

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-073

████████████████████
██████████ LT

FINAL DECISION

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 on January 26, 2018,¹ and assigned it to staff member ██████████ to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated July 19, 2019, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT’S REQUEST AND ALLEGATIONS

The applicant, a Lieutenant who was separated from the Coast Guard “under honorable conditions” due to “Unacceptable Conduct,” asked the Board to correct his record by upgrading his character of service to honorable, changing his narrative reason for separation to “Completion of Required Active Service,” changing his separation code to a “non-punitive” one, and correcting a spelling error in Block 18 (changing “WIIT” to “WITH” in one instance). He alleged that he was forced to resign after he was falsely accused of sexual harassment and that these discharge classifications do not accurately reflect his service in the Coast Guard.

To support his allegations, the applicant provided a personal statement. He began by briefly describing his career in the Army, in which he enlisted in 1990, was deployed to Korea, was stationed in Colorado and Alaska, and received several awards for his service. He stated that he enlisted in the Coast Guard in 1998, reenlisted in 2001, and was commissioned as an Ensign in 2003. He provided a list of his 24 awards from both branches of service with copies of each, his 11 qualifications and proof of receiving them, and copies of his Officer Evaluation Reports (OERs) showing generally excellent work in the Coast Guard.

¹ The applicant requested and was granted a 180-day extension of the 30-day period for responding to the Coast Guard’s advisory opinion.

After discussing his decorated military record, the applicant focused on the sexual harassment allegations leveled against him. He provided the following timeline of events related to the investigation of those allegations:

- January 28, 2008: The applicant's accuser, a petty officer second class (PO2), made the sexual harassment allegations to the Executive Officer (XO) of his unit.
- February 4, 2008: The applicant was verbally notified of the accusations against him. He stated that he was not presented with evidence or read his rights under the Uniform Code of Military Justice (UCMJ) at the time.
- February 25, 2008: Commander, Deployable Operations Group, began to investigate the allegations.
- March 12, 2008: The Preliminary Inquiry Officer, a Captain, completed the investigation and submitted a report recommending Non-Judicial Punishment (NJP).
- April 16, 2008: Maintenance and Logistics Command Atlantic charged the applicant with violating Article 133 of the UCMJ.
- May 5, 2008: The applicant submitted a request for an unqualified resignation from the Coast Guard. This request was denied.
- May 22, 2008: An investigation into a compact disk (CD) that the applicant allegedly gave the accuser determined that the authorship of the document could not be determined and that nothing had been deleted off the CD.
- July 7, 2008: A UCMJ Article 32 hearing into the applicant's conduct was convened, and the investigating officer recommended NJP.
- August 18, 2008: The Rear Admiral serving as Commander, Maintenance and Logistics Command Atlantic recommended a court-martial, instead of NJP.
- October 2, 2008: New charges were preferred against the applicant, which he alleged came without the presentation of new evidence.
- October 3, 2008: These new charges were referred to a general court-martial.
- October 29, 2008: A second Article 32 investigation for the Article 133 charge began.
- January 14, 2008: The applicant was offered and accepted NJP and resigned for the good of the service. The resignation letter details the offenses as the accused explained.
- April 2, 2009: The applicant received verbal confirmation that he would be receiving new orders shortly. The applicant told the assignment officer that he had recently submitted his resignation from the Coast Guard.
- April 15, 2009: The applicant received orders to transfer to Portsmouth, Virginia.
- June 1, 2009: The applicant reported to Portsmouth and again informed his superiors that he was resigning from the Coast Guard.
- July 22, 2009: The Coast Guard approved the applicant's resignation for the good of the service. His superiors did not attempt to retain the applicant.

- October 30, 2009: The applicant was discharged from the Coast Guard for “Unacceptable Conduct.”

The applicant alleged that circumstances at his post created a negative atmosphere on Base and contributed to his resignation. He noted that he had recommended an investigation of one of his subordinates for taking a service weapon off base, but his superiors stymied the investigation. He submitted a copy of a Report of Offense and Disposition dated September 25, 2007, showing that as the unit Weapons Officer, he had charged a petty officer with taking a weapon from his unit to the adjacent naval base in violation of Articles 92 (failure to obey order or regulation) and Article 134 (conduct to the prejudice of good order and discipline). He also submitted a report of an investigation into these charges that was conducted by a chief warrant officer (CWO). The CWO stated that on August 13, 2007, the petty officer had signed out a 9 mm weapon and failed to return it to the armory before leaving the unit. He stated that the petty officer had been upset because he had just been informed that he was being discharged, but that the incoming Duty Gunnersmate had failed to make a log entry about the missing weapon and that procedures for missing weapons had not been followed. The petty officer had already received a Page 7 rescinding his qualifications due to the incident, and the CWO recommended that the charges be dismissed. He also recommended that the unit conduct an inspection of the weapons control procedures and implement needed safeguards in the armory’s procedures.

The applicant added that he had lodged complaints against the superior who blocked the investigation for lackluster performance and that he went to the Naval Criminal Investigative Service (NCIS) regarding the matter of the subordinate taking the weapon off base. He alleged that the NCIS informed the superior that the applicant was circumventing his authority. After this, he alleged, this superior hinted at the assault allegations on February 4, 2008, but did not disclose them, and that this whole incident prejudiced the Base against the applicant, since he had exposed the command as ineffective and unwilling to take disciplinary action.

The applicant next described his accuser as an enlisted member with a history of alcohol-related disciplinary action and claimed that he had recommended her demotion and separation based on an alcohol incident. He alleged that this was her motive to frame him through a sexual harassment complaint and that she used her skill as an electronics technician to fabricate a trail of exclusively electronic evidence against him. He added that she knew and lied about an upcoming time-sensitive and prestigious posting to Bahrain, since he turned his laptop in to her, and alleged that she launched the investigation to delay and ultimately block his transfer.

After this, the applicant highlighted several aspects of the investigation into the sexual harassment. He questioned why a Captain led the investigation, when other officers that outranked him were stationed at posts closer to the base, and why the Captain’s investigative report was so heavily redacted before it was handed over to the applicant’s attorney. The applicant provided a copy of the report, which shows that the names of other members were redacted. The applicant added that his accuser’s father is a detective stationed near Camp LeJeune, a prominent Coast Guard facility, who had sent letters to the Commandant on his daughter’s behalf. Next, the applicant stated that his computer and his accuser’s computer were never investigated for digital evidence and that one of the pieces of evidence, an explicit MySpace message, was sent on the day of his son’s birth, when he did not have access to his computer. As proof, he provided copies of the MySpace messages in question and his son’s birth certificate. One of the MySpace messages

was sent on the date of his son's birth, and a second message is dated a few weeks after the first one. The applicant also noted that an investigation into a piece of evidence, a CD with an explicit story that he allegedly gave his accuser, bore no author data. He compared his situation to that of a colleague from his time in Officer Candidate School who was honorably discharged after an NJP for "arguably worse" sexual harassment allegations. The applicant next noted that his top secret clearance was never revoked after the investigations.

The applicant ultimately maintained his innocence and stated that he was intimidated into resigning from the Coast Guard under trying circumstances, including a constant threat of court-martial and the birth of his child. He urged the BCMR to consider seventeen letters of reference he submitted, which are from former Coast Guard colleagues, family members, and coworkers who highly praised his character, commitment to his family, and willingness to speak truth to power, even when it is inconvenient. Of the seventeen, only the applicant's wife (now ex-wife) provided first-hand knowledge of interactions between the applicant and the PO2 in a statement dated April 15, 2010:

The first moment I heard about [the applicant's] situation with his accuser, [the PO2], I did not believe a word. From the day she arrived at the unit (receiving a DUI the night before) she never struck me as a 'stand-up' individual. Every time I saw her, she looked very unkempt and did not have the decorum or bearing displayed by her peers. One of her pieces of evidence against my husband supposedly took place on the day my son was born – when he was in the hospital with me the entire day. She also had her father write letters to the Commandant, which should not be done. There is a Chain of Command for a reason. I feel that she felt 'burned' by the command at the unit because she was recently demoted from E6 to E5 (while working for my husband), and made up things to make [the applicant] look bad – none of her 'evidence' could be proven, as it was either e-mails, CDs, or 'electronic' (she is an Electronics Technician and a designated unit "Super User" who has access to everyone's computer accounts). At one of [the applicant's] Article 32 Investigations, she admitted that she never told him to stop the harassment (as she should, based on CG Policy [sic] – we take training yearly!), and also stated during the same Article 32 Investigation that she would definitely work with him again! (Why would she if she's so scared of him?) There are many reasons I do not believe her, and I have tried to look at the situation as an outsider, not as a spouse.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 6, 1998. He graduated from Officer Candidate School on February 26, 2003, as an Ensign and was promoted to Lieutenant on April 12, 2007. Previously, the applicant had served in the Army between February 7, 1990, and July 25, 1995, and received an honorable discharge to attend college.

The applicant's military record shows a series of favorable OERs from the Coast Guard, as well as numerous awards and commendations, which the applicant provided in his BCMR application to demonstrate his good service record until the sexual harassment allegations surfaced.

Administrative Investigation

The record contains documents from the investigation into the sexual harassment claims, which were submitted by the applicant with his BCMR application. These records show that on February 25, 2008, the Deployable Operations Group Commander, a Rear Admiral, appointed a Captain to investigate allegations made by a female PO2 against the applicant. On March 12,

2008, the Captain submitted his report of his investigation. He attached the following evidence to his report:

- **Accuser PO2's Statement:** In an undated statement, the PO2 wrote the following about her interactions with the applicant:

[The applicant] and I were in the same [government vehicle] on our way back from my second trip to [location]. During this trip he had a green notebook that he was writing me notes in and showing them to me. This was done in a way so that no one else in the van could see what was written. He wrote me a question that asked me if I wanted to be with him sexually. I do not remember the exact wording. I shook my head no in response. He then ask [sic] me why, and if it was because I was too scared. I shook my head no again and motioned around the [government vehicle] to try and imply that it was inappropriate... Late November, just before Halloween, he gave me what he referred to as a "training disk". The disk was in a plastic sleeve labeled "Ice Cream". He told me not to open it up before I got home... As I was reading it, I kept looking for a punch line or a reference to something else... When I got to the end and realized that was it, I was in shock. I just kept staring at it, thinking this had to be a mistake. I knew that I needed to say something or do something about it but I didn't know what. He kept asking me if I had read the disk, and I kept telling him no. I didn't know weather [sic] I was going to go strait [sic] to the command with it or tell him first. At that time my marks were up, and they were debating on advancing me to first class or not... When he got back from leave he asked me again if I had looked at the disk. I told him yes, and that we needed to talk about it... I felt that I handled it on the lowest level possible, that I had gotten my point across, and that I wouldn't have to deal with it anymore. Also I received a message on my Myspace account from him where he wrote it was probably a good thing we didn't see each other on Halloween and that if I ever did want any more "training disk" [sic] that he had more. Two months later a tree fell in my back yard. I ask [sic] the shop, about 4 or 5 people, who I needed to call to get it removed before it caused any damage. [The applicant] was in the room and said that he could take care of it. He asked me if I would like him to look at it that day. I told him may be tomorrow or the next day... The next day I got some e-mails and messages asking if we were still on for today. I ignored them till I got home, I then called him and said that it wasn't a good day and that I was busy doing things. He said that he was already almost at my house and that he might as well just take a look at it... I went out the back and opened my gate to find him already on the other side... When I was walking away he said that if I wanted anymore disks that he was still writing them. I ignored his comment. That night he wrote me on Match.com a similar in context message...

- **Summary of Interview with CGIS Agent:** On February 26, 2008, the PIO met with a CGIS agent who had met with the accuser. After meeting with her and reviewing the Match.com and MySpace messages, the agent advised the command that "while the case had 'merit', that no 'criminal' acts had occurred to predicate CGIS investigation."
- **Summary of Interview with CGIS Agent:** On February 26, 2008, the PIO met with another CGIS agent who confirmed that there was no affair or improper physical contact. However, the agent recommended the command should pursue a sexual harassment case.
- **MySpace message dated November 21, 2007:** The applicant wrote the following message to the PO2: "I guess it's probably good that I didn't see you the night of the haloween [sic] party, right? If you ever DO want some more training/instruction discs, or the content on them, let me know. Some are better than the last one."
- **MySpace message dated November 3, 2007:** The applicant wrote the following message to the PO2: "open that training disk yet?"

The Captain also listed the training disk, statements from three enlisted members on the Base, CD-CRO notes from a lieutenant, a statement from a lieutenant commander, an excerpt of the instructions for CGIS, a summary of the Captain's interview with a commander, and a summary of the Captain's interview with a civil rights counselor as attachments to his report, but the applicant did not submit them to the Board. According to the report, the Captain did not interview the applicant for the investigation, but he included the following findings about how the applicant was notified of and responded to the PO2's allegations:

- The CO and XO had spoken to the applicant "concerning the allegations made against him. He was not read his rights. [He] was not questioned but was told to document his interactions with [the PO2]."
- The applicant later offered a written statement to the XO, which the XO read but did not accept.
- On February 20, 2008, the applicant submitted a statement to the Civil Rights Office, which was received and reviewed. He was not advised of his rights.

Based on this evidence, the Captain concluded that the applicant began harassing the PO2 on the ride in the government vehicle, that he gave her a CD with graphic contents, that she did not report these initial incidents of harassment, that the applicant unexpectedly showed up at her house, that the applicant sent her more messages and explicit content via MySpace and Match.com, that the PO2 did not go to the XO until after she received these messages, that the XO found her credible but pushed her for more information, that CGIS began an investigation into the incident, that the applicant contested allegations against him when asked about them, that the XO confronted the PO2 again and said that, with her history of misconduct and parent's involvement, the investigation could get "messy," and that the PO2's father had contacted the Coast Guard. He recommended that the applicant be found guilty of violating UCMJ Article 93, Cruelty and Maltreatment for sexual harassment; UCMJ Article 134 for Indecent Language; and UCMJ Article 133 for Conduct Unbecoming of an Officer.

On April 16, 2008, the applicant was charged with violating Article 133 of the UCMJ by "on divers occasions from August 2007 to 23 January 2008: (1) ask [the PO2] if [she] wanted to be with [the applicant] sexually, or words to that effect; (2) give [the PO2] a computer disc containing a sexually explicit story; (3) send [the PO2] a sexually explicit story to [her] myspace account; and (4) send [the PO2] a sexually explicit e-mail message, acts which are to the disgrace of the armed forces."

On May 5, 2008, the applicant submitted a "Request for Unqualified Resignation" to be effective as of August 15, 2008, but he specified in this request that he would "receive a certificate of honorable discharge from the Coast Guard."

On May 22, 2008, the Coast Guard Investigative Service (CGIS) reported that it had conducted a forensic examination of the CD provided by the PO2 and found no user information or deleted images on the CD.

On June 19, 2008, the charges against the applicant were referred for trial by general court-martial, and trial was set for October 27, 2008.

Article 32 Hearing

At an Article 32 hearing on July 7, 2008, the investigating officer (IO) received testimony from the PO2 and two other petty officers; an electronic copy and transcript of the contents of the CD; a MySpace screen capture dated November 3, 1997; a MySpace screen capture dated November 21, 1997; a Match.com email screen capture dated January 23, 2008; and an email dated June 5, 2008.

The PO2 was questioned at the hearing. The IO's notes of her responses match the undated written statement that the PO2 provided to the Captain, but include some extra details, like the fact that the applicant had helped to ensure she was retained on active duty her after an alcohol incident prior to the start of harassment. During cross-examination, the PO2 said that she knew that she did not properly follow Coast Guard sexual harassment policy when she did not report the first instances of harassment and that she went to the Executive Officer (XO), rather than Human Resources with her accusation, because she thought the XO would be a better point of contact given the rank of the applicant. During cross-examination, she said that she was aware of the applicant's out-processing since he had turned his computer in, but she was unaware of the specific nature of his reassignment.

The IO also interviewed a colleague on the Base who had briefly lived with the PO2 but stated that their relationship was rocky, and she did not consider the PO2 to be a friend. This individual stated that the PO2 had mentioned harassing notes to her in November 2008 but did not show them to her. She had advised the PO2 to contact the applicant directly to tell him to stop, though she did not follow up because she figured that the PO2 could handle this on her own or go up the chain of command without her advice. This colleague went to the PO2's meeting with the XO to support her, because the PO2's relationship with the XO "wasn't very good," and said that the meeting went poorly, since the PO2 did not provide many details. The colleague then said that, after this meeting, the PO2 showed her the Match.com messages and MySpace messages with explicit content in them, and though she could not positively identify all of them in their entirety under cross-examination, she remembered some particular details in them. She mentioned that the PO2 met with the XO approximately three other times after the initial meeting, but she did not go to those meetings with the accuser.

The IO also interviewed a second colleague, the significant other of the first colleague, who had also attended the initial meeting with the XO. This colleague considered the applicant to be a mentor and stated that he did not consider the PO2 a friend. He said that the PO2 had told him that she had received a CD with explicit content on it in November 2007, but she had refused to show him it and instead showed it to her father and the female colleague mentioned above. He added that in March 2008, the PO2 had said that she had received a second CD with explicit content, and she again did not provide it. The PO2 had shown the female and male colleague the MySpace messages at their house and he had recognized the MySpace messages, though he did not understand what they meant. He stated that he had also not seen the transcript of the explicit CD.

The IO's report concluded that the applicant had violated Article 133 of the UCMJ because he was a commissioned officer and that, based on the interviews and documentary evidence presented, there were grounds to believe that the applicant propositioned the PO2, gave her a CD with explicit content, and sent an explicit story to her MySpace account. The IO did not find enough evidence to show that the applicant sent the PO2 an explicit email message and recommended that that specific charge be removed. The IO found that, even without this charge, the applicant's behavior constituted conduct unbecoming of an officer because sexual harassment "seriously compromises an officer's standing as an officer." The IO recommended that these charges be disposed of at NJP.

On October 2, 2008, additional charges and specifications were referred for trial. The applicant was charged with the following violations:

- UCMJ Article 80 for attempting to violate a lawful general order, here, attempting to engage in a romantic relationship outside of marriage with the PO2.
- UCMJ Article 93 for maltreatment, here, sexual harassment.
- UCMJ Article 133 for conduct unbecoming of an officer, here, his communications with the PO2.
- UCMJ Article 134 for indecent language. The charge includes transcripts of the messages that the applicant allegedly sent to PO2; the first message, likely from the "Ice Cream" disk, reads in part:

... You swing your legs up on the couch- Damn you have great legs- I love em [sic]! ... To push your feet under my thigh, you have to stretch your legs a little which causes your little shorts to ride up. I get hard thinking about you being so close...

The second message reads in part:

Me and you, out for drinks, and dinner. You are wearing a skirt, about mid-thigh, and a white silk button down shirt, that is opened up to show only the very top of your bra when you turn the right way... still it's snug enough that I can clearly make out the shape of your incredible breasts, and I know that you nipples will show through very clearly when you get excited. You have tremendous legs, Baby! The kind that I want to kiss all the way from the sandals on your feet to the bottom of your ass, and of course, around to the prize in front...

- Customary violation of fraternization with enlisted persons for pursuing an enlisted member sexually.

On October 16, 2008, the applicant's attorney sent a letter to the Rear Admiral requesting that the additional charges against the applicant be withdrawn and submitted for a new Article 32 hearing. He noted that the applicant had originally been charged with a single count of violating Article 133 of the UCMJ but that several additional charges with specifications including other alleged facts had been preferred against the applicant on October 2, 2008, and that no Article 32 investigation had been conducted regarding those charges. On October 17, 2008, the Rear Admiral approved this request.

According to the applicant, another Article 32 hearing was held on October 29, 2008, but he did not submit any documentation of this proceeding.

Mast

On January 14, 2009, the applicant was punished at mast for violating Article 133 of the UCMJ (conduct unbecoming an officer and gentleman) for:

Wrongful[ly engaging] in a series of unprofessional communications with a subordinate... by giving her a computer disc containing an offensive sexually explicit story, by sending related follow-up e-mail messages, and by sending another offensive sexually explicit story to her Match.com account...

As punishment, the applicant received a Punitive Letter of Reprimand and forfeiture of pay for two months, but the forfeiture was suspended on condition of good behavior for one month. The Punitive Letter of Reprimand, which the applicant acknowledged but declined to add comments to, states that NJP found that the applicant violated UCMJ Article 133 when he harassed his subordinate when he sent her “graphic details of [his] sexual fantasies about that Petty Officer.” The letter goes on to state:

Your illegal and unethical behavior was reprehensible and set a poor example for other members of the Coast Guard. Your conduct was inconsistent with my stated Commanders’ Intent to take care of your people. You disgraced yourself and failed to act in the manner expected of a commissioned officer. ...

On January 15, 2009, the applicant submitted a “Request for Resignation for the Good of the Service” pursuant to Article 12.A.6.d. of the Personnel Manual then in effect. His request states the following:

1. I hereby resign my commission in the United States Coast Guard for the good of the Service in lieu of a trial before a general court-martial, and request its acceptance... I have been informed and understand that if my resignation for the good of the service is accepted, I may receive a discharge under other than honorable conditions; that I may be deprived of substantial rights, benefits, and bounties Federal and State legislation confers or hereafter may confer on persons with honorable service in the Armed Forces of the United States; and that I may expect to encounter substantial prejudice in civilian life in situations in which the nature of the service rendered in or character of separation from the Armed Forces may have a bearing.
2. The basis for my request stems from conduct unbecoming of an officer...
3. In October 2007, I gave [PO2] a compact disc (CD) and told her that it contained Coast Guard training materials, but she should not view the contents of the CD at work. Instead of Coast Guard training materials, the CD contained a lengthy explicitly erotic and offensive story. [PO2] did not desire to receive any erotic materials from me.
4. In the following weeks, I sent several messages to [PO2] referencing the CD using myspace.com. Although I was aware that [PO2] did not desire to receive any erotic materials from me, I intended my messages to pressure her to accept additional erotic stories from me.
5. On 23 January 2008, I sent an electronic message to [PO2] using match.com. This message contained another lengthy explicitly erotic and offensive story.
6. After [PO2] received the second erotic story, [PO2] reported my conduct to her chain of command. During the subsequent investigation by the Atlantic Area Civil Rights Office, I denied giving or sending the two offensive stories to [PO2]. These statements were untruthful.

7. On 14 January 2009, [RDML] imposed non-judicial punishment upon me for misconduct pursuant to Article 15, Uniform Code of Military Justice.
8. ... I realize that as a result of this resignation I will neither complete 20 years of service, nor be entitled to receive retired pay.
9. ...
10. I have served my country with pride and honor for nearly sixteen years... The decisions I made regarding the conduct at issue were poor, lacked maturity and professionalism, and I will now lose [sic] the career I have pursued my entire adult life for those decisions. However, the years of dedicated service, while tarnished, warrant a more favorable discharge than an Other Than Honorable characterization. I ask that my overall service be considered and I be allowed to leave the Coast Guard with discharge characterization of General Under Honorable Conditions...

On January 26, 2009, the applicant was notified by memorandum that he would retain his security clearance but was being cautioned because of “a history [of] questionable personal conduct.”

In an OER dated March 30, 2009, the applicant’s supervisor referenced his NJP for violating Article 133 of the UCMJ and his reporting officer stated that he had “no potential for future leadership opportunities in the Coast Guard” and did not recommend him for any promotions, reserve duty, or assignments with supervisory qualities. The reporting officer recommended separation from the service.

On April 2, 2009, the applicant received a note in his personal email account stating that he would be transferred to the OPCOM Command Center Prevention Watchstander in Portsmouth, VA. He received his official orders for this transfer on April 15, 2009.

The applicant’s resignation for the good of the service was approved on July 22, 2009. On October 30, 2009, the applicant received a general discharge “under honorable conditions” with a BNC separation code, which means “Resignation allowed in lieu of further administrative separation proceedings or board actions when member performs acts of unacceptable conduct (i.e., moral and/or professional dereliction) not otherwise listed.” The narrative reason for separation is “Unacceptable Conduct.”

On May 31, 2012, the applicant submitted an application to the Discharge Review Board (DRB) seeking an upgrade in his character of service, reason for separation, and reenlistment code. In a unanimous decision dated December 18, 2012, the DRB denied relief, saying that the applicant “was afforded applicable due process” over the course of his investigation, including through the NJP proceeding and the applicant’s request for discharge for the good of the service. The DRB noted that he had confessed to committing the acts in his two resignation letters, which is inconsistent with his position before the DRB that he never committed the acts. The DRB closed by saying that the applicant had provided no evidence to refute the evidence from the initial investigation or to show that the processes behind the discharge were not equitable.

VIEWS OF THE COAST GUARD

On May 30, 2018, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she 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).

PSC noted that the application was not timely. It added that the policy for resignation for the good of the service in 2009 showed that the acceptable form for this type of resignation indicates that an officer requesting discharge for the good of the service “will receive a discharge under other than honorable conditions.” PSC highlighted that the applicant never provided evidence to show that his investigation was not properly handled within the Coast Guard, and that the applicant’s allegation that he was not properly read his rights, even if true, would not weigh on the decision, since improper Miranda policy would only have affected a trial by court-martial,² which he resigned to avoid. Because he stated multiple times that he understood the severity of a general discharge, PSC was satisfied that he was aware of the possibility of his life being impacted in that way.

PSC found that the spelling error in Block 18 should be corrected, which is the only basis for granting partial relief.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 13, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within thirty days. The applicant requested and was granted a 180-day extension to respond.

The applicant responded with a personal statement dated December 21, 2018, and a news article. In the personal statement, the applicant wrote that during the investigation, he had been scheduled to deploy to Bahrain and was not receiving an answer about the state of his deployment, so he contacted his Congressman. He speculated that this is why the chain of command “came down so hard” on him. He reiterated his suspicion that the accuser’s father influenced the investigation and his claim that it was strange that the Captain submitted a heavily redacted investigation report. The applicant next explained why he elected not go to a court-martial, saying that the charges would be criminal if he lost and that he feared the jury would be stacked against him at trial. He supported the latter point with an on-line news article stating that the rape conviction of an enlisted member had been overturned because the Coast Guard had stacked the seven-member jury with five women, four of whom had served as advocates for victims of sexual assault. The applicant stated that, by resigning for the good of the service and informing his reassignment post of his resignation, he was “playing it safe and smart” rather than confessing, since he maintains his innocence. The applicant again noted that his security clearance was never revoked, implying that the Coast Guard did not believe the charges against him.

² Article 1.D.1.g. of the Military Justice Manual 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.”

Next, the applicant described his military history in the Army and Coast Guard, alleging that he has post-traumatic stress disorder from the harrowing situations he witnessed in the Army. He again highlighted his good service record in the Coast Guard prior to the incident.

After this, the applicant discussed his post-separation career, saying that he had had suicidal thoughts and his marriage had fallen apart. He expressed difficulty in holding a job, saying that many employers automatically reject him because of his discharge classification, and that the jobs that would take him, like prison guard, he could not keep because he could not bear the thought of confining innocent people. He hoped that the correction of his DD 214 would help him land employment and contribute to society, adding that he was no longer pursuing positions with the Army Reserves given his arthritis developing from injuries sustained in past deployment.

The applicant closed by contesting the PSC memorandum. He argued that the Board should excuse the untimeliness of the application because he applied to the Discharge Review Board under the three-year statute of limitations before they referred him to the BCMR. Regarding the model discharge for good of the service allegation, he stated that he was coerced into including that language in his letter and it should be ignored. Finally, the applicant stressed that, since the CD's authorship could not be determined, it could not be used as evidence against him, though the Coast Guard continues to do so.

APPLICABLE LAW AND POLICY

Personnel Manual

Regarding discharge in lieu of a court-martial, Article 12.A.6.d.1. of the Personnel Manual in force in 2009 provides a template for this type of discharge. It reads:

I hereby submit my resignation from the United States Coast Guard for the good of the Service and in lieu of trial before a general court-martial. I have been informed and understand if my resignation for the good of the Service and in lieu of trial by general court-martial is accepted, I subsequently may receive a discharge under other than honorable conditions; I may be deprived of substantial rights, benefits, and bounties Federal or State legislation confers or later may confer on persons with honorable service in the Armed Forces of the United States; and I may expect to encounter substantial prejudice in civil life in situations in which the nature of service rendered in or the character of separation from the Armed Forces may have a bearing.

Under Article 12.A.6.d.4. of the Personnel Manual, "Officers whose resignations for the good of the Service and in lieu of trial before a general court-martial are accepted **may** be awarded a discharge under other than honorable conditions. (emphasis included)"

Civil Rights Manual

Chapter 3.A.5.a. of the Civil Rights Manual in force in 2009 provides a general overview of the Coast Guard sexual harassment policy, stating, "**Important: Sexual harassment is a behavior that will not be tolerated in the Coast Guard** [emphasis included]."

Chapter 3.A.5.e of the Civil Rights Manual defines sexual harassment as "**Any behavior that relates to sex, is intentional and/or repeated, is unwelcome, and interferes with a person's**

ability to do their job or has an adverse effect on their working conditions can be classified as sexually harassing behavior and will not be tolerated in the Coast Guard [emphasis included].”

Chapter 3.A.5.g. of the Civil Rights Manual discusses best practices for victims of sexual harassment, saying, “When a person experiences sexual harassment, they **should not** ignore the problem or assume it will stop... The person experiencing the harassment should report the problem and seek assistance as soon as possible [emphasis included].”

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The applicant is correct in stating that all BCMR applicants must exhaust administrative remedies before applying to the Board, but he received the decision of the Discharge Review Board on his case in 2013, five years before his 2018 application to the BCMR. Regardless of whether the applicant was applying to the Army Reserve at that time, he was aware of the alleged error and injustice in his record in 2013 and should have applied to the BCMR within three years of the DRB’s decision.⁴ Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error and injustice in his record in 2013, and his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.⁵ In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”⁶ to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”⁷
4. Regarding the delay in applying to the Board, the applicant explained that he was applying to positions in the Army Reserve. The Board finds that the applicant’s explanation for the delay is not compelling because he failed to show that anything prevented him from applying to the BCMR more promptly upon receipt of the decision of the DRB.
5. A cursory review of the merits of this case indicates that it lacks potential merit: There is no evidence that the applicant was questioned about his interactions with the PO2 before

³ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

⁴ *Ortiz v. Secretary of Defense*, 41 F.3d 738, 743 (D.C. Cir. 1994).

⁵ 10 U.S.C. § 1552(b).

⁶ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁷ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

being informed of his rights, and even if he was, that would not invalidate the NJP.⁸ The records, which are presumptively correct,⁹ show that based on the recommendations of the preliminary inquiry and CGIS, the command found the allegations of sexual harassment against the applicant credible, as did the IO following the first Article 32 hearing. And the applicant admitted to the misconduct in the request for resignation he submitted to avoid trial by court-martial. Given the standards of conduct in the Coast Guard Civil Rights Manual, the applicant's discharge "under honorable conditions" appears appropriate on its face and that is the type of discharge he requested in his request to resign.

6. The Board notes that the applicant belatedly mentioned that he had PTSD in response to the Coast Guard's advisory opinion. But he did not allege that his PTSD caused or contributed to his sexual harassment of the PO2, and so the Board's liberal consideration policy, which would require waiving the statute of limitations, does not apply. Even if it did apply, PTSD would not excuse or outweigh the applicant's long-term sexual harassment of the PO2.

7. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations to conduct a thorough review of the merits of the allegations. The applicant's requests to upgrade his character of service to honorable, change his narrative reason of separation to "Completion of Required Active Service," and change his separation code to a "non-punitive" one should be denied.

8. The Board agrees with JAG and PSC that the "WIIH" on the applicant's DD 214 should be corrected to read "WITH."

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ Article 1.D.1.g. of the Military Justice Manual 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."

⁹ 33 C.F.R. § 52.24(b); *see Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979), for the required presumption, absent evidence to the contrary, that Government officials have carried out their duties "correctly, lawfully, and in good faith.").

ORDER

The application of LT [REDACTED], USCG, for correction of his military record is granted in part as follows: The Coast Guard shall correct the entry in Block 18 of his DD 214 to read "COMDT'S LETTER OF COMMENDATION WITH ONE GOLD STAR" instead of "COMDT'S LETTER OF COMMENDATION WIIT ONE GOLD STAR." All other requests for relief are denied.

July 19, 2019

