

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2021-066

██████████ ██████████ ██████████ ██████████
LTJG

FINAL DECISION ON RECONSIDERATION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application and military records on April 22, 2021, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated March 25, 2022, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND BASIS FOR RECONSIDERATION

The applicant, through counsel, asked the Board to reconsider his request in BCMR Docket No. 2020-043, to remove two Administrative Remarks forms (“Page 7s”) from his record.¹ The Page 7s are dated March 21, 2018, and April 26, 2018. The first documents an “alcohol incident”² and the second documents subsequent alcohol screening.³ Additionally, the applicant submitted a

¹ In BCMR Docket No. 2020-043, the Board denied the applicant’s request to remove the two Page 7s. However, the Board granted alternative relief. The Board determined that his record contained two erroneous Officer Evaluation Reports (OERs) in his record at the time the Promotion Year 2020 Lieutenant (LT) selection board convened. While the Personnel Service Center administratively corrected his record by removing the two erroneous OERs, the Board determined that the applicant was entitled to a Special Selection Board to reconsider his non-selection for promotion to LT.

² Article 1.A.2.d. of the Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10, defines an alcohol incident as “any behavior, in which the CO/OIC determines by a preponderance of evidence after considering the relevant facts (i.e., police reports, eyewitness statements, and member’s statement if provided) that alcohol was a significant or causative factor that resulted in the member’s loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the UCMJ, Federal, State, or local laws. The military member need not be found guilty at court-martial, in civilian court, or be awarded non-judicial punishment for a behavior to be considered an alcohol incident.”

³ Article 2.B.5.a. of the Coast Guard Drug and Alcohol Abuse Program, COMDTINST M1000.10, states that “[a]ny member who has been involved in an alcohol incident or otherwise shown signs of alcohol abuse shall be screened in accordance with the procedures outlined in reference (a), Coast Guard Health Promotion Manual... The results of this alcohol screening shall be recorded and acknowledged on an Administrative Remarks, Form CG-3307, entry or letter, as appropriate, in the member’s PDR.”

new request and asked the Board to remove or amend a third Page 7, dated July 27, 2018, that documents formal counseling on several provisions of Coast Guard policy.

The applicant argued that the Page 7s documenting his alcohol incident and alcohol screening should be removed from his record because he did not commit assault. The applicant received an alcohol incident when his abuse of alcohol was determined to be a significant and/or causative factor in his assault on a shipmate on July 24, 2017. More specifically, a female shipmate accused the applicant of rubbing his “bladed” hand across her vaginal region above her clothing without her consent while they were at a bar. The applicant put forth several arguments in support of his assertion that he did not commit the assault. First, the applicant argued that while the alleged victim claimed that he assaulted her, she did not leave the bar and continued to play beer pong with him after the incident. Next, the applicant argued that although several Coast Guard members were at the bar on the night of the incident, there were no witnesses to the alleged assault. Finally, the applicant argued that the alleged victim is a person of questionable character. To support his assertion, the applicant submitted a signed declaration by a female first class Petty Officer in the Coast Guard, YN1 T, dated March 25, 2021. YN1 T stated that on two occasions, she witnessed the alleged victim in a very intoxicated state. Notably, YN1 T stated that she saw the alleged victim “very drunk” on the night of the incident. YN1 T also stated that the alleged victim had a reputation on the ship for not being able to keep her hands to herself. For example, YN1 T stated that the alleged victim inappropriately touched her breasts. While YN1 T reported the incident, she stated that she did not proceed with any additional action against her. However, YN1 T stated that she reported two additional incidents that occurred involving the alleged victim. Specifically, YN1 T stated that the alleged victim showed her breasts to a fellow Coast Guard member and inappropriately kissed and hugged another member without his consent. YN1 T stated that a CGIS investigation was conducted regarding these matters, and asserted that the alleged victim was subsequently removed from her duty station. The applicant argued that justice demands more than an unsubstantiated allegation by an “unreliable, sexually aggressive” complainant.

The applicant also argued that the Page 7s documenting his alcohol incident and alcohol screening should be removed from his record because his non-judicial punishment (NJP) was set aside. He argued that his Commanding Officer (CO) set aside his NJP because it was no longer supported by the preponderance of the evidence. The applicant argued that since he received the alcohol incident based on the same underlying misconduct as the NJP, there was also insufficient evidence to find that he had incurred an alcohol incident. To support this assertion, the applicant submitted a new memorandum dated January 7, 2021, from CAPT R, who was his CO at the time of the incident in 2017. CAPT R stated that the applicant is a victim of an egregious administrative error. CAPT R stated that in June 2018, he set aside the applicant’s NJP because there was no longer the preponderance of the evidence to support it. As such, CAPT R stated that he was advised by Office of Personnel Management (OPM) that he could not issue the applicant an alcohol incident. Instead, CAPT R stated, he issued the applicant a Page 7 dated July 27, 2018, to document his counseling on the Coast Guard’s policies regarding sexual assault and alcohol.

The applicant also argued that the Page 7 dated July 27, 2018, should be removed from his record. On July 27, 2018, the applicant received a Page 7 stating that he had received formal counseling as a result of his actions towards a female Coast Guard member who perceived his actions as unacceptable. The Page 7 further states that the applicant’s conduct was concerning and

that counseling on Coast Guard policy was required to prevent similar incidents. The applicant argued that the Page 7 should be removed because the evidence does not support a finding that he had committed actions against a shipmate which were perceived by her to be objectionable. The applicant argued that it is unconscionable that his CO set aside his NJP and yet issued another Page 7 counseling him based on the same underlying facts.

The applicant argued that he was the victim of an unfair process. First, he argued that both the Coast Guard Investigative Service (CGIS) and the Naval Criminal Investigative Service (NCIS) conducted incomplete investigations. Specifically, he alleged that CGIS and NCIS failed to challenge the alleged victim's account of the incident. Instead, the applicant argued that both CGIS and NCIS merely concluded that he had committed the assault because he "had a black out." He argued that his admission that he did not remember whether the alleged assault had occurred did not equate to an admission that he had committed the assault. Further, the applicant argued that his right to counsel was violated. The applicant argued that although he requested legal counsel on September 12, 2017, the next month, CGIS had the alleged victim call him in an attempt to perform an "oral intercept."

The applicant concluded by reiterating that he did not commit assault. He stated that he is a responsible, dedicated, and respectful man of integrity and character. To support his request, the applicant submitted several character references. The character references praised the applicant's personal and professional values and described him as a self-starter, positive, helpful, responsible, and hard-working.

Finally, the applicant provided the Case Management Report from CGIS. The relevant information contained in the report is included in the summary of the record below.

SUMMARY OF THE RECORD

The official records were summarized in BCMR Docket No. 2020-043, but the following records are particularly pertinent to the request for reconsideration.

On July 26, 2017, CGIS received a report of alleged abusive sexual contact perpetrated by the applicant. The next day, CGIS requested assistance from NCIS in performing interviews and seizing appropriate evidence related to the allegations.

On July 31, 2017, NCIS interviewed the alleged victim. The alleged victim stated that on July 24, 2017, she and the applicant were socializing at a bar. The alleged victim stated that she consumed one cocktail, and so she was barely "buzzed." At some point in the evening, the applicant and the alleged victim were partners in a game of beer pong. The alleged victim stated that as she passed between the pool table and beer pong table, the applicant rubbed his bladed hand across her vaginal region above her clothing without her consent, until she used her left hand to forcibly push his hand away. She stated that she was initially in shock and continued to play beer pong with the applicant for approximately twenty minutes.

That same day, NCIS interviewed additional Coast Guard members who were present during the alleged assault. The interviews revealed no additional witnesses. One of the Coast

Guard members who was interviewed characterized the applicant's level of intoxication as "not excessive, being able to walk and talk okay."

Also on that day, NCIS interviewed the applicant. The applicant did not deny touching the victim's vaginal region. However, the applicant maintained that he had no memory of the incident. He explained that "I don't remember doing that, or playing (beer pong) with her at all, so I have no insight towards that." The applicant stated that he had consumed part of a bucket of Jack Daniels whiskey and Coca-Cola and then switched to drinking beer. He estimated that he drank one cocktail and five beers. When an NCIS agent asked the applicant whether his level of alcohol intoxication was so high that he was not sure whether he touched the groin of the victim, the applicant replied: "I would say yes to that."

On September 11, 2017, the applicant refused to be interviewed regarding the allegations of sexual assault. He also refused to submit to a polygraph examination. The applicant stated that while he was not represented by legal counsel, he wanted more time to consult with legal representatives.

On October 20, 2017, an NCIS special agent attempted a consensually monitored telephone call between the alleged victim and the applicant. The applicant did not answer the phone on the first attempt. On the second attempt, the applicant answered the phone and stated, "we shouldn't be talking" and "I'm hanging up now."

On October 26, 2017, the CGIS investigation was closed.

On March 21, 2018, the applicant received NJP from his CO for assault consummated by a battery,⁴ conduct unbecoming of an officer,⁵ and disorderly conduct, drunkenness.⁶ As punishment, he was awarded 30 days' restriction and a Punitive Letter of Reprimand.

Also on March 21, 2018, the applicant received a Page 7 that documented his first alcohol incident. The Page 7 states that he had received an alcohol incident because his abuse of alcohol was determined to be a significant and/or causative factor for assaulting⁷ a shipmate on July 24, 2017. The Page 7 was signed by the applicant and CAPT R.

On April 26, 2018, the applicant received a second Page 7 documenting his receipt of alcohol screening pursuant to his alcohol incident. The Page 7 was signed by the applicant and CAPT R.

On June 19, 2018, CAPT R notified the applicant that he had determined that "the ends of justice and discipline" would be best served by setting aside his NJP. Accordingly, CAPT R stated that documentation of the NJP proceeding, including the Derogatory OER and Punitive Letter of

⁴ Article 128, UCMJ

⁵ Article 133, UCMJ

⁶ Article 134, UCMJ

⁷ Black's Law Dictionary (11th ed. 2019) defines assault as follows: The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.

Reprimand, would be removed from the applicant's record. However, CAPT R informed the applicant that since this decision did not equate to a finding that no misconduct had occurred, he might still be subject to other adverse administrative actions as permitted by Commandant policy.

On July 27, 2018, the applicant received a third Page 7 from the CO documenting formal counseling on several provisions of Coast Guard policy including Chapter 2.A. of the Discipline and Conduct Manual, Chapter 2 of the Sexual Assault Prevention and Response Program Manual, and Chapter 2 of the Shipboard Regulations Manual. The first paragraph of the Page 7 states the following:

You are being counseled on Coast Guard policies following a reported incident while on liberty in [redacted] on or about July 24, 2017. After consuming numerous alcoholic beverages at a bar, despite the fact you had duty the next morning and the cutter was in a recall status, your actions towards a female E6 assigned to the unit were perceived by her as unacceptable. This is concerning and requires counseling on applicable policy to prevent similar incidents in the future.

On September 16, 2019, the promotion year (PY) 2020 LT selection board convened. The applicant was not selected for promotion.

On November 13, 2019, CAPT R wrote a memorandum in support of the applicant's original BCMR application. CAPT R stated that he had determined that "the ends of justice and discipline" were best served by setting aside the applicant's NJP. He did not mention any new evidence or information that had led him to that conclusion. In accordance with that decision, the applicant's record was reviewed to determine which documents required removal. However, CAPT R stated that the Page 7s documenting the applicant's alcohol incident and alcohol screening were not in his record at the time of the review. CAPT R stated that if he had known that the disputed Page 7s would become part of the applicant's record, he would have requested that both of them be removed. CAPT R stated that as the applicant's former CO, he supports removing the alcohol incident and alcohol screening from his record.

On September 14, 2020, the PY21 LT selection board convened. The applicant was not selected for promotion.

On February 17, 2021, a Special Selection Board (SSB) convened to consider the applicant for promotion in accordance with the order from BCMR Docket No. 2020-043. The applicant was not selected for promotion.

VIEWS OF THE COAST GUARD

In accordance with 33 C.F.R. § 52.42, the Chair forwarded a copy of the request for reconsideration to the Coast Guard. On November 1, 2021, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center (PSC). The JAG recommended that the Board grant the applicant's reconsideration request to remove the Page 7s that document his alcohol incident and alcohol screening, but deny his new request to remove the Page 7 that documents formal counseling on several provisions of Coast Guard policy.

PSC argued that the applicant has proven by a preponderance of the evidence that the Page 7s that document his alcohol incident and alcohol screening should be removed from his record. PSC argued that after the applicant received the alcohol incident, his CO discovered new evidence and facts that led him to believe that an alcohol incident had not occurred by a preponderance of the evidence. PSC argued that the CO intended to remove the alcohol incident and alcohol screening from the applicant's record. However, since the alcohol incident had not yet been entered into the applicant's record, the CO incorrectly assumed the alcohol incident had been properly removed. PSC considered administratively correcting the applicant's record by removing the alcohol incident and alcohol screening, but determined that it did not have authority to do so since there is no documentation showing the CO's attempt to remove the documents.

PSC argued that the Board's original decision to deny the applicant's request to remove the alcohol incident and alcohol screening from his record was an error. First, PSC argued that CAPT R used standard language in the memorandum notifying the applicant that his NJP had been set aside. PSC argued that the statement notifying the applicant that setting aside NJP "does not equate to a finding that no misconduct occurred... you may still be subject to other adverse administrative action as permitted by Commandant Policy," is not indicia that other administrative action would or should occur. Further, PSC argued that the BCMR disregarded the availability of new information to change CAPT R's determination that a preponderance of the evidence existed to justify an alcohol incident. However, PSC did not identify or submit this new information. PSC argued that there is no one more appropriate than the CO to make such a determination.

PSC concluded by arguing that the applicant failed to prove by a preponderance of the evidence that the Page 7 dated July 27, 2018, which documents formal counseling on several provisions of Coast Guard policy, should be removed from his record. First, PSC argued that the Page 7 was factually correct and conformed to Coast Guard policy. PSC noted that the Page 7 does not include a determination of whether the applicant's conduct was acceptable or unacceptable. Instead, the Page 7 states that the applicant's conduct was perceived by a colleague as unacceptable. Further, PSC stated that CAPT R did not allege any errors in the Page 7.

The JAG reiterated that the Page 7s documenting the applicant's alcohol incident and alcohol screening should be removed from his record. The JAG argued that the new evidence provided by the applicant shows that the alcohol incident is no longer supported by the evidence. The applicant's alcohol incident was based on the same incident, allegedly assaulting a shipmate, that his NJP was based. The JAG argued that since the CO determined that the NJP was no longer supported by a preponderance of the evidence, the alcohol incident was also no longer supported by the required evidentiary standard. Further, the JAG argued that since the alcohol incident is no longer valid, the alcohol screening should also be removed from the applicant's record.

The JAG argued that the applicant is entitled to an SSB after the removal of the Page 7s documenting his alcohol incident and alcohol screening. An officer is entitled to an SSB if an action of the selection board that considered the officer involved material error of fact or material administrative error. In this case, the Page 7s documenting the applicant's alcohol incident and alcohol screening were included in his record at the time of his consideration for promotion to LT. The JAG argued that the inclusion of the Page 7s should be considered material error because the

documents more likely than not deprived him of a fair and impartial consideration by the selection board.

Finally, the JAG reiterated that the applicant failed to prove that the Page 7 dated July 27, 2018, which documents formal counseling on several provisions of Coast Guard policy, is erroneous or unjust. The JAG argued that the Page 7 was drafted in accordance with Coast Guard policy and is factually correct. The JAG acknowledged that reading the introductory paragraph in conjunction with the other paragraphs could illicit negative inferences. However, the JAG stated that CAPT R did not request removal of the Page 7. The JAG argued that the absence of advocacy from the applicant's CO regarding the Page 7 is notable and is evidence that the document is not erroneous or unjust.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 26, 2021, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The applicant agreed with the JAG's recommendation to remove the Page 7s that document his alcohol incident and alcohol screening from his record. However, the applicant argued that the Page 7 that documents formal counseling on several provisions of Coast Guard policy should also be removed or redacted from his record.

The applicant argued that the Page 7 that documents formal counseling on several provisions of Coast Guard policy is erroneous and should be removed from his record. The applicant argued that based on the CGIS investigation and supplemental material, the allegation against him was not supported by the evidence. He argued that since the allegation against him was not supported by the evidence, the counseling documented in the Page 7 was unwarranted. First, the applicant argued that his CO determined that no crime was committed when he set aside NJP. Next, the applicant argued that there is no evidence that he committed assault or any other unlawful action against the alleged victim. To support his assertion, the applicant stated that no other Coast Guard members at the bar witnessed the alleged conduct. Further, he argued that the alleged victim had "absolutely no credibility" because she was extremely intoxicated on the night of the incident. Finally, the applicant argued that the evidence could support a finding that the alleged victim was actually the aggressor. The applicant argued that it is not hard to imagine that the alleged victim disparaged him after he rebuffed her advances. To support his assertion, the applicant referenced the declaration from YN1 T dated March 25, 2021, which accused the alleged victim of having been the aggressor on a number of occasions with other shipmates.

The applicant also argued that the Page 7 is unjust and should be removed from his record or redacted. He argued that the language in the Page 7 insinuates that he committed some type of sexual offense against a woman. The applicant argued that since his CO determined that he had not committed a sexual offense when NJP was set aside, the Page 7 in its present form "shocks the sense of justice." He argued that if the Page 7 is not removed in its entirety, the first paragraph should be redacted. He argued that counseling on Coast Guard policy could have been accomplished without such prejudicial introductory language.

Finally, the applicant argued that he is entitled to an SSB for both of his non-selections to LT. He argued that the Page 7s that document his alcohol incident and alcohol screening likely

contributed to his non-selections to LT. Further, he argued that if he is promoted by the SSB, he is entitled to receive the immediate payment of his Engineering Bonus, his backpay and allowances from the date of his separation, and constructive credit for the lost active duty time.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The request for reconsideration was properly filed with new material evidence as required by 10 U.S.C. § 1552(a)(3)(D).

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.⁸

3. The applicant has not submitted evidence or arguments that warrant reopening any of the issues that were decided in the Final Decision in BCMR Docket No. 2020-043. The applicant argued that his alcohol incident should be removed from his record because it is no longer supported by the preponderance of the evidence. The Board disagrees. The record shows that on October 26, 2017, the CGIS investigation into the applicant's conduct was closed. Then, on March 21, 2018, the applicant received NJP and a Page 7 that documented his first alcohol incident. Three months later, the applicant's CO determined that "the ends of justice and discipline" would be best served by setting aside his NJP. The applicant argued that given his CO's determination to set aside his NJP, the Page 7 documenting his alcohol incident should also be removed since they were based on the same underlying incident. However, the applicant's argument incorrectly equates the determination to set aside NJP with a finding that the NJP was no longer supported by a preponderance of the evidence. Further, the applicant failed to show that his NJP was in fact set aside because it was no longer supported by the preponderance of the evidence. At the time the applicant received his NJP and alcohol incident, the CGIS investigation had been completed for several months. Then, on June 19, 2018, CAPT R notified the applicant that his NJP was set aside in the interest of justice and discipline, but that this decision did not equate to a finding that no misconduct had occurred and that he might still be subject to other adverse administrative actions. In CAPT R's memorandum in support of the applicant's original BCMR application dated November 13, 2019, he reiterated that he had set aside the applicant's NJP in the interest of justice and discipline. It was not until CAPT R's letter dated January 7, 2021, after the applicant's original request to the Board had been denied, that he stated that he set aside the applicant's NJP because it was no longer supported by the preponderance of the evidence. Moreover, in his two separate memoranda to the Board, CAPT R failed to discuss or submit the alleged new evidence that was found between March 21, 2018, when the applicant received NJP and the alcohol incident, and June 19, 2018, when he set aside the NJP, to warrant removing the alcohol incident. Although PSC and the JAG also claimed that the CO had received new evidence before setting aside the NJP, no such evidence was submitted with the advisory opinion. Given the CO's statements in 2018—his

⁸ *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).

vague explanation that he had decided that “the ends of justice and discipline” would be best served by setting aside the NJP and, especially, his statement that his decision to remove the NJP did not equate to a finding that no misconduct had occurred—the Board will not remove the Page 7s based on the CO’s mere allegation of new evidence—made after the Board had denied relief because of the lack of new evidence—no matter how many times the allegation is made.

4. The applicant’s request to remove the Page 7 dated July 27, 2018, which documents formal counseling on several provisions of Coast Guard policy, was not included in his original application and is therefore treated as a request of first impression. The application is timely because it was filed within three years of the applicant’s discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).

5. The applicant alleged that the Page 7 dated July 27, 2018, is erroneous and unjust. When 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 the military record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁹ 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.”¹⁰

6. The applicant argued that the Page 7 dated July 27, 2018, is erroneous. The Page 7 states that the applicant received formal counseling as a result of his actions towards a female Coast Guard member who perceived his actions as unacceptable. The Page 7 further states that the applicant’s conduct was concerning and that counseling on Coast Guard policy was required to prevent similar incidents. The applicant first argued that the Page 7 is erroneous because the allegation against him was not supported by the evidence. The Board disagrees. First, as discussed above, the CO’s decision to set aside NJP did not equate to a finding that the applicant did not commit wrongdoing. Further, the applicant’s conduct for which he was counseled in the Page 7—specifically that his actions were perceived by a female Coast Guard member as unacceptable—is supported by the record. On July 31, 2017, NCIS agents interviewed the alleged victim. She alleged that while playing a game of beer pong, the applicant rubbed his bladed hand across her vaginal region above her clothing without her consent. That same day, NCIS agents interviewed the applicant. During the interview, the applicant did not deny touching the alleged victim’s vaginal region. Instead, the applicant stated that he had no memory of the incident. When an NCIS agent asked the applicant whether his level of alcohol intoxication was so high that he was not sure whether he had touched the alleged victim’s groin, the applicant answered in the affirmative. It was not until the applicant’s reconsideration request to the BCMR that he asserted that he did not commit the alleged conduct. To support his assertion that he did not commit any wrongdoing, the applicant noted that there were no witnesses to confirm the allegation. However, the unavailability of witnesses is not persuasive that the conduct did not occur since such a motion might well have escaped the notice of other patrons of the bar. Further, the applicant stated that the victim had “absolutely no credibility” because she was extremely intoxicated on the night of the incident. However, none of the witnesses interviewed by NCIS commented on the alleged victim’s level of

⁹ 33 C.F.R. § 52.24(b).

¹⁰ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

intoxication. Other than the applicant, only YN1 T claimed that the alleged victim was “very drunk” on the night of the incident. However, YN1 T was not interviewed by NCIS as a witness. The Board also notes the irony of the applicant’s assertion that the alleged victim has “absolutely no credibility” because she was extremely intoxicated, when the applicant himself told NCIS agents that he did not remember the incident due to his level of alcohol intoxication.

Finally, the applicant argued that the evidence suggests that the alleged victim was actually the aggressor in the incident because she had been the aggressor on a number of occasions with other shipmates. The only evidence the applicant provided to support his argument was a statement provided by a fellow shipmate. None of the witness statements collected by CGIS described the alleged victim’s conduct toward the applicant as aggressive. And no Coast Guard records were provided to support such accusations. Moreover, even if the alleged victim was the perpetrator in other instances of wrongdoing, that is insufficient evidence to prove that the applicant did not commit conduct towards her which she reasonably perceived to be unacceptable and sexual in nature. Therefore, the applicant has not shown by a preponderance of the evidence that the Page 7 dated July 27, 2018, is erroneous.

7. The applicant also argued that the Page 7 dated July 27, 2018, is unjust. Under 10 U.S.C. § 1552, the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”¹¹ The Board has authority to determine whether an injustice exists on a “case-by-case basis.”¹² Indeed, “when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,”¹³ and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”¹⁴

The applicant argued that the Page 7 is unjust because the language improperly suggests that he committed sexual assault. The Board disagrees. The first paragraph of the Page 7 states that the applicant was counseled for his actions towards a female Coast Guard member who perceived his actions as unacceptable. The remaining paragraphs cite to provisions of Coast Guard policy in which the applicant was counseled, including the Discipline and Conduct Manual, the Sexual Assault Prevention and Response Program Manual, and the Shipboard Regulations Manual. While the introductory paragraph uses broad language, when read in conjunction with the remaining paragraphs, the Page 7 insinuates that the application’s actions towards the female Coast Guard member were of a sexual nature. However, there is nothing improper about such implication. First, as discussed above, the record supports a finding that the applicant’s actions were perceived by the female Coast Guard member as unacceptable and sexual in nature. Further, the Page 7 clearly states that the actions towards the female Coast Guard member were perceived by her to be unacceptable. There is nothing in the Page 7 that improperly suggests that the applicant received

¹¹ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907 (finding that “[t]he words ‘error’ and ‘injustice’ as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ need not have been caused by the service involved.”).

¹² Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

¹³ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

¹⁴ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

NJP or was found guilty at a criminal proceeding of any wrongdoing. Therefore, the applicant has not shown by a preponderance of the evidence that the Page 7 is unjust.

8. The applicant made numerous allegations with respect to the actions and attitudes of various officers involved in the CGIS and NCIS investigation of the alleged abusive sexual contact perpetrated by the applicant. Those allegations not specifically addressed above are considered to be unsupported by substantial evidence sufficient to overcome the presumption of regularity and/or are not dispositive of the case.¹⁵

9. The applicant asked that his non-selections for promotion to LT be removed from his record and that the Board direct the Coast Guard to convene an SSB to determine if he would have been promoted with a corrected record. However, the applicant has not proven by a preponderance of the evidence that his record was erroneous or unjust when it was reviewed by the selection boards. Therefore, the Board finds no grounds for directing the Coast Guard to convene an SSB.

10. Accordingly, the applicant's request for reconsideration should be denied. Further, the applicant's request to remove or amend the Page 7 dated July 27, 2018, should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

¹⁵ 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”).

ORDER

The application of LTJG [REDACTED]-[REDACTED] [REDACTED] USCG, for correction of his military record is denied.

March 25, 2022

[REDACTED] Digitally signed by [REDACTED]
Date: 2022.03.30 09:41:14 -04'00'

[REDACTED] Digitally signed by [REDACTED]
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