCDR: I have 4 corona's, rum, one can of coke, 4 budweisers.
2146	LCDR: I can run to the store if you want something els.
2146	LCDR: Else*

- **Text Messages from the LCDR to her copilot, LT C, on July 7, 2015** (These texts were likewise dated an hour later, but the times have been corrected below because, according to their statements, the applicant arrived at the hotel at about 0345 hours and the LCDR left her room to meet a member of the aircrew and go to the cutter at about 0700.):

0400 LCDR: Hey, a little weirded out. Just got a knock on the door. XO is in my room. He wants to stay here. Needed someone to know.
LCDR: He's still talking.

0708 LCDR: Please do not share the XO story with anyone. I told him I wouldn't tell anyone after I had already sent that text. We'll talk later. Headed to the boat to check on the plane and workout.

- **Statement from the LCDR dated July 15, 2015**: The LCDR wrote to the PIO that on July 6, 2015, she and the aircrew left the cutter on the same water taxi as the applicant and the CO. When they arrived at the island, she gave the XO her phone number in case they needed to reach her either in an official capacity or to meet up for conversation. About ten minutes later, she and the aircrew were in front of the hotel she was staying in, when the applicant and the CO came by. The CO said that perhaps later, they and the pilots could "meet and sit on the 'O4 and above hotel room balcony overlooking the water. The CO was joking of course as the copilot, [LT C] had previously joked with him that my room must have been the O4 and above room since it was the nicest." Therefore, she was expecting to receive a text either to arrange to have dinner together with the CO and XO (applicant) or to visit on the balcony of her hotel room. At 1930, she received a text from the applicant asking where she was. She told him they were still eating dinner, would be done in about 30 minutes, and asked where he was. The applicant replied that he was at a bar, which was "no place [LT C] or I would have wanted to go," so after dinner they and an enlisted member of the aircrew headed back to her hotel room balcony. Then the applicant texted her that he was "with your boys." Later she told him they were in room #1 in case he wanted to meet up with her and LT C. But he texted her again asking if they were coming out. But he was still at that bar, and she and the LT C just wanted to "have a mellow evening."

  The LCDR stated that she received more texts asking if they were coming out or had fallen asleep and then saying that the applicant was coming to the hotel room with the aircrew members. When they arrived, the applicant "seemed a little disappointed with us as we weren't looking to party and he kept telling me to get a drink. He explained that it was his night to enjoy himself and he needed some running mates," but she and LT C "were just looking for some rest and relaxation." The applicant "wanted to head back out to [the bar] and party, so [LT C] and I came up with a plan to walk him to [the bar], get him talking to some [of the cutter's] crew members and then leave quietly. I knocked on [another aircrew member's] hotel room door and told him the plan and he agreed since he did not want to hang out either." They left for the bar at about 2230 or 2245 hours, and when she arrived, she ordered a drink but took only one sip because it tasted terrible. The applicant said he would drink it. She walked away and told LT C and the other aircrew member that she would wait outside for them. The enlisted member came out after five minutes and LT came out after ten or fifteen minutes. At about 2330, the three of them walked back to the hotel and called it a night.

  The LCDR stated that at about 0345 she woke up to a knock on her hotel room door. She was nervous but worried that something might have happened to a member of her aircrew, so she asked who it was. The applicant gave his first name, and when she asked who "first name" was, he said, "It's XO." When she opened the door wondering if something bad had happened, the applicant

> walked right in, soaking wet to the point that he left a puddle at my door. He began taking his shoes and socks off. I asked, "What are you doing?" and he said, "I had to walk in knee deep water to get here." He said something along the lines that he would be crashing at my room for the night and I told him, "This can't happen, this isn't an ideal situation."
>
> I walked out of the room to the front desk and asked the security guard if there were any rooms available for the night to which he replied no. I was will to pay for another room, so the XO [applicant] wasn't in mine. I walked back into my room and saw the XO laying on the couch in the room with was a suede material. I told him, "you're going to ruin the couch, you're soaking wet." That's when he got up and said, "Oh yeah" and started to take his pants off. I said, "Whoa, what are you doing?" He stated that he was soaking wet.
>
> Realizing the water taxi [that the cutter] had contracted stopped making runs to the ship at 0200, I started to think I just needed to help the XO [applicant], a shipmate who had made some bad decisions to get him to this point. I walked out of the room and asked the front desk for some extra sheets. I walked back into the room and put the sheets down on the couch and gave him a bottle of water.
>
> The XO [applicant] took his clothes off, except his boxers and I shut off light and climbed into my bed. I had my phone with me and I sent a text to the copilot because I felt the need for someone to know this was taking place.
>
> The XO [applicant] was sitting on the couch, and kept asking me questions and he asked one or two of them two or three times. What's your favorite port call over here? What do you think about this person or that person on the ship? A few times he would stand up and walk over to my bed, stand at the foot of my bed and then walk back over to the couch. I was nervous, I didn't/don't know this man on a personal level, I just met him two weeks ago.
>
> The chit chat continued until 0530. The XO [applicant] told me he shared a room with one of the pilots on his last deployment and ended up sharing the bed. He said, "It's getting late and I guess we should go to bed, huh?" I told him, "Yes, I'm very tired" although I knew I would be going to sleep with a strange man in my room. He then asked, "Can I get in bed with you?" or, "Can I share that bed with you?" (I don't remember the exact verbiage, but he wanted to get in bed with me) to which I said, "Absolutely not. You stay over there, I stay over here, and in the morning this never happened!"

The LCDR wrote that she lay awake until 0700, when she got up to meet a petty officer on the aircrew to check on the aircraft and exercise on the cutter: "It was earlier than we had planned to meet, but I couldn't stay in the room any longer. Before I left the room, I hit the XO in the foot with my hand twice and called out "XO, XO!" He didn't budge, so I left. I then knocked on [the other member's door] and he agreed to head to the ship." While they were checking the aircraft and then exercising, the other member asked her if something was wrong and asked her three times if she was okay. She finally told him what had happened and that the applicant was still in her hotel room. He told her that she should have woken him up in the middle of the night to get the applicant out. They had breakfast and at about 1000, the member asked if she thought the applicant had gone or was still in her room. She asked him to go back to the room with her, and they found the applicant still asleep on the couch. So they went to get another cup of coffee and met up with LT C. LT C told her that he had not received her text messages until he woke up,

and she told them the whole story. LT C and the other member agreed to return to the hotel room with her, where the men opened the balcony door, made some noise, and shook the applicant to wake him up. The LCDR quickly went into the bathroom but returned to the room to get something and saw the applicant standing in his boxers in the room's kitchen so she went back in the bathroom and decided to take a long shower so she would "have an excuse not to talk to him." But when she came out of the bathroom more than a half an hour later, however, the applicant was still there on the balcony talking to the others. He came over to her "to make some chit-chat asking, 'Anyone looking for me at the boat?'" She and the other two left when the applicant went into the bathroom and started taking a shower.

The LCDR stated that when the aircrew gathered in the lobby because they had planned to take a tour boat ride, she began to worry about what they were going to think. The aircrew saw the applicant walk out of her hotel room in the same clothes that he had worn the night before. She called her husband, told him what had happened, and started to cry. She wanted to leave and not interact with the applicant, but he "kept hanging around talking to my crew, asking what we were going to do." He also asked her where they were going. The aircrew "finally left after a few awkward minutes."

The LCDR stated that all day, instead of enjoying the boat ride, she was "replaying the situation over and over and over again, wondering what I had done for the CO [applicant] to think what he did was okay. Why did he feel he could spend the night in my room?" She told another enlisted member of the aircrew what had happened because she did not want anyone to think that she had been having an affair with the applicant. She had planned on talking to the crew as a whole but "felt sick and wanted to go home" so she left early, went back to her hotel room, and called her husband to go "over all the possible repercussions of reporting the incident. … I was terribly concerned that I would be sent home." She was afraid that other members of HITRON would think that she could not be trusted on deployment and she did not want to become alienated and known as "that pilot who got the XO of the [cutter] removed from the ship." However, AMT1, the captain of the aircrew, told her that he "was not going to stand for this nonsense, and reported the situation to the HITRON XO."

- **Email from the LCDR dated July 15, 2015**: In response to an email from the PIO, the LCDR told him that AMT1 and another member of the aircrew had taken rooms at the same hotel on the night of July 6. She also told him that the entire aircrew would be "crossdecking" (changing cutters) either that night (July 15) or the next day.

- **UCMJ Miranda/Tempia Rights**: On July 15, 2015, the applicant was advised that he was the subject of an investigation for failing to obey an order or regulation and that he had rights, including the right to remain silent and to answer questions with or without a military or civilian attorney. He signed the form indicating that he did not want an attorney and that he wanted to "make a statement and/or answer any questions." The PIO signed this form as the witness.

- **PIO's Summary of Interview with Applicant on July 15, 2015**: According to the PIO's summary, the applicant told him that he left the cutter with the CO between 1500

and 1530 hours and went to a café to use the wifi. The MKC arrived, and the applicant said he "had a couple of beers" but then said three beers between 1500 and 1700 hours. The applicant and the CO then walked around a bit and saw the LCDR and some of the aircrew. The LCDR asked for his phone number, and he gave it to her. At about 1800, the applicant had dinner with the CO, the MKC, the LCDR, and several other members at a pizzeria/bar. The applicant stated that he had one beer with his dinner. At 1930, the CO returned to the cutter, and the others who had been eating with him also left.

The applicant told the PIO, according to the notes, that he stayed at the bar and "connected with" two other members of the aircrew. He thought they would be going to a particular bar, but they told him they had already been to that bar. He asked them where the pilots (the LCDR and LT C) were, and they told him the pilots "were at dinner." The applicant had another beer and played games with the two members of the aircrew. He also had a gin and tonic. The applicant asked them for the LCDR's telephone number, and they gave it to him. He and the LCDR texted back and forth for about two hours. The applicant said that she invited him to her hotel room where the aircrew was hanging out. The applicant left the restaurant with the two members of the aircrew and they went to the LCDR's hotel room. The aircrew members "walked right in," with the applicant following, and "everyone gathered on the balcony." While on the balcony, the applicant stated, he drank a rum and coke.

According to the PIO, the applicant told him that after an hour on the balcony, everyone went to another bar but "went their separate ways in the bar." The applicant "was on his own as he moved around the bar." However, he only had one more drink—a beer—and the rest of the night, he drank water or cola. At 0200 on July 7, 2015, the water taxi service stopped and there was heavy rain. The applicant left the bar with one of the members of the aircrew "and together went to [the LCDR's] room. Both were wet from rain and deep puddles." The applicant could not remember which of them knocked on the LCDR's door. When she opened the door, LT C was in the room. The LCDR made up the couch with sheets for him and "offered him a bed scarf" because there were no blankets. The applicant hung his clothes on a chair and but kept his boxers on.

According to the PIO, the LCDR was in bed, he was on the couch, and because the room was cold, she offered to open the window to warm up the room, but he said "no." He asked her "if it would be weird if he climbed into bed with her because he was cold," and she replied something like "yes, it would be weird." Then he fell asleep. When the applicant woke up at about 1100 hours on July 7, 2015, LT C and one of the enlisted aircrew were one the balcony, and the LCDR was in the shower. He greeted her when she came out of the bathroom, and then she left to go on a boat ride. The applicant took a shower, and LT C and the other member had left when he finished. He cleaned up the couch, left the room, and saw the LCDR, LT C, and two members of the aircrew in front of the hotel. He "greeted them, but nothing seemed awkward." He went somewhere else to call his wife and brother and to have lunch and returned to the cutter at about 1400 hours.

According to the PIO, when he asked the applicant if he had been intoxicated during the evening, the applicant had replied, "I was over the legal limit to drive, but don't think

alcohol was the reason for my behavior." The PIO noted that the applicant weighed 225 pounds and was 5'9" tall.

- **Statement of AMT1, the Aircrew Captain, dated July 16, 2015**: In a reply to an email from the PIO, AMT1, who reported the incident to HITRON, told the PIO that on July 6, 2015, he and another aircrew member were sitting at a bar having pizza when they saw the applicant and some other members having dinner. When the others left, the applicant came over and asked if he could hang out with them. The applicant asked him where the pilots were, and AMT1 told him that he thought they were relaxing at the hotel. The applicant asked for the LCDR's telephone number and said that they "needed to try to get them to come out and hang out." AMT1 replied that he would text them but thought that they wanted to relax in the hotel. The LCDR responded to AMT1's text and said that they had just finished dinner and were heading back to the hotel to hang out on her balcony. She invited them to stop by. They stayed and ate their pizza while talking to the applicant. He "probably drank a few beers I would say while we ate our dinner." When they got to the LCDR's hotel, the other aircrew member left immediately to call his fiancé, and the rest of them sat on the LCDR's balcony. AMT1 saw the applicant "pour a glass of flora-cana and coke" but AMT1 left after about ten minutes to go back to his own room and call his wife. About twenty minutes later, however, LT C knocked on his door and told him that the XO (applicant) wanted to go out. They talked about it and none of them wanted to go out at all. But just so the applicant would not "think anything negative," they decided to go out with him for about thirty minutes and then leave. Therefore, AMT1 went with LT C, the LCDR, and the applicant to a bar where most of the cutter's crew were hanging out. They decided to leave as soon as the applicant "settled in" with his crew. The applicant "was drinking" but "did not seem out of control," and AMT1 could not recall exactly what he was drinking. After about twenty minutes at the bar, the LCDR said she was going to get a drink but actually went outside to wait. "We knew if we all left at once [the applicant] would know that we were leaving and more than likely would say something and that's what we were trying to avoid." So AMT1 left a few minutes later and waited outside with the LCDR for LT C. When LT C came out, they walked to the hotel and "called it a night."

  AMT1 stated that the next morning, he and the LCDR needed to check out of their rooms because they had to change rooms since they had already decided to stay a third night so they could talk to their spouses "via wifi." She agreed that they would leave all the luggage in her room, and so he brought his luggage to her room that morning. When he went to her room, he saw the applicant and LT C on the balcony talking. He decided not to go out on the balcony so he would not get asked what had happened the night before. He left his luggage in the room and went to the lobby to wait for the rest of the aircrew. Another enlisted member asked him if the LCDR was mad at him. When AMT1 asked him why she would be mad at him, the member said, "because she was acting like something was wrong." After the aircrew had gathered in the lobby, the applicant came out, and AMT1 asked him where he had been. The applicant told him that he had taken a shower, and AMT1 noted that the applicant was wearing the same clothes as the night before. But he did not think anything of it and went on the tour boat ride with the rest of the aircrew. However, "something was just not right with [the LCDR] as she was pretty quiet and not into the sightseeing." Then the LCDR left early to go back to the hotel, and

another member left with her. So AMT1 knew something was wrong and asked LT C about it. LT C told him that "something happened last night and she is upset and didn't sleep at all last night." Then LT C told him that the applicant had knocked on the LCDR's door at about 0230, and when she asked who it was, the applicant gave his first name but then identified himself as the XO. LT C told him that when she opened the door to find out if everything was okay, the applicant had walked in, sat on the couch, and started talking. The applicant asked if he could crash there, and she told him no, but she knew that the water taxi had stopped taking people back to the boat at 0200, so she went to the lobby to see if there was another room that the applicant could buy for the night, but was told the hotel was full. LT C told him that the LCDR then texted him to let him know that the applicant was in her room and needed a place to crash, but LT C was already asleep and did not see her text until the next morning. LT C told him that at some point, the applicant had asked the LCDR if he could sleep in the bed with her since the couch was uncomfortable, but the LCDR told him "absolutely not and you will stay on the couch and I will stay right here and first thing in the morning you will leave." AMT1 said he "couldn't believe [his] ears" and so after dinner texted the LCDR and asked to meet. She said that she was talking to her husband but he could stop by afterward. When they met, AMT1 told her that he knew what had happened and planned to report it to HITRON. The LCDR gave him the telephone number of HITRON's XO so he could call him.

- **Email from PIO to Applicant dated July 17, 2015**: The PIO asked the applicant whether he had written a statement to submit and said that he had two more questions for him: "1. After you went to [the LCDR's] room the second time, you said that [LT C] was there. How long did you stay? 2. You said that you don't think that alcohol was the reason for your behavior. If not, what was the reason?"

- **Email from Applicant to PIO dated July 21, 2015**: On July 21, 2015, the applicant responded to the PIO and attached his statement (below). He noted that his statement should answer the PIO's second question. Regarding the first, he said he wanted to "clarify that [LT C] was not there when I arrived the second time to the room. I had expected that he and the others would still be there hanging out since I knew they were all out very late the previous night together, but they were not here like I anticipated." He stated that he thinks he had misremembered about LT C being there because LT C was there on the balcony both when he had gone to the hotel room the first time and when he woke up in the morning. He also stated that he "believe I arrived alone to the room on my second trip there. I am sorry for the confusion and did not intend any deception by it."

- **Statement from Applicant dated July 21, 2015**: In his written statement for the PIO, the applicant stated that on July 7, 2015, the crew had been granted liberty until noon the next day. He left the ship with the CO at about 1500 hours and had one of the cutter's cell phones on him at all times. They walked around town and ran into the LCDR and some of the aircrew. She asked him for his telephone number, and he gave it to her. She said "they would all be hanging out later." She mentioned a bar that he wanted to go to. He and the CO went to a café near the water taxi service and the MKC, who was the Command Chief, joined them. They had three beers and used the wifi.

At about 1800, the applicant wrote, they went to a pizza place at the front of a bar and saw some other officers from the cutter there. He had "a beer or two with dinner." At about 1930, the others departed, and the applicant told the CO that he was going to "stay out." He wanted to go to the bar that the LCDR had mentioned, but a waitress told him that it closed at 2000. However, he found an AMT1 and another member of the aircrew at the bar and chatted with them. He wanted to meet up with the LCDR and the other aircrew. He wanted to socialize with them because, unlike the cutter's prior aircrew, this aircrew "had been mostly keeping to themselves" so he wanted to "bridge the gap." He asked the aircrew members where the pilots were, and they told him that the pilots were having dinner. The three of them talked about the patrol and played mind games, and he had a beer and a gin and tonic. He told them he had given the LCDR his number earlier, but he had not gotten hers, and he asked for it so he could text her. The AMT1 gave him the number, so he texted her and learned that the pilots were still at dinner. But when the pilots got back to the hotel, the LCDR texted him her room number, so they went to her hotel room to hang out at about 2145. When they left the restaurant to go to the hotel, it started pouring rain. But they used overhangs and got to the hotel room without getting too wet. One of the enlisted aircrew he was with left to call his girlfriend.

The applicant stated that when he and AMT1 got to the hotel room, AMT1 entered without knocking, which the applicant noticed and "interpreted to mean that this room was essentially a community hang-out room for all the aviators." LT C was sitting on the balcony, and the LCDR offered him a choice of beer or Panamanian rum. The rum was in a regular bottle, "likely 750 mL," and it was "already 80% gone. I chose the rum since I did not care for either of the beer options and was curious about the local rum." He made himself a rum and coke. Another member of the aircrew also entered without knocking. They sat on the balcony talking "for at least an hour and a half." He wanted to get them to go to a bar where he knew that some of the cutter's crew would be so that the two crews would integrate and socialize together. At about 2330, the group in the hotel room headed to the bar using the overhangs not to get wet. At the bar, he walked around a bit but spent most of his time beside the water, where he spoke to some locals and American tourists. He had one more beer, but "was mostly drinking ice waters and cokes because [he] was starting to get tired."

The applicant stated that just before 0200, while he was still at the bar, a torrential downpour started. The road looked like a river, and

> [n]one of the boat launches [water taxis] were running during the storm to get [him] back to the ship. I was tired and I was ready to leave the bar. The only safe and dry place on the island that I was familiar with was the hotel room we had all been hanging out in earlier. I knew from talking with the aircrew earlier that they had been out very late the night before so I assumed they would still be hanging out in the room this night as well. I figured I could go there, wait out the rain, and take a boat launch back to the ship when the rain stopped.
>
> When I arrived at the hotel room a 2nd time, following the same path as my first visit to the room, my socks and shoes were absolutely water logged from the rain water in the street, so I took them off upon entering the room in an effort to not get the floors wet. My clothes were wet, I was tired, and I had no idea when the rain would stop to allow me to catch a launch back to the ship, so I accepted when [the LCDR] was gracious enough to offer her couch for me to stay on. We had hung out on and off throughout the night,

> we were peers and of the same rank, and there was a torrential rain storm preventing me from getting back to the ship, so I saw this situation as a friend offering me a couch to sleep on, and I accepted. I also knew the hotel was completely booked which is why the aircrew had been split between 2 different hotels. After [the LCDR] made up the couch for me with a fitted sheet on the cushions and a top sheet for a cover, I laid down and was shivering uncontrollably. The temperature of the room was already quite cold from the A/C being on so high and since I was wet from the rain, I was freezing. [The LCDR] could not find the controls for the A/C and offered to open the balcony door to try to warm the room up. I told her that she did not have to do that since it was raining and everything could get wet inside the room. She gave me the decorative bed scarf from the foot of the bed (about 2 ft wide by 6 ft long) which was the closest thing to a spare blanket she could find; however, it was paper thin and did nothing to warm me up. I then made a comment to her in a joking manner and tone, "Would it be weird if I just got into your bed?" She said yes and I agreed. I laughed it off, rolled over, and fell asleep on the couch.

The applicant stated that when he woke up at about 1100, the LCDR was taking a shower, and LT C and another member were on the balcony hanging out. He cleared off the couch and went to the balcony to talk to them. One of them was drinking a beer, and nothing seemed awkward. When the LCDR came out of the shower, she was in work-out clothes. He asked her if she was going for a run, and she said that she had already been back to the cutter to work out. Nothing seemed strange or awkward in their interaction. She left the hotel room and he decided to take a shower since only "sea showers" were available on the cutter. When he got out of the shower, the other two had left but the LCDR's luggage was still there. He got dressed, locked the doors, and went to the lobby. The two enlisted members of the aircrew whom he had hung out with at the pizza place the night before were in the lobby, so he sat and spoke with them for a few minutes. He ran into the LCDR in the street and told her that he had locked the doors of the hotel room since he was the last one out and that he hoped she had a key. She said that she had only booked the room for two nights but wanted to stay three nights, so the hotel was moving her to another room. She said that she was going on a boat tour, and he told her to have fun. It seemed like a normal, friendly interaction.

The applicant stated that he was "completely blindsided" when he was told that the LCDR said she would be uncomfortable being on the cutter with him. Neither she nor anyone else had shown any discomfort around him, and "[e]verything about the night to me seemed completely innocent." He would have apologized if he had known that she felt uncomfortable. "I see now that I misjudged the nature of my familiarity/friendship with the aircrew that night." Regarding his comment about getting into the LCDR's bed, the applicant said that

> the only thing going through my mind was how cold I felt. I wanted to get warm and said something off the cuff without thinking of who I was saying it to and how it might be misinterpreted. Though I had consumed alcohol earlier in the evening, alcohol was not what caused me to make the comment and was not a factor in what I said. I simply did not think before I spoke. I let me guard down and talked to [her] and joked with her as I would with any of my friends, male or female. Since we had not known each other that long, I should have been more careful. There was no sexual innuendo nor intention to my comment whatsoever. I understand that it was misinterpreted by her and I am sincerely regretful of that. In retrospect, because I felt it was so innocent, I should have told the CO where I had slept the night before so he would not have been blindsided if/when he received any reports about it.

> While I regret making the comment, I did not drive under the influence; I did not assault anyone or get into any physical or verbal fight; I was not arrested nor did I have any run-ins with law enforcement; I did not engage in an adulterous or prohibited relationship. I remained in control of my actions and was not overly intoxicated. I made a regretful comment that was misinterpreted, but nothing else happened. There was a miscommunication and misunderstanding between me and [the LCDR]. Nothing physical happened between me and [her], nor would it have. I am happily married and would never do anything to jeopardize my marriage or family. I also would never do anything intentionally to jeopardize my career. …
>
> … As the XO, I set the example that I want my crew to follow, and I failed in that duty on this particular night. Males sleeping in females' rooms, no matter how innocent, is not an example I want the crew to follow. This night had the potential for negative perceptions and rumors, which can be caustic on a ship. Moving forward, I will be the model example …

- **Notes on PIO's Follow-Up Questions to the LCDR dated July 22, 2015**: The PIO called the LCDR and asked her six questions. She told him that the first time the applicant was on her balcony, he drank the rest (1/3 to ½) of a standard-sized bottle of rum and mixed it with cola. Otherwise, she saw him drink the drink she had ordered for herself at the bar and could not say "what else of how much he drank." She stated that the applicant had come to her room alone the second time. When asked if he had appeared intoxicated that second time, she said "I could tell he had a few in his system. He wasn't falling down drunk, but knew what he was doing."

- **Statement of LT C dated July 23, 2015**: In response to an email from the PIO, LT C, the copilot, stated that on the evening of July 6, 2015, he was hanging out with the LCDR and another member of the aircrew on the balcony of the LCDR's hotel room. They were tired and had decided to have an "early night." However, the applicant had met up with two other members of the aircrew and asked them to bring him back to the LCDR's hotel room to meet up with the pilots. The applicant arrived and the two members who had brought him left to go to their own rooms shortly thereafter. The four remaining in the hotel room had a few drinks and talked on the balcony for about an hour. The applicant persistently asked them to go out to a bar, so they eventually decided to go out with him for a short while. At the bar, many members of the cutter's crew were mingling, and after about thirty minutes, the applicant was hanging out with his crewmembers, so LT C, the LCDR, and the other aircrew member "could slip away," and they headed back to their respective hotel rooms. LT C stated that they did so not because they wanted to avoid the applicant but because they were tired and did not want to stay out late.

  LT C stated that he woke up at about 0900 the next morning and found some texts from the LCDR on his phone. The LCDR had told him that the applicant "had come to her room intoxicated and needed a place to sleep and she wanted someone else to know." LT C then met up with the LCDR and another aircrew member for breakfast, and the LCDR explained that she was "very uncomfortable" and so had left her hotel room early. The LCDR told them that the applicant had knocked on her hotel room door in the early morning and, when she opened it, entered uninvited and intoxicated. She told them that she went to the lobby to try to get him a room but was unsuccessful. The applicant was soaking wet and wanted to stay the night because the water taxi back to the ship had

stopped running. The LCDR told them that she kept telling the applicant that this was "not ideal" but never told him to leave the room. When the applicant lay down on the couch, she told him not to ruin it because he was wet, and then the applicant took off his clothes, except his boxers, and laid on the couch. LT C wrote that "[a]t some point after this they were talking and [the LCDR] stated that [the applicant] made a comment along the lines of wanting to share the bed. [The LCDR] said no and stated this made her pretty uncomfortable and did not sleep much the remainder of the night." After breakfast she asked them to accompany her back to the room to wake the applicant up. LT C was not certain whether she was "uncomfortable with the situation and/or the perception of it or if she felt as if this was an actual harassment situation. While this incident was definitely inappropriate, she wasn't clear on how she wanted to proceed." So they went to the room with her and woke the applicant up in a "fairly cordial" manner. The applicant joined them on the balcony, while the LCDR went into the bathroom to shower and then packed her bags. While on the balcony, LT C and the other aircrew member "attempted to get [the applicant] going, but he needed to use the restroom." When the applicant went into the bathroom, the three of them left to meet the rest of the aircrew in the lobby. The applicant came out to the lobby after taking a shower. The other aircrew member eventually told the applicant, "we will see you later," and the applicant left. The LCDR then asked them not to say anything to the rest of the aircrew and "let her process what had happened." He told her to take her time and call her husband. That night, he again recommended that she talk to her husband about how she wanted to proceed, and an hour later, she told him by text that the captain of the aircrew (an enlisted member) had stopped by and they had agreed to contact the XO of the HITRON,

- **Notes on PIO's Follow-Up Questions to LT C dated July 24, 2015**: The PIO asked LT C for a screen shot of his texts with the LCDR; whether he had observed the applicant drinking and, if so, how much; and whether the applicant had appeared intoxicated. LT C replied that he would send the screen shot at the next port call (of the aircrew's new cutter) and that he had seen the applicant have "a few drinks" on the hotel balcony and later, about two drinks in the bar before LT C left. LT C stated that at the bar, the applicant was not "fully intoxicated, but for a lack of a better word he was buzzed. When we left he was in good spirits and mingling with the ship's crew."

- **A Body Mass Index calculator**: According to an online BMI calculator of one of the National Institutes of Health, a man who, like the applicant, is 5'9" and weighs 225 pounds has a BMI of 33.2, which falls in the "obese" range.

- **"How many drinks are in common containers?"**: According to a printout from the website of one of the National Institutes of Health, a "fifth" of 80-proof (40%) distilled spirits is equal to 750 milliliters, which makes approximately 17 "standard drinks."

PIO's Findings, Opinions, and Recommendations

The PIO stated that he had conducted a "preliminary inquiry" into the applicant's actions, that the requirements of the AIM had been met, and that the legal counsel had provided advice. He noted that because the aircrew was deployed elsewhere, he had been unable to meet with any

of the witnesses in person except the applicant, who had been read his rights and agreed to answer questions without counsel present.

The PIO stated that according to the applicant, he had three beers (which he corrected from two) with the CO at the café in the afternoon, a beer with dinner, a beer and a gin and tonic at the bar after dinner, an unknown amount of alcohol on the LCDR's hotel room balcony, and when asked if he had drunk any alcohol at the bar later in the evening, replied, "I think just one." The PIO stated that the aircrew members who had gone from the balcony to the bar with the applicant left him there. The ferry to the ship stopped running at 0200 hours. Heavy rain fell, which caused the applicant's clothes to get wet. The applicant returned to the LCDR's hotel room. He claimed that she invited him in, while she said he "walked right in." There were no free hotel rooms, but the LCDR got sheets from the front desk. The applicant removed his clothing except for his boxers. The LCDR got in her bed, while the applicant was on the couch. The applicant asked the LCDR if it would be weird if he got into her bed or if he could share the bed with her. She refused and notified LT C that she was "a little weirded out." The applicant fell asleep at some point, while the LCDR lay awake until about 0700. The LCDR tried to wake him without success and departed the hotel. When she returned to the room at about 1000, the applicant was still asleep. She returned to the room again with LC C and another member of the aircrew, and they woke him up at about 1100. The LCDR showered and left, the other two left, and then the applicant took a shower.

The PIO noted that during his interview, the applicant had said he drank six beers and two "standard drinks in an unknown timeframe," but in his statement, he said he drank seven or eight beers and two "standard drinks in roughly 8 to 9 hours." In addition, none of the witnesses who responded to the PIO's inquiries could confirm exactly how much the applicant had drunk, but the LCDR claimed that the applicant had drunk between half and one-third of maybe a "standard size" fifth of rum, which would be between 5 and 9 standard drinks, while the applicant claimed that the rum was already 80% gone when he got it, and 20% of a bottle would be about 3 or 4 drinks. The PIO stated that only LT C had described the applicant as intoxicated. The applicant had said he was over the legal limit to drive but that alcohol had not caused his behavior. The LCDR stated that she could tell that the applicant "had a few in his system" when he arrived at her hotel room the second time, and LT C had described the applicant as "not fully intoxicated" but "buzzed" and "in good spirits" when they left him at the bar.

The PIO noted that members of the aircrew recognized the next morning that the LCDR was upset by what had happened as well as "concerned about perceptions and the effects of this incident on families, careers, crews, and their mission."

The PIO noted that under Chapter 6-2-1 of Coast Guard Regulations, the orders of a cutter's XO "shall have the same force and effect as though issued by the commanding officer and shall be obeyed accordingly by all persons on board" and "shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command." The PIO stated that under Chapter 6-10-2 the LCDR was subordinate to the applicant. The PIO noted that Chapter 8-1-2 requires members to be "good example[s] of subordination, courage, zeal, sobriety, neatness, and attention to duty. They shall aid to the utmost of their authority, in maintaining good order and discipline, and in all that concerns the efficiency of the command." Chapter 8-1-3 states that "discipline depends in a large degree upon the example set by commanding and other officers in authority, and may be maintained in many cases by their

own attention to duty and by their personal influence, tact, and discretion." The PIO also noted the definition of an alcohol incident and the elements of Article 92 of the UCMJ (dereliction of duty) and Article 133 of the UCMJ (conduct unbecoming an officer and gentleman).

The PIO opined that the applicant had "invited himself to [the LCDR's] room the first time" he went and "exercised poor judgment in his alcohol consumption and was intoxicated during the course of the evening/morning," including when he entered the LCDR's room the second time. He stated that the applicant had also exercised poor judgment by "staying out in a foreign port after the ferries to the ship stopped running … without a secure place to stay for the night. These factors placed him in a dangerous situation and undermine his credibility as [the cutter's] Executive Officer."

The PIO concluded that the applicant had violated Article 92 of the UCMJ by being derelict in the performance of his duties as the XO of the cutter "as articulated in the Coast Guard Regulations in that his actions were upsetting to the good order and discipline of the entire command and undermine any future efforts he might make in maintaining such good order and discipline." He also concluded that the applicant's actions had "crossed boundaries of appropriate behavior in interpersonal relationships and irreparably damaged respect for his rank and position authority. His actions can raise numerous perceptions that undermine good leadership, military discipline, and his ability to develop junior officers. [He] did not show himself in a good example of sobriety."

The PIO concluded that the applicant had also violated Article 133 of the UCMJ because his actions "upset the good order and discipline of the entire command, were contrary to an example of sobriety especially before those subordinate in the ship's organization, and set a generally poor example of proper officer conduct."

Finally, the PIO concluded that the applicant's conduct had met the criteria for an "alcohol incident" because his alcohol consumption had been a significant or causative factor in his behavior: "A reasonable and prudent person, thinking clearly and uninhibited by alcohol or other substances, would have avoided such a situation."

The PIO recommended that the applicant be issued an "alcohol incident," be removed from his duties as XO, and be punished at mast for violating Articles 92 and 133 of the UCMJ.

Page 7 Documenting an "Alcohol Incident"

On August 19, 2015, the CO signed a Page 7 documenting an alcohol incident for the applicant's personnel record with the text shown below. The applicant signed the Page 7 to acknowledge receipt.

> You received an alcohol incident on 07 July 2015 when your abuse of alcohol was determined to be a significant and/or causative factor in your lack of judgment and inappropriate behavior during a port call in … . On the evening of 06 July and into the morning of 07 July, you consumed at least 7-8 beers and two standard drinks in roughly 8-9 hours and admitted that your blood alcohol content was beyond legal limits to drive. Subsequent to consuming alcohol, you violated cutter liberty policies, exercised poor judgment, and acted inappropriately/unprofessionally when you entered a female crew member's hotel room and voluntarily removed your clothing down to your boxer shorts, before falling asleep in her room. You remained in the room for approximately 8

> more hours, including for one more hour after having to be woken up by others. Your actions were derelict to your performance of duties and undermined your credibility as Executive Officer.
>
> You were counseled on Coast Guard policies concerning alcohol use and abuse as well as the serious nature of this incident. The unit Command Drug and Alcohol Representative (CDAR) will arrange an appointment with a provider who will determine the nature of your relationship with alcohol. It is highly recommended that you abstain from the use of alcohol until your screening and assessment is completed.
>
> This is considered your first alcohol incident. Any further incident may result in you being processed for separation, in accordance with Chapter 2 of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10 (series).

Removal from Primary Duties

Also on August 19, 2015, the CO gave the applicant a memorandum with the subject line "Notification of Relief from Primary Duties."[7] The CO cited the provisions of COMDTINSTs M1000.8A and M1000.3 (series) and the Page 7 dated August 19, 2015. The CO stated that "[i]n accordance with [COMDTINST M1000.8A], you are hereby relieved of your primary duties as

---

[7] Article 1.F.2. of COMDTINST M1000.8A contains the following pertinent policies about removing an officer from his primary duties:

> **1.F.2.a. Removal from Primary Duties (RPD)**
>
> All officers are assigned to positions accompanied by a set of primary duties. Under exceptional circumstances, normally due to the officer's inability to adequately perform those duties, the officer may be formally removed from his/her primary duties and transferred to another permanent duty station. This is different than a commanding officer's relief for cause (RFC) as detailed in Article 1.F. of this Manual. A RPD will not be confused with an RFC, and an RPD will not be employed in lieu of an RFC.
>
> **1.F.2.b. Circumstances that may Warrant Removal from Primary Duties**
>
> An officer may be considered for permanent removal from primary duties under the following circumstances:
>
> (1) The officer fails to perform primary duties such that their performance significantly hinders mission accomplishment or unit readiness, or
>
> (2) After an adequate amount of time at the unit (normally at least six months), it becomes clear to the command that the officer has neither the ability nor desire to perform assigned duties, or
>
> (3) The officer's actions significantly undermine their leadership authority.
>
> • • •
>
> **1.F.2.d. Removing an Officer from Primary Duties**
>
> (1) At the command's discretion, an officer may be temporarily removed from primary duties at any time. Upon determining that an officer meets the requirements of Article 1.F.2.b. of this Manual for permanent removal from primary duties, the command will submit an OER in accordance with Articles 5.A.3.c and 5.A.4 h. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series). The command should inform the officer of the RPD process and way forward.
>
> (2) After the OER is routed to Commander (CG PSC-OPM-3) or (CG PSC-RPM) per Article 5.A.2.i. of reference (q), Officer Accessions, Evaluations, and Promotions, COMDTINST M1000.3 (series), Commander (CG PSC-OPM) or (CG PSC-RPM) will review and make the final decision on removal from primary duties.

Executive Officer, [cutter]. Your actions as stated in [the Page 7] significantly undermined your ability to perform your leadership responsibilities as the Executive Officer. Additional information regarding your relief from primary duties will be detailed in a special OER." The CO told him to report to another unit, "your temporary duty assignment during this process," and also named an officer at PSC who had been assigned to guide him "through the special OER process."

SOER

On September 4, 2015, the CO signed an SOER "submitted under COMDTINST M1000.3A, Article 5.A.3.e.(1)(b)[8] due to sub-standard performance and/or conduct and is a derogatory OER per Article 5.A.7.c.;[9] officer removed from primary duties on 19 Aug 2015." The SOER states that it covers the applicant's service from May 1, 2015, to August 19, 2015, and shows that the applicant did not submit input about his performance.[10] The Review, who was the Chief of the Area's Cutter Forces, signed the SOER on October 6, 2015.

---

[8] Article 5.A.3.e. of COMDTINST M1000.3A, "Special OERs," includes the following provisions:

> The Commandant, commanding officers, higher authorities (including convening authorities) within the chain of command, and reporting officers may direct these reports. The circumstances for the special OER must relate to one of the situations described in Article 5.A.3.e.(1) through 5.A.3.e.(5) below.
>
> (1) Subsequent to Substandard Performance or Conduct.
>
> • • •
>
> (b) A special OER shall be submitted to permanently remove an officer from primary duties as a result of conduct or performance which is substandard or as directed by the permanent relief authority's final action on a permanent relief for cause request per by Article 1.F. of reference (q), Military Assignments and Authorized Absences, COMDTINST M1000.8 (series)). The OER will be defined as derogatory and shall follow the procedures for derogatory OER submission in accordance with Article 5.A.7.c. of this Manual. This OER will count for continuity.

[9] Article 5.A.7.c.(1) of this manual states that any OER documenting an officer's removal from primary duties is "derogatory" and must be completed by the rating chain so as to be received by PSC no more than 45 days after the OER was initiated. The following procedures in Article 5.A.7.c.(2) apply:

> (a) Reporting Officer. The reporting officer shall provide an authenticated copy to the reported-on officer and counsel the reported-on officer of their option to prepare an addendum. The supervisor and the reporting officer shall be afforded the opportunity to address the reported-on officer's addendum via individual one-page signed endorsements to the reported-on officer's addendum. The reporting officer will then forward the OER and attachments to the reviewer.
>
> (b) Reported-on Officer. The reported-on officer has the option to prepare an addendum using Coast Guard Memorandum limited to two pages with no enclosures. The addendum must be submitted to the supervisor within 14 days of receipt of the OER unless an extension is specifically requested from Commander (CG PSC- OPM-3) or (CG PSC- RPM-1). …
>
> (c) Reviewer. The reviewer shall ensure that the evaluation of the reported-on officer is consistent and that the derogatory information is substantiated. If the reviewer finds otherwise, they shall return the report to the reporting officer for additional information and/or clarifying comments. Substantive changes to the OER require its return to the reported-on officer to provide another 14-day opportunity for the reported-on officer to revise the addendum.

[10] Article 5.A.2.d.(1)(e) of COMDTINST M1000.3A states that all officers must "[s]ubmit to the supervisor not later than 21 days before the end of the reporting period a listing of significant achievements or aspects of performance which occurred during the period along with a copy of their updated Employee Summary Sheet (ESS)."

Twelve of the eighteen performance categories on the SOER are marked as "Not Observed" with comments stating, "Sufficient information not available to fully evaluate performance in all dimensions during brief period of report, therefore a mark of "Not Observed" is selected."[11] But the CO assigned the applicant poor marks of 2 (out of 7) for the performance categories "Judgment," "Professional Presence," and "Health and Well-Being"; substandard marks of 3 for "Teamwork," "Workplace Climate," and "Responsibility"; and a mark in the third spot (of seven) on the officer comparison scale, denoting a "Fair performer; recommended for increased responsibility." These low marks are supported by the following written comments:

> [The applicant] did not take full responsibility for actions as an officer and the XO when [he] neglected to inform the Commanding Officer (CO) of excessive alcohol consumption, personal violation of cutter liberty policies, and subsequent sleeping in another crew member's hotel room during a foreign port call. CO received report of unbefitting actions first from the XO of [HITRON] and not the member, requiring challenging and immediate personnel planning between two major operational commands and [the Area Command]. Did not readily recognize impact of actions on other member directly involved, resulting in member being unable to execute own operational/administrative duties due to unwarranted stress and inability to concentrate in [the applicant's] presence aboard the cutter. Lack of personal discipline regarding use of alcohol and interpersonal relationships resulted in a damaged climate/environment between cutter crew and Aviation Detachment, requiring significant CO involvement to repair key working relationship in order to maintain full operational effectiveness. Member did not provide OSF input after it was solicited. …
>
> [The applicant's] actions including conduct unbecoming an officer and failure to understand interpersonal relationship with a deployed crew member, who reported directly to [him], had a direct and negative impact on the operational effectiveness of the cutter while deployed. Lack of judgment led to temporary removal from the cutter, requiring another assigned/more junior officer to assume critical duties. Per CG Regulations, [the applicant] was negligent in XO role/responsibilities regarding maintaining good order and discipline for the cutter and all assigned personnel.
>
> Displayed poorest judgment for rank when violated cutter liberty policies and acted inappropriately/unprofessionally by entering another crew member's hotel room at 0345, then voluntarily removed clothing down to boxer shorts after consuming alcohol over a period of approximately 12 hours. Moreover, made the crew member uncomfortable by asking to share the same bed, and then approaching the bed after the member refused request to engage in small talk while member was trying to sleep; intervention from several crew members was required to wake [him] after remaining in the room for a significant period of time after entering. Breached core values by failing to report own unsuitable actions, placing a subordinate in a poor situation by entering the hotel room while intoxicated where member was alone, and not adhering to liberty policies and personal readiness which undermined [his] position authority as second in command of a major cutter responsible for maintaining good order and discipline. [His] behavior irreparably damaged the [cutter] crew's respect for [his] authority, rendering mbr unable to continue duties. Failed to maintain CG sobriety standards; issued AI [alcohol incident] when alcohol was determined to be a causative factor in behavior.
>
> While a capable administrator and operator, this officer is not recommended for promotion at this time. Failure to adhere to core values, a loss of confidence in ability to execute assigned duties, and subsequent relief from primary duties indicate [he] is not prepared at this time to assume duties with increased responsibilities. Not recommended for continued afloat assignments. Place

[11] Articles 2.E.2.f. and 2.F.2.c. of the OER Manual, PSCINST M1611.1B, state that a rater should assign a mark of "not observed" for a performance dimension on an OER "[i]f observations are believed to be inadequate to render a judgment" about the officer's performance in that dimension. In addition, the reason for the "not observed" mark "must be briefly stated" in the comment block.

in financial management and/or operations research assignments to harness previous ashore assignment experience and completed MBA postgraduate studies.

SOER Addendum

On October 5, 2015, the applicant submitted the following addendum for inclusion in his record as part of the SOER:[12]

> I am incredibly ashamed and embarrassed that I am writing an addendum to a Special/Derogatory OER. This situation is not at all indicative of my character, performance, commitment to the Coast Guard's core values, or potential as a senior leader in this organization. I made a mistake on a single night of liberty, but this OER omits important extenuating circumstances from that night. I stayed overnight in an O4 pilot's hotel room, on the couch, and made a comment which was misinterpreted. I did not touch, make advanced towards, or engage in any unacceptable relationship. I did not break any laws, get arrested, assault someone, drive under the influence, or use any drugs. I stayed out too late while on liberty, consumed some alcohol, and did not make a contingency plan in the event that I could not get back to the ship. I am most deeply regretful of the fact that I made a member uncomfortable in any way. I neither intended nor considered those potential consequences at the time of the events. I never should have put myself in this position in the first place and I will always regret how things unfolded this night. I fully accept responsibility for what I did, but I want to set the record straight on a few items that are either inaccurate as written in the OER or are ambiguous/misleading.
>
> The ship was anchored with overnight liberty authorized. Though the ship's contracted water taxis stopped at 0200, other water taxis are available for hire at all hours in … . At the end of my night, however, torrential rain had suspended operation of all water taxis. The pilots had been out very late the night before, so I assumed they would still be awake, hanging out. I returned to the hotel room in which I had hung out earlier that night with the O4 pilot, O3 co-pilot, & two aircrew. The suite style room was in the O4's name, but the aircrew were coming and going without knocking. All had been consuming alcohol. When I arrived again later, I knocked on the door, soaking wet from the rain. The O4 asked who it was, I announced myself, and the member opened the door to let me in. This OER says I entered the room, omitting the facts that I knocked and was allowed in. At this point I learned the member had been asleep and was alone. The hotel was fully booked. The member did not seem or act uneasy or uncomfortable with my arrival. It was pouring rain, it was late, and I was tired, so I asked if I could stay in the room. Besides stating that it was not an ideal situation, the member appeared welcoming and comfortable with me staying on the couch. This OER omits important extenuating circumstances that would explain how and why I ended up in my boxer shorts. When the member went to the front desk to get sheets for me, I laid down on the suede couch, fully clothed. The member came back and said my soaking wet clothes would ruin the couch, so I undressed to my boxer shorts. The O4 made up the couch for me, and I laid down. We talking cordially during this time. The room was very cold, I was wet from the rain, and I could not get comfortable on the small couch. No blankets were available and the decorative bed scarf the member gave me was not keeping me warm. While laying [sic] on the couch, I asked to share the king-sized bed to get warm, a comment I intended as an obvious joke and ridiculous proposal. The O4 said no, I laughed it off as a stupid joke, did not persist, and slept on the couch until 1100 the next day. This OER says I approached the bed after the request was rejected. That is completely false and inaccurate. When I was trying to get comfortable, I got up a few times to reposition, look for blankets, find the thermostat, etc. I

[12] Article 5.C.1. of the OER Manual, PSCINST M1611.1B, states that "[a]fter both the Supervisor and Reporting Officer sign the OER, and either the required or optional Reviewer Comments, CG-5315 (series) are completed and signed, the Reporting Officer provides a copy to the Reported-on Officer requesting that an addendum be prepared. The Reported-on Officer's addendum does not constitute an official request for correction of a record but provides the Reported-on Officer an opportunity to explain the failure or provide their view of the performance in question."

never invaded personal space or approached the member's bedside as this OER implies. I was respectful to the member the entire night.

A day after these events occurred, I was called into the CO's office for what I thought was an informal chat. I was not told that I was suspected of any wrongdoing, was not told what accusation had been made against me, and was not read or reminded of my rights to an attorney or against compulsory self-incrimination. The CO asked me to provide details on everything about the previous night from the time dinner ended until the time I returned to the ship. Without hesitation, I immediately recounted my entire night in hopes of clearing up whatever had been presumably reported. I was upfront about all actions and comments I made, but I was very concerned that a false accusation had been made. My failure to report this information to the CO was not deceptive behavior or a violation of core values as this OER states. I had not considered my actions unbecoming or unsuitable, under the circumstances. However, since learning that I made this member uncomfortable and that I created unwarranted stress, I have readily taken full responsibility for my actions and understand how a comment I intended as a joke could have been misinterpreted. I asked for an opportunity to meet with the member to formally apologize, but was denied. I agreed that it was in the best interest of the unit and mission effectiveness if I departed the ship until the helicopter disembarked. I returned to the ship only nine days later, completed three more weeks of patrol, and resumed all of my duties as XO for five weeks without any reported irreparable damage to the crew's respect for my authority as the OER states. To the contrary, I regularly checked with the Command Chief who confirmed there had not been any questions or rumors related to this event. Though I did not set a good example, the crew was unaware of these events, and I experienced their full level of respect until my last day aboard.

This OER says I was intoxicated and consumed an excessive amount of alcohol over approximately 12 hours. The time and assessment is inaccurate and inconsistent with even the account of the O4 pilot who "could tell [I] had a few drinks in [my] system" when I arrived, but "was not falling down drunk."

I woke up the next morning to the O3 co-pilot and E5 aircrew talking on the balcony, just as they had done the night before. One was already drinking a beer. These are the "several crew members" referenced in the OER as being required to intervene to wake me up; they opened the curtains and talked loudly. When I saw the O4 and other aircrew members, we again talked cordially for some time before we parted ways. With two members witnessing that I had slept alone on the couch, it did not cross my mind that there was any potential of misperceptions or misunderstandings about the night or that I should self-report it. Had I detected any inkling of the extent to which my actions and words had impacted this member, I would have apologized immediately and then reported them to the CO. Instead, an aircrew member who had heard the story third-hand from the O3 co-pilot, reported the event to the HITRON XO. The O4 pilot's version of events supports mine factually, though it describes the member's thoughts and feelings that were not apparent to me at the time.

This certainly was not an ideal situation, but one I viewed as an O4 helping out another O4 who was in a quandary. I misjudged our level of familiarity, and I obviously wish I had made different choices that night. I exhibited poor judgment that I wholeheartedly regret, and I made an out of character mistake. I will not let this event define an otherwise stellar career, and I ask that the Coast Guard does not either.

The CO forwarded the addendum with a note stating that "an investigation was completed on 31 Jul 2015 by a Preliminary Inquiry Officer into the circumstances surrounding the actions of

[the applicant] as assigned by the Commanding Officer and with the concurrence of Coast Guard … Area."[13] The Reviewer forwarded the addendum to PSC without comment.

Permanent Removal from Primary Duties

PSC submitted a database print-out entitled "RPD Panel Sheet," which shows the steps followed within PSC for the applicant's permanent removal from primary duties (RPD). The RPD Panel Sheet begins with an overview that states the following:

> [The applicant] was temporarily relieved of his primary duties as the Executive Officer of CGC [cutter] on 19 Aug 2015. This relief stemmed from the findings of an investigation which found that [he] demonstrated a lack of judgment due to an incident that involved excessive alcohol consumption and violation of liberty policy during a foreign port call. Specifically, [he] spent the night in another crew member's hotel room while removing articles of clothing and approaching the member's bed as well as making comments that made the member feel uncomfortable. [He] failed to report his actions the following day to the Commanding Officer who was not informed of this incident until approached by the other member's chain of command. In his addendum, [the applicant] admits to poor behavior and judgment but argues the notion that he consumed excessive alcohol and provides clarification that his actions/comments in the hotel room were not intended to have the effect they had on the other member. He also states that he was welcomed into the hotel room and did not simply just "enter the room" of another member.

The RPD Panel Sheet shows that the CO's recommendation to remove the applicant was forwarded first to the Associated Assignment Officer in the Officer Assignment Branch (OPM-2) of PSC's Officer Personnel Management Division. The Assignment Officer recommended approval and forwarded it to the head of OPM-2 on October 8, 2015, with this comment:

> Even giving [the applicant] the benefit of the doubt and taking his clarifying comments into account, it is apparent that he exercised poor judgment by putting himself in a situation where he violated liberty policy and committed actions that clearly made another crewmember feel uncomfortable. As an Executive Officer, this clearly impairs his ability to have good standing with the rest of the crew and cripples his ability to hold others accountable for similar actions. I recommend that he be permanently relieved of his position. Without knowing all of the specifics of the investigation, it's worth noting that [the remainder of the comment is cut off by the print-out].

On October 10, 2015, the head of OPM-2 recommended approval of the applicant's removal from primary duties and concurred with the Assignment Officer. He also noted that the applicant's removal had been discussed between the CO and the command of the Area cutter forces, who had concurred with the recommendation for removal before the CO forwarded it to OPM for approval.

The head of OPM-2 forwarded the recommendation for removal to the head of OPM-3, the Officer Evaluation Branch of OPM, who on October 13, 2015, also recommended approval and noted that the SOER was "ready for validation" in the applicant's record. She forwarded it to the Assistant Chief of OPM, who on October 19, 2015, likewise recommended approval of the applicant's RPD and forwarded the recommendation to the Chief of OPM noting that "[a]s outlined in M1000.8 the member's actions clearly undermine his leadership authority."

---

[13] Article 5.C.2. of the OER Manual states that the Supervisor and Reporting Officer have the opportunity to address the Reported-on Officer's addendum with comments or may endorse it with their signatures alone before forwarding it to the OER reviewer.

Finally, on October 20, 2015, the Chief of OPM electronically signed the "decision" approving the CO's recommendation to remove the applicant from his primary duties. He noted that he concurred with the other officers' recommendations and was "also provided with a verbal brief from OPM-2 staff following temp RPD."

FOIA Request for PIO's Report

In an email exchange dated October 26, 2015, an officer—apparently a JAG who was helping the applicant—was told that except through a FOIA request, the JAG could not have a copy of the PIO's report or review it with the applicant in person.

On October 28, 2015, the applicant submitted a FOIA request for the PIO's report and requested expedited processing "in a timely manner in order to give me enough time to review and prepare my derogatory OER reply (due 21 days after I receive a validated copy of the OER, which could be any day now) and in the event a special board is convened, to help me write my communication to the board."

Alcohol Screening and Treatment

On October 28, 2015, the applicant's command was informed that he had undergone substance abuse screening and that "[h]is answers to the questions asked based on the Diagnostic and Statistical Manual IV (DSM IV) meets [sic] the criteria for no diagnosis." Therefore, treatment was not recommended, but the recommendation "should not have any bearing on administrative proceedings or command policies."

On December 14, 2015, the applicant acknowledged receipt of two more Page 7s. The first congratulated him for having completed an addiction early intervention program and warned him that any future pattern of alcohol misuse or alcohol incident, might result in separation. The second noted that he had been screened for alcohol abuse because of the incident on July 7, 2015; that he should report the results of his screening to his future commands and Command Drug and Alcohol Representatives; and that he had been advised about alcohol abuse policies and continued support plans.

Final Action Memorandum

On November 26, 2015, the CO of the cutter issued a "Final Action Memorandum Concerning Investigation into Circumstances Surrounding the Actions of [the applicant], USCG, on the Evening and Early Morning of 6-7 July 2015." The CO stated that having considered the AIM and the PIO's report, the investigation was closed because appropriate administrative actions had been taken. The CO found that the applicant "spent several hours drinking" and "became intoxicated"; he went to the LCDR's hotel room at about 0345 "while still under the influence of alcohol"; he "removed his clothing other than his boxers and slept on the couch"; and "he asked to get into the LCDR's bed at one point." The CO stated that the applicant had "demonstrated poor judgment which undermined his credibility as Executive Officer"; violated Articles 133 and 92 of the UCMJ; and incurred an alcohol incident. Therefore, the CO concluded, he had issued the applicant an alcohol incident and relieved him of his primary duties.

Applicant's SOER Reply

On December 9, 2015, the applicant submitted a Reply to become part of the SOER as well as the addendum.[14] He stated that when the CO requested his input for the SOER, the CO "did not give me a set timeframe within which to complete OSF input, and he did not indicate the Special OER would be completed with signatures within nine working days of my reporting to [his next duty station]." He argued that he was not given an adequate opportunity to provide input. He complained that even though the CO marked him as "not observed" in the "Evaluations" performance category, he criticized the applicant for not providing input in the comments. The applicant stated that after the CO first requested his input for the SOER, he did not receive any additional solicitations for input for the SOER. The applicant argued that although he did not submit input for the SOER within two weeks of being asked for it, "it is simply misleading and unfair to provide a disparaging comment when I was not provided a reasonable opportunity." The applicant therefore provided nine examples of his performance during the reporting period:

- "Flawlessly planned and prepared all aspects of mid June 2015 Change of Command …";
- "Expertly coached inexperienced conning officers for all small boat and helo launches, detainee and contraband transfers, and 12 mooring/unmooring evolutions …";
- "Presented sensitive annual sexual assault awareness training to crew for over four hours …";
- "Advocated for subordinates; formally recognized & publicly praised superb performance …";
- "Reviewed, revised, and submitted 34 enlisted evaluations …";
- "Drafted persuasive AY 16 Command Concerns to address enormous turnover in Eng. Dept, extensions, fleet-ups, …";
- "Coordinated alcohol-free professional development outing for wardroom to a mariner's museum …";
- "Self-assured and confident; projected ideal CG image as Master of Ceremony for [Change of Command] ceremony …"; and
- "Maintained good order and discipline aboard cutter and displayed sound judgment and integrity; coordinated two masts for unacceptable romantic relationship and theft of shipmate's speaker … ."

Regarding the CO's SOER comments that he had neglected to inform his CO of what had happened early in the morning on July 7, 2015, the applicant argued that they are inappropriate because he had "no duty to report … himself for any actions short of arrest or civil prosecution" and he "is constitutionally protected from a compulsory requirement to potentially self-incriminate. To comment that a [reported-on officer] availed … himself of a constitutional right or that exercising such a right violates CG core values, vice strictly address the underlying conduct, is wholly inappropriate."

[14] Article 6.A. of the OER Manual, PSCINST M1611.1B, states that an officer may submit a reply to any OER through his rating chain to become part of the OER within 21 days of receiving the validated OER from PSC, and the raters may respond to the reply with comments in their endorsements.

The applicant stated that his actions did not meet the criteria for an alcohol incident. He alleged that the CO "did not have a complete grasp of the incidents as they actually occurred." He noted that the Page 7 states that he drank alcohol over a period of eight to nine hours, while the SOER stated that he drank alcohol over approximately twelve hours. He stated that he was on "approved overnight liberty during this time that would not expire for another 30+ hours and there were no assigned duties that I was unable to perform. … There were also no Coast Guard-wide or cutter-specific limitations in place regarding alcohol consumption 36+ hours prior to sailing or berthing in the same room with a shipmate of the same rank. Most importantly, there was neither evidence that alcohol was a significant or causative factor in my actions that night, nor that any of my actions violated UCMJ, Federal, State, or local laws."

On January 6, 2016, the CO forwarded the applicant's OER Reply with comments for inclusion in the SOER. The CO quoted the findings of the PIO that the applicant had arrived at the room intoxicated, lay down on the couch while the LCDR went to the front desk to determine whether there was another room for him, stripped down to his boxers, and asked the LCDR to share her bed with him. The CO further stated that before preparing the SOER, he told the applicant "that he needed to provide OER input as soon as possible. Rather than provide input, [the applicant] chose to take three weeks of leave after reporting to [his temporary duty station]." The CO noted Coast Guard Regulations regarding ensuring good order and discipline by example and stated that the applicant had "failed to uphold the Coast Guard core values, expectations of a commissioned officer, and the position of Executive Officer (XO). As XO, he had a duty to report actions of members that fell short of these standards, including his own." The CO stated that the alcohol incident, relief from primary duties, and SOER were all justified after he and the Area command lost confidence in him.

Confirmation of Appointment

On December 10, 2015 (the day after the applicant had submitted his OER reply), the Senate confirmed the appointment to commander of all the officers who had been selected for promotion on July 20, 2015, including the applicant.

FOIA Request Response

On January 12, 2015, the Area Command responded to the applicant's FOIA request. Of 42 total pages that were deemed responsive to his request, the command released 15 partially redacted pages and withheld 27 pages.

Commander Assignment Panel

On January 19, 2016, a Commander Assignment Panel convened to match officers with upcoming vacancies in commander billets. The results show that various commanders, selected commanders, and lieutenant commanders, had been selected for assignment to fill vacancies in commander billets. The applicant was listed as a selected commander who had been assigned to one of the commander billets.

Notification of Delay of Promotion & Special Board

On January 28, 2016, PSC informed the applicant in a memorandum that his promotion was being delayed based on adverse information, pursuant to Article 3.A.12.f. of COMDTINST M1000.3A. PSC advised him that a special board of officers would be convened to recommend whether his name should be permanently removed from the promotion list. PSC stated that his name was being removed from the list based on the receipt of the SOER and the Page 7 documenting the alcohol incident. PSC advised him that he had a right to submit comments to the board within ten calendar days of the notification. PSC asked him to execute and return an acknowledgment of the notification.

On March 1, 2016, PSC sent the applicant a nearly identical notification memorandum except that it did *not* list the PIO's report dated July 31, 2015, as one of the documents that would be viewed by the special board.

Applicant's Communication to Special Board

On March 16, 2016, the applicant submitted his communication to the special board in a sixteen-page memorandum with seventeen attachments, which he stated was his "first and only opportunity to provide input in my defense that is unrestricted in both length and content." The applicant noted that he had worked very hard for sixteen years and taken on challenges and assignments of increased responsibility that would lead to promotion. He noted that he had served more than nine years of sea duty and "accepted substantial personal sacrifice" over the years by being separated from his family and missing important family events. He noted his operational experience, education, and expertise in an important non-operational field.

The applicant told the special board that while he regretted the comment that made the LCDR uncomfortable, the punishment he had received had "already surpassed the crime." He argued that the CO could have retained him as XO and considered his conduct on the night in question when preparing his next annual OER. The applicant asked the special board to "visualize the circumstances surrounding this event and consider the possibility that I did not disqualify myself from promotion." He reviewed his qualifications and noted the excellent marks that he had received as XO of the cutter on his annual OER dated April 30, 2015, which the prior CO had signed on June 11, 2015. He pointed out that after the change of command, there had been "a week of unobserved 'stand-down' time," and so prior to the patrol, the new CO "had only known and observed me for two and a half weeks at the time of this regrettable port call." The applicant stated that because HITRON had been told of the incident,

> this placed a lot of stress and pressure on my CO; in fact, he told me as much and stated that if he did "nothing" to me, he might have the "O6 CO of HITRON accusing [him] of influencing the investigation" while if he was harsh with me, he might have to deal with "the people [I] know" from my career judging his decision or coming to my defense. He assured me he could "handle" the latter, but it was still clearly weighing on him. Given the short time he had known me and been in command, I can understand if he was not willing to potentially risk his reputation, his command, and his career for the sake of mine. Though this information may help explain factors the CO considered in making his decision, it does not make his decision right or just, especially when all other factors and circumstances are fully and fairly considered.

The applicant claimed that the CO's summary of the events "unreasonably implies this was a sexually charged event" even though he was never accused of sexual assault or harassment. He stated that he did "not deserve to have any allusions or implications" of such an offense in his record. He also argued that although the LCDR was subordinate to him, the person "was the absolute closest I could have found to a 'peer'" because he would not be preparing an OER for the member and "had no direct influence on this member's career or duties." He alleged that the fact that the incident was reported to HITRON, instead of the CO, shows that the aircrew "did not consider themselves to fall within my chain of command, and the O4 did not consider me a direct reporting officer," as stated in the SOER. He claimed that his relationship with the LCDR was "strictly a 'personal relationship'" and not inappropriate just because they were of the opposite sex. He alleged that if two male members share a king-sized bed during a port call, they are "presumed innocent" but "still deeply rooted in [military] culture is an absence of that same presumption of innocence when the scenario applies to a male and female. Many officers still automatically presume motives were sexual in nature." He argued that it is unjust and a violation of civil rights to differentiate the handling of two such scenarios based solely on the gender of those involved. … I am offended that the CO assumed the worst in me, attacked my character and commitment to core values, and then stuck with his disgusting narrative that he created in his mind, even when other evidence pointed to my innocence."

The applicant stated that the CO did not want him to continue as the XO "regardless of the evidence." He stated that the Page 7 and SOER painted him "in a predatory light and ignored several extenuating factors while distorting others." He stated that he sent the CO an email asking him "to clear up some of [the Page 7's] ambiguity" but received no reply. And even though the applicant pointed out errors in the SOER in his addendum and reply, the CO stood by the SOER as written.

The applicant disputed the claim that he had admitted that his BAC was beyond the legal limit to drive. He called this claim was "manipulated and taken out of context" and used as the "smoking gun" to determine that he was intoxicated. He claimed that the PIO had asked him whether he had been intoxicated "that *evening*. I responded that I was not drunk, but that I would not have driven that night." When the PIO asked him if he had driven that night, he replied that he "had not driven, but that [he] would never get behind the wheel of a car when [he] had been drinking. [He] then reiterated that [he] was not intoxicated and that alcohol was not a contributing factor in why [he] returned to the hotel room or in what [he] said to the O4." He stated that the PIO misquoted him and clearly distorted what he said. He alleged that without the PIO's false report of his admission, there was no other evidence to support the claim that he was intoxicated. He also stated that he had no opportunity to challenge the eighteen-word alleged quotation of him that the PIO used to report this false admission because they were alone, the interview was not recorded, and he was not granted a forum, such as mast, where he could challenge the PIO on this point. He also argued that because the PIO had asked him whether he had felt intoxicated that evening, his reply was irrelevant to his conduct in the next morning. The applicant noted that the PIO's other quotations in the report were shorter and argued that it "is not believable that this eighteen-word quote was either memorized or noted without check to ensure he had it exactly right." The applicant stated that he was not given the chance to review and confirm the validity of the PIO's summary of the interview, which he stated the subject of an investigation is usually allowed to do, and he only saw the PIO's report about thirty minutes before he was relieved of his duties by the CO.

The applicant stated that "[r]egardless of how the exchange of questions and answers actually went on the subject, it is an indisputable fact that [he] had no way of knowing definitively whether [his] BAC had been above or below the legal limit to drive." The applicant noted that the PIO could have but did not include an estimate his BAC in the report and claimed that depending on whether he had nine or ten standard drinks and whether he had them over eight, nine, or twelve hours, his BAC would have ranged from negligible to 0.07%, which is below the legal limit, but that would not have "fit" the PIO's narrative. He claimed that to have been over the legal limit to drive, he would have had to have drunk sixteen or more standard drinks between the time he first drank a beer with the CO until he made the comment about sharing the bed in the LCDR's hotel room, and there is no evidence showing that he drank more than ten drinks during those fourteen hours. The applicant repeated that he was not over the legal limit or intoxicated and claimed that LT C's claim that he was "buzzed" was based on the last time LT C saw him (about 2320 on July 6, 2015).

The applicant stated that other extenuating circumstances included the fact that the water taxis had stopped running at 0100 because of the rain; 4.74 inches of rain fell between 0130 and 0400; he had initially waited for the rain to subside; the LCDR's hotel room was the only one "in which [he] knew another Coast Guard member was staying"; he had already heard that all of the rooms in town were full; and he removed most of his clothes because they were drenched and the LCDR had told him he was going to ruin the couch. In addition, he stated, the fact that the LCDR got sheets and made up the couch for him indicated that she was comfortable with him sleeping there. He alleged that she could have "given [him] the hotel number and directions to the hotel of the O3 co-pilot, which the O4 was aware of, but [he] was not. This option was not suggested by the member. Since I did not sense any awkwardness or uneasiness and it was still pouring rain, I did not consider this option either, as I felt welcomed to stay, given the circumstances."

The applicant stated that other extenuating circumstances were that the room was very cold; they could not find the thermostat or an extra blanket; it was still raining heavily so opening the door was not a good option; and he "could not get comfortable and kept sitting up and getting up to try to find something to use to get warm." The applicant stated that "[w]hile trying to get warm and joking about the whole situation, [he] made a comment in a sarcastic manner, asking if [he] could just sleep in the bed. Though the member declined, the tone of the conversation did not change nor give [him] any sense that the comment had created discomfort. … There is no evidence supporting a claim in the Special OER that [he] ever approached the member after the member declined to share the bed. That is unfounded and contrary to the member's own statement, which confirms [he] fell asleep shortly after making the comment." And even though he pointed out that inconsistency in his SOER Reply, the CO continued to support the SOER "as written."

The applicant also argued that his conduct had not met the requirements for an alcohol incident because he was on liberty and so did not have any duties that day that he could not perform; he did not bring discredit upon the Coast Guard since only two members were involved; and he did not violate any law or policy. He noted in this regard that the CO had not punished him at mast and relied solely on administrative measures.

The applicant stated that he was "not afforded fair process" pursuant to Coast Guard policy. He stated that much of the information that the CO used in the Page 7 and SOER was

obtained without reading him his rights. The CO interviewed members of the aircrew and clearly suspected him of having committed an offense but did not read him his rights. Because the applicant felt he had nothing to hide, he told the CO "everything [he] could think of." The applicant stated that he did not have an opportunity to present evidence in his defense or confront his accuser or the PIO at mast or court-martial. He alleged that when the PIO informed him that he was suspected of having violated Article 92 of the UCMJ—failure to obey an order or regulation—the PIO could not identify the order or regulation he was being charged with failing to obey. The applicant answered all of the PIO's questions because he "though this whole thing was a big misunderstanding" and had nothing to hide. The PIO erroneously signed as the witness on the rights form and did not allow the applicant to review and sign the PIO's summary of their interview. The PIO emailed him and asked him more questions and requested a written statement without reminding him of his rights. And when he requested a copy of the PIO's report, he was allowed to review it twice, but neither he nor a Coast Guard attorney he consulted about preparing his SOER reply was not provided a copy of it. Nor were they allowed to review it together.

The applicant stated that the Final Action Memorandum regarding his removal was drafted and signed on November 26, 2015, but he did not get a copy of it until he filed a request under the Freedom of Information Act (FOIA), which left the applicant "in a state of uncertainty." He stated that while drafting his addendum and reply for the SOER he never knew whether the CO's decision to remove him was final or whether the CO might punish him at mast or refer charges for court-martial. He stated that this failure to furnish him with a copy of the FAM was unreasonable and caused him a lot of stress. The applicant also stated that he did not receive a response to the FOIA request until 83 days later, which was after he was required to submit his SOER reply even though he had identified the office that had the information he was seeking and it was in the building where he worked. And the response to his FOIA request omitted all of the witnesses' statements except his own and the PIO's report. He did not receive the entire PIO's report until March 2, 2016. He alleged that the Coast Guard had resisted giving him a copy of the report because it was so deficient.

Special Board Report

On March 17, 2016, a Special Board composed of a captain and two commanders convened to examine the records, including the disputed Page 7 and SOER and the applicant's submission, and to determine whether to recommend his removal from the commander promotion list. The Special Board reported that the applicant's

> conduct, as documented in [the SOER], constituted a significant breach of good order and discipline, reflecting poorly upon his judgment and professionalism as an officer in the U.S. Coast Guard. While serving in a position of trust and leadership as Executive Officer of a major cutter, [he] displayed a level of judgment inconsistent with what the Coast Guard expects from commissioned officer, regardless of rank, and in particular senior officers as described in the Commandant's Guidance to PY16 Officer Selection Boards and Panels. Specifically, a series of poor decisions culminated in [the applicant] entering a subordinate female's hotel room in the early morning hours of 07 July 2015 after consuming alcohol, and then removing his clothing down to his boxer shorts and remaining overnight. We find that [he] did not demonstrate the personal responsibility and

> accountability expected and demanded of command cadre whose ship was at anchor in a foreign port. As supported by his CG Memo 1401 dated 16 Mar 2016 (Communication to Special Board), OER addendum statement to [the SOER], and [Page 7] dated 19 Aug 2015, [the applicant] did not adhere to unit liberty policy and personal readiness standards which undermined his position of authority as the Executive Officer. Furthermore, his actions negatively impacted subordinate members of the crew by placing upon them the burden of having to assume responsibility for his wellbeing. Regardless of any extenuating circumstances, his lack of judgment placed him in a state of undress in a subordinate's hotel room. Ultimately, his actions alone resulted in his relief of primary duties and a documented alcohol incident.
>
> [The applicant's] actions are inconsistent with Coast Guard Core Values. [He] failed to meet the prescribed standards expected of senior officers as outlined in Commandant's Guidance to PY16 Officer Selection Boards and Panels. As a result, this Board recommends that [the applicant] be removed from the PY16 Commander Selection List.

Commander, Personnel Service Center forwarded the report of the Special Board through his chain of command to the Commandant with a recommendation that the Commandant approve the Special Board's proceedings, findings, and recommendation to remove the applicant from the commander selection list.

Commandant's Recommendation and Secretary's Action

On April 15, 2016, the Commandant approved the proceedings, findings, and recommendation in the Special Board's report and forwarded the report to the Secretary with a request that the Secretary approve the report and remove the applicant from the commander selection list. He noted that the proceedings had been reviewed by counsel and the Deputy Judge Advocate General and that under 14 U.S.C. §§ 271(f) and 272,[15] an officer's promotion could be delayed pend-

[15] 14 U.S.C. § 271 (2015), now codified at 14 U.S.C. § 2121, states the following:

> (a) When the report of a board convened to recommend officers for promotion has been approved by the President, the Secretary shall place the names of all officers selected and approved on a list of selectees in the order of their seniority on the active duty promotion list. The names of all officers approved by the President and recommended by the board to be placed at the top of the list of selectees shall be placed at the top of the list of selectees in the order of seniority on the active duty promotion list.
>
> (b) Officers on the list of selectees may be promoted by appointment in the next higher grade to fill vacancies in the authorized active duty strength of the grade …
>
> • • •
>
> (e) Appointments of regular officers under this section shall be made by the President, by and with the advice and consent of the Senate except … .
>
> (f) The promotion of an officer who is under investigation or against whom proceedings of a court-martial or a board of officers are pending may be delayed without prejudice by the Secretary until completion of the investigation or proceedings. However, unless the Secretary determines that a further delay is necessary in the public interest, a promotion may not be delayed under this subsection for more than one year after the date the officer would otherwise have been promoted. An officer whose promotion is delayed under this subsection and who is subsequently promoted

ing an investigation or board of officers and that the President could remove the name of any officer from a list of selectees established under § 271. He stated that the Secretary had "the authority to act for the President under the 'alter ego' principle." The Commandant summarized the circumstances as follows:

> [The applicant] was removed from primary duties as the Executive Officer on Coast Guard Cutter … on 19 August 2015 due to receipt of an alcohol incident. While on liberty during a port call, the officer became inebriated and entered the hotel room of a female crewmember, disrobed down to his boxer shorts, and remained overnight. This misconduct was discovered after [the applicant] was selected to promote to Commander in the Promotion Year 2016 Commander Selection Board.

The Secretary approved the applicant's removal from the selection list on April 20, 2016.

In a memorandum dated April 26, 2016, the Personnel Service Center informed the applicant that he had been removed from the PY 2016 commander selection list, which constituted his first non-selection for promotion, and that he would again be considered for promotion by the next commander selection board, which would convene that summer.

Subsequent Performance

For the period August 20, 2015, to April 30, 2016, the applicant received a "continuity OER"—with no performance marks or comments—from the cutter because he had not yet received permanent change of station (PCS) orders for a new permanent assignment. He also received a substantive concurrent OER, dated June 6, 2016, from the command where he had been assigned on a temporary basis. On the concurrent OER, the applicant received fifteen marks of 6 and three marks of 7 in the performance dimensions, a mark in the fifth spot (of seven) on the officer comparison scale, and his reporting officer's "Highest recommendations" for promotion and Senior Service School. He also received a Commendation Medal from this unit for the period August 2015 to June 2016. However, the applicant was not selected for promotion by the commander selection board that convened in July 2016. Although it was his second non-selection, because of his rank, he is being retained on active duty at least until eligible for retirement in 2020 pursuant to 14 U.S.C. § 2145.

On April 30, 2017, the applicant received an annual OER for his performance in the O-5 division chief position he had assigned to by the January 2016 Commander Assignment Panel. He received all marks of 6 and 7 in the performance categories, a mark in the sixth spot on the comparison scale, and a mark of "definitely promote" on the new promotion scale. But he was not selected for promotion in July 2017.

On April 30, 2018, the applicant received an annual OER for his performance in the same O-5 position and received primarily marks of 7 in the performance categories, another mark in the sixth spot on the comparison scale, and a mark of "in-zone reorder" on the promotion scale. The applicant also received a Commendation Medal for his service in this billet from July 2016 to July 2018.

> shall be given the date of rank and position on the active duty promotion list in the grade to which promoted that he would have held had his promotion not been so delayed.

14 U.S.C. § 272(a) (2015), now codified at 14 U.S.C. § 2122(a): "The President may remove the name of any officer from a list of selectees established under section 2121 of this title."

In July 2018, the applicant was transferred to another O-5 billet within the same command. His supervisor explained in a letter dated July 21, 2018, that based on the applicant's performance in the O-5 division chief position, he had chosen the applicant to lead another division with even more responsibility and high visibility. He stated that the applicant had exceeded his expectations and had the highest integrity and character. The applicant had also been selected for this billet by the 2018 Commander Assignment Panel, the results of which list the commanders, selected commanders, and other lieutenant commanders who had been selected for assignment to vacant commander billets. The list shows that the applicant was one of several lieutenant commanders being assigned to a commander billet. On his annual OER dated April 30, 2019, the applicant received primarily top marks of 7 in the performance dimensions; a mark in the sixth spot on the comparison scale, denoting "one of the few distinguished officers"; and his reporting officer's "absolute highest recommendation to re-order and promote" him with a mark of "in-zone reorder" on the promotion scale.

SUMMARY OF THE VIEWS OF THE COAST GUARD

On April 10, 2019, a judge advocate (JAG) submitted an advisory opinion and recommended denying relief. In recommending denial, the JAG forwarded and adopted a memorandum provided by Commander, Personnel Service Center (PSC). PSC noted that the applicant failed to submit an application to the Personnel Records Review Board (PRRB) to seek removal of the disputed Page 7 and SOER.

Regarding the PIO's report, PSC stated that it shows that the CO left the applicant and returned to the cutter before the latter's questionable conduct occurred and the CO was not interviewed by the PIO as a witness. PSC also stated that OPM's RPD Panel Sheet shows that the CO's recommendation to remove the applicant from his primary duties was forwarded and approved by OPM in accordance with the policies in COMDTINST M1000.8A. PSC submitted a declaration dated January 18, 2019, from the CO of the cutter, who wrote that he had reviewed the applicant's BCMR application and "stand[s] by [his] previously submitted documents."

PSC concluded by recommending that the Board deny relief because the applicant had not submitted evidence to support his claims that the Page 7 and SOER were based on "falsities and inaccuracies" or that there was "any improper involvement by his commanding officer." PSC argued that there was "no evidence of failure or laxity in the investigative process" and that the applicant had "met the requirements of an alcohol incident. The following actions of the commanding officer were within his authority and executed in accordance with policy."

In her legal memorandum, the JAG first reviewed the facts and in doing so alleged that the contracted water taxi "would normally operate until approximately 0300"[16] but torrential rains had forced the water taxi service to stop earlier. Therefore, she wrote, the applicant "was stuck in town without a way back to the Cutter." The JAG alleged that the record shows that the applicant asked to stay in the LCDR's room, took off his wet clothes down to his boxer shorts, and asked to share the LCDR's bed, which she declined. The JAG wrote that while in the room,

[16] However, the LCDR's statement and the XO's Morning Orders show that the contracted water taxi service was supposed to end at 0200.

the applicant "would get up from the couch and walk around. This made [the LCDR] uncomfortable enough that she texted other members of her AVDET of the situation."

JAG's Arguments about the "Alcohol Incident"

The JAG argued that the applicant's conduct had met the definition of an "alcohol incident," although he claimed that he was not "intoxicated," because under the definition there is no requirement that a member be "intoxicated" or have a particular BAC to incur one or that any particular amount of alcohol be consumed. But the member must have consumed alcohol, and the applicant admitted that he had drunk alcohol that evening. Moreover, according to the PIO's report, he admitted that he had been "over the legal limit to drive." The JAG stated that the determination of an "alcohol incident" lies solely with the CO, who uses a preponderance of the evidence standard. She noted that pursuant to Article 2.B.2. of COMDTINST M1000.10, "the definition of an alcohol incident … gives commands broad latitude in curbing intemperate alcohol use." The JAG stated that the record shows that

> Applicant consumed a large amount of alcohol on the night of 6 July/early morning of 7 July. Applicant elected to stay out drinking after other members of the command returned to the ship. Applicant failed to secure transportation and/or lodging as appropriate to facilitate his liberty activities. As a result, [he] imposed upon a junior member of his command, placing her in an uncomfortable situation while engaging in questionable activities such as removing his clothing down to his boxer shorts and making "jokes" about sharing a bed. Applicant has failed to provide sufficient evidence that the Commanding Officer erred in finding that such behavior, at the very least, brought discredit upon the Coast Guard and that Applicant's consumption of alcohol throughout the evening was a causative factor.

The JAG noted that the Page 7 documenting the alcohol incident did not accuse the applicant of being "intoxicated" and instead states that his CO had found that his consumption of alcohol was a significant or causative factor in his lack of judgment and inappropriate behavior on the night in question, which had been a dereliction of duties and undermined his credibility as the Executive Officer. The JAG stated that there "was not error or injustice in issuing Applicant an Alcohol Incident."

JAG's Arguments about the CO

The JAG stated that there is no policy in the AIM that requires a CO to recuse himself from being the Convening Authority for an investigation "simply because, by virtue of his/her position as CO they are aware of some of the details surrounding the incident that occurred within their unit and/or interacted with witnesses or the subject of the investigation." Although the applicant called the CO a "material witness" because the CO had drunk alcohol with the applicant while they ate dinner, the CO did not witness any of the events that were the subject of the investigation—the events in the LCDR's hotel room. The JAG noted that *Black's Law Dictionary* defines a "material witness" as a "witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about those matters.[17] The JAG stated that the CO was not present for any of the events after dinner and "has no personal knowledge of any additional event of import."

[17] BLACK'S LAW DICTIONARY, 7th Ed. (2000), p. 1295.

The JAG stated that, contrary to the applicant's claims, the CO's conversations with the XO of HITRON "were not part of an investigative process." In speaking to HITRON, the CO simply received "basic information necessary to evaluate the necessity of initiating administrative action (i.e., start an investigation)." The JAG stated that the CO was consulting with the LCDR's chain of command of a member who had been detailed to the cutter about how to proceed as required by Article 1.F.2. of the AIM.

The JAG stated that the applicant did not prove that the CO had any prohibited conversations with the aircrew, either, and even if the CO did speak to them, he was not conducting an investigation and "there is no evidence of any act of impropriety." The JAG noted that the CO is entitled to a presumption of regularity and so the Board should presume that the CO "asked questions necessary to determine if any events required investigation," as permitted by policy.

The JAG stated that when the CO had sufficient information to determine that an administrative investigation was warranted, he appointed an independent officer to conduct a fair and impartial investigation and provided the officer with access to legal counsel. Thus, the CO ensured that he had a "fair and impartial determination of what occurred" and recommendations from the investigator to guide his decisions.

JAG's Arguments about the Investigation

In response to the applicant's criticisms of the PIO's investigation, the JAG stated the following:

Questioning by CO and Lack of Cleansing Warning: The JAG stated that any failure to inform the applicant of his rights or to provide a cleansing warning would only impact the Coast Guard's ability to try him at court-martial or impose NJP.[18] The JAG noted that Article 4.E.7.b. of the AIM states, "Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement. However, the information may not be used in judicial proceedings such as courts-martial or civil actions." The JAG also noted that the requirement for a "cleansing warning" is not statutory but a judicial rule and that in *United States v. Hines*, 49 M.J. 506, 508 (1998), the U.S. Coast Guard Court of Criminal Appeals held the following regarding a court-martial proceeding:

> Fact that accused, when he was given his rights warning, was not given "cleansing" warning that his prior incriminating statements could not be used against him, did not preclude finding that his subsequent statements were voluntary, where the prior statements were not used to elicit the subsequent statements, and there was no evidence that the later statements were coerced.

The JAG stated that there is no evidence that the CO told the PIO about any prior statements the applicant had made, and if the PIO was unaware, there would have been no need for a cleansing warning under the rule in *Hines.* Moreover, the JAG argued, because the applicant's subsequent statements to the CO were not coerced and were not used against him in a criminal

[18] However, Article 1.D.1.g. of the Military Justice Manual, COMDTINST M5810.1E, states that "[j]udicial exclusionary rules involving rights warnings … do not apply at mast, and the [CO] may consider evidence that would be inadmissible at court-martial."

setting, the lack of a cleansing warning would not entitle the applicant to relief. The JAG stated that this "argument is without merit."

The JAG also pointed out that the PIO informed the applicant of "the full panoply of rights available to him and he waived them all." The JAG concluded that the applicant has "failed to establish that his due process rights were violated."

Unsworn Statements: The JAG stated that under Article 4.C.4.b. of the AIM, there is no requirement that witness statements be signed: "A Standard Investigation is no bound by formal rules of evidence applicable to courts-martial, and may collect, consider, and include in the record any credible (reasonably believable) evidence that is relevant to the matter under investigation …. A witness statement may be signed by the witness, but may also be certified by an investigator to be either an accurate summary of, or a verbatim transcript of, an oral statement made by the witness." And under Article 4.E.7.e. of the AIM, "documented statements, even summaries of witness interviews, may be relied on in administrative proceedings." The JAG noted that the PIO was unable to interview anyone in person accept the applicant himself, who had been transferred ashore, and so relied on emailed responses, telephonic interviews, and his summaries of their statements, which is sufficient under the AIM.

Un-interviewed Witnesses: The JAG stated that the AIM does not require that every witness be interviewed and specifically states that "all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute." The JAG stated that while other crewmembers may have observed the applicant drinking alcohol that night, only the applicant and the LCDR were present during the critical events in question, and there were no other members present in the hotel room at the time who could be questioned. The JAG also pointed out that the applicant has not shown that any of the witnesses who were not questioned had any relevant information that would have changed the outcome of the investigation.

Lack of Legal Review: The JGA stated that the PIO's report shows that he did receive legal advice in conducting the investigation.

JAG's Arguments about Removal from Primary Duties

The JAG stated that the applicant was properly removed from his primary duties pursuant to Article 1.F.2.b.(3) of COMDTINST M1000.8A, which authorizes such removal if "[t]he officer's actions significantly undermine their leadership authority." She noted that the procedures for temporary and permanent removal from temporary duties in COMDTINST 1.F.2.d. were followed and that, contrary to the applicant's arguments, the XO of a cutter is not subject to the "relief for cause" procedures under Article 1.F.2.d. She stated that in this case, the applicant's CO determined that, based on his conduct on the night of July 6 and 7, 2019, he was no longer fit to be the XO. Although the applicant claimed that his removal was unnecessary because the crew of the cutter continued to respect him, this argument is "predicated upon the assumption that the crew would somehow overtly communicate a perceived lack of leadership authority and, more importantly, ignores the critical fact that the [CO] no longer had faith in, or trusted his Executive Officer's judgment." The JAG noted that the CO explained why he thought that the applicant's conduct had undermined his leadership authority in the SOER comments. She also explained that the CO and XO of a cutter have great responsibilities, and the CO con-

sults the XO and must trust the XO. She stated that the record shows that the CO "felt that the actions of Applicant irrevocably breached the faith and trust" of the CO, and this loss of confidence justified the applicant's removal.

The JAG also stated that the CO's obligation to explain the "way forward" to the applicant was fulfilled in the August 19, 2015, notification of removal from primary duties. The CO told him in that memorandum that an SOER would be prepared to document his removal; that he would temporarily be assigned elsewhere; that an officer in PSC would help guide him through the process; and that Commander, PSC-OPM would review the matter and make the final decision about his removal. The memorandum also recommended that the applicant be assigned to a shore billet in his specialty, rather than duty afloat.

JAG's Arguments about the SOER

The JAG claimed that "[a]ll Coast Guard policy was complied with in the issuance of the Special OER." In accordance with that policy, the applicant was allowed to submit both an addendum and a reply for inclusion in the SOER.

Regarding the applicant's complaints about the "not observed" marks, the JAG stated that pursuant to Articles 2.E.2.f., 2.E.4.c., 2.F.2.c., and 4.B.1.e., of the OER Manual, PSCINST M1611.1B, a rating chain member is supposed to assign a mark of "not observed," instead of a numerical rating, when observations of the officer's performance in that category "are believed to be inadequate to render a judgment." The JAG also noted that Article 4.B.1.e. provides that an SOER "may include other information as necessary to accurately reflect the performance being evaluated. Information may be included in the report even if it took place outside the reporting period. Any dimension which is not evaluated is marked "not observed." Therefore, the CO did not err by marking certain performance categories as "not observed" in the SOER.

Regarding the applicant's complaint about the CO failing to identify what liberty policy he had violated, the JAG noted that both the CO and the applicant, as XO, would have had and known the cutter's liberty policies,[19] which normally include travelling with a crewmate when away from the cutter, not missing the transport back to the cutter, not being late for muster, being a good emissary of the Coast Guard and CO when ashore, and not bringing disrepute to either. The JAG stated that the applicant himself, as XO, would have transmitted these policies from the CO to the crew and was responsible for knowing and following them.

The JAG stated that there is no requirement that a reported-on officer agree with every mark and comment in an SOER, and the CO was allowed to enter information that he believed to be true based either on his own observations or on information provided to him by the LCDR or the PIO that he considered to be reliable. The JAG stated that as the XO of the cutter, the applicant was expected to act and behave "in conformity with the customs of the service," pursuant to Article 2-2-1-B of Coast Guard Regulations, COMDTINST M5000.3, and should have adhered to the core values and been "above reproach at all times" especially because he would be Acting CO in the CO's absence. Therefore, she argued, the CO's comments in the SOER were proper.

[19] The JAG erroneously claimed that the applicant alleged that the CO had not published the liberty policies, but the applicant complained only that the PIO and CO did not identify which of the liberty policies he violated and that specific aspects of his conduct were not prohibited by the liberty policies.

JAG's Arguments about the Special Board and Removal from Selection List

The JAG stated that after the applicant was selected for promotion to commander/O-5 in July 2015, his name was published as one of the selected candidates for promotion on September 22, 2015. The JAG stated that the applicant's promotion was properly delayed in accordance with 14 U.S.C. § 271,[20] and his name was removed from the selection list by the Secretary after the Special Board determined that the removal would be in the best interest of the Coast Guard. The JAG stated that the applicant submitted sixteen pages of comments to the Special Board, as well as numerous exhibits attached to his comments. The JAG stated that the Special Board's report shows that the board reviewed all of the permitted documents, including the applicant's submissions and his professional development record, which contained the SOER with his addendum and reply and the disputed Page 7. Therefore, the JAG argued, the applicant had the opportunity to persuade the Special Board that his name should not be removed from the selection list, and the Special Board was not persuaded.

In response to the applicant's claim that the Commandant's memorandum recommending his removal from the selection list distorted the facts, the JAG pointed out that there is nothing factually incorrect in the Commandant's memorandum to the Secretary, especially given the lack of a legal definition of "inebriated" and the evidence that the applicant had been drinking.

The JAG also argued that the applicant's assignment to an O-5 position is not an unjust "windfall" to the Coast Guard. The JAG alleged that Coast Guard officers and enlisted members "routinely serve in billets coded for one paygrade above or below their rank" because in assigning members, the needs of the Coast Guard come first and no policy prohibits it. The JAG noted in this regard that Article 3.A.13. of COMDTINST M1000.3 permits "frocking," whereby an officer is "symbolically promoted and wears the rank of the next higher position as it corresponds to their billet but remains at the paygrade of their actual rank."

SUMMARY OF APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 30, 2019, the applicant responded to the views of the Coast Guard. The applicant alleged that the JAG's advisory opinion "is more suited to an adversarial process" as an "extraordinarily partial" defense of the Coast Guard and again asked the Board for a hearing. He stated that the JAG engaged in "rather severe cherry picking" and frequently misrepresented or ignored inconvenient facts as "an attempt to defend the indefensible." The applicant claimed that the JAG mischaracterized the "crux" of his application as a claim that he had not incurred an "alcohol incident." He stated that while he has proven that he did not incur one, that issue is not the crux of his application. He listed his primary arguments as follows:

1. The Coast Guard failed to follow mandatory procedures in the investigation of the events of July 6 and 7, 2015. The applicant stated that the AIM required the PIO to gather either signed statements or to certify that his summaries of the interviews were accurate, and the PIO did neither. The applicant noted that the PIO's difficulties in conducting interviews while the cutter was underway did not prevent him from procuring signed statements and did not excuse these deficiencies.

[20] Now codified at 14 U.S.C. § 2121. *See* footnote 15 above.

2. The CO was a material witness to those events but failed to recuse himself in the matter. The applicant stated that the CO clearly met the definition of a material witness in Black's Law Dictionary, which the JAG cited, because he could "testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about those matters." He noted that the dictionary also defines a "material witness" as "a person who is capable of testifying in some relevant way in a legal proceeding." He stated that the CO spoke to the XO of HITRON, as well as the LCDR and other members of the aircrew and so possessed information that was highly relevant to the investigation. The applicant stated that although the JAG attempted to cast doubt on his claims about the CO talking to the aircrew, the CO has never denied drinking alcohol with the applicant or speaking to the LCDR and the aircrew after receiving the report from HITRON. The applicant argued that the Board should deem the CO to have admitted to any facts alleged by the applicant that the CO did not specifically deny. And he argued that after speaking to the XO of HITRON, the CO had no reason to talk to the aircrew himself because "he surely had formed an opinion of what had transpired and suspected [the applicant] of violating the UCMJ."
3. The PIO's investigation was "fatally flawed by his failure to establish facts based on the evidence of record." He noted that the PIO was instructed to investigate how much alcohol the applicant had drunk but the LCDR's statement for the PIO did not allude to his alcohol consumption. He argued that the CO issued the Page 7 documenting an "alcohol incident" because he believed that the applicant was intoxicated, but "this simply was not the case," and he reiterated his arguments about not being intoxicated and his behavior not being caused by alcohol consumption. In addition, he argued that arrests, public drunkenness, driving while intoxicated, and violence bring discredit on the Coast Guard but sleeping on the hotel couch of a fellow officer of the same rank does not. He argued that he has shown that the PIO should have but failed to interview the XO of the HITRON and other members.
4. The LCDR had "likely engaged in fraternization by consuming alcohol with her subordinates, including enlisted personnel"; did not assert that the applicant was intoxicated or that alcohol contributed to his behavior; and "clearly stated that she feared repercussions if her decision to invite [the applicant] into her room and to stay overnight were discovered and reported."
5. The CO failed to obtain a legal review of the investigation before taking action against the applicant. The applicant argued that the PIO's claim in his report that he had received the advice and assistance of an attorney is not evidence that the CO secured a legal review of the investigation before acting on it. He stated that a legal review was required by Chapter 4.F.3.a. of the AIM, COMDTINST M5830.1A and Chapter 5.E. of the Commander's Quick Legal Reference Guide.
6. And the Commandant made prejudicial and misleading assertions in his memorandum to the Secretary, painting a false and nefarious picture of the events consistent with the CO's false statements in the SOER. The applicant stated that, contrary to the JAG's claim, he has never admitted that he was inebriated, only that he had consumed alcohol. He argued that he had demonstrated that he was not inebriated or intoxicated and so the Commandant's memorandum to the Secretary was wrong. He repeated his allegations about how the Secretary might have misinterpreted the memorandum as describing "a drunken, out-of-control officer" who walked uninvited into the LCDR's room. He also claimed that

the JAG admitted that the date of discovery of his conduct while on liberty in the Commandant's memorandum was false.

The applicant also described the JAG's arguments about the liberty policy as "Kafkaesque" because she simply opined about what those policies might have been and then claims he violated him. The applicant then claimed that "no cutter liberty policy was ever published," and he claimed that he had already made this claim in his original application on pages 59 and 60, as the JAG had alleged.[21] Later, the applicant argued somewhat contrarily that he "was the executive officer for over 12 months and he was very familiar with the cutter's liberty policies. There were no published liberty policies violated by [him] on 6-7 July. To say [he] violated some or all of the policies provided by [the JAG in the advisory opinion] would be disingenuous."

Regarding the JAG's allegations about what was expected of him as the XO, the applicant pointed out that the JAG did not criticize the LCDR for fraternizing with her aircrew and so unjustly held him to a higher standard than the LCDR. He noted that the JAG did not address the fact that the CO repeatedly criticized him in the SOER for exercising his constitutional right not to incriminate himself.

Regarding the SOER, the applicant noted that the outgoing CO should have provided the incoming CO with draft input for his next OER, either on an OER form or in handwritten bullets, as required when an OER Supervisor or Reporting Officer changes during the middle of a reporting period. He noted that his prior CO had observed his performance for over a year and for more than 40 days of the reporting period for the SOER itself and argued that the new CO should have requested OER input from him instead of marking the applicant's performance as "not observed" in so many performance dimensions. The applicant also stated that he and the CO served together for more than 70 days on a 270-foot ship and that it is "absolutely implausible that a competent Commanding Officer could claim that he was unable to observe and render judgment of the performance of his Executive Officer throughout that period of time."

The applicant disputed the JAG's claim that he was not entitled to be read his rights before the CO questioned him since the CO admitted that the XO of the HITRON had told him that the applicant had engaged in "unbefitting actions." He argued that the CO did take disciplinary action against him based on his unwarned statements by removing him from the cutter.

The applicant repeated and elaborated on many of his factual allegations and legal arguments. And he argued that the JAG ignored and misinterpreted the facts in the advisory opinion. He stated that he went to a bar with the aircrew between 2245 and 2330 on July 6, 2015, but he stopped drinking alcohol because he was tired before the rain became torrential by 0100, which prevented him from returning to the cutter. He claimed that he tried to wait out the rain in the bar until closing time and then waited at the water taxi landing "until a point at which he saw no end to the rain in sight, nearly three hours." He objected to the JAG referring to the LCDR as a "victim" in a footnote because he did not harm her "in any way." He stated that he is not disputing that the CO was entitled to accept the statements of the LCDR over his own but that the CO made "statements that were not reflective" of either of them, as when the CO claimed that the applicant approached the LCDR's bed after asking to share it (getting the sequence of events in

[21] On pages 59 and 60, however, the applicant listed specific elements of his conduct that the cutter's policy did not specifically prohibit and did not claim that the cutter had no published liberty policies.

the LCDR's statement prejudicially wrong) and that the LCDR had refused to engage in small talk when the LCDR stated that the "chit-chat continued until 0530."

The applicant also claimed that given the LCDR's concerns about his wet clothes ruining the couch, he reasonable removed them except for his boxers. Also in light of those concerns, he argued, her offer to open the balcony door to warm up the room was "obviously sarcastic" since it was still raining. He also pointed out that the LCDR never sent a text to the copilot claiming that the applicant was walking around or asking the copilot of the applicant could sleep in his room. He argued that her texts show instead that she was worried about "misperceptions or rumors." He stated that the LCDR's own statement to the PIO shows that she was undecided about reporting what had transpired and did not want people to think that she was having an affair with the applicant because she might "be sent home."

The applicant repeated his arguments about his CO's failure to read him his rights and the PIO's failure to provide a "cleansing" warning. He noted that even if the PIO had provided a cleansing warning, the CO could not have unheard the unwarned statements that the applicant had already made to him. And he argued that because the CO failed to read him his rights, the CO instead took actions against him that were "severe, but technically administrative in nature, to avoid vulnerability to an appeal."

Regarding his removal from primary duties, the applicant argued that if his actions had actually undermined the CO's confidence in his leadership, the CO would not have allowed him to continue serving as XO of the cutter for a month after the aircrew left. He noted that the JAG did not mention the statements he submitted saying that the crew continued to respect him and he alleged that the CO did not learn anything new from the PIO's report because the CO had already interviewed the aircrew. He also disputed the JAG's claim that the CO's memorandum dated August 19, 2015, adequately advised him of "the RPD process and the way forward."

The applicant also complained that PSC made the decision to remove him from his primary duties after the SOER and his addendum were submitted but before he submitted his reply to the SOER. He argued that PSC should have delayed the decision until after the 21-day period for submitting his reply had passed. He also noted that the RPD Panel Sheet of PSC's decision-making about his removal was not entered in his professional development record, was marked "deliberative in nature," and was not sent to him when he submitted his FOIA request. He argued, therefore, that the Panel Sheet cannot be the documented decision to remove him because it was not entered in his permanent record. He claimed that the RPD Panel Sheet only proves that his RPD was "considered and deliberated, but not that a final decision was ever issued."

The applicant also argued that the fact that he was sent on temporary duty to another unit, instead of being permanently transferred, until the spring of 2016, as shown on his subsequent OERs, is evidence that he was not "formally removed from his/her primary duties and transferred to another permanent duty station," as described in Article 1.F.2. of COMDTINST M1000.8A. He argued that if his removal became permanent in October 2015, as the Coast Guard claimed, then his OER from the cutter dated April 30, 2016, should be removed; and the June 6, 2016, "concurrent" OER he received from the unit he had been sent to in August 2015, should be changed to a "detachment of officer" OER.

The applicant stated that the JAG's claim that the CO issued a Final Action Memorandum on the investigation on November 26, 2015, is "very misleading" because he did not receive this memorandum in 2015 and has only ever seen a redacted version because of his FOIA request. He stated that PSC "never issued transfer orders, a decision memo, or anything else to indicate a final decision on RPD."

The applicant argued that the Coast Guard "has failed to justify" why the delay of his promotion was not done until January 28, 2016. And he pointed out that although the CO stated in the SOER that he was not ready for greater responsibility, PSC nonetheless assigned him to an O-5 position, not once but twice. He stated that he has since been assigned to a 90-day detail in a GS-15/O-6 equivalent position. The applicant also argued that PSC's memorandum, which the JAG adopted, failed to address many of his claims and so is "unworthy of any deference."

FINDINGS AND CONCLUSIONS

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

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.[22]

3. The applicant alleged that a Page 7 documenting an alcohol incident dated August 19, 2015, his removal from primary duties as the XO of a large cutter, the SOER documenting his removal, and his loss of promotion to commander/O-5 are erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant's military record is correct as it appears in her record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[23] Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."[24] In addition, to be entitled to removal of an SOER, an officer cannot "merely allege or prove that an [SOER] seems inaccurate, incomplete or subjective in some sense," but must show that the disputed SOER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[25]

4. **Alcohol Impairment**: The preponderance of the evidence shows that the applicant's consumption of alcohol was a significant or causative factor in his conduct early in the morning on July 7, 2015. The evidence shows that the applicant drank at least 9 or 10 drinks between the time he went ashore sometime after 1500 and midnight on July 6, 2015. Although the applicant denied having consumed alcohol while he sat at a bar from midnight until closing at

---

[22] *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).
[23] 33 C.F.R. § 52.24(b).
[24] *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).
[25] *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), *cited in Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

0300, the record shows that when the aircrew left him at the bar at about 2330 on July 6, 2015, he had "settled in" to socialize with members of the cutter's crew. If the applicant had been drinking water or cola at the bar, his crewmates would presumably have been willing to provide him with statements to that effect to the CO or the Board, but he submitted no such evidence. Moreover, the following evidence shows that the applicant's judgment was impaired by alcohol:

- Although heavy rain is common in that location, it had rained heavily the night before when the cutter was at anchor, and very heavy rain must have been forecast, the applicant remained in the bar oblivious to the forecast, substantial breaks in the rain when he could have returned to the cutter, and the possibility that he might not be able to get back to the cutter but had no hotel room reserved. His lack of attention to the weather and forecast is evidence of alcohol impairment.
- The applicant remained in the bar long past midnight despite the increasing rain even though the cutter's last contracted water taxi ran at 0200, he had no hotel room reserved, and he allegedly knew the location of only one hotel room where he might be admitted—that of a female subordinate officer whom he had known for about two weeks. His lack of attention to the time and final contracted water taxi service is evidence of alcohol impairment.
- The applicant was last seen by the aircrew at about 2330 on July 6, 2015, when he was settling in to socialize with crewmembers of the cutter and he remained in the bar until it closed at 0300 despite the earlier departure of all of his more careful subordinate crewmates (since, he alleged, he was stuck there alone with nowhere to go but the LCDR's hotel room). His lack of attention to his circumstances is evidence of alcohol impairment.
- As discussed in finding 5, below, the applicant violated the cutter's liberty policies that night. His lack of compliance with cutter policies is evidence of alcohol impairment.
- After the torrential rain started around 0130, the applicant had his cell phone on him and could have called the OOD or another crewmate from the cutter to try to find a place to stay overnight or, at least, he could have stopped at the front desk of the hotel to ask for advice on finding the room of another crewmate or another safe place to stay. But instead, at about 0345, he knocked on the door of a sleeping female subordinate officer whom he had known for about two weeks and entered her room without an express invitation to do so. His failure to even attempt to find a more appropriate place to sleep is evidence of alcohol impairment.
- After entering the subordinate LCDR's hotel room, the applicant immediately began taking off his socks and shoes. And when she asked him, "What are you doing," he—her direct supervisor at the time—told her that he needed to stay in her room overnight and ignored the clear discomfort in her response: "This can't happen, this isn't an ideal situation." His obliviousness to her discomfort is evidence of alcohol impairment.
- When the applicant told the LCDR he intended to spend the night in her room, she went to the front desk to try to find another room for him, which was very clear evidence of her discomfort with his presence. Instead of accompanying her to attempt to find a more appropriate resolution to his predicament, however, the applicant lay down on the couch in her hotel room. His decision to lie on the couch instead of helping her find him a more

appropriate place to sleep, despite her clear discomfort, is evidence of alcohol impairment.

- The applicant lay down on a suede couch oblivious to the damage his sopping wet clothes might do. His obliviousness to the potential damage is evidence of alcohol impairment.
- When asked about the applicant's level of sobriety or intoxication at the time, the LCDR told the PIO that she "could tell he had a few in his system. He wasn't falling down drunk, but knew what he was doing." This description shows that the applicant was under the influence of alcohol—i.e., intoxicated, inebriated—only not so drunk that he could not stand up.
- After the LCDR returned to the hotel room, the applicant was oblivious to her discomfort despite other statements she made that expressed her discomfort with his presence, such as asking what he was doing when he started to take his pants off and repeatedly telling him that it was "not an ideal situation." At 0400, the LCDR felt the need to notify her copilot about the situation because she was "a little weirded out. Just got a knock on the door. XO is in my room. He wants to stay here. Needed someone to know." Although the applicant did not see her text at the time, his obliviousness to her discomfort, as shown by the statements she was making, is evidence of alcohol impairment.
- After the LCDR turned off the light and got back in bed to go back to sleep—as she had been when the applicant arrived—the applicant sat up on the couch and kept talking, to her discomfort, as indicated in her next text to the copilot, "He's still talking." The applicant's behavior in sitting up on the couch and continuing to talk after she had turned off the lights and gotten into her bed—clear signals that she wanted to go back to sleep—is evidence of alcohol impairment.
- According to the LCDR, the applicant sat on the couch in the dark while the LCDR was in bed and "kept asking [her] questions and he asked one or two of them two or three times." During this "chit-chat" and while she was in bed, "[a] few times [the applicant] would stand up and walk over to [her] bed, stand at the foot of [her] bed and then walk back over to the couch," which made her nervous particularly because she had only met him two weeks before. And this behavior continued until about 0530, when the applicant suggested they should go to bed, even though the LCDR was already in bed and the lights were off. The applicant's behavior in repeatedly asking the LCDR the same questions and repeatedly approaching her bed is evidence of alcohol impairment.
- At some point, the applicant told the LCDR a story about how he had ended up sharing a bed with a pilot during a previous deployment and then asked the LCDR if he could share her bed too. The applicant's decision to ask a female subordinate officer whom he had known for only two weeks if he could share her bed is evidence of alcohol impairment.
- Before the LCDR left the room at about 0700, she tried to wake the applicant by hitting him on the foot and saying, "XO, XO," but he did not wake up. The applicant's failure to wake up despite her attempts is evidence of alcohol impairment.
- The applicant could not accurately recall some of the significant events of the night when he was interviewed by the PIO. For example, although he now states that he had been waiting for the rain to stop by himself for about an hour before he went to the LCDR's hotel room, he initially told the PIO that he had been with another member of the aircrew

> and that they arrived at the LCDR's room in the wee hours together, both were soaking wet, and LT C was inside with the LCDR. He later corrected himself to say that he had been alone when he returned to the hotel room and so had nowhere else he could go and that LT C was not in the room when he arrived. The applicant's failure to accurately remember these significant details during his interview with the PIO is evidence that he was impaired by alcohol when he returned to the LCDR's hotel room. His memory failure also casts substantial doubt on the accuracy of all of his claims and denials about how much alcohol he drank that night, what he did in the hotel room that morning, and his motivations for behaving as the LCDR described.

Therefore, despite the applicant's consistent claims that he did not drink alcohol after midnight and was not inebriated or intoxicated when he went to the LCDR's hotel room at about 0345, the great preponderance of the evidence shows that he was acting under the influence of alcohol and that his consumption of alcohol that night caused or significantly contributed to his predicament—being stuck on shore in a foreign port overnight without a reserved hotel room—and his inappropriate conduct in the LCDR's hotel room in the early morning of July 7, 2015.

5. **Violation of Liberty Policies**: The applicant variously alleged that there were no specific liberty policies prohibiting some of his specific acts; that he was never told which liberty policies he had violated; that the cutter had no "published" liberty policies; and that he knew the cutter's liberty policies and did not violate them. In light of his admission that he knew the cutter's liberty policies, his role as the XO in transmitting those policies to the crew, the PIO's and CO's claims that he violated those policies, and the applicant's conduct on the night of July 6 and 7, 2015—getting stuck on shore overnight in a foreign port without a reserved hotel room—the Board finds that the preponderance of the evidence shows that the applicant violated one or more of the cutter's liberty policies. At the very least, he violated the "2-person buddy system" required by his own "Executive Officer's Morning Orders." As XO, the applicant had the cutter's liberty policies, and he failed to submit them to the Board to prove that he did not violate them. Therefore and given that he got stuck in a foreign port overnight without a reserved hotel room, the Board finds that he has not proven by a preponderance of the evidence that the statements in the PIO's report, the disputed Page 7, and the SOER that he violated the cutter's liberty policies are erroneous or unjust.

6. **LCDR's Motivations**: The applicant alleged that the LCDR had motivation to lie about his conduct and her own conduct that night because she had fraternized with her crew and was worried about the effect of the discovery of his overnight stay in her hotel room would have on her career. The record shows, however, that while the applicant was in her hotel room that morning, the LCDR was not trying to hide it but was actively informing her copilot because she felt "weirded out" by the applicant's presence and behavior. And the next morning, she told other members of the aircrew about the applicant's overnight stay and intentionally invited them back to her hotel room so that she would not be alone with him. These are not the actions of an officer trying to hide inappropriate behavior. The fact that the LCDR subsequently expressed concerns about the impact of gossip on her professional reputation within HITRON and potential retaliation (being "sent home") and other negative career consequences of reporting a fellow officer's misconduct does not cast doubt on the accuracy of her descriptions of the applicant's conduct in her hotel room.

7. **Alcohol Incident**: The preponderance of the evidence shows that the applicant's CO did not abuse his discretion or commit an error or injustice in determining that the applicant incurred an "alcohol incident" on July 7, 2015, as defined in Article 1.A.2.d.(1) of COMDTINST M1000.10.[26] As stated in findings 4 and 5 above, his consumption of alcohol was a significant or causative factor in his conduct in the early morning of July 7, 2015, when he violated the cutter's liberty policies and so disobeyed orders in violation of the UCMJ. His conduct also brought discredit to the Uniformed Services because he himself knew what he had done under the influence of alcohol (one can discredit oneself in one's own mind); the aircrew knew some or all of what he had done; the hotel staff knew a member was staying overnight without a reservation; the HITRON command knew what he had done; his CO knew what he had done; and some of the cutter's own crew would likely have noticed his violation of liberty policies and/or subsequently learned through the grapevine what he had done in the LCDR's hotel room. Moreover, as explained in finding 13 below, the applicant's inappropriate conduct did leave him unable to effectively perform significant XO enforcement and disciplinary duties. Although the applicant complained vehemently that he never told the PIO that his BAC was beyond the legal limits to drive, he admitted that the PIO asked him about whether he would have driven a vehicle that night and that he responded that he would not have. The PIO was an impartial officer and he interviewed the applicant in person. Therefore, and given the clear evidence that the applicant was under the influence of alcohol early in the morning on July 7, 2015—albeit not "falling down drunk"—the Board finds that the applicant has not shown that the CO committed an error or injustice in relying on the PIO's report of the applicant's admission that he would not have driven because he knew or suspected that he was beyond the legal limit.

8. **No Investigation Required**: No investigation was required by law or policy for the CO to determine that the applicant had incurred an "alcohol incident"[27] or to initiate his removal from primary duties. Although a determination of a "drug incident"—which results in both disciplinary action and a less than honorable discharge—requires an investigation,[28] a determination of an "alcohol incident" does not. Therefore, the CO could have made the determination that the applicant had incurred an alcohol incident and should be removed from his position based solely on his own observations and other information that he considered reliable.

9. **Type of Investigation**: The record shows that on July 12, 2015, the CO appointed an LCDR from another unit to conduct a "standard investigation" pursuant to the AIM. The AIM provides procedures for Standard Investigations, Formal Investigations, and Courts of Inquiry, but only requires one of these three types of investigations for fires, explosions, material deficiencies, ship collisions, and groundings; Class A and B mishaps; environmental violations; death or injury of a member or employee; or when significant damage or loss occurs to government housing; when someone complains that members have willfully damaged or wrongfully taken personal property; or when there is a credible report of a violation of the Anti-Deficiency

[26] Article 1.A.2.d.(1) of COMDTINST M1000.10 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. … (2) The member must actually consume alcohol for an alcohol incident to have occurred. Simply being present where alcohol is consumed does not constitute an alcohol incident."

[27] COMDTINST M1000.10.

[28] *Id.* at Article 3.A.2.

Act.[29] The AIM also states that unless a sexual assault is suspected, a CO may direct an officer to conduct a "preliminary inquiry" to determine whether to convene one of the three formal types of investigations or to identify what specific matters need to be investigated.[30] In the Board's experience, the vast majority of all administrative personnel investigations, including drug incident investigations, are actually preliminary inquiries. Although the CO used the term "standard investigation" in his memorandum, the appointed officer conducted a "preliminary inquiry": He identified himself as a PIO in his report and entitled it, "Preliminary Inquiry into Circumstances Surrounding the Actions of [the applicant] on the Evening and Early Morning of 6-7 July 2015" (capitalization altered). Whether the PIO and the CO had discussed this change earlier is unknown, but the CO accepted the PIO's preliminary inquiry report when it was completed on July 31, 2015, without requiring a Standard Investigation. Because nothing the applicant had done required a Standard Investigation under the rules and the CO did not take any action against the applicant that required either a preliminary inquiry or a Standard Investigation, the Board finds that the CO's decision to accept a report of a preliminary inquiry, instead of a Standard Investigation, did not violate the applicant's rights or render the outcome—his alcohol incident and removal from primary duties—erroneous or unjust.

10. **Quality of Preliminary Inquiry**: The applicant made many criticisms of alleged deficiencies in the PIO's report because the PIO did not conduct or submit a report on a Standard Investigation. But Chapter 1.F.4. of the AIM, which authorizes preliminary inquiries, states that "[t]here is no mandatory procedure, or form of report required to initiate or report the results of this inquiry." Therefore, the steps taken with regard to the preliminary inquiry did not violate the AIM, including

- the PIO's failure to interview or get a statement from every possible witness, including the CO;
- the PIO's acceptance of unsigned, unsworn statements by telephone and email from members (who were all subject to potential charges of making false official statements in violation of UCMJ Article 107 even for unsigned statements) and his failure to expressly state that he was certifying the summaries of interviews he included with his report;
- the PIO's failure to have the applicant review and sign off on the PIO's summary of his interview with the applicant;
- the alleged deficiencies in the interviews, including the failure to determine exactly how much alcohol he had drunk, whether the LCDR thought the applicant had a made a "romantic advance" or had a "romantic" interest in her (and vice versa), and whether she thought his request to share the bed was "sexually charged" and felt that his presence aboard the cutter would make it hard for her to perform her duties;
- the alleged deficiencies in the collection of evidence, such as evidence about the rainfall, the water taxis, his BAC, and the temperature of the hotel room; and
- the CO's alleged failure to get a formal legal review of the PIO's report.

[29] AIM, Chapter 2.B.
[30] AIM, Chapter 1.F.4.; Manual for Courts-Martial United States (2012) Pt. II-19.

11. **CO as Material Witness**: The applicant has not proven by a preponderance of the evidence that the CO should have recused himself from the decision-making because the CO witnessed the applicant drinking alcohol at dinner early in the evening on July 6, 2015; received the report of the applicant's behavior from the XO of the HITRON; and spoke to member(s) of the aircrew about what had happened. As noted in finding 8, above, no investigation was required and so there was no requirement for the PIO to interview any material witnesses except as the CO required him to. Under COMDTINSTs M1000.10 and M1000.8A, a CO can determine that an alcohol incident has occurred and remove an officer from his primary duties for loss of confidence based on the CO's personal observations alone. Therefore, the fact that the CO witnessed the applicant drinking alcohol at dinner and received information from the XO of the HITRON and one or more members of the aircrew before appointing the PIO does not render either the CO's failure to provide the PIO with a written statement about what he saw and was told or the CO's subsequent administrative actions—sending the applicant off the cutter for the duration of the aircrew's stay, determining that he had incurred an alcohol incident, removing him from his primary duties due to loss of confidence, and preparing the SOER documenting the removal—either erroneous or unjust.

12. **Rights Warnings**: The applicant alleged that the administrative actions taken against him—the alcohol incident and his removal from primary duties—were erroneous and unjust because his CO questioned him without first informing him of his rights and the PIO did not provide a "cleansing" warning before interviewing him. The record shows that after the XO of the HITRON reported to the CO that he had received a report of inappropriate behavior by the applicant from one of the aircrew, the CO asked the applicant questions about his behavior on the night in question without having him read and sign an Article 31(b) rights warning. As the applicant noted, if the CO suspected the applicant of having committed an offense under the UCMJ, the CO should have provided this formal warning. And as the JAG noted, the PIO should have provided a "cleansing" warning if the PIO knew what the applicant had told the CO and used his prior statements to elicit admissions,[31] but there is no evidence that the PIO used the applicant's statements to the CO to elicit admissions during their interview. The CO's failure to have him read and sign an Article 31(b) rights warning and the lack of a cleansing warning by the PIO would presumably have protected the applicant from being tried by court-martial for any UCMJ offenses he might have committed. But such failures do not prevent COs from taking administrative actions. They do not even prevent a CO from taking a member to mast for NJP.[32] Therefore, contrary to the applicant's and JAG's claims, the CO could have imposed NJP on the applicant, as recommended by the PIO, despite the CO's failure to have the applicant read and sign an Article 31(b) rights warning and despite the lack of a cleansing warning from the PIO.

13. **CO's Decision to Remove the Applicant from His Primary Duties**: In light of the applicant's "alcohol incident" and violation of liberty policies, the Board finds that the CO's loss of confidence in the applicant's leadership authority and decision to initiate his removal from primary duties were fully justified. The XO of a cutter is second in command; transmits the

---

[31] *See United States v. Hines*, 49 M.J. 506, 508 (1998) (finding that an accused's statement is voluntary even without a cleansing warning unless the accused's prior, unwarned statements were used to elicit subsequent statements).

[32] Article 1.D.1.g. of the Military Justice Manual, COMDTINST M5810.1E, states that "[j]udicial exclusionary rules involving rights warnings … do not apply at mast, and the [CO] may consider evidence that would be inadmissible at court-martial."

CO's orders to the crew, including liberty policies; and is substantially involved in investigations and disciplinary decisions.[33] Given that the applicant was socializing with the cutter crew at the bar; remained at the bar past the last contracted water taxi trip at 0200; remained at the bar after the rest of his crew had left—either to go to a hotel room or to return to the cutter on the last water taxi; and violated at least the "buddy" policy, the Board is not persuaded that no members of the crew were aware of at least some of the applicant's poor decision-making and inappropriate behavior that night. And even if the crew of the cutter was temporarily unaware, the aircrew and the XO of HITRON knew what the applicant had done and would be likely to warn subsequent aircrews sent to the cutter about his conduct if he had remained the XO. Having broken the liberty and alcohol policies himself, the applicant could hardly enforce them on his subordinates without appearing hypocritical and losing their respect. Nor was the CO required to trust him not to break the policies again. The fact that the applicant was returned to cutter for a month after the aircrew left and that the crewmates who wrote on his behalf stated that they detected no loss of respect towards him as XO during that period does not persuade the Board that the applicant could have maintained his leadership authority as XO and effectively enforced the liberty and alcohol rules once word of his own violations of those rules had spread through the grapevine.

14. **RPD Initiation**: The applicant complained that the CO did not follow proper procedures because the CO's memorandum notifying him of the RPD, dated Wednesday, August 19, 2015, does not expressly state that the CO was only initiating the applicant's temporary removal and did not describe the RPD process or "the way forward," in accordance with Article 1.F.2.d. of the Assignments and Unauthorized Absences Manual, COMDTINST M1000.8A. The Board disagrees. First, the applicant admitted that he met with the CO in person, and Article 1.F.2.d. does not require the description of the RPD process or "the way forward" to be in the CO's memorandum. Second, the CO's memorandum cited COMDTINSTs M1000.8A and M1000.3A, which contain the rules for RPD and SOERs documenting RPD, and the applicant is a highly educated officer who, as XO, would have been very familiar with both of those manuals. Third, the CO advised him to report to a unit that would be his "temporary duty assignment during this process" the following Monday morning. And fourth, the CO told the applicant that he would be preparing an SOER and named an officer at PSC who would guide him through the process. Therefore, the preponderance of the evidence shows that the CO properly informed the applicant about the RPD process and "the way forward," as required by Article 1.F.2.d. of COMDTINST M1000.8A.

15. **SOER Input**: The applicant complained that the CO did not wait for him to provide input for the SOER before signing it on September 4, 2015. The CO stated, however, that he told the applicant on August 19, 2015, that he needed the applicant's input about his accomplishments in May, June, July, and the first half of August as soon as possible. The CO waited two and a half work weeks for the applicant's input before signing the SOER, and the

[33] According to Article 1 of the Military Justice Manual, COMDTINST M5810.1E, the Executive Officer of a unit normally performs the following duties when a member of the command is charged with an offense and taken to mast: Reviewing the Report of Offense; advising the member of the nature of the offense and of the fact that NJP may be imposed; designating a PIO and receiving the PIO's report; dismissing an offense, if delegated that authority by the commanding officer, or forwarding the matter to the CO with a recommended disposition of the charges; amending the Report of Offense and Disposition as needed to ensure that the charges are supported by evidence; arranging with the PIO to make witnesses, statements, documents, and other physical evidence available for the mast; appointing the accused's mast representative; attending the mast; questioning the accused at mast, if authorized by the CO; and commenting on the offenses and the accused's prior conduct and performance at mast.

applicant has not shown that he had so many other assigned duties during that period that he could not reasonably prepare and submit his input. The Board finds that the applicant has not shown that the CO acted unreasonably fast. The applicant knew that the CO needed his input for the most recent 3.5 months as soon as possible, and preparing such information should not have taken more than a few hours. The applicant has not shown that he was so inundated with work at his temporary assignment that he did not have time to write and submit input about his recent accomplishments aboard the cutter. Moreover, the CO stated that the applicant opted to take three weeks of leave after he reported to his new duty station instead of writing and submitting his input for the SOER in a timely fashion. Therefore, the applicant has not proven by a preponderance of the evidence that the CO committed an error or injustice when, after telling the applicant that he needed his input for the SOER as soon as possible, the CO waited two and a half work weeks for the input and then completed and signed the SOER when the input did not arrive. Nor is the CO's comment in the SOER about the applicant failing to provide input erroneous or unjust because, as the JAG noted, Article 4.B.1.e. of the OER Manual, PSCINST M1611.1B, states with respect to SOERs that "[i]nformation may be included in the report even if it took place outside the reporting period."

16. **SOER Marks**: The applicant complained that the CO assigned numerical performance marks in only six of the eighteen performance dimensions and marked the other twelve performance dimensions as "not observed" even though the reporting period lasted 3.5 months, the CO had assumed command of the cutter on June 11, 2015, and they had worked together for several weeks. The CO stated that he assigned twelve "not observed" marks because he did not believe that he had enough information to accurately mark the applicant in those twelve performance dimensions. The OER Manual states that, on an SOER documenting an RPD, all performance dimensions are evaluated but also that "[a]ny dimension which is not evaluated is marked 'Not Observed.'"[34] And the general OER instructions state that a rater should assign a mark of "not observed" for a performance dimension "[i]f observations are believed to be inadequate to render judgment about the officer's performance in that dimension."[35] For each performance dimension on an OER form, there are detailed written performance standards for the numerical marks.[36] Therefore and given the very short period of the report, the newness of the CO, and the applicant's TDY absence for part of the time, the Board cannot conclude that the CO committed an error or injustice in finding that he had insufficient bases on which to evaluated the applicant in twelve of the eighteen performance dimensions: "Planning and Preparedness," "Using Resources," "Results/Effectiveness," "Adaptability," "Professional Competence," "Speaking and Listening," "Writing," "Looking Out for Others," "Developing Others," "Directing Others," "Evaluations," and "Initiative."

17. **Input from Prior CO**: In his response to the advisory opinion, the applicant suggested that his prior CO might not have provided the incoming CO with a draft OER or handwritten bulleted information as required by COMDTINST M1000.3A.[37] During the six

[34] PSCINST M1611.1B, Article 4.B.1.e.
[35] *Id.* at Articles 2.E.2.f. and 2.F.2.c.
[36] *See* CG-5310B (Rev. 02-09).
[37] COMDTINST M1000.3A, Article 5.A.2.d.(2)(b)[9], states that a Supervisor shall "[p]rovide the incoming supervisor a draft of the supervisor portion of the OER when the supervisor changes during a reporting period. The draft may be handwritten and shall include marks and comments (bullet statements are acceptable) for the period of observation. It shall be prepared and signed by the departing supervisor prior to departure." The same policy applies to departing Reporting Officers pursuant to Article 5.A.2.d.(3)(b)[7].

weeks from May 1 to June 11, 2015, the prior CO and the applicant presumably worked together unless the applicant or the prior CO took leave or worked TDY some of the time, and so the CO could presumably have provided the incoming CO with at least some information about the applicant's performance in at least some of the performance dimensions during those six weeks. The prior CO's assessment of the applicant's performance up through April 30, 2015, was already well documented on his regular, annual OER, however, and it is unlikely that more comments based on just six weeks of performance would have persuaded the new CO to assign higher marks (or numerical marks instead of marks of "not observed") on the SOER. Moreover, the applicant has not shown that the prior CO failed to provide the incoming CO with written information about the applicant's performance. Given the presumption of regularity,[38] the lack of evidence supporting the claim, and the fact that the applicant has not previously mentioned this issue, either in his SOER addendum and reply or in his application to the Board, the Board finds that the applicant has not proven by a preponderance of the evidence that the SOER is erroneous or unjust because of an alleged lack of information about the applicant's performance during the first six weeks of the reporting period from the prior CO.

18. **SOER Comments**: The applicant alleged that many of the written comments in the SOER and the CO's endorsement to his SOER reply are erroneous and unjust. For the reasons explained below, the Board finds that the applicant has not proven by a preponderance of the evidence that any of the CO's comments in the SOER constitute "misstatements of significant hard fact."

- The applicant objected to the comments that criticize him for failing to report what had happened to the CO and argued that he should not have been evaluated on his failure to self-incriminate, while also arguing that his conduct had not constituted an offense under the UCMJ. When the applicant was failing to report (before the CO questioned him), no investigation had been convened and he did not know that anyone had complained about his conduct. But he knew or should have known that his conduct the night before could adversely affect his working relationship with the aircrew, and military officers are regularly held to a very high standard of honesty and accountability, particularly when they are members of the command cadre with tremendous influence over and impacts on the crew and operations. The Board finds that in light of the circumstances, it was neither erroneous nor unjust for the CO to evaluate the applicant based in part of his lack of candor about what he had done as XO while on liberty in the early morning of July 7, 2015, given the potential impacts on the LCDR and his working and supervisory relationship with her and the aircrew.
- The applicant complained that the SOER comments indicate that he approached the LCDR's bed after asking to share it, whereas the LCDR did not mention in her written statement to the PIO that he had approached the bed after asking to share it. The SOER says that the applicant "made the crew member uncomfortable by asking to share the same bed, and then approaching the bed after the member refused request to engage in small talk while member was trying to sleep; which undermined [his] position authority as second in command of a major cutter responsible for maintaining good order and discipline." (Emphasis added.) In her statement for the PIO, the LCDR wrote in one paragraph that the applicant kept asking her questions and got up from the couch a few times to stand at the foot of her bed. In the next paragraph, she wrote that during "chit-chat" that lasted until 0530, the applicant told her

[38] 33 C.F.R. § 52.24(b).

that he had shared a bed with a pilot during his last deployment, suggested they go to bed, and then asked to share her bed. Although the order of the paragraphs implies that the applicant remained on the couch after asking the LCDR if he could share the bed, the LCDR did not explicitly say that the applicant did not get off the couch again after asking about sharing the bed. And the PIO's report was not the CO's only source of knowledge about the events because the CO himself spoke to the LCDR about the applicant's conduct. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the word "then" makes this SOER comment a "misstatement of significant hard fact."[39] Even if the "then" were erroneous, it is not substantially prejudicial, as the applicant argued. Getting up from the couch to approach the bed after having asked to share the bed would not make the applicant's conduct appear substantially worse given that he had already gotten up off the couch "a few times" to approach the bed of a subordinate female LCDR whom he had known for only two weeks and who had long since turned out the lights and gotten back in bed to try to sleep.

- The applicant argued that the SOER erroneously states that the LCDR had "refused request to engage in small talk" even though the LCDR stated that the "chit-chat" lasted until 0530. The LCDR's statements show, however, that she had been asleep when the applicant arrived and, after putting sheets on the couch for the applicant, she turned off the lights and got back in bed to try to return to sleep. But the applicant kept talking—as she complained to LT C in a text—and he repeatedly asked her the same questions. In addition, the CO spoke to the LCDR about what had happened that night. Therefore, even though the LCDR described the talking as "chit-chat," the Board finds that the applicant has not proven by a preponderance of the evidence that the LCDR did not refuse or try to refuse his request to engage in small talk so that she could get back to sleep before the final time the applicant rose off the couch and approached the bed.
- The applicant complained that the CO wrote that he had drunk alcohol excessively, become intoxicated, violated liberty policies, showed a lack of judgment, failed to properly assess interpersonal relationships, acted unbecomingly, and undermined his leadership authority, ability to perform his duties, and good order and discipline. For the reasons provided in findings 4, 5, 6, and 13, above, the Board finds that he has not shown that any of the CO's comments in the SOER about his conduct on the night in question and the consequences of his conduct on the crew and his authority are erroneous or unjust.
- The applicant alleged that he did not violate the Coast Guard's Core Values: honor, respect, and devotion to duty. But the applicant's conduct, as described in findings 4 and 5, shows that the applicant was extremely careless with regard to his duty to obey the liberty policies; to model good behavior as the XO; to respect the LCDR; and to hold himself accountable by following policies and reporting what had happened so that any adverse impacts could be averted. The applicant has not shown that his CO committed an error or injustice in stating that the applicant had violated the Core Values.
- The applicant contested his CO's characterization of the personnel planning and the efforts required to repair the damage done by his inappropriate behavior and its negative impact on operational effectiveness. He submitted statements from officers claiming that they had detected no diminishment in operational effectiveness, and he alleged that because an incom-

[39] *Hary*, 618 F.2d at 708.

ing Operations Officer had arrived while the outgoing Operations Officer was still aboard, the latter was able to serve as XO during the applicant's absence. However, it was not the applicant who had to do the personnel planning and repair the damage between the command, the aircrew, and HITRON so that HITRON would agree that the LCDR and her aircrew could remain aboard for the remainder of the deployment. And the Operations Officers presumably overlapped for orientation and training purposes that would have been frustrated to some extent when the outgoing Operations Officer had to take on the duties of the XO.

- The applicant complained that the LCDR did not mention in her written statement to the PIO that she would be uncomfortable aboard the cutter while the applicant remained on board. The preponderance of the evidence shows, however, that the LCDR must have said this to either the CO or HITRON because the applicant was immediately sent TDY from the cutter just for the remainder of the aviation detachment's deployment and then was returned to the cutter while the PIO's report was pending and the CO was consulting with his chain of command to decide what actions to take.
- Although the applicant alleged that the SOER is clearly erroneous and unjust given the excellent quality of the rest of his performance record, the fact that an officer has received better OERs before and after the reporting period for a disputed OER is not evidence that the disputed evaluation does not accurately reflect his performance during the reporting period.[40]

Accordingly, the Board finds that the applicant has not proven by a preponderance of the evidence that the SOER is adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[41]

19. **Permanent RPD**: The preponderance of the evidence also shows that the RPD initiated by the CO on August 19, 2015, was processed through OPM and officially approved by the Chief of OPM on October 20, 2015. The RPD Panel Sheet shows the following:

- After the CO initiated the applicant's temporary removal, the Associated Assignment Officer in OPM-2 reviewed it, recommended approval of the RPD, and forwarded the matter to the head of OPM-2 on October 8, 2015.
- On October 10, 2015, the head of OPM-2 recommended approval of the applicant's RPD and forwarded the recommendation for removal to the head of OPM-3.
- On October 13, 2015, the head of OPM-3 also recommended approval of the RPD; noted that the SOER documenting the RPD was "ready for validation" in the applicant's record; and forwarded it to the Assistant Chief of OPM.
- On October 19, 2015, the Assistant Chief of OPM likewise recommended approval of the applicant's RPD and forwarded the recommendation to the Chief of OPM noting that "[a]s outlined in M1000.8 the member's actions clearly undermine his leadership authority."
- And finally, on October 20, 2015, the Chief of OPM electronically signed the "Decision"

[40] *Grieg v. United States*, 226 Ct. Cl. 258, 271 (1981) ("[T]he fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.").
[41] *Hary*, 618 F.2d at 708.

approving the RPD.

The applicant alleged that OPM should not have acted until after his reply to the SOER, as well as his addendum, was submitted, but nothing in the rules required OPM to wait until after the applicant had submitted a reply, and there is nothing in the applicant's reply that could have changed OPM's decision given his conduct early in the morning on July 7, 2015.

The applicant argued that he was not properly removed from his primary duties because PSC did not issue him permanent change of station (PCS) orders to assign him to another unit until several months later. However, being removed from one's primary duties does not exactly equate to being reassigned to a new permanent billet, as removal and reassignment are separate processes. The rules for RPD in COMDTINST M1000.8A do not say how quickly an officer who has been permanently removed from duties should receive PCS orders to another unit. Although the applicant's permanent RPD was approved on October 20, 2015, the applicant was left in his temporary duty assignment ashore and was not transferred to a new permanent duty station until the next transfer season, June 2016. In making assignments, "the needs of the Service come first,"[42] and as shown in the record, officers normally receive permanent assignments via Assignment Panels that convene in the fall and winter to decide which officer will be permanently assigned to which open billet the following summer. Therefore, the Board finds that the delay in the applicant's receipt of PCS orders is not evidence that he was not permanently removed from his primary duties by the Chief of OPM on October 20, 2015. And his removal is properly documented in his record by the SOER, which OPM entered in his record after the Chief of OPM made the decision.

20. **Continuity and Concurrent OERs**: The applicant complained that as a result of the delay in his receipt of PSC orders, his record contains a Continuity OER from the CO of the cutter for the period August 20, 2015, to April 30, 2016, with no performance marks or comments but notations indicating that his permanent assignment was still being the XO of the cutter, and an overlapping Concurrent OER covering the period August 21, 2015, to June 6, 2016, with numerical marks and comments from the command at his temporary duty assignment. He argued that if he had received PCS orders to what had been his temporary duty station promptly in October 2015, then he would not have either a Continuity OER or a Concurrent OER but instead a single Detachment of Officer OER from the new command covering the period August 20, 2015, through June 6, 2016, with the same marks and comments that he received on his Concurrent OER. While this change would simplify his OER records, nothing in COMDTINST M1000.8A states that an officer has to be issued PSC orders as soon as his permanent RPD is approved. Assigning officers to billets is a complex process normally accomplished through fall and winter Assignment Panels resulting in PSC orders for the summer transfer season. Therefore, the combination of the Continuity and Concurrent OERs in the applicant's record is not erroneous. Nor is it unjust or prejudicial because the Continuity OER from the command of the cutter contains no performance marks or comments.

21. **Special Board**: The applicant alleged that the result of the Special Board was erroneous and unjust because the Page 7 and SOER are erroneous and unjust. Because the Board has found no error or injustice in either document, there are no grounds for disturbing the result of the Special Board.

---

[42] COMDTINST M1000.8A, Article 1.A.1.a.(1).

22. **Commandant's Memorandum**: The applicant alleged that the Commandant's memorandum to the Secretary portrayed him "in a rather predatory light" and that "[n]o reasonable construction of the evidence of record can support the Commandant's summarization." The Board finds, however, that the Commandant's summarization of the applicant's conduct is not erroneous, misleading, or unjust. In particular, as explained in finding 4, above, the Commandant's description of the applicant as "inebriated" is supported by the preponderance of the evidence.

The applicant also complained that the Commandant's memorandum stated that the applicant's misconduct was "discovered" after he was selected for promotion to commander. He argued that because the AMT1 complained about his conduct to HITRON and HITRON complained to the CO before the applicant was selected for promotion on July 20, 2015, the Commandant's statement is false. The Board disagrees. While the CO received HITRON's complaint about the applicant's conduct before he was selected for promotion, the PIO's report was not completed until July 31, 2015, and so the CO did not "discover" what the applicant had done until after the applicant was selected for promotion. Moreover, the Chief of OPM, Commander, PSC, and the Commandant himself presumably discovered the applicant's misconduct much later. Moreover, even assuming *arguendo* that the Commandant "discovered" what the applicant had done before the commander selection board convened on July 20, 2015, that would not be grounds for overturning the Secretary's decision, which was based on the applicant's conduct as accurately described in the Commandant's memorandum.

The applicant has not proven by a preponderance of the evidence that anything in the Commandant's Memorandum to the Secretary recommending his removal from the commander selection list was false, misleading, or unjust.

23. **Unjustifiable Windfall**: The applicant argued that the loss of his promotion to commander/O-5 is unjust because he has been serving in an O-5 position in the interim. The Board disagrees as numerous Coast Guard officers and enlisted members serve in billets one paygrade above or below their own, as proven by the reports of the Assignment Panels that the applicant submitted.

24. The applicant made numerous allegations with respect to the actions and attitudes of various officers and members. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption or regularity and/or are not dispositive of the case.[43]

25. The applicant has not overcome the proven by a preponderance of the evidence that the Page 7 documenting his "alcohol incident" is erroneous or unjust or that the SOER is adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.[44] He has not shown that either his removal from his primary duties or his removal from the commander selec-

[43] 33 C.F.R. § 52.24(b); *see Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").
[44] *Hary*, 618 F.2d at 708.

tion list was erroneous or unjust. The Board finds no grounds for removing or changing the Page 7 or the SOER or for granting any other relief. The applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of LCDR [redacted], USCG, for correction of his military record is denied.

August 2, 2019

[redacted]