

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2020-060**



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**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 7, 2020, and assigned the case to the staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision dated March 10, 2023, 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 former Chief Electronics Technician (ETC/E-7), who received a General<sup>1</sup> discharge on July 22, 2019, after being administratively separated for misconduct, asked the Board to correct his record by making the following changes:

- Remove an April 25, 2015, disciplinary remarks, stemming from an arrest due to an alleged domestic violence incident that occurred on April 25, 2015.
- Remove a May 5, 2015, alcohol incident, stemming from an arrest due to an alleged domestic violence incident that occurred on April 25, 2015, documented on a Page 7.
- Remove a January 18, 2017, alcohol incident, documented on a Page 7, stemming from an affair that occurred in February 2013.
- Remove a January 18, 2017, negative Page 7, for adultery and sexual behavior stemming from an affair that occurred in February 2013; and

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<sup>1</sup> There are five types of discharge: three administrative and two punitive. The three administrative discharges are honorable, general—under honorable conditions, and under other than honorable (OTH) conditions. The two punitive discharges may be awarded only as part of the sentence of a conviction by a special or general court-martial.

- Reverse the June 18, 2019, “Action of Final Reviewing Authority,” wherein the applicant was recommended for discharge for Commission of a Serious Offense.

The applicant alleged that he was arrested for two counts of simple assault because his wife lied to police and claimed that he had hit her, which was untrue. The applicant claimed that he was found not guilty of simple assault in a civilian court on March 8, 2016. The applicant further claimed that the entirety of his record regarding these charges was annulled on September 27, 2019. The applicant alleged that being found “not guilty,” in combination with the evidence he submitted with his application, provides clear and convincing evidence that overcomes the presumption of regularity. The applicant claimed that the only remedy available within his chain of command to correct his Page 7s is to put another Page 7 in his record, rescinding the previous Page 7s from his record, but that would not fix the prejudice caused by the original Page 7s.

The applicant explained that on January 18, 2017, he was awarded a second alcohol incident, which he alleged was the result of an email he sent to a former subordinate wherein he called himself a “womanizer” and apologized to her for “not just being a friend.” The applicant alleged that his email was conciliatory in nature and that he did not understand the verbiage he used because he is not a “womanizer.” The applicant admitted that he is an adulterer but alleged that that has no bearing on his case. He claimed that the relationship he spoke of in the January 18, 2017, email was one of an emotional connection between two people in very awkward moments in their lives. According to the applicant, the sexual encounter he was accused of having was based solely on the statement of a female petty officer, who herself admitted that she did not remember having intercourse because she had been drinking. The applicant alleged that alcohol incidents are based on a preponderance of the evidence, but it is impossible to determine the validity of an action through a single statement by a person who admitted to having trouble recollecting the events. The applicant cited the Final Reviewing Authority’s Report, which stated, “...so she had a Bloody Mary. He came over and they talked. She continued to drink, having approximately three pint sized Bloody Marys she prepared herself. She drank enough that she felt she could not drive. They slept together that night, she did not recall the actual intercourse, but remembers telling him to wear a condom.”<sup>2</sup> The applicant stated that the petty officer does not remember having sex with him because they did not have sex. According to the applicant, Article 4.D.2. of the Drug and Alcohol Abuse Manual, COMDTINST M1000.10A, states that a 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.<sup>3</sup>

Regarding the sexual encounter that resulted in the applicant receiving an alcohol incident, the applicant alleged that his Coast Guard appointed attorney was reluctant to discuss the sexual encounter with the petty officer and that she advised him to make an unsworn statement due to her belief that any denial of the sexual encounter would be construed as a lie. The applicant further alleged that he could not have had intercourse because he had recently had a vasectomy and suffered from complications that followed the surgery. The applicant claimed that since his early

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<sup>2</sup> Page 5, Paragraph 3, Final Reviewing Authority Report.

<sup>3</sup> Article 1.A.2.d. 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.”

days in the Coast Guard he had experienced problems with testicles, and his subsequent surgery exacerbated things. The applicant claimed that the only document he could obtain was the original referral from his civilian doctor, but the doctor did not give him any documentation of the surgery or the follow-up examination.

The applicant alleged that the Final Reviewing Authority unequivocally and unethically based its entire decision about his discharge on assumptions. The applicant claimed that the Coast Guard assumed he had assaulted his wife and then relieved him of his position as a Recruiter in Charge and ordered him not to speak to his coworkers based on that assumption. The applicant further claimed that the Coast Guard and his Command assumed he had committed sexual assault against a female petty officer and that he had intentionally and deceitfully tried to hide his misconduct. The applicant claimed that the Final Action of the Final Reviewing Authority is shockingly prosecutorial in tone and that the statements provided by his Commanding Officer (CO) and others are in no way representative of how he conducts his life. The applicant stated that the assumptions made by the Coast Guard were based on foggy details and a lack of credible knowledge. The applicant claimed that Coast Guard officials thought they were reading the statements of a victim when in fact, they were reading a story concocted by a female petty officer to save face. The applicant accused the female petty officer of discrediting him in order to salvage her relationship with her current husband, whom she was dating throughout the investigation into the applicant's alleged misconduct. The applicant further accused the female petty officer of having an affair with a married officer at her previous unit. According to the applicant, the female petty officer was warned upon her arrival to his unit that if she repeated her previous conduct, she would be discharged immediately.

The applicant argued that he did not cause disruption to good order and discipline within the crew of his cutter; nor did he use his rank and authority to persuade someone into a situation they did not want to be in. The applicant stated that he did not spend the last two years trying to hide his misconduct.

To support his application, the applicant submitted various medical records pertaining to a small mass on his left testicle, which he first reported in March of 2000. The records also included medical notes from the applicant's vasectomy in September of 2012.

### **SUMMARY OF THE RECORD**

The applicant enlisted in the Coast Guard on January 31, 2000. He trained as an Electronics Technician, where he continued to promote. He was a Chief Electronics Technician at the time of his discharge.

#### ***Alleged Extramarital Affair with Subordinate Petty Officer, SM***

According to a 2016 report of the Coast Guard Investigative Service, for an approximately eight-month period between September 2012, and April 2013, the applicant engaged in an extramarital affair with one of his subordinates, SM, aboard his cutter. The applicant obtained SM's phone number without her permission and began communicating with her. SM received text messages and emails from the applicant that she described as "complimentary, flirtatious, and relentless." Despite SM's request that the applicant stop contacting her, he continued to do so. In

February 2013, the applicant contacted SM and asked if he could visit her at her house, which SM agreed to. According to the SM, the applicant and SM drank cocktails and had sexual intercourse. After this encounter, SM attempted to stop all communications with the applicant. She obtained a new phone number and blocked the applicant on all social media platforms. However, the applicant was able to obtain SM's new phone number and continued his attempts to communicate with her.

The CGIS investigation also collected the following messages and emails:

On October 13, 2014, after SM would not return the applicant's messages and/or phone calls, the applicant reached out to one of SM's friends on Facebook with the following message:

Hey [Redacted]

I would like to ask you a favor. A simple favor. I know [SM] probably hates me at this point, but I want her to know something for the simple fact of putting her mind at ease. I know she has thought that every time I write or call or whatever that everything was going to be found out. I know it's caused her undue stress and for that I feel awful. I was selfish and wanted nothing but to keep talking to her. So here I am. Writing you because I trust you and hope that you will deliver a message. I want her to know that my wife and I are filing for divorce. I caught her cheating with two men off of her boat and after much consideration we have decided to separate. I can only hope that this little bit of information will help and let her live a life without a thought of me or something stemming from the mistake she made of having a relationship with me. I loved her. Still love her. I can only hope that this can give her peace. I wanted to tell her myself but she blocked me. I'm not a psycho. I just feel awful for all I've caused. I've worn out my welcome and for that I feel like an idiot. I only hope that you let her know this so that she knows that nothing will ever come of what happened. Can you do that? No need to write back. You can pretend you never read this & say nothing. I ask that you don't. Just let her know she has nothing to do with this and that I'm sorry.

I apologize for writing you like this, but I know no other way to let her know short of a carrier pigeon and some small handwritten notes. You know how those carrier pigeons can be. I hope you are well.

[Applicant]

On November 18, 2014, the applicant emailed SM the following message with a subject line, "Please Don't Delete":

I don't think your comment was very fair. I may have tried to contact you a lot, but in my defense there were many many times that you said you were done & then came back with a comment...for instance...One night when you said you had to stop you wrote me out of the blue "17 Hours" I was like what? and you had calculated the distance from [redacted] to [redacted].

Another night you write that you loved me.

Once you write about how you went shopping with your friend for an maps [*sic*] and you couldn't get that "atlas" song out of your head.

[Redacted], I could go on. I don't have anything anymore... just my memories of you. I know you think I made everything up and told you stories but I felt something for you that I had never felt before and it was excruciating to think you were gone. All I ever wanted to do was to keep in contact with you. That's it. In fact you wrote me out of the blue on communicator one morning after I had spent my entire drive up listening to our mixes ... Was so nice to just talk to you and keep in touch. I mentioned grabbing a coffee with you since you said you were visiting and you said "[Applicant], I don't ever want to see you again, EVER". I get it... I didn't think seeing you as a friend would be that bad, but I get it.

Now.... I find out that you're up here? Why? What happened? I just want to bury the hatchet since now we work miles away from each other. I'm not crazy [SM], I just wanted to keep in touch with you. I had a difficult time with how things ended & yes I could have handled it differently and I am sorry that I caused you stress! I am.

Look, I'm not saying that we are or that you want to be friends with me. I just think saying that I stalked you is a little harsh. I would ask that you try to see that I'm sorry for everything. I hope that you can find it somewhere to be a friend again. I am getting a divorce... probably in the next couple of months. I'm not telling you that thinking that you'll come running to me, but I hope it eases your mind. I know you thought I was going to get us in trouble again, but that just isn't going to happen. My personal cell is now on my own contract. She has no ability to see anything on my phone or phone bill so if you want my cell its [redacted].

Just let me know you got this. For all I know you changed your email.

I hope your well.

On November 18, 2014, SM responded to the applicant with the following email:

All of the examples of times that I have reached out to you, were emails I sent to you in the spring of 2013. I made a mistake, and that is the only thing I can apologize to you for now. I am sorry if what took place 1.5 years ago has left some resonating impact on you. I was young and naive and I wanted attention. You gave me that. I never loved you [applicant], you were only filling a void. I have had countless hours to sit and think about why I acted the way that I did and I still have no answer that I like, except to say that I wanted the attention.

For the last few years I have literally felt debilitating anxiety when I see your name show up in my emails, communicator and on my phone because in some way I feel like I have sold my soul to the devil. I feel like I trusted you with too much information that you can keep in your back pocket to literally destroy my career with, because personally I have moved on and forgiven myself for the fool I was. I disrespected you, your wife and your daughters and every time I see your name it reminds me of that.

To answer your question about me being in [location redacted]. I have been dating someone that works in [redacted]. I put in for a critical fill to pursue the relationship. I never sent you a communicator message to notify you that I was visiting [redacted]. I reached out to you because I had received my orders to Sector [redacted] and was so filled with anxiety about running into you, that the only way I could calm myself was to reach out to you and ask where you and your wife were living. You may have allowed your mind to think otherwise, but [applicant] I don't communicate with you because I want to.

I know you want to bury the hatchet but I will never be at peace with this because I don't trust you. I have received countless emails stating "this is the last one", "I swear I'm not crazy", "Please talk to me" after months of me avoiding you. You summarize conversations we have had and emails I have written you in the past (like the one you just sent), it all just leaves me to believe you are holding onto these things, waiting to use them against me and I'm not going to caudle [sic] you to prevent you from blackmailing me.

If it means anything, I'm not mad any longer, I am however sick of feeling victimized by someone that is infatuated with this idea of something from years ago. It was foolish and it's time to move on.

Please don't respond to this email.

### ***Arrest for Domestic Violence***

On April 25, 2015, the applicant was arrested by civilian authorities based on allegations of domestic violence against his wife. The relevant portions of the police report are summarized below:



On Saturday April 25, 2015 at 3:13 am I was dispatched to a domestic with assault at: [applicant's residence] while responding dispatch advised that the caller was assaulted but refused an ambulance. I also learned that she was with her three children and a neighbor at number [redacted] and that her husband was at the residence and unaware that the police were responding. Dispatch advised there were weapons in the home but they should be secured. When I was dispatched, I requested assistance from [redacted] and [redacted] and when I was traveling on [redacted] I heard Officer [redacted] from [redacted] advise he was on [redacted] awaiting my arrival. When I reached [the officer] was at the top of street and we pulled down the road together.

The homes on [redacted] are duplexes that are connected in the center by their garages with each residence on either side. I reached number [house number redacted] and found that [house number redacted] was to the right of it. When I parked I could see a subject sitting on the front stairs to number [redacted] in dark and I could see lights on in both residences. I exited my cruiser and at this time a [redacted] cruiser pulled up and Officer [redacted] and [redacted] exited their vehicle.

I walked up to the male who was sitting on the front steps smoking a cigar. I illuminated the subject with my flashlight and could see that he [had] a cut to his forehead with a small amount of blood coming from it. In looking at the subject I recognized him from a call this past winter where I requested he move a vehicle from the roadway for snow removal. I asked the subject his name and he told me: [applicant]

I asked [applicant] what happen and he stated, I took her phone from her and threw it in the sink. I believe it is still in the sink with the water running. He then told me that they were struggling in the bathroom. I asked what happen to his head and told me that she had thrown something at him. In speaking with [applicant] I detected an odor of an alcoholic beverage coming from him. I asked if he had been drinking and he told me he had a couple beers. After speaking with [applicant] I asked Officer [redacted] to remain with [applicant] here and went to number [redacted] to speak with the reporting party. I knocked on the door and a female who I knew to be: [friend of applicant's wife] answered and asked me to come in. I walked into her living room and inside there was female seated on the couch on the phone and three young females. I said hello to everyone and asked the female on the couch her name and she said: [applicant's wife].

I asked [applicant's wife] if we could go into the kitchen and speak there. When she got from the couch the [middle child] female asked why daddy was hitting mommy. [Applicant's wife] then told me that the kids were there when this happened. I again asked her to come out into the kitchen to speak there. Once there I asked [applicant's wife] to tell me what happened.

She told me that her and her husband are in the process of getting divorced and that he went out tonight and returned around 2:30 am. [Applicant's wife] told me she had stayed home and that she had a couple drinks and was on the couch in the living room talking to her girlfriend [redacted] when he walked in. [Applicant's wife] said that he came into the living room and sat directly across from her while she was on the phone and said he was going to wait for her. [Applicant's wife] told me that she could tell he had been drinking and that he had a Bud Light in his hand and that he must have brought it in with him because they do not have any of that type of beer in the home. [Applicant's wife] told me that he was making her uncomfortable and that she said that to her friend and that she decided to go upstairs to her bedroom that she shares with her daughter [redacted]. [Applicant's wife] told me that she hoped he would just stay downstairs and fall asleep. [Applicant's wife] said that [applicant] followed her upstairs and then turned the lights on in the room and was being obnoxious. She asked him to turn the lights off and told him he was being an asshole.

[Applicant's wife] said that she then got up and was walking out of the room and in the hallway when [applicant] then grabbed her cell phone from her and threw in the toilet of the bathroom that is off the hall. [Applicant's wife] then try to get into the bathroom to get her phone out of the toilet and he stopped her and the two struggled and [applicant] pushed [applicant's wife] down the stairway. [Applicant's wife] then went into the dining room and [applicant] followed her. [Applicant's wife] grabbed a figurine from a desk and he grabbed the house phone. [Applicant's wife] went back upstairs and got her cell phone from the bathroom then went into her youngest daughter's bedroom. [Applicant's wife] climbed into her daughter [redacted] bed and [applicant] pulled her off the bed and then assaulted her again. [Applicant's wife] told me that he was

swinging and striking at her face and that she used her arms to block his strikes. He then threw her around the room and was yelling at her.

[Applicant's wife] then threw the figurine she had [been] striking him [with] and telling her daughter to call 911. [Applicant] then stopped and she grabbed the children and fled to the neighbor's house. I asked [applicant's wife] if she wanted an emergency restraining order and she told me she did.

After speaking with [applicant's wife] I returned to [applicant] and explained to him that having listened to both parties and the fact that he had stalked her throughout the house that he was the physical aggressor and that I was placing him under arrest for Simple Assault. I asked [applicant] to stand and place his hands behind his back. [Applicant] was unsteady on his feet while standing and had to be held to steady him. I placed the handcuff on him (double locked) and escorted him to my cruiser. While walking with him I again noticed he was unsteady on his feet and assisted him into the rear of my vehicle.

Once in the cruiser I tasked Officer [redacted] to stand by while I spoke with the victim again. I returned to [redacted] and asked [redacted] if she would watch the children while [applicant's wife] came to the police department and she agreed. I then completed a walkthrough of [redacted]. Walking in the front door I looked to the living room to the right and saw a rocking style chair was flipped over. I then walked upstairs and went into the hall bathroom. There I saw cell phone in the sink which was filled with water. I checked the toilet and found that there was water on the seat and around the base on the floor consistent with what [applicant's wife] had told me. I also checked the kids' room. I asked [applicant's wife] to come to the police department where we could complete a statement form and contact the on call judge for the restraining order. [Applicant's wife] agreed and it was decided that she would be transported to the police department by the [redacted] officers. I transported [applicant] to the police department and Officer [redacted] followed me. Once at the police department I escorted [applicant] into the booking room. There he emptied his pockets and removed his belt. [Applicant] was then placed in cell 1 and Officer [redacted] stood by in the booking room while I spoke with [applicant's wife]. [Applicant's wife] provided a written statement and identified her children as: [redacted]

When that was completed I contacted [redacted] dispatch requested the on call judge be notified and called the police department. A short time later I received a call from Judge [redacted] of the [redacted] Family court. She was made aware of what [had] transpired and issued an Emergency Order of Protection. I completed the form as requested by Judge [redacted] reading each paragraph to her and completing the boxes as instructed. When the protective order was issued I then completed LAP<sup>4</sup> screening for first responders. Upon completion of this paperwork, I then spoke with [applicant] and informed him that the order from Judge [redacted] required I remove all the firearms from his residence. [Applicant] described where his weapons were located and how to access them. This information was then provided to Officer [redacted] who transported [applicant's wife] back to the residence. I requested Officer [redacted] to collect the firearms from the residence per the protective order. He agreed and after dropping off [applicant's wife] he returned with the firearms that were in the residence. ...

On April 28, 2015, Coast Guard Investigative Service (CGIS) opened an investigation into the applicant's conduct on April 25, 2015.

Also on April 28, 2015, the arresting officer spoke with the applicant's wife regarding court paperwork. During the conversation, the applicant's wife informed the arresting officer that she had a bruise on her back that she believed was the result of having been pushed down the stairs by the applicant. The arresting officer met with the applicant's wife and took pictures of the bruises. The arresting officer also took pictures of the applicant's wife's left shoulder and the palms of her hands.

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<sup>4</sup> The officer presumably referred to a Lethality Assessment Program (LAP) report.

***First Alcohol Incident Documented on a Page 7 & Disciplinary EER***

On May 5, 2015, the applicant received an alcohol incident for his conduct on April 25, 2015. The Page 7 states that the CO had determined that the applicant's abuse of alcohol was a significant and/or causative factor in his arrest. The Page 7 further states that between 5:30 a.m. and 8:00 a.m., a few hours after the applicant's arrest, his BAC (blood alcohol content) was tested and found to be 0.105. This was the applicant's first documented alcohol incident. The applicant was warned that any further incidents might result in his separation.

According to the applicant, he also received a disciplinary Enlisted Evaluation Report (EER) dated April 25, 2015, due to his arrest and subsequent alcohol incident.

***Email Chain Between the Applicant and His Wife***

CGIS also gathered the following emails between the applicant and his wife. On June 17, 2015, the applicant emailed his wife and requested that she email the arresting officer. The contents of the email are as follows:

If you still wanted to write a new statement the best way to do it is to write the arresting officer directly & he will forward up to the courts. Since these are not felony charges, the case sits in the district court, not with the Prosecuting attorney.

[redacted]

This is the arresting officer. If you write him he can & will forward it up and this could all go away within days. You know as well as I do if you turn this email in or any other for that matter I go straight to jail. Not that cozy little pen I stayed in that night as I lay all bloodied, but actual jail. I'm taking a chance every single time I email you.

I need this part of my life to be behind me. Not in the future on 26th of August, but behind me. I can't move forward with anything else until this is gone. I know you have no idea what this is like, but it weighs on me every single day of my life. Please help me move on with my life.

I want you to know that I have not given a statement. When I do (if I even do) I want you to know that what I said that night on the steps still stands. I never said you hit me, or punched me in the groin. I won't mention that you were drinking. It bears no consequence on the outcome of this. I just don't want you to think that I am waiting to pull the trigger on something. I just want to be able to breathe easy again.

\*\*please. if you do email Officer [redacted], don't just forward this email. I really really don't want to go to jail.

On June 17, 2015, at the request of the applicant, the applicant's wife emailed the arresting officer the following statement:

Officer [redacted],

I am writing on behalf of the events that took place 25Apr2015 at my home [redacted]. First and foremost I want to thank you for your professionalism and compassion during that night and since.



Since the night of 25 Apr 2015 I have had some time to process and think about what actually happened that night. I have been in therapy since and have been able to read and reread all the statements provided. I wanted to write and make another statement and hopefully be able clarify or make a better assessment of that night.

I do want to state that I believe that everything that happened was because of an extremely over emotional state by my husband [applicant] and I. We had recently filed for divorce and were trying to live in the same house as I deploy and it would be easier for the children. We had both been drinking and I do not believe that [applicant] ever intended to harm me in any way. I believe that he did think that he needed to take my phone from me and that the scuffle that happened in front of the stairs allowed me to become off balance and I slid/fell down the stairs. I do not believe that he pushed me or wanted to cause me harm. I also recall being antagonistic when entering my daughters' room and making matters worse. I don't believe that he was going to hit me in the face, and that he was again trying to get my phone. I was incredibly frightened by his actions causing me to react and become defensive in the way that I did. I believe that I made my statement that night based on pure emotion and that I didn't have a full appraisal of the actual facts. I have gone over this time and time again and don't believe that [applicant] regardless of the state of our marriage that he should be convicted of the allegations that he was charged with. [Applicant] has never caused me or our children harm and I fully believe that we both made very emotionally based and alcohol influenced decisions that night. I believe that [applicant] has suffered enough with his position in the Coast Guard and that if convicted of the allegations he stands to lose his ability to provide for his family and to maintain his position in the Coast Guard which he has worked long and hard to achieve. I am embarrassed by my actions that night and hope that I haven't further complicated the case that is ongoing. As it stands [applicant] has complied with the bail restrictions and I have also been informed that he has been completely sober and extremely remorseful for his actions. I hope that we are able to possibly put this terrible event behind us and eventually heal as a family.

On June 17, 2015, immediately following her email to the arresting officer, the applicant's wife sent the applicant a copy of the personal statement she had provided to the arresting officer. In addition to the copied personal statements, the applicant's wife stated the following:

This is what I wrote to Officer [redacted]. I hope that it is what you wanted and that it will make things move faster and that you are able to get the answers that you are looking for. I've never wanted for your life to be destroyed and I'm incredibly saddened by the way everything has happened and is effecting you.

On June 18, 2015, the applicant responded to his wife's email with the following:

It's not so much "what I wanted", but more that I only wanted the truth to be heard so that this could go away. That's all. It's an awful awful thing to be thought of as something that your not. To be treated as something that your not. I thank thank thank you for taking the time to write this. You always surprise me with how well you articulate in letters & emails when you sit down & think about (or I should say when you have the time). Not that your not a good speaker or writer, but lengthy emails from you are hard to come by (when your not mad).

As I said, you held to your word and did all that you could do. I knew that you would, but seeing each day pass without anything happening was and is eating away at my emotions and general livelihood. Thank you for taking the time to write this. Thank you for having the compassion and humility to write this statement.

I still love and care for you deeply [applicant's wife] and hope that someday we heal and that things can be better between us. (you wrote it perfectly, I wish this too).

### ***Email to SM***

On August 14, 2015, approximately nine months after SM asked the applicant to stop communicating with her, according to evidence gathered by CGIS, the applicant again emailed SM. The email, with the subject line "Measure of a Man," stated the following:

I owe you an apology for things that can't quite be apologized for. So many things have happened in my life over the past few months. I saw you a few times when I was living on base in [redacted]. I remember thinking I wished I could have reached out to you as a friend when I needed one so bad - but I ruined that.

I ruined that because I am an alcoholic and was an empty hearted womanizer. On April 25th I came home drunk and started an argument with my wife. She called the police and said I pushed her down the stairs & struck her in the face. I did not do these things & can only surmise as to why one would lie. She has since accounted for the truth in her latest statement and now faces possible perjury charges.

Why the hell am I telling you this? I spent 10 days unable to speak to my children and a number of days where I could not speak directly to my wife. For almost 30 days I did nothing but sit in that tiny room in [redacted] and reflect on periods of my life and all of the things I did wrong, could have done better, or maybe did right.

I've said it so many times to you before, but as I rebuild my life I want to live without lies and deceit. I want to be happy with the choices that I make. I want to be a good man again.

I'm so completely sorry for not being able to just be a friend to you. I was a selfish, immature man and I did not respect you as I should have. I'm not looking for forgiveness, or anything else. I know words carry little weight - as Florence puts it "we both know words are empty air".

If you take nothing from this. Please know two things: I am truly sorry and I do not, nor have I ever kept anything.

I wish you the best [redacted].

P.S. Don't turn me in for writing this or anything please. I have enough on my plate & I won't bother you.

### ***Civilian Authorities Request for CGIS Assistance***

On September 8, 2015, the CGIS investigator received a call from the arresting agency requesting assistance in locating the applicant's wife. The arresting agency informed CGIS that the applicant's wife had failed to appear on August 26, 2015, a date set by the court at the request of the applicant's wife. The applicant's wife had been issued a subpoena to appear, and after failing to appear, she avoided the prosecutor and would not return any phone calls or emails.

On September 9, 2015, the applicant's wife appeared before the court and when asked why she had not appeared as required, she stated that she was advised not to show up by her mother-in-law and other counsel. This was in addition to her being busy at work. When the judge asked for clarification as to which attorney had told her not to appear, the applicant's wife stated that her mother-in-law spoke with the applicant and that the applicant's attorney had suggested the wife not appear before the court. The applicant's wife clarified that she had not spoken to the applicant or his attorney directly.

On December 12, 2015, the applicant was interviewed by CGIS investigators. During this interview, the applicant accused his wife of using marijuana while serving in the Coast Guard. The applicant told investigators that he had located a jar, hidden in one of his wife's jacket pockets, that contained marijuana.

On December 14, 2015, the applicant's wife was interviewed by CGIS investigators regarding her use of marijuana. The relevant portions of the interview are summarized below:

(S) [Applicant's wife] stated that (W) [applicant] was trying to hurt her because she will not get back together with him, and he is trying to go after her retirement. This was not about marijuana, (W) [applicant] is a lunatic who has been emotionally abusing her for years. (W) [applicant] has constantly gone through her stuff; her drawers, closet. (S) [Applicant's wife] stated that she recently received a call from her landlord telling her that (W) [applicant] has not paid the rent for the last two months, despite the fact that she has sent him her portion of the rent and he is getting the BAH. (S) [Applicant's wife] asked, when does the abuse stop, when do her rights get upheld, and when does he stop doing this "shit." (S) [Applicant's wife] described (W) [applicant] as a narcissistic sociopath. She added that just this morning, prior to getting underway, (W) [applicant had] deposited two hundred dollars into her bank account; why?

(S) [Applicant's wife] stated that the abuse started on 04 October 2014, when (W) [applicant] reviewed a phone bill and accused her of having an affair because she [had] sent a text to two males on the ship.

(S) [Applicant's wife] stated that she keeps falling back into (W) [applicant's] trap, the cycle. He will be nice to her after being abusive. "When will it stop?"

(S) [Applicant's wife] stated that (W) [applicant] has had approximately seven adulterous affairs during their marriage, two of them with Coast Guard members he was stationed with, a GMCS with the first name of [redacted] (last name unknown) that he was stationed on a cutter in [redacted] with, and immediately after that with an OS2 from the same ship.

Regarding the affairs, (W) [applicant] told (S) [applicant's wife] that he only wanted her, but she was not showing him the attention he needed. (S) [Applicant's wife] stated that sex is very important to (W) [applicant], it is what makes him feel wanted.

When asked why (S) [applicant's wife] did not report the continuous violations of (W) [applicant's] bail conditions, by constantly contacting her about issues that have nothing to do with the children, (S) [Applicant's wife] stated that she was trying to keep the peace. If (W) [applicant] was to get arrested, it's money out of her and the kids' pocket. Nothing he communicates is about the kids and if he gets arrested what happens to her children. (W) [Applicant] watches the kids in her home while she is underway.[<sup>5</sup>]

On January 25, 2016, the applicant was arrested by the same authorities for witness tampering and obstruction, both class B felonies.

On March 8, 2016, the applicant was found not guilty in civilian court on both counts of Simple Assault.<sup>6</sup>

### ***CGIS Investigation into Sexual Misconduct***

On April 2, 2016, CGIS opened an investigation into the applicant's allegedly inappropriate sexual relationship with the OS2, SM.

On February 3, 2016, SM was interviewed by CGIS investigators. The following is CGIS's summary of the interview:

On 02/03/2016, at approximately 1159, S/A [RK] and I interviewed (V) OS1 [SM] The interview took place at RAO [redacted]. During a separate investigation, [redacted], an email from (S) ETC [applicant] to than OS1 [SM] was revealed in which (S) [applicant] states "I owe you an apology for things that can't quite be

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<sup>5</sup> The applicant's wife consented to a drug test which came back negative for the use of illegal substances.

<sup>6</sup> This not guilty verdict does not include the charges of witness tampering or violating the protective order.

apologized for,” and “Don't turn me in for writing this or anything else” (ETC [applicant] email dated 8/14/2015). A second email string between (S) ETC [applicant] and (V) OS1 [SM] was provided by BMC [applicant's wife], (S) ETC [applicant's] spouse, on 12/20/2015 (ETC [applicant] email string dated 11/18/2014). (V) OS1 [SM], in substance, stated the following.

(V) OS1 [SM] recently married and her maiden name was [redacted]. She was stationed as OS2 [SM] with (S) ETC [applicant] on board the USCGC [redacted], home ported in [redacted]. She reported on board in June 2012. At the end of her first patrol, September 2012, she was the Duty Driver, in [redacted] She received a text message from (S) ETC [applicant], she did not give him her number and the text was unexpected. He continued to text her, and she described the text as very flirtatious, very complimentary, relentless, and she was not proud of the fact that she reciprocated; this went on for about two months.

While underway, (S) ETC [applicant] loaned her a hard drive, which had his family photographs on it. She sent him a text stating that this was awful, she can't do this, she was not interested in him, and to forget her. (S) ETC [applicant's] wife found a text message and called her and asked her what happened. (V) OS1 [SM] explained that they only talked and texted; she felt traumatized and awful and thought it was squashed. Following this conversation, (S) ETC [applicant's] wife threw him out of the house and he was staying on the ship.

(S) ETC [applicant] called her, left voicemails, and was relentless and never stopped. He told her he was falling in love with her. It was manipulative and annoying. She explained that at some point when you harass someone to the point he did, frequent and intense, she would feel bad and communicate back.

She was living alone, had no friends, and spent most of her time on the ship. (S) ETC [applicant] would come and find her on the ship, even coming to her berthing area. He asked her for her address, and told her that he would use his Chiefly powers to find it. He was persistent and highly inappropriate. He would tell her he jogged by her apartment and wished he was coming home to her. He was a married man and he should not be looking for her address or jogging by her house. He was relentless and it was awful, and it continued until August 2015. She never came forward out of fear for her career.

After (S) ETC [applicant's] wife called, he took a turn for the crazy. One weekend (S) ETC [applicant's] his wife went to Mardi Gras and ETC [applicant] asked to come to her apartment and talk things out and hang out. She agreed, but was uncomfortable, so she had a Bloody Mary. He came over and they talked. She continued to drink, having approximately three pint sized Bloody Mary's she prepared herself. She drank enough that she felt she could not drive. They slept together that night, she did not recall the actual intercourse, but remembers telling him to use a condom. (S) ETC [applicant's] mother was watching his children, and she recalled waking up at 0400, and wondering why he was still there. She was full of guilt and shame knowing that he was married with three kids. Later, he sent her emails and text messages reminding her of what happened, each charming, poetic, and dramatic. She was fearful, waiting for the moment his wife found out and confronted her or her command. She would not have slept with him had she not been drinking.

(S) ETC [applicant] would switch the times he was on duty so he could be on watch at the same time she was, and would sit on the Quarterdeck with her for the entire four hours. She felt that she needed to keep him close so he would not release any of the emails and ruin her career. She described this as awful, and described (S) ETC [applicant] as having a crazy hamster wheel in his head.

Over the following years, every email he has sent her has left her with the worst anxiety. Her husband has been aware and by her side and has told (S) ETC [applicant] to leave her alone.

(S) ETC [applicant] told her that on two occasions he entered the female berthing space and stood in front of her rack and stared at it while she was in it.

In the female berthing area the subject of (S) ETC [applicant] came up, and the other females described him as a pig. Someone, she does not recall who, mentioned that (S) ETC [applicant] once changed his running course to go past a female crew member's house.

(S) OS1 [SM] has considered getting out of the coast Guard because of (S) ETC [applicant]. The interview concluded at approximately 1350.

### ***Military Protective Order Issued***

On February 4, 2016, the applicant's CO issued a Military Protective Order prohibiting the applicant from making any further contact with SM. This order was issued in response to SM's interview with CGIS investigators and the fact that, despite SM's requests that the applicant stop contacting her, he continued to do so.

### ***Page 7 on Misconduct***

On January 18, 2017, the applicant received his second alcohol incident. The Page 7 is summarized below:

Based on a CGIS investigation, I have determined that you committed an alcohol incident in February 2013, as defined in 1.A.2.d of reference (a) because there are sufficient facts before me to indicate that you consumed alcohol and that alcohol was a significant or causative factor to your violation of Article 134 (adultery) of the Uniform Code of Military Justice (UCMJ), despite not pursuing Non-Judicial Punishment. I find that given the totality of the specific factual circumstances here, your violation of Article 134 (adultery) is a "serious offense" because your conduct warrants discharge and Article 134 (adultery) is punishable under the UCMJ and Manual for Courts-Martial with a punitive discharge.

Your alcohol use was a significant causative factor of your misconduct on or about February 2013 where, at or near [redacted], as an E-7 and after consuming alcohol, you had sexual intercourse with an E-5, with whom you aggressively pursued a romantic relationship with, while you and she were assigned to the USCGC [redacted]. You were married to BMC [redacted], USCG, at the time. Furthermore, I find that because this adulterous sexual relationship with a woman who was not your spouse, was an "unacceptable relationship" as described by multiple subparagraphs of section 2.A.2.f of reference (b), it was prejudicial to good order and discipline.

I first learned of this incident as a result of a CGIS investigation that was concluded in March 2016, and as your current commanding officer, am documenting it with this CG-3307 within two years of when I knew or should have known of the misconduct.

You also previously received a documented alcohol incident on 25 April 2015 for an unrelated event. While PSC-epm may not consider this February 2013 misconduct as a second alcohol incident for the purposes of an unsuitability-based administrative separation as described in 2.B.8 of reference (a) and 1.B.15.b.5 of reference (c), because it took place earlier in time than your last documented alcohol incident, I am nonetheless processing you for administrative separation, for misconduct; commission of a serious offense, in accordance with Chapter 1.B.17.b.3.c of reference (c).

You were previously counseled on Coast Guard policies concerning alcohol use and abuse, as well as the serious nature and potential career impacts of receiving an alcohol 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. I strongly recommended that you abstain from the use of alcohol until your screening is complete.

### ***Two Page 7s about Misconduct***

Also on January 18, 2017, the applicant received a negative Page 7 wherein he was counseled about the allegations of sexual misbehavior and adultery. The pertinent text of this Page 7 appears below:



Based on a CGIS investigation into allegations of sexual misbehavior and adultery, I note that from September 2012 to April 2013 while stationed onboard USCGC [redacted], you, as a Chief Petty Officer, actively pursued and participated in an inappropriate relationship with a female Junior Petty Officer while you were married to another Coast Guard member. After the member asked you on multiple occasions to cease all contact with her, you continued to text, email, call and leave voice messages. When the member blocked you from calling or texting her on her personal phone, you reached out to her friend on social media asking that she deliver the message for you. She described your pursuit of her as “relentless” and it continued until August 2015.

Based on your own e-mail 14 Aug 2015 from your Coast Guard standard workstation account, you apologized for not being just a friend with the female petty officer and admitted to being a womanizer.

I first learned of this incident as a result of a CGIS investigation that was concluded in March 2016, and as your current commanding officer, am documenting it with this CG-3307 within two years of when I knew or should have known of the misconduct.

The Coast Guard does not tolerate this type of behavior, your actions were contrary to our Core Values, and I find your judgment and conduct, as both a Coast Guard member and Chief Petty Officer, completely unacceptable.

Any future breach of our Core Values may result in further administrative or disciplinary action.

### ***Involuntary Separation & Administrative Separation Board (ASB)***

On January 24, 2017, the applicant’s CO issued a memorandum, “Notice to Respondent—Involuntary Separation,” wherein the applicant was notified that he would be processed for involuntary separation under Article 1.B.17.B.3 (Commission of a Serious Offense) of the Military Separations Manual, COMDTINST M1000.4. This memorandum informed the applicant that due to the reason for his separation, he faced a possible “Under Other Than Honorable (OTH) Conditions” characterization of service. The applicant was also informed of his rights to an Administrative Separations Board (ASB) and the right to military counsel.

On January 24, 2017, the applicant acknowledged receipt of the memorandum, including his understanding of the possible characterization of service he would receive, and the consequences of that type of characterization.

On February 6, 2017, the applicant submitted a memorandum, “Exercise of Rights—Involuntary Separation,” wherein he acknowledged that he had consulted with a military attorney, waived his right to submit a written statement, requested to appear before an ASB, and requested military counsel be appointed to represent him at the ASB hearing.

On April 26, 2017, the applicant’s CO issued a Convening Order wherein a board president was named in the applicant’s ASB proceedings.

On May 18, 2017, an ASB was convened to hear the evidence and to decide whether to recommend the applicant’s retention on active duty or separation. The applicant was represented by military counsel and was able to submit evidence and witness testimony in his defense.

On June 7, 2017, the ASB submitted its final report, wherein it found that the applicant had had sexual intercourse with SM in February 2013, even though he was married at the time, thereby satisfying the first two elements of Article 134 of the UCMJ.<sup>7</sup> However, the ASB found that although sexual intercourse between the applicant and SM had taken place and was “theoretically discrediting,” there was no evidence that indicated that the applicant and SM’s relationship was prejudicial to good order and discipline or that their relationship was service discrediting. The ASB found that their relationship failed to satisfy the third element of adultery as outlined in the UCMJ and that the Coast Guard failed to prove, by a preponderance of the evidence, that there was a basis for the applicant’s discharge. The ASB recommended that the applicant be retained, not placed on probation, but that if he were discharged, his characterization of service should be General—Under Honorable Conditions.

On May 9, 2018, the ASB issued a memorandum, “Supplemental Documentation for Involuntary Separation Board Report,” wherein the ASB addressed the fact that during the ASB proceedings, the applicant had obtained, or was likely to obtain, eighteen years of service. The contents of the memorandum are as follows:

1. When Section 8.e. of reference (a) was completed, the board determined that ETC [applicant], “did not have 18 or more years of creditable active service (or 20 or more years of satisfactory federal service) and was not expected to complete 18 years of creditable active service (or 20 or more years of satisfactory federal service) prior to final action being taken in the administrative board process.”
2. Per reference (b) the Staff Judge Advocate (SJA) subsequently requested the board to provide an after-the-fact recommendation regarding the offer of voluntary retirement, as the member may have accrued over 18 years of creditable service during convening authority review. Per the SJA’s request, the board was reconvened.
3. The board has examined the respondent’s record and determined that ETC [applicant] has reached or is likely to reach 18 or more years of creditable active service (or 20 or more years of satisfactory federal service) prior to final action being taken in this administrative board process. If discharge is approved, the respondent should not be permitted to voluntarily retire from the Coast Guard, if he so requests, in lieu of immediate involuntary separation.
4. As detailed in reference (a) in arriving at this and its other decisions, the board weighed the following heavily:
  - a. Reference (d), revised after the events and acts considered by the board occurred, stipulates the “...crime of adultery [is limited] to those situations where the negative impact to the unit is real rather than theorized...wholly private and consensual sexual conduct between adults is generally not punishable under this paragraph.”
  - b. The board determined that the government had not presented a preponderance of evidence demonstrating that there had been a real impact to the unit or that the sexual acts were not consensual. As such, the board did not find a basis for discharge.

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<sup>7</sup> Adultery, within Article 134 of the UCMJ, has three elements: (1) that the accused wrongfully has sexual intercourse with a certain person; (2) that, at the time the accused or other person was married to someone else; and (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or of was of a nature to bring discredit upon the armed forces. To constitute an offense under the UCMJ, adulterous conduct that is directly prejudicial to good order and discipline includes conduct that has an obvious, and measurably divisive effect on the unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority of, stature of or respect toward a service-member. Manual for Courts Martial, United States, 2016.

5. However, as with its recommendation in 8.c. and 8.d. of reference (a), in the event that subsequent review authority determines that there is a basis for discharge within the facts of this case, the Board recommends that voluntary early retirement should not be offered to ETC [applicant]. As with decisions in sections 8.c. and 8.d., the board's decision is based on ETC [applicant's] record of service as summarized in opinion's 4 and 5 of reference (a), as well as Exhibit 9 of reference (c), which includes ETC [applicant's] reenlistment contract.

6. Though like factors were considered in each decision, the board considered characterization of service, probation, and offer of early retirement separately. In the first two, the board determined that if a subsequent level of review found that ETC [applicant] had committed a serious offense and that grounds for discharge existed, the nature of his service overall would be best characterized as other than honorable and that probation would not be corrective. In considering whether the offer of voluntary early retirement was appropriate, the board felt that if a subsequent level of review found that ETC [applicant] had committed a serious offense, then he would not have met the requirements of his enlistment contract and therefore should not be offered retirement benefits associated with satisfactory service.

### ***Command Recommendation for Separation***

On February 1, 2019, the applicant's CO issued a memorandum, "Recommendation for Discharge of ETC [applicant]," The contents of the memorandum are as follows:

1. I do not concur with the findings of the Enclosure and strongly recommend immediate involuntary separation of ETC [applicant] under General conditions. Despite the Board's findings, the evidence shows that his actions met the definition of Adultery per reference (a)<sup>8</sup> and therefore meet the definition of commission of a serious offense per reference (b).<sup>9</sup> Furthermore, the Recorder's closing argument in Enclosure (44) of the Board Report lays out the aggravating factors that compel me to insist that this member be separated. Alcohol incidents, domestic violence, sexual predation, entering female berthing aboard a cutter for personal gratification, a trained Victim Advocate who should know better: this behavior has to be stopped and the member separated. The Coast Guard can be selective about who we retain and discharge, ETC [applicant] is a member who should no longer be given the opportunity to serve in our great Coast Guard.

2. The Board concluded that ETC [applicant's] actions did not meet all three UCMJ elements of Adultery; specifically, that his actions did not present a negative impact to good order and discipline in the armed forces, I disagree.

a. ETC [applicant] was able to hide his relationship with a female E-5 while legally married, This behavior is inherently subversive to good order and discipline and clearly not in keeping with the Coast Guard's Core Values, Further, these types of behaviors erode a command's ability to effectively manage its crew whether they are aware of the behaviors or not.

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<sup>8</sup> Article 134 (Adultery) Manual for Courts-Martial.

<sup>9</sup> Article 1.B.17.b.3. of the Military Separations Manual, COMDTINST M1000.4., "Commission of a Serious Offense. Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense."

(a) Members may be separated based on commission of a serious military or civilian offense when:

- (1) The specific circumstances of the offense warrant separation; and
- (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

b. ETC [applicant] used his positional power, charisma, and alcohol to persuade the female E-5 to engage in sexual relations with him. This is classic victim grooming and sexually predatory behavior which has a negative impact to good order and discipline. The fact that it was neither reported nor pursued as a sexual assault case does not lessen its impact on the junior female member of the command. As a matter of fact, his continued predatory behavior was a key factor in the E-5 voluntarily separating from the service despite her solid, positive career.

c. ETC [applicant] did not cease and desist preying on the female E-5 even after the allegations came to light. He continued with aggravated predatory behavior until the Coast Guard had to initiate a Military Protective Order in 2016.

d. ETC [applicant's] misconduct has had far reaching impacts. He has negatively affected Sector [redacted], where the female E-5 was subsequently stationed, USCGC [redacted], where her now-husband was stationed, and Base [applicant] as outlined in the Recorder's closing argument in Enclosure (44) of the Board Report.

3. ETC [applicant's] employment must be terminated immediately. His chronic history of misconduct, manipulation, and sexual predation on junior enlisted female service members make his continued service a significant risk to others.

4. I recommend that ETC [applicant] be required to surrender his uniforms upon separation from the Coast Guard.

On February 14, 2019, the first Flag Officer in the applicant's chain of command submitted a Second Endorsement, "Recommendation for Discharge of ETC [applicant]," wherein he recommended that the applicant be administratively separated. The Rear Admiral stated that although the ASB found that one element of adultery was not met, the ASB did find that the applicant had engaged in an unacceptable relationship with a fellow crew member. The Rear Admiral also stated that the applicant had been issued numerous negative Page 7s throughout his eighteen-year career, three of which had occurred since his reenlistment in 2012. Finally, the Rear Admiral stated that based on a thorough examination of the record, he fully concurred with the CO's recommendation that the applicant be discharged. The Rear Admiral stated that he believed it would be in the best interest of the Coast Guard to separate the applicant with his discharge characterized as General—Under Honorable Conditions.

### *Action of Final Reviewing Authority*

On June 18, 2019, the Final Reviewing Authority issued findings and a decision in response to the ASB's final report, which appear as follows in pertinent part.

The Record, Findings of Fact, Opinions, and Recommendations of the Administrative Separation Board for ETC [applicant] held on 18 May 2017 have been reviewed and are approved except for Recommendations #8.a, and #8.b, which are disapproved for the reasons explained in this Final Action. Some Finding of Facts are also amended below to correct the Board's Record.

**Delay.** The misconduct cited by the command was almost four years old by the time ETC [applicant's] command discovered it. ETC [applicant] began pursuing the OS2 soon after she reported aboard Coast Guard Cutter [redacted] in Jun of 2012. He sent his first text to the OS2 in Sep of 2012 and he continued to pursue her by text, telephone and in person, until he succeeded in having sex with her in February of 2013. Despite ETC [applicant's] continued, unrelenting and unwanted pursuit of the OS2, she remained silent because she was afraid she would be blamed for the affair and it would ruin her Coast Guard career. But for the fact that

local police began investigating ETC [applicant] for domestic abuse of his wife, his misconduct with the OS2 might never have been discovered by his command.

Based on the information gathered by the [redacted] police, CGIS began the first of two investigations in April of 2015. The first investigation looked into reports that ETC [applicant] had abused his wife, a BMC in the Coast Guard. During the first investigation, the BMC told CGIS that her husband had engaged in approximately seven adulterous affairs, including one with the OS2. On or about February 2016, CGIS convened a second investigation to probe his alleged affair with the OS2. On or about 18 Jan 2017, ETC [applicant's] command learned about his 2012-2013 misconduct with the OS2 and convened an Administrative Separation Board on 26 Apr 2017.

I conclude that the gap in time between when ETC [applicant] committed his misconduct and when his command convened his board is solely attributable to ETC [applicant] efforts to hide his misconduct from his command and the coerced silence of his victim, the OS2. The delay clearly did not harm ETC [applicant] and to treat it as a material error would create an undeserved windfall springing directly from the misconduct at issue in the hearing.

**Administrative Errors Including Delay in Completion of Final Board Report.** The record for ETC [applicant's] Administrative Separation Board was not perfected until Feb 2019. Although the almost two-year period between when the board was convened and when the record was completed is extraordinary, this delay was not materially harmful to ETC [applicant]. The Enlisted Personnel Administrative Boards Manual (EPAB), PSCINST M1910.1 (series) establishes time goals for the board process; it states the hearing should take "as long as necessary." Art. 1.1.1. of the EPAB explains the time goals for the duration of the board process:

"It is in the best interests of both the respondent and the Coast Guard to complete board proceedings without delay. However, unless waived or forfeited, the respondent's rights shall not be denied, especially through haste. The Coast Guard's interests also should be thoroughly protected; the best way to protect those Coast Guard interests is by developing a complete board report. Processing time for board proceedings and board reports will vary because of operational needs and local circumstances. Processing time will also be affected by location, the availability of counsel, support staff, and other process requirements."

Finally, Art. 1.1.3. of the EPAB states that, failure to process a board proceeding within the recommended time goals does not affect the validity of the final action taken by Coast Guard Personnel Service Center.

Notwithstanding the nearly two-year period the Board took to perfect the record, the Board made a number of clerical errors in its Findings of Fact (FOF) within the Board Report. However, none of these mistakes amount to material error that would make the report not legally sufficient. Nevertheless, I am correcting the record by amending the FOF to reflect the correct supporting exhibits.

**Findings of Facts.** The Board made clerical errors in identifying the FOF's supporting documentation. Thus, the Board Report's FOF are amended as follows:

The exhibit that supports FOF #9, FOF #11, FOF #14, & FOF #33 is, in fact Exhibit #9. FOF #10 should read "in 24 Dec 2004..." instead of "in 2005..." and the exhibit that supports FOF #10 is also Exhibit #9. The exhibits that support FOF #12 are Exhibits #9 and #10.

### **Basis for Discharge.**

**Adultery:** In Recommendation #8.a, the Board found that one element of the offense of Adultery under the Uniform Code of Military Justice (UCMJ) was not met. The Board's Opinions #1 through #3 concluded that ETC [applicant] and the OS2 had sexual intercourse in Feb of 2013, while he was married to the BMC. However, in its Opinion #3, the Board concluded that "no evidence was presented [to show] that the relationship between [ETC] [applicant] and [the OS2] was prejudicial to good order and discipline or that



their relationship was service discrediting.” The Board summed up its conclusions as follows, “As such, ETC [applicant] is considered to not have commissioned [sic] a serious offense.” I disagree.

It is true that in the military, not all adultery is prohibited. The Manual for Courts-Martial contains a relatively lengthy list of factors to be considered in determining when such conduct is prejudicial to good order and discipline or service discrediting. In the military, the offense of Adultery is only prohibited if it offends good order and discipline or is service discrediting. While the Board is correct that strictly private, consensual, and discreet sexual behavior may not be found to be service discrediting, it is incorrect to conclude that a sexual relationship between two members of the same Coast Guard Cutter with a rank imbalance is not prejudicial to good order, even if that relationship is discreet.

ETC [applicant’s] conduct was *per se* prejudicial to good order and discipline as defined in the Discipline and Conduct Manual, COMDTINST M1600.2—which was cited in the notice of board action—and specifies when romantic relationships between Coast Guard members are “unacceptable,” to include: (1) Members [that] have a supervisor and subordinate relationship (including periodic supervision of duty section or watch standing personnel), or...[when] (3) Members are assigned to the same cutter. In an amplifying note, the policy states that “The nature of operations and personnel interaction on cutters...makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command, and, therefore, unacceptable. This policy applies regardless of rank, grade, or position.” The record is unequivocal—ETC [applicant] violated Coast Guard policy when he engaged in an unacceptable romantic relationship with a subordinate assigned to the same cutter. By its very definition in policy, his actions were prejudicial to good order and discipline and affected a junior member in the same cutter subject to his orders.

Beyond the mere recitation of the policy, ETC [applicant’s] actions were in fact prejudicial because of its direct impact on military order. While it is true that the one-time sexual act was discreet, as his spouse, his command, and his shipmates did not immediately know of this sexual conduct with his subordinate, the facts in this case, nevertheless, militate against finding that his actions were remote and theoretical. ETC [applicant’s] actions went beyond engaging in a purely private consensual relationship. At the time of the relationship, he was a Chief Petty Officer, in the pay-grade of E-7; the OS2 was a Second Class Petty Officer, recently advanced to pay-grade E-5 when ETC [applicant] sent her the first of many unsolicited text messages. See Exhibit #22, Page 6.

Both ETC [applicant] and the OS2 were assigned to the same cutter. To ignore these facts, is to ignore the nuance of military life aboard a cutter. Discipline, leadership, and standards are also important aspects of military life underway. Good military order requires that relationships remain professional and not familiar, and certainly not intimate. As a Chief Petty Officer on a cutter, ETC [applicant] maintained special authority over the OS2. She was required to obey all his lawful orders. By engaging in sexual relations, ETC [applicant] corrupted his special stature as a Chief and severed the formal military relationships he had with a subordinate. By doing so, he reduced the OS2’s respect in his positional leadership role aboard the cutter and caused him to be less likely to use his vested military authority over the OS2. By engaging in a sexual relationship with the OS2, ETC [applicant] would be less likely to promptly enforce military standards in an even-handed manner; moreover, he would have a perceived diminished ability to instill professional obedience over a military subordinate. Thus, ETC [applicant’s] conduct was not merely private adulterous behavior, but wrongful adultery with an obvious nexus to military discipline aboard CGC [redacted].

**Second Alcohol Incident:** The Board’s FOF #12 correctly noted that ETC [applicant] received an Alcohol Incident “in 2015”. But, the Board apparently did not recognize or did not identify the fact that ETC [applicant] received a second alcohol incident on 18 Jan 2017, documented in a performance and conduct Form CG 3307. See Exhibit #9, Page 57.

ETC [applicant’s] command made the following comment in the CG 3307 documenting his second alcohol incident:

...

Notwithstanding the command’s concern about the efficacy of documenting a second alcohol incident that occurred earlier in time than the one identified as the “first Alcohol Incident”, I conclude that both are valid

Alcohol Incident determinations. They are correct in form and in content. The fact that the “second” Alcohol Incident occurred first in time but was documented after the “first” Alcohol Incident is merely a function of when ETC [applicant’s] command discovered the misconduct. As I discussed in this Final Action, in the “Delay” section above, the mismatched chronology of the first and second Alcohol Incidents is directly attributable to ETC [applicant’s] efforts to hide his misconduct from his command.

Accordingly, I find that the Board erred by not concluding that ETC [applicant] may be separated for violating Article I.B.15.b.(5) of the Military Separations manual (MILSEP), COMDINST 1000.4 and Article 4.H.2.c of the Military Drug and Alcohol Policy, COMDTINST M1000. 10A, (Second Alcohol Incident). Therefore, pursuant to my authority under I.B.22.d.(1) of the MILSEP, I am amending the Board's Paragraph #8.a to find that a basis to separate ETC [applicant] for Unsuitability due to Alcohol Abuse that is proven in the record.

As such, I disapprove Recommendation #8.a, and find that there are two bases proven in the record to separate ETC [applicant]. However, I find that Misconduct due to Commission of a Serious Offense is the more appropriate in this case, as this was the basis for which the Convening Authority initiated the Administrative Separation Board proceedings.

**Separate/Retain.** Having established that there are two bases for discharging ETC [applicant] proven in the record, the next question is whether he should be retained in the Coast Guard. In Recommendation #8.b, the Board recommended that ETC [applicant] be retained because no basis of separation had been proven in the record. I disagree with this recommendation because it is contrary to the evidence in the record developed by the Board.

ETC [applicant] was a Chief Petty Officer in the same cutter, CGC [redacted], as the OS2. The record clearly indicates that ETC [applicant] used his positional power as a Chief aboard CGC [redacted] to take advantage of the OS2, who was subject to his orders and authority. He aggressively pursued and harassed the OS2 even after she repeatedly asked that he leave her alone. In her own words, “She received a text message from ETC [applicant], [but] she did not give him her number and the text was unexpected. He continued to text her, and she described the texts as very flirtatious, very complimentary, relentless...” As he continued to pursue her, she states that later, “She sent him a text stating that this was awful, she can't do this, she was not interested in him, and to forget her.” When ETC [applicant’s] wife found out he was texting the OS2, and confronted her, the OS2 said, “she felt traumatized and awful and thought it was squashed.” But it was not, and he continued to harass her, as she stated, “[he] called her, left voicemails, and was relentless and never stopped. He told her he was falling in love with her. It was manipulative and annoying.” See Exhibit #12, Page 6.

...

ETC [applicant’s] pursuit and harassment of the OS2 continued well after she left the ship. On 04 Feb 2016, the commanding officer of CG Base [redacted] (ETC [applicant’s] then commanding officer) issued a military protective order to ETC [applicant] prohibiting him from contacting the OS2, who at the time of the Protective Military Order was an OS1 due to her advancement. See Exhibit# 15. And, in fact, as a result of the continued pursuit along with the stress and anxiety caused by the affair and the relentless communications from ETC [applicant], the OS2 and her husband (another Coast Guard member) eventually left the Coast Guard to escape this incessant harassment, and the guilt the event caused. See Exhibit #16, Page 1.

In addition, ETC [applicant’s] misconduct occurred while he was married to another service member, a BMC. The Board Record shows that ETC [applicant’s] actions and adultery also negatively impacted the good order and discipline of the BMC's (his wife at that time) unit, CGC [redacted]. On 12 Dec 2015, ETC [applicant] accused the BMC of using marijuana, in an apparent attempt to convince her to drop assault charges against him. She then submitted to a urinalysis, which results were negative. See Exhibit #10, Page 2.

Furthermore, the Recorder's closing argument in Exhibit #41, Enclosure (2) of the Board Report, lays out the aggravating factors involved in this case: Alcohol Incidents, domestic violence, sexual predation, entering female berthing aboard a cutter for personal gratification, a Recruiter removed for cause.

And, as the Board itself opined in their Opinion #5, "...as a Coast Guard Chief Petty Officer, ETC [applicant] carried on an inappropriate relationship, earned two alcohol incidents, was the subject of two CGIS investigations, was twice arrested, had to be transferred early from Recruiting Office [applicant], made apparently false allegations of drug use against his E-7 spouse, and required the Coast Guard to otherwise expend significant resources to manage around his service."

ETC [applicant's] predatory behavior clearly had a negative impact on the good order and discipline of his unit and the Coast Guard. His actions are against the Coast Guard's core values, and have no place in our service.

For the reasons discussed in this Final Action and based on the record and my findings above, I disapprove Recommendation #8.b, and pursuant to my authority in Article 1.B.22 of the MILSEP, I direct ETC [applicant] be separated for Misconduct due to Commission of a Serious Offense.

On July 2, 2020, a Coast Guard Lieutenant Commander (LDCR), who was legal counsel for CGIS, at the request of the Coast Guard's Office of General Law, submitted a memorandum wherein she provided a detailed review of the applicant's alcohol use as recalled by SM. The CGIS LCDR reviewed a recording of the February 3, 2016, CGIS interview with SM and provided the following account of SM's CGIS testimony:

A review of reference (b)<sup>10</sup> revealed a detailed description of Mr. [applicant's] alcohol consumption during the incident at issue. The victim stated Mr. [applicant] requested and consumed multiple mixed-drinks (Bloody Marys) over the course of several hours while at the witness's residence. (*"I remember specifically having a Bloody Mary for some reason. He asked if he could have one, and I said sure."*) [Interview at 18:59 (12: 18:40 PM)] The victim said they both continued to drink Bloody Marys. When asked by the investigating special agent how many they each had, the victim said three for each of them, in pint-sized glasses. (*"I can say for sure I probably had three. [Agent: And him?] I would say for sure three."*) [Interview at 42:20 (12:42: 14 PM)].

### VIEWS OF THE COAST GUARD

On July 22, 2020, a judge advocate (JAG) for the Coast Guard submitted an advisory opinion in which she recommended that the Board deny relief in this case and adopted the findings and analysis provided in a memorandum prepared by the Personnel Service Center.

The JAG argued that contrary to the applicant's contentions, the Coast Guard did not err in giving him disciplinary marks and an alcohol incident stemming from his April 25, 2015, domestic violence arrest. The JAG stated that the information contained within the CGIS investigation provided sufficient evidence to establish, by a preponderance of the evidence, that the applicant had been drinking, and that his alcohol use was a significant or causative factor in the domestic dispute that occurred between the applicant and his wife. Furthermore, the JAG stated that the applicant himself admitted to the arresting officer that he had been drinking, and at a minimum threw his wife's phone into a sink with water running on it. The JAG stated that the disciplinary actions are further supported by the arresting officer's report which stated that the applicant's middle child asked him, "Why was Daddy hitting Mommy?" In addition, the arresting officer's report provided a detailed statement from the applicant's wife who stated that the applicant stalked her through the house and repeatedly assaulted her. Although the applicant's wife did recant her statement, she still confirmed that both parties had been drinking and were in an

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<sup>10</sup> Victim Interview, CGIS CSE-2016-02-000186.

“extremely over emotional state,” and that they were involved in a scuffle. The JAG argued that the physical evidence, the outcry of the applicant’s child, and the 911 call to police are sufficient to support a finding of an alcohol incident.

The JAG further argued that the applicant’s claim that the “not guilty” finding at his civilian criminal trial overcomes the presumption of regularity fails because it does not take into account the difference between a criminal trial and a command determination of an alcohol incident, nor does it adjudicate other issues that warranted the issuance of an alcohol incident—discredit upon the uniformed services. The JAG explained that alcohol incidents are determined by a preponderance of the evidence, whereas verdicts in a criminal trial require a finding of beyond a reasonable doubt. In addition, the JAG stated that criminal trials are subject to a variety of evidentiary rules that do not apply to a commander’s determination of whether an event qualifies as an alcohol incident. The JAG explained that Coast Guard policy explicitly acknowledges that “[t]he member need not be found guilty at a court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.”<sup>11</sup> Furthermore, the JAG argued that between police reports, victim statements, and subsequent emails, there is sufficient evidence to show that the applicant pressured or influenced his wife not to testify at court. Therefore, the reason for the applicant’s “not guilty” finding was not an adjudication that the events in question did not occur, but rather, because the applicant manipulated the criminal justice system’s evidentiary rules to his advantage. Finally, the JAG explained that the applicant’s alcohol incident was not predicated upon a finding of domestic violence, rather, as detailed in the Page 7, the applicant was awarded an alcohol incident when his “abuse of alcohol was determined to be a significant and/or causative factor in your being arrested...” According to the JAG, nothing in the rationale for awarding the alcohol incident acknowledges that being arrested and the circumstances surrounding the applicant’s arrest were sufficient to establish that an alcohol incident had occurred. The JAG argued that the applicant’s use of alcohol likely contributed, at least in part, to his actions on the evening of April 25, 2015, even if he was found not guilty of simple assault.

The JAG argued that the applicant’s alcohol incident and separation pertaining to adultery were neither erroneous nor unjust because there was sufficient evidence to support the alcohol incident. The JAG stated that the applicant’s contentions that he received his January 18, 2017, alcohol incident because he sent an email where he referred to himself as a “womanizer” is without merit. The JAG further argued that the applicant’s claims that his second alcohol incident was based solely on SM’s statement, and that SM never confirmed the applicant’s consumption of alcohol fails because it is predicated upon only the written summary of SM’s witness testimony, and does not address SM’s verbal statement to CGIS investigators, where she confirmed applicant had consumed three alcoholic beverages. The JAG explained that the verbal statement is sufficient to support the underlying basis for the alcohol incident. Furthermore, the JAG noted that SM had every reason to lie about the consumption of alcohol because it also implicated her in the incident, but she chose not to do so. Unlike the applicant, who the JAG claimed has every reason to lie in order to receive an upgraded discharge. In addition to the applicant’s behavior on April 25, 2015,

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<sup>11</sup> Article 1.A.2.d. of COMDTINST M1000.10, “[T]he 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.”

the JAG argued that SM's statement, along with other corroborating evidence, is sufficient to rebut the applicant's argument that the presumption of regularity has been overcome.

Regarding the applicant's claims that he could not have had sexual intercourse with SM because of a vasectomy and complications that resulted from the surgery, the JAG argued that the only evidence provided by the applicant are a doctor's note from 2008, nearly five years before the sexual encounter with SM. The JAG stated that the notion that a doctor would not provide documentation for the surgical procedure or that the applicant's insurance had no record of the surgery is fanciful at best. The JAG argued that the records provided by the applicant to support his claim that he could not have had sexual intercourse with SM do not meet the burden of proof required by this Board.

In addressing the applicant's claims that there was no evidence that his extramarital affair with SM was prejudicial to good order and discipline, the JAG argued that the applicant's contentions are refuted by the Final Reviewing Authority's analysis of the applicant's behavior. Specifically, the JAG highlighted the Final Reviewing Authority's argument as it pertains to relationships within small units, which is included in the Discipline and Conduct Manual. The JAG also argued that the Coast Guard further noted that there is also sufficient evidence to support a finding of "service discrediting conduct." According to the JAG, after finding out of the applicant's affair, his wife "threw him out of the house," which resulted in the applicant living on the ship. The JAG argued that a Coast Guard member living in his own workplace because his Coast Guard spouse found evidence of an affair with another Coast Guard member is disruptive at worst and bring discredit upon the Coast Guard.

Importantly, the JAG stated that the applicant did not raise any equity concerns in his application that warrant a finding of injustice. The JAG argued that the applicant received a full and fair hearing at the ASB, received legal counsel to represent his interests, and received the procedural due process owed to him. The JAG further argued that the applicant did not discover exculpatory or mitigating evidence subsequent to the proceedings that would have been available to him at the time of the hearing. According to the JAG, the applicant being unhappy with the outcome of his separation proceedings does not entitle him to receive a proverbial second bite at the apple. Ultimately, the JAG claimed there was no error in either the finding of adultery or the issuance of an alcohol incident because the evidence supported the underlying misconduct. Furthermore, the JAG argued that there was no injustice because there was sufficient evidence to support the Final Reviewing Authority's actions.

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

On August 6, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. As of the date of this decision, no response was received.

#### **APPLICABLE LAW AND POLICY**

Article 1 of the Coast Guard Drug and Alcohol Abuse Program Manual, COMDTINST M1000.10, provides the necessary guidance on the procedures for alcohol incidents. In relevant part:



#### 1.A.2.d. Alcohol Incident

1. Alcohol is the Significant or Causative Factor. Any 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. Alcohol Must be Consumed. 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. The member may be counseled on appropriate behavior or may be held jointly responsible for any damage or untoward behavior associated with the group. Purchasing alcohol for use by minors is not an alcohol incident, but does represent a serious breach of discipline and subjects the member to civil or military (UCMJ) penalties.

...

**2.B.2. Alcohol Incident.** The definition of an alcohol incident (See Article 1.A.2.d. of this Manual.) gives commands broad latitude in curbing intemperate alcohol use. A key fact to keep in mind is that the member must actually consume alcohol for an alcohol incident to have occurred.

The Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10A, provides the necessary guidance on alcohol incidents. Specifically, Article 4.D. states:

1. Except as set forth in Paragraph 4.D.3. below, 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 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.** (Emphasis added).

The Manual for Courts Martial, Article 134—Adultery of the Uniform Code of Military Justice (UCMJ), the “General” article under the UCMJ, provides that:

a. Text of Statute. See Paragraph 60.<sup>12</sup>

b. Elements.

1. That the accused wrongfully had sexual intercourse with a certain person;
2. That, at the time, the accused or the other person was married to someone else; and
3. That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

1. Nature of offense. Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member.

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<sup>12</sup> Paragraph 60, “Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”

2. Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. To constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. Adulterous conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization, discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember. Adultery may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes adulterous conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While adulterous conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether adulterous acts are prejudicial to good order and discipline or are of a nature to bring discredit upon the armed forces:

- (a) The accused’s marital status, military rank, grade, or position;
- (b) The co-actor’s marital status, military rank, grade, and position, or relationship to the armed forces;
- (c) The military status of the accused’s spouse or the spouse of co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the adulterous relationship on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;

...

e. Maximum Punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

...

The Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B, provides the following guidance on disciplinary EER’s after an alcohol incident:

**Article 4.C.2.c. Performance Based.** The following events require an unscheduled enlisted evaluation report, regardless of the time since the last evaluation report.

...

**8. Alcohol Incident.** A disciplinary enlisted evaluation report is required for a member who has an alcohol incident with an effective date of the day of the COMDTINST M1000.2B 4-15 alcohol incident regardless of the date it is determined an alcohol incident occurred.

The Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, provides the following relevant guidance on interpersonal relationships within the Coast Guard:

**2.A.2.a. Professional Work Environment.** Coast Guard policy is to sustain a professional work environment which fosters mutual respect among all personnel, and in which decisions affecting personnel, in appearance and actuality, are based on sound leadership principles. Commanding Officers, officers-in-charge, and supervisors are expected to provide an environment which enhances positive interaction among all personnel through education, human relations training, and adherence to core values.

...

**2.A.2.d. Assessing the Propriety.**

...  
(3) The character of the relationship; e.g., personal, romantic, marital.  
...

(b) Romantic relationship: Sexual or amorous relationship. (Does not involve conduct which violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended)).

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

(d) Prohibited relationship: Violates reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Resolution may be either administrative, punitive, or both as circumstances warrant.  
...

**2.A.2.f. Unacceptable Romantic Relationships.** Romantic relationships between members are unacceptable when:

(1) Members have a supervisor and subordinate relationship (including periodic supervision of duty section or watch standing personnel), or

(2) Members are assigned to the same small shore unit (less than 60 members), or

(3) Members are assigned to the same cutter (see note below), or

(4) The relationship is between chief petty officers (E-7/8/9) and junior enlisted personnel (E-4 and below), or

(5) The relationship is manifested in the work environment in a way which disrupts the effective conduct of daily business.

Note: The nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position. This policy applies to Reservists in an active status, whether or not on duty.

Article 1 of the Military Separations Manual, COMDTINST M1000.4 (August 2018), provides the necessary guidance on discharging a service member with eight or more years of active service. In relevant part:

**1.B.1.d. Retention or Separation.** In determining whether a member should retain current military status or be separated administratively, the Service may evaluate the member's entire military record, including records of non-judicial punishment imposed during a previous enlistment or period of service, all courts-martial records or convictions, and any other material or relevant factors. Commanding officers, investigating officers, administrative discharge boards, and other agencies charged with making such decisions consider records of non-judicial punishment imposed during a previous enlistment or period of service only if, under the case's particular circumstances, the records would have a direct, strong probative value in determining whether retention or administrative separation is appropriate.  
...

**1.B.17. Misconduct.**

**a. Policy.** Except as specifically provided here, only Commander (CG PSC) may direct a discharge for misconduct and the type of discharge (under other than honorable, general, or honorable) as warranted by the particular circumstances of a given case (see Article 1.B.2. of this Manual.).

Disability evaluation processing will be terminated as described in Article 1.B.1.e. of this Manual for members discharged for misconduct. See Article 1.B.39. of this Manual when recommending the discharge of a first-term performer for misconduct.

**1.B.17.b. Reasons to Discharge for Misconduct.**

**3. Commission of a Serious Offense.** Commission of a serious offense does not require adjudication by non-judicial or judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding or not holding non-judicial punishment proceeding does not prohibit proceedings under this provision. However, the offense must be established by a preponderance of the evidence. Police reports, CGIS reports of investigation, etc. may be used to make the determination that a member committed a serious offense.

(a) Members may be separated based on commission of a serious military or civilian offense when:

- (1) The specific circumstances of the offense warrant separation; and
- (2) The maximum penalty for the offense or closely related offense under the UCMJ and Manual for Courts-Martial includes a punitive discharge. The escalator clause of Rule for Courts-Martial 103(d) shall not be used in making this determination.

The Enlisted Personnel Administrative Boards Manual, COMDTINST M19210.1, provides the following guidance on the duties and authority of ASBs:

**Article 1.J. Board Recommendations and Final Action by CG PSC.** Unless terminated as authorized by Article 8.C. of this Manual, final action on all boards controlled by this Manual is taken by Commander, Coast Guard Personnel Service Center. A board's report, including its findings of fact, opinions, and recommendations, is advisory only; it will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC. CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard. Whether CG PSC accepts the board's recommendations or not, the board process is inherently valuable for the following reasons.

...

**7.B.2. Standard of Proof – Preponderance of the Evidence.** In an administrative board hearing, the findings of fact need to be supported by a preponderance of the evidence presented at the hearing. That is, findings of fact should be based on evidence that, after considering all evidence approved for consideration, points to a particular conclusion that is more likely than not the correct conclusion.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. 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).

3. The applicant alleged that the Coast Guard erred when they issued him an alcohol incident for his April 25, 2015, arrest. The applicant further alleged that the Coast Guard erred when they issued him his second alcohol incident for an extramarital affair that he initiated in February 2013. Finally, the applicant alleged that the Final Reviewing Authority erred when they disregarded the findings and recommendations of the ASB and discharged him for misconduct. 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.<sup>13</sup> 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."<sup>14</sup>

4. **Alcohol Incident for Domestic Violence Arrest:** The applicant alleged that the Coast Guard erred when it issued him an alcohol incident for his domestic violence arrest on April 25, 2015. The applicant claimed that his verdict of not guilty in a civilian court is clear and convincing evidence that overcomes the presumption of regularity. The Board finds the applicant's arguments unpersuasive. Article 4.D. of the Military Drug and Alcohol Abuse Policy Manual, COMDTINST M1000.10A, states:

Except as set forth in Paragraph 4.D.3. below, 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 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.** (Emphasis added).

The record shows that in the early morning hours of April 25, 2015, the applicant returned home in an intoxicated state and with a Bud Light in his hand. Upon realizing that the applicant was intoxicated, the applicant's then wife went upstairs hoping to avoid the applicant, where she got into bed with their daughter. The applicant followed her into the room and turned on the light. The applicant's wife tried leaving the room when the applicant took her phone and threw it in the toilet. A struggle then ensued and the applicant pushed his wife down the stairs. After further altercations between them, the applicant's wife ran to a neighbor's house and the police were called. An emergency order of protection was issued against the applicant and he was forbidden from contacting his wife.

The preponderance of the evidence shows that despite the order of protection, the applicant contacted his wife and requested that she recant the statements she made on the night of his arrest. In this email, dated June 17, 2015, the applicant provided his wife with the arresting officer's email address and told her:

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<sup>13</sup> 33 C.F.R. § 52.24(b).

<sup>14</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).



You know as well as I do if you turn this email in or any other for that matter I go straight to jail. Not that cozy little pen I stayed in that night as I lay all bloodied, but actual jail. I'm taking a chance every single time I email you.

In response to the applicant's request, his wife emailed the arresting officer and changed her account of the events that took place on April 25, 2015. She explained to the arresting officer,

We had both been drinking and I do not believe that [applicant] ever intended to harm me in any way. I believe that he did think that he needed to take my phone from me and that the scuffle that happened in front of the stairs allowed me to become off balance and I slid/fell down the stairs.

Even after the applicant's wife changed her account of the events, she still acknowledged that both she and the applicant had been drinking. The Board finds this statement is persuasive, especially given that the applicant's wife was also a Coast Guard member and was implicating herself in a possible alcohol incident, as well as the applicant. In addition, these facts are supported not only by the April 25, 2015, police report, but by the applicant's own words in his August 14, 2015, email to SM, wherein he stated, "On April 25th, I can home drunk and started an argument with my wife." Moreover, the applicant's own child asked police, "Why was Daddy hitting Mommy?" Therefore, the preponderance of the evidence shows that the applicant had been drinking in the early hours of April 25, 2015, and that his drinking was a significant and/or causative factor when he stalked his wife through their home and physically assaulted her. As stated above, Article 4.D. of COMDTINST M1000.10A states that a member need not be convicted in a civilian court for a behavior to be considered an alcohol incident. Accordingly, the Board finds that the applicant's CO did not err when he found, by a preponderance of the evidence, that the applicant had incurred an alcohol incident on April 25, 2015.

5. **Disciplinary EER.** Although the applicant asked the Board to remove the disciplinary EER that he received as a result of his domestic violence arrest and first alcohol incident, the Board finds that the EER was required by Article 4.C.2.c.8. of the Enlistments, Evaluations, and Advancements Manual, COMDTINST M1000.2B. Because there are no grounds to remove the alcohol incident, the Board finds that there are no grounds for removing the disciplinary EER.

5. **Second Alcohol Incident.** The applicant alleged that he was erroneously given a second alcohol incident based off an email he sent to SM, a subordinate petty officer, wherein he apologized for "not being just a friend," and calling himself a "womanizer." However, the applicant's allegations are without merit. The record shows that in February 2013, the applicant contacted SM and requested to come to her home and "talk things out and hang out.". The record further shows that the applicant asked SM to make him some Bloody Marys, and before the night was over they had each consumed at least three Bloody Marys. The preponderance of the evidence shows that this alcoholic intake resulted in sexual intercourse between the applicant and SM, who was the applicant's subordinate at the time. This conclusion is further supported by both the ASB's findings and recommendations, as well as the Final Reviewing Authority's Final Action Report. Although SM stated that she did not recall having intercourse with the applicant, she did recall asking him to wear a condom, and upon waking at approximately 4 in the morning, the applicant was still in her bed. This relationship was prohibited and unacceptable because he was married, SM's supervisor, and were both assigned to the same cutter.

The applicant repeatedly attacked the credibility of SM, but the applicant has provided no evidence, sufficient to overcome his burden, to refute the statements made by SM, or the Coast Guard's finding that alcohol was a significant or causative factor in his misconduct. The applicant alleged that the Coast Guard based its findings on his misconduct solely on the statement of SM, but the applicant has failed to take into account that his wife confirmed the applicant's adulterous behavior to CGIS investigators during the course of their investigation into the applicant's domestic violence. The applicant further alleged that he could not have had intercourse with SM due to complications from a vasectomy, but again, the applicant has failed to prove, by a preponderance of the evidence, that he was physically unable to have sexual intercourse in February 2013. The applicant did submit medical records, but none of those records were contemporaneous with the applicant's misconduct, nor do they support the applicant's claim that he could not have had sexual intercourse.<sup>15</sup> Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it found that he had incurred a second alcohol incident in February 2013.

6. **Page 7 about Adultery** . The applicant asked the Board to remove the Page 7 dated January 18, 2017, documenting his adultery and unacceptable relationship. The record shows that during the course of the investigation into the applicant's arrest for domestic violence, the Coast Guard became aware of the applicant's extramarital affair. As a result of these revelations, a second CGIS investigation was initiated, and the applicant received a Page 7 documenting counseling about the adultery.

The second CGIS investigation revealed that in September of 2012, the applicant had obtained his subordinate's, SM's, phone number, without her permission, and began texting her. SM described the texts as unexpected, flirtatious, very complimentary, and relentless. During the initial few months of their communications, the applicant's wife discovered the applicant and SM's text messages and contacted SM about her communications with the applicant. SM stated that she was traumatized by this communication and asked the applicant to leave her alone and "forget about her." In response to the applicant's communications with SM, his wife kicked him out of the home, causing him to take residence on the cutter, where SM spent a majority of her time. SM described the applicant's communications as relentless, nonstop, manipulative, and annoying. SM stated that these communications continued until August of 2015. Therefore, the Board finds that the applicant has not proven by a preponderance of the evidence that the Page 7 documenting his adultery and unacceptable relationship is erroneous or unjust.

7. **Discharge for Commission of a Serious Offense**. The applicant argued that his discharge was improper because he had not committed a serious offense, as the ASB found that he had not committed adultery. For the following reasons, the Board, like the FRA, disagrees with the ASB's finding on this issue. The ASB found that the applicant had had sexual intercourse with his subordinate, SM, while he was married, but that the third element of the offense of adultery under Article 134 of the UCMJ was not met because his conduct was not prejudicial to good order and discipline or service discrediting. Therefore, the ASB concluded that he had not committed a serious offense and recommended that the applicant be retained. The offense of adultery in Article 134, UCMJ, does require that the conduct be "prejudicial to good order and discipline" or "service

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<sup>15</sup> The applicant submitted a September 28, 2012, medical record from a urologist for a referral for a vasectomy, wherein the physician reviewed the procedure with the applicant, as well as the potential side effects.

discrediting.” However, the Final Reviewing Authority (FRA), found that the applicant’s unacceptable relationship with a subordinate aboard his cutter was a violation of Coast Guard policy and *per se* prejudicial to good order and discipline. As a result, the Final Reviewing Authority ordered that the applicant be administratively separated for misconduct because his conduct with the SM met the elements of adultery, a serious offense under the UCMJ.<sup>16</sup>

Like the FRA, the Board finds that the sexual encounter between the applicant and his subordinate was both unacceptable and prohibited by policy, and “adultery” under Article 134 of the UCMJ. Article 2.A.2. of the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, states that “romantic relationships” include sexual relationships and that they are unacceptable when the members are assigned to the same cutter. The record shows that at the time of the applicant’s pursuit of and sexual encounter with SM, they were assigned to the same cutter. Therefore, the FRA properly concluded that the applicant had engaged in an unacceptable romantic relationship in violation of Article 2.A.2.f. of COMDTINST M1600.2.

Article 134—Adultery, of the UCMJ states, “Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member.” Article 134 further provides that for the applicant to be found guilty of adultery he must have wrongfully had sexual intercourse with a certain person, be married to someone else at the time of the sexual encounter (or if the certain person is married to someone else), and that under the circumstances, the conduct was prejudicial to good order and discipline, or was service discrediting. Article 134 defines prejudicial conduct as, “[c]onduct that has an obvious, and measurably divisive effect on unit or organization, discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember.” There is no requirement that the effect be widespread.

In this case, the preponderance of the evidence shows that the applicant’s unacceptable relationship and adultery with SM made her feel anxious, uncomfortable, and frightened. Despite these feelings, SM was forced to endure the applicant’s unwanted advances out of fear that he would ruin her career. The applicant’s senior position provided him with a clear advantage over SM, which he used to engage in his inappropriate and aggressive pursuits. This is further evidenced by the fact that the applicant obtained SM’s phone number without her consent and told her that he would use his “chiefly powers” to get her address. The applicant’s inappropriate behavior was so detrimental that it contributed to SM ending her Coast Guard career. Accordingly, the Board finds that the applicant’s conduct caused an obvious and measurably divisive effect on the cutter’s morale and cohesion and was detrimental to the authority and respect of the applicant and other service members. Therefore, the applicant has failed to prove, by a preponderance of the evidence, that the FRA erred in finding that his relationship with SM was not only an unacceptable relationship under Article 2.A.2.f. of the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2, but also a violation of Article 134 of the UCMJ.

8. **FRA Authority.** The applicant alleged that it was erroneous for the Final Reviewing Authority to disregard the ASB’s findings and recommendations, but he is mistaken. Article 1.J. of the Enlisted Personnel Administrative Boards Manual, COMDTINST M19210.1, states that an ASB’s report, including its findings of fact, opinions, and recommendations, is

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<sup>16</sup> The Final Reviewing Authority’s findings and recommendations regarding the applicant’s sexual misconduct are provided on pages 19 through 21 of this decision.

advisory only; it will be thoroughly and carefully reviewed and considered, but it is not binding on CG PSC. CG PSC is responsible for enforcing policy that is in the best interests of the entire Coast Guard and for ensuring the consistent application of military personnel policy across the Coast Guard.” Coast Guard policy makes it clear that the ASB’s report is advisory only and that the Final Reviewing Authority is not bound by those recommendations put forth by the ASB. The Final Reviewing Authority’s findings and recommendations were fully explained in the FRA’s Report, supported by policy, and reviewed by legal authorities to ensure its findings and recommendations were legally sufficient before being approved. Therefore, the Board finds that the applicant has failed to prove, by a preponderance of the evidence, that the Coast Guard erred when it relied upon the Final Reviewing Authority’s Report to separate him for misconduct. Accordingly, his request for relief should be denied.

7. The applicant made varied allegations and arguments. 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.<sup>17</sup>

8. For the reasons outlined above, the applicant has not met his burden, as required by 33 C.F.R. § 52.24(b), to overcome the presumption of regularity afforded the Coast Guard that its administrators acted correctly, lawfully, and in good faith.<sup>18</sup> He has not proven, by a preponderance of the evidence, that the Coast Guard erred when they entered the disputed Page 7s in his record and discharged him for misconduct after he was found to have committed adultery, a serious offense under Article 134 of the UCMJ.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>17</sup> 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”).

<sup>18</sup> *Muse v. United States*, 21 Cl. Ct. 592, 600 (1990) (internal citations omitted).

